



LINCOLN LEGAL SERVICES (MYANMAR) LIMITED

NEWSLETTER 7 - 7 August 2016

Dear Readers,

Welcome to a new edition of our newsletter.

1. Aeon's announcement to open supermarkets in Myanmar

A few days ago, Aeon, a Japanese supermarket chain, announced (<http://tinyurl.com/zt9yask>) that its Myanmar joint venture is to acquire 14 supermarkets from the local joint venture partner and start "supermarket business" on 1 August. Does this mean that the government has changed its policy and now allows foreigners to trade? Japanese press reports that Aeon acquired government approval because of past merits (<http://tinyurl.com/zgmbvyg>).

In reality, however, nothing has changed. A company search on DICA's homepage reveals that the joint venture company, Aeon Orange Co., Ltd., is set up as a simple services company (<http://tinyurl.com/hwsrmxl>). Being foreign-invested, it is impossible for it to import goods. It appears that the importing is done by the local joint venture partner; the goods then seem to be sold by the joint venture company.

As the joint venture company would have signed, when applying for company registration, an undertaking not to engage in trade, this is a "gray zone" set-up, and theoretically competitors could try to lobby DICA to deregister the joint venture company. Against this background, it is a bit surprising that Aeon should have chosen to announce its entry into the Myanmar supermarket business with so much fanfare.

We have taken this story as an opportunity to summarize, inside the newsletter, how foreigners can engage in wholesale and retail activities in Myanmar.

And if YOU want to have your own supermarket, but don't have a Myanmar N.R.C. - no worries, our local lawyers will be happy to import for you...

2. National economic policy

Much has been made of the government's perceived "vague and thin" national economic policy announced on 29 July 2016 (<http://tinyurl.com/jtzqs2p>), but this criticism fails to take into account that there exists a detailed industrial policy (<http://tinyurl.com/zbz54i8>); Frontier Myanmar provides a good summary (<http://tinyurl.com/jauqk28>).

3. Pricing

The new managing director of a client came to our office, waiving some papers in disgust: His predecessor had ordered a memo from a large international law firm. The memo comprised five



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pages; its contents: flimsy at best. Robust, however, was the price: The memo had cost USD 8,000 (plus 5% commercial tax). We were just thinking: If the firm is charging, say, USD 400 per hour, it must have taken it 20 hours to produce the 5 pages memo on topics that were really not complicated.

In a similar vein, we were told that a competitor charges USD 10,000 for company incorporation. It is simply beyond us to understand what they need all this money for.

Before you get ripped off, better hire us... You will find our prices to be very reasonable (please request a price list if you are interested).

4. Our seminar on land law on 4 August

We had 104 participants - thank you very much for coming! If you are interested in the presentation slides, please drop us an e-mail.

We are planning to have our next seminar mid-September or end of September. The topic will be "investments in the power sector". We want to make the event a bit bigger than the previous seminars and are presently looking for partners to team up with.

We trust that you will find this newsletter useful and hope that you will enjoy reading it.

Sebastian Pawlita
Managing Director

Nyein Chan Zaw
Director



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Press review (24 July - 6 August 2016)

- Japan-built weather radar a new landmark in Yangon: <http://tinyurl.com/z89y6er>
- Emirates has launched a direct daily flight to Yangon: <http://tinyurl.com/lb53jsf>
- Heavy floods in Mandalay, Ayeyawady, Magway and Bago: <http://tinyurl.com/h2tpdbz>
- Hlaingtharyar Industrial Zone to be upgraded: <http://tinyurl.com/htow4kl>
- POSCO Daewoo selected by Myanmar Electric Power Generation Enterprise to construct and operate a steam power plant in Shwetaung: <http://tinyurl.com/z8wuf84>
- Yangon Stock Exchange debates bank disclosure ahead of Myanmar Citizens Bank listing: <http://tinyurl.com/juj4gk7>
- United Amara Bank joins ADB trade finance programme: <http://tinyurl.com/j6eyczd>
- Yangon zoning plan to be opened for public comment within this year?: <http://tinyurl.com/j2ap3vp>
- Yangon authorities appear to backtrack over high-rise review: <http://tinyurl.com/jhdjqc9>
- Government courts ADB for power line funding: <http://tinyurl.com/gu6oxu9>
- World Bank discusses USD 300m in new Myanmar loans: <http://tinyurl.com/jhb5zev>
- New laws to be drafted for agricultural loans: <http://tinyurl.com/hfnuegw>
- Inland Water Transport to introduce container barges and cut trade costs: <http://tinyurl.com/gmnceaz>
- Exports for first quarter up USD 260m year on year: <http://tinyurl.com/zcdyke5>
- MIC warns companies to follow reporting requirements: <http://tinyurl.com/hh6xx38>
- Government to allow bus companies to open petrol stations to subsidize low fares: <http://tinyurl.com/jpddrjv>
- Ministry to halve hotel and tourism license fees: <http://tinyurl.com/ho6gn6n>
- Showroom owners call for clear automobile import policy: <http://tinyurl.com/z57fkuk>



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How foreigners can engage in wholesale and retail activities in Myanmar

(The following text first appeared as two articles in the Myanmar Times on 14 and 21 July 2014. We have updated it and included information from a previous newsletter on trading in the Thilawa SEZ).

1. How foreigners are barred from trading

With few exceptions, foreigners are barred from engaging in trading activities: They are not allowed to buy or import goods in order to resell or export them.

The definition of “foreigner” includes companies incorporated in Myanmar where as little as one share is held by a foreigner. It is not possible for a foreigner to set up a company whose business scope includes trading activities, and it is likewise not possible to register as an importer or exporter with the Ministry of Commerce with the objective of engaging in trade.

It does not matter whether it is wholesale or retail - the sector is, as a general rule, off limits to foreigners. It is also not possible for, say, a foreign producer of machines to set up a distribution company in Myanmar in order to import and sell machines of its own brand.

There is no explicit legal basis for this prohibition. Rather, it is administrative practice that appears to have set in rather suddenly in 2002. Until then, it seems to have been possible for foreigners to establish trading companies in Myanmar and import goods for trading purposes.

However, these business permits have long expired.

Foreigners may set up factories in Myanmar, import machines and raw materials, produce goods and sell and/or export these goods. However, they cannot - officially - outsource production to a local manufacturer (so-called contract manufacturing), pay him a fee and sell the goods thus produced. This is rather surprising as the creation of value through production takes place in the country in both cases.

This means most foreign goods on the market locally are traded through domestic importers and distributors. This is often not a bad thing as it can be difficult to penetrate the market without some local help.

Leaving everything to the local distributor is not always the preferred option, though, and there are several other alternatives.



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2. Joint ventures in certain sectors

The Ministry of Commerce has in the meantime relaxed the trading ban a little: In certain sectors, it is possible for foreigners to set up joint ventures with locals in order to import and sell goods. These goods are:

- Brand-new cars (MoC Notification 20/2015)
- Fertilizer, seeds, pesticides, hospital equipment (MoC Notification 96/2015)
- Construction materials (MoC Notification 56/2016)

The Mitsubishi car showroom in Yangon was set up under this policy.

3. Trading in the Thilawa SEZ

On 27 May 2015, the Thilawa SEZ Management Committee published details of the scope of trading activities that foreign investors can engage in if they invest in the Thilawa SEZ (<http://tinyurl.com/zwh3b5t>). Wholesale trade outside the SEZ of goods stored in warehouses located in the SEZ is permitted if a large-scale investment is made.

Foreign investors in the Thilawa SEZ can operate a trading business on the following conditions:

- Foreign investors can register their business as a “free zone business” or a “promotion zone business”. Free zone businesses have to export at least 75% of their goods (by value), but enjoy more tax incentives than promotion zone businesses. Trading is allowed for both types of businesses, but the conditions are different.
- Irrespective of the type of business, the trading of 4-wheel vehicles, motorcycles, goods of which trading is restricted by other laws (presumably, these are products such as alcoholic beverages whose import is restricted, and products such as arms or drugs of which the trade and often possession are banned) and goods specified by the Thilawa SEZ Management Committee from time to time is prohibited.
- “Wholesale” means the sale of products to other businesses for resale or for use in the manufacture of goods or supply of services. Additionally, the direct sale to end-users is included if (i) industrial materials are sold in bulk or (ii) industrial machinery and equipment with a sales price of USD 500,000 or more per transaction are sold.
- A free zone business may sell products manufactured by itself or obtained from a group company or a third party to promotion zone businesses and outside the SEZ if (i) it has a factory or warehouse in the SEZ and (ii) its annual turnover from such sales does not



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exceed 25% of its total annual turnover from sales. There are no limits on the export of products manufactured by a free zone business or purchased from other free zone businesses. The Instruction is silent on whether a free zone business may purchase products from promotion zone businesses or outside the SEZ in order to export them.

- A promotion zone business may sell products manufactured by itself without restrictions (note: this is not stated in the Instruction, but it is clear that an investor setting up a factory can sell the goods produced in this factory; restrictions only apply to free zone businesses as they are obliged to produce predominantly for export purposes).
- A promotion zone business may sell products imported from a group company within the SEZ and, provided that it restricts itself to wholesale trade, outside the SEZ if it (i) has a warehouse in the SEZ, (ii) adds value (e.g. through repacking, labelling, other forms of processing, quality control, testing, laboratory services, maintenance or other technical services) and (iii) the investor has invested at least USD 2 million (excluding the rent for the land) for providing the value-adding services.
- A promotion zone business may sell products imported from a third party within the SEZ and, provided that it restricts itself to wholesale trade, outside the SEZ if (i) the investor is certified as an “official agent” or “official distributor” of the manufacturer, (ii) the investor or a group company has been active in international trade for at least 10 years with an annual turnover of at least USD 500 million for a minimum of 3 years and an established place of business in at least 5 countries, (iii) the paid-up capital of the investor or a group company amounts to at least USD 25 million, (iv) the business has a warehouse in the SEZ, (v) the business adds value (e.g. through repacking, labelling, other forms of processing, quality control, testing, laboratory services, maintenance or other technical services) and (vi) the investor has invested at least USD 3 million (excluding the rent for the land) for providing the value-adding services.
- A promotion zone business may sell locally sourced products within the SEZ and, provided that it restricts itself to wholesale trade and does not sell agricultural, fishery or mineral products or precious stones, outside the SEZ.
- A promotion zone business may export goods manufactured by itself or other promotion zone businesses.
- Investors may set up sales offices outside the SEZ with the proviso that the lease term must not exceed one year.



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4. **An aggressive approach: Ignoring the ban**

When foreign-invested companies are being registered with the Directorate of Investment and Company Administration (DICA), the applicant has to sign an undertaking not to engage in trading activities. Nevertheless, trading joint ventures exist where (i) the local partner imports the goods (as it is impossible for a foreign-invested company to register as importer) and (ii) the foreign-invested joint venture company then sells the goods locally.

This is of course a “gray zone” approach, and investors theoretically risk that competitors try to lobby DICA to deregister the joint venture company.

5. **Franchising**

Retail is also possible through a franchising structure. The foreign partner (franchisor) and the local partner (franchisee) conclude a franchise agreement by which the franchisee pays a franchise fee to the franchisor; the franchisor allows the franchisee to use the franchisor’s trademark; and the franchisor provides the franchisee with a business concept (e.g. design of the shops, assistance with sourcing goods at a low price, marketing services, training of employees, etc.).

Franchising, although not specifically regulated, is more and more common in Myanmar. It is a legal business model and foreigners are not prohibited from entering into franchise agreements with locals. Internationally, franchise models are tried and tested models in the retail sector; for example convenience stores in Japan are often operated as a franchise. The idea of a franchise is appealing as there is a wealth of experience with franchise models internationally from which the parties can draw.

The services provided by the franchisor usually justify a substantial remuneration, meaning that the franchisor is entitled to a substantial portion of the profits of the retail business. The local partner, in return, may, amongst others, acquire access to cheap financing (if the franchisor extends a loan at advantageous conditions), profit from low purchase prices when acquiring stock (as the franchisor is usually able to buy in bulk), profit from the franchisor’s reputation with producers (if, for example, the franchisor is already their distributor in other countries) and use the franchisor’s experience in setting up and managing a chain of retail stores.

6. **Other methods**

It is possible to set up joint ventures outside of Myanmar to participate in the Myanmar retail market. Sojitz, for example, announced in 2013 that it had set up a joint venture company in



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Singapore together with the City Mart group to purchase consumer goods in bulk in order to distribute them through the City Mart network.

Foreign manufacturers cannot set up a distribution company in Myanmar in order to sell their goods if these goods are manufactured abroad. However, a manufacturer of machines could set up a services company in order to install the machines and provide customer support. The machines would have to be imported by a local importer or the customer.

Foreign sellers wishing to support their local distributor so as to increase sales can provide marketing and management assistance.

Please contact Sebastian Pawlita (sebastian@lincolnmyanmar.com) or Nyein Chan Zaw (nyeinchanzaw@lincolnmyanmar.com) if you are interested in this topic.



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