



**LINCOLN LEGAL SERVICES (MYANMAR) LIMITED**



**FOREX CONTROL AND LENDING • REGISTRATION OF LEASE AND  
OTHER AGREEMENTS • TRADEMARK PROTECTION**

**27<sup>th</sup> February, 2018**

# FOREX CONTROL AND LENDING



**LINCOLN LEGAL SERVICES (MYANMAR) LIMITED**

# FOREX CONTROL: REGULATORY FRAMEWORK

- **Foreign Exchange Management Law 2012, amended 2015**
- **Foreign Exchange Management Regulation 2014**
- **Several directives and letters from the Central Bank, in particular:**
  - **Directive 16/2015 dated 27 May 2017 limiting cash disbursements in foreign currency**
  - **Letter 904/2015 dated 28 May 2015 (apparently repeated on 3 Jan 2017) ordering “local payments to be made in kyats”**



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# FOREX CONTROL: REGULATORY FRAMEWORK

- Letter FE-10/365 dated 13 Oct 2015 revoking all foreign exchange acceptor & holder licenses



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# FOREX CONTROL: CASH PAYMENTS

- **Section 8 FEML: “The domestic payment and transfer with/of foreign currency ... shall only be done through a foreign exchange dealer license holder.” (Penalty for non-compliance: Not clear, but possibly imprisonment of up to 3 years or a fine or both, section 42 FEML)**



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# FOREX CONTROL: CASH PAYMENTS

- However, para. 15 FEMR: “A domestic resident may possess, for up to six months from the date of receipt, USD 10,000 or other types of foreign currency in an equivalent amount, if obtained legally by this person. If the foreign currency is not used within six months, it shall be sold to, and exchanged by, foreign exchange dealer license holders at the market price or deposited in a bank account.”



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# FOREX CONTROL: CASH PAYMENTS

- Letter 904/2015: “The relevant ministries and regional and state government organisations are requested to direct, as necessary, their sub-organisations, related government organisations and private businesses and organisations to make payments in Myanmar kyats and refrain from specifying the price for making sales or purchases or providing services in a foreign currency.”



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# FOREX CONTROL: CASH PAYMENTS

- Letter FE-10/365: Foreign exchange acceptor & holder licenses are revoked “in order to implement measures so that only Myanmar currency is used for the purchase of goods and services in the country and to improve the use of local debit/credit cards, internal payment cards and online payment systems instead of cash.”



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# FOREX CONTROL: CASH PAYMENTS

- Unless there are specific directions from the relevant ministries or regional or state government organisations (letter 904/2015), we think that it is legal
  - to accept cash payments of up to USD 10,000 (several times if necessary, if the cash is exchanged to MMK or deposited in a bank account after receipt), para. 15 FEMR, and
  - consequently, also to advertise prices in a foreign currency.
- The Central Bank seems to disagree, but presently not enforce its stance.



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# FOREX CONTROL: BANK TRANSFERS

- Domestic bank transfers in foreign currency are allowed irrespective of the amount (confirmed orally by the Central Bank; however, section 69 FEMR states that “without documentary evidence, a foreign exchange dealer license holder may make payments and transfers only in kyats”).
- Bank transfers into the country are allowed irrespective of the amount. However, choosing the correct “purpose of payment” is important (e.g., banks issue confirmation for paid-up capital only if the purpose of payment is “capital” or “investment”).



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# FOREX CONTROL: BANK TRANSFERS

- Bank transfers out of the country are often not possible. Prior consultation with the bank is required before attempting a transfer. One should be prepared to prepare a lot of paperwork and spend several hours at the bank even for simple transactions involving small amounts.
- The FEMR specifically allow banks to execute the following transfers to a destination abroad without prior Central Bank approval:
  - Payment for imports after the goods have been delivered
  - Advance payment for goods or services



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# FOREX CONTROL: BANK TRANSFERS

- Payment for acquiring a patent, trademark, right to operate a business, [other] intellectual property
- Payment of up to USD 10,000 for travel expenses, medical expenses, educational or examination fees, admission fees for a conference or seminar, living expenses for family members residing abroad
- Payment for product exhibitions held by domestic companies abroad
- Payment of up to USD 10,000 for travel expenses, medical expenses, educational or examination fees, admission fees for a conference or seminar, living expenses for family members residing abroad



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# FOREX CONTROL: BANK TRANSFERS

- **Payment of dividends (Para. 31 FEMR)**
- **Repatriation of salary paid in Myanmar**
- **Repayment of the principal and payment of interest for a loan for which Central Bank approval had been obtained (para. 52 FEMR)**
- **Gifts, donations, repair and maintenance fees, inheritances, cash from the transfer of real estate, other types of financial support or monetary aid if the amount does not exceed USD 10,000 per year and the sender is an individual**



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# FOREX CONTROL: BANK TRANSFERS

- Banks must report any transaction involving more than (the equivalent of) USD 10,000 (cross-border) or Ks. 100 million (domestic) to the Financial Intelligence Unit



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# FOREX CONTROL: REPATRIATION OF PROFITS

- So far, it seems to have been always possible to exchange MMK for USD in order to repatriate profits
- Section 31 FEMR: “A foreign exchange dealer license holder that buys and sells foreign currency may, when foreign investors, submitting documentary evidence, request the payment and transfer of a profit or a profit share or interest, approve the payment and transfer after having satisfied itself that the investments brought into Myanmar to which the payment and transfer is related was reported to the Central Bank and the documentary evidence is genuine.”



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# FOREX CONTROL: REPATRIATION OF PROFITS

- **Non-MIC companies:** Banks seem to only request a BoD resolution approving the profit distribution + sufficient money in the corporate bank account in order to transfer dividends abroad
- **MIC companies:** Banks require MIC approval in order to transfer dividends abroad. The MIC only seems to allow the transfer of retained earnings from the previous financial years; submission of tax clearance certificate required.



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# FOREX CONTROL: REPATRIATION OF PROFITS

- The Companies Act 1914 limits dividend payments to hitherto undistributed profits whereas the new Companies Law will allow dividend payments as long as the payments do not put the solvency of the company at risk. This has been described as a major change, but we expect only minor effects in practice.
- No withholding tax on dividends



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## LENDING: LOANS BY NON-BANKS

- Foreign trading house A has a branch in Myanmar and intends to advance a loan to its local agent B through the branch. Possible?
- C is an individual shareholder in a joint venture company and intends to advance a shareholder loan to the joint venture company. Possible?



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# LENDING: LOANS BY NON-BANKS

- It is often said that companies and individuals are prohibited from extending loans. The legal basis for this assertion could be:
  - The Money Lenders Act 1945 which requires any person who carries on the “business of advancing loans” to register; however, this act does not cover loans advanced by a trader (wholesale or retail merchant, commission agent, broker, manufacturer, contractor or factory owner) to another trader in the ordinary course of business and in accordance with trade usage



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# LENDING: LOANS BY NON-BANKS

- Financial Institutions Law 2016 which requires a license from the Central Bank for the “business of providing credit facilities”
- Microfinance Law 2011 which requires a license for the “business of a microfinance institution”
- Yangon City Development Affairs Law 2013 which requires pawnshops to obtain a license
- To get around the alleged prohibition to advance loans, it is often recommended to conclude trust agreements (which would have the added advantage that failure to return the entrusted money would be a “criminal breach of trust”)



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## LENDING: LOANS BY NON-BANKS

- However, that there is a general prohibition on advancing loans is a myth. Rather, it is only prohibited to make a business out of it without obtaining the relevant licenses.
- Loan agreements made by A's branch or C in the examples above are therefore legal and enforceable.



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# LENDING: LOANS AND STAMP DUTY

- Improperly stamped documents may not be introduced as evidence in court unless the proper duty and a penalty of 10 times the shortfall is paid (section 35 Stamp Act)
- Interest payments may not be recognised as deductible expenses if the loan agreement is improperly stamped
- An improperly stamped document may, if it comes to the attention of the tax office, be impounded; the tax office may request payment of the proper duty, a penalty of 10 times the shortfall (section 40 (1) Stamp Act) plus a fine of up to Ks. 500,000 (section 64 Stamp Act)



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# LENDING: LOANS AND STAMP DUTY

- Proper stamp duty for a loan agreement?
- IRD internal circular dated 30 November 2015:
  - (a) Loan secured with immovable property: 0.5%
  - (b) Loan secured with movable property: Approx. 0.0065%
  - (c) Guarantee for a loan or the purchase of movable or immovable property: 0.5%
- The policy behind the sometimes enormous stamp duty amounts is mysterious as they arise exactly when the taxpayer has no money (otherwise he would not borrow)



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# LENDING: LOANS AND STAMP DUTY

- (a) is difficult to reconcile with the Stamp Act as mortgages of immovable property are usually established “by deposit of title deeds” which should only attract 0.0065% stamp duty (nos. 40, 6 Schedule I to the Stamp Act)
- Unfortunately, the IRD applies (c) not only to a “guarantee for a loan” (as would be the wording of (c)), but also to “a loan”, i.e. a loan which is neither secured with immovable nor movable property



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# LENDING: LOANS AND STAMP DUTY

- The duty rate of (c) is that of a “bond”. A bond is defined in section 2 (5) Stamp Act as -
  - any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be **[could this be a loan?]**;
  - any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another **[could this be a loan?]**
  - any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another **[could this be a loan?]**



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# LENDING: LOANS AND STAMP DUTY

- The IRD uses the internal circular dated 30 November 2015 also for shareholder loans, although almost its entire text deals with bank loans
- Cross-border loans require prior Central Bank approval. The Central Bank requires the submission of the loan agreement, but does not require the loan agreement to be revenue-stamped
- “Agreements which are not otherwise provided for” are stamped with Ks. 300 (no. 5 (d) Stamp Act)



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# LENDING: LOANS AND STAMP DUTY

- Credit facility composed of a number of agreements (loan agreement, security agreements): Does stamp duty accumulate?
- Section 4 (1): “Where, in the case of any **sale, mortgage or settlement**, several instruments are employed for completing the transaction, the principal instrument only shall be chargeable with the duty prescribed in Schedule I for the conveyance, mortgage or settlement, and each of the other instruments shall be chargeable with a duty of one hundred kyats instead of the duty (if any) prescribed for it in that Schedule.”



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# FOREX CONTROL: CROSS-BORDER LOANS

- Cross-border loans require prior Central Bank approval (para. 48 FEMR)
- Criteria for approving a cross-border loan (as published on the Central Bank's homepage):
  - Borrower's paid-up capital exceeds USD 500,000
  - Borrower's business must generate enough to repay the loan
  - Borrower has access to sufficient foreign-exchange income or plans to mitigate the exchange risk if the borrower has MMK-income



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# FOREX CONTROL: CROSS-BORDER LOANS

- If the borrower is an MIC company: Borrower has contributed at least 80% of the equity referred to in the MIC application
- Borrower's debt : equity ratio not higher than 4 : 1
- The loan agreement makes sense
- The loan tenure is "mid-term or long-term" (not less than 1 year)
- Interest: "Market rate" (para. 51 FEMR) - up to 8% in practice (the lower, the easier for Central Bank to approve)



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# LENDING: CROSS-BORDER LOANS

- Documents to be provided to the Central Bank:
  - Cover letter
  - Copies of company registration certificate, form 1 (if foreign-invested company), form 6, form 26, form E (if any), memorandum and articles of association
  - Evidence of paid-up capital / other equity
  - Copy of MIC permit (if any)
  - Copies of the audited financial statements of the previous two years (if any)
  - Copy of the (draft) loan agreement
  - As such not required, but we think it prudent to submit copies of the security instruments (if any) as well



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# LENDING: CROSS-BORDER LOANS

- Details of the loan (lender's details; borrower's details; total amount of the facility; draw-down schedule; repayment schedule; interest rate; security; sources from which the loan is to be repaid)
- Business plan (introduction of the borrower's business; borrower's corporate structure; reason for the loan; financial plan for the tenure of the loan which shows the projected revenue and expenses, interest expenses and repayment of the principal - must show that the loan can be served from the borrower's ordinary business income)



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# REGISTRATION OF LEASE AND OTHER AGREEMENTS



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# REGISTRATION

- A variety of documents have to be registered with the Registration of Deeds Office, among others lease agreements for immovable property for a term exceeding one year and sale and purchase agreements for immovable property (section 17 Registration Act)
- Exemption: Documents evidencing transfers of land or any interest in land on behalf of the Government (section 90 (d) Registration Act)



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# REGISTRATION

- Unregistered documents do not “affect any immovable property comprised therein” and cannot be enforced (section 49 Registration Act)
- Draft Registration Law unfortunately retains the registration requirement for long-term lease agreements (and sale and purchase agreements for immovable property)



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# REGISTRATION

- Only revenue-stamped documents may be registered. Revenue-stamping must be done “before or at the time of signing” (section 17 Stamp Act)
- Stamp duty amount (one-off payment):
  - Lease up to 3 years: 0.5% of annual rent
  - Lease in excess of 3 years: 2% of the annual rent
  - Sale and purchase of immovable property: 6% (Yangon) or 4% (rest of the country) of the purchase price (minimum purchase price in Yangon for tax calculation purposes: Ks. 500,000 per square foot)



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# REGISTRATION

- **Registration fee:**
  - **Lease agreement: 0.2% of annual rent**
  - **Sale and purchase of immovable property: 0.2% of the purchase price**
- **Application for registration must be filed within 4 months after signing (section 23 Registration Act)**
- **Late-filing possible only within an additional 4 months period at the discretion of the Regional Registration of Deeds Office upon payment of a fine of up to 10 times the registration fee (section 25 (1) Registration Act)**



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# REGISTRATION

- Approval from the Regional/State or National Farmland Management Committee is required if farmland is to be used for non-farming purposes. This takes months (at best). Lease agreements can only be registered thereafter which means that it may not be possible to register them at all as more than 8 months may have been passed since signing.
- Every Land Record Department is different
- At the very least, landlord, tenant and two witnesses have to appear in person



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# REGISTRATION

- Landlord and tenant can be represented with a power of attorney; power of attorney has to be notarised
- Documents to be submitted may include:
  - Original BoD resolution appointing representatives for the registration
  - Original corporate documents and MIC permit
  - Original land documents, in particular form 105, 106; form 7; permission according to section 30(a)/(b) Farmland Law)



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# PROTECTION OF INTELLECTUAL PROPERTY



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# IP PROTECTION

- Drafts (bills) of modern IP laws exist, but they are not enacted yet
- Presently, owners of a trademark, patent, industrial design can register a “declaration of ownership” under the Registration Act 1908 and publish a cautionary notice in the newspaper
- Protection is tied to the actual use of which registration is an indication



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# IP PROTECTION

- Remedies against infringements:
  - Civil (temporary or perpetual injunction; damages)
  - Criminal (sections 478-489 Penal Code 1861)
- Registration of trademarks with the Customs Department to help customs intercept counterfeit goods
- Copyright protection of foreign works is as such not available. Bootlegged videos may, however, be seized under section 32 (b) Television and Video Law 1996 (“distributing videos without censorship sticker”)



**LINCOLN LEGAL SERVICES (MYANMAR) LIMITED**

# CONTACT

**Lincoln Legal Services (Myanmar) Ltd.**

**La Pyi Wun Plaza, Room 409 (4<sup>th</sup> Floor),  
37, Alan Pya Pagoda Road, Dagon Township,  
Yangon, Myanmar**

**Phone: +95-9-262546284 (English) or  
+95-9-790488268 (Myanmar)**

**E-mail: [info@lincolnmyanmar.com](mailto:info@lincolnmyanmar.com)**

**Homepage: [www.lincolnmyanmar.com](http://www.lincolnmyanmar.com)**



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