

LINCOLN LEGAL SERVICES (MYANMAR) LIMITED

NEWSLETTER 51 – 30th July 2018

Dear Readers,

Welcome to a new edition of our newsletter.

1. Foreign retail and wholesale companies: List of goods and standard operating procedures issued

The Ministry of Commerce last Friday published “Newsletter 3/2018” dated 26 July 2018 containing a list of 24 types of goods that foreign companies and joint ventures may trade in. An English translation of the list is available on our homepage: <https://tinyurl.com/y8u8m9jj>.

Trade in these goods by foreign companies and joint venture companies is subject to the restrictions imposed by Ministry of Commerce Notification 25/2018 (<https://tinyurl.com/y9h92rap>), in particular (i) the requirement that retail sale may only occur in outlets with a floor space of at least 929 square metres and (ii) the following minimum investment amounts:

	80.1-100% foreign ownership	0.1-80% foreign ownership	100% Myanmar ownership
Wholesale	USD 5 million	USD 2 million	0
Retail	USD 3 million	USD 0.7 million	0

Notification 25/2018 was hailed as a milestone as it opened the Myanmar market to foreign retail and wholesale companies for (almost) all goods. Newsletter 3/2018 is a step backwards as it closes the market again for goods that are not on the list (**but the list is actually fairly long and comprehensive**).

Unfortunately, the Ministry of Commerce also seems to have backtracked on previous notifications that allowed foreigners to trade in specific goods with no minimum floor space and investment requirements.

In particular, Notification 36/2017 dated 12 June 2017 (<https://tinyurl.com/ydcxetxf>) allowed foreigners to trade in fertilisers, seeds, pesticides, hospital equipment and construction materials.

According to “Newsletter 2”, likewise dated 26 July 2018, existing companies engaging in retail and wholesale under a previous Ministry of Commerce Notification must obtain a retail and/or wholesale business permit according to Ministry of Commerce Notification 25/2018 and have five years to top up the investment amount to meet the minimum investment requirements.



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New foreign and joint venture companies apparently may no longer rely on the previous notifications and may only engage in retail and wholesale according to Notification 25/2018.

On the flip side, however, Newsletter 2 offers foreign-invested outlets in shopping malls with a retail permit the opportunity to import and sell goods, irrespective of floor space and minimum investment requirements: Such outlets do not need a retail permit themselves and may import goods either with the exporter/importer registration certificate of the shopping mall, or obtain their own exporter/importer registration certificate with a recommendation from the shopping mall.

“Newsletter 2” contains the “standard operating procedure” for applications for retail or wholesale permits under Notification 25/2018. An English translation is available to our premium subscribers.

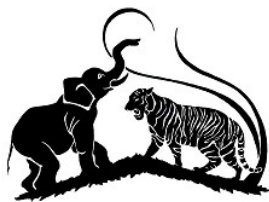
2. New Companies Law and electronic registration system going live on 1 August 2018

(a) How to use the new electronic registration system

The new electronic registration system MyCO will be available to the public from 1 August 2018, 9:00 a.m. at www.myco.dica.gov.mm.

Prospective users will apparently have to complete the following steps (DICA has published some instructions here: <https://tinyurl.com/ybqj3v6j>).

- (aa) Create a MyCO ID and log in with this ID.
- (bb) For re-registration of an existing company, branch or rep office, users shall apparently select the name of the entity from a list, fill in the re-registration form (form B-1 for a private company limited by shares and form B-6 for a branch or rep office), attach the required documents and submit the application; there is no re-registration fee.
- (cc) For the registration of a new entity, users shall select the appropriate form (form A-1 for a private company limited by shares and form A-8 for a branch or rep office - under the new Companies Law referred to as an “overseas corporation”), fill it in, attach the required documents, submit the application and pay the registration fee by credit card or a card of the Myanmar Payment Union (MPU).
- (dd) The system will reply by e-mail.



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(b) Features of the new electronic registration system

- (aa) **Compliance will matter:** The system will keep track of missed filings and late filings for anybody doing a company search to see (more information: <https://tinyurl.com/ybqj3v6j>). In addition, the Companies Law provides for substantial fines for non-compliance. Apart from filings with DICA, an entity will furthermore have to keep various registers and documents. We therefore recommend to retain a company secretary (please contact us for a fee quote).

Our “compliance bible” is available to our premium subscribers.

- (bb) The current **registration fees and late filing fees** (but not the many other penalties provided by the new Companies Law - let’s see how strict DICA is going to be about them) can be found here: <https://tinyurl.com/y9jptybl>
- (cc) Without a specific form issued by DICA, no registration can be done. The available forms can be found here: <https://tinyurl.com/yd9nn8hm>
- (dd) Attachments may only be submitted if required by a form.
- (ee) The filing is effective once it has been approved by DICA (which is done automatically or manually, depending on the form).
- (ff) Offline filing is still possible; in this case, a DICA officer keys the data into the system.
- (gg) There is no more five year term: A company or branch/rep office registration is valid indefinitely (unless de-registration occurs).
- (hh) There are no more minimum capital requirements for company registration (although minimum capital requirements still exist if the company needs an MIC endorsement or permit and/or specific licenses). A foreign-invested services company and a branch or rep office may be set up with USD 1. Bank statements do not have to be provided anymore.
- (ii) An existing company, branch or rep office will, upon re-registration, receive a new registration number and an electronic registration certificate.
- (jj) The registration number will also serve as tax ID.



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- (kk) The incorporation certificate will not show it if a company is a foreign company (no “FC” in the company number) - but sighting the “company extract” will reveal if a company has foreign shareholders.
- (ll) Company search is free; additional information (such as a “company extract” - which we understand to correspond to a Bizfile in Singapore) has to be purchased.

(c) **Features of the new Companies Law**

We have written and held seminars about the new Companies Law before, so we are only briefly summarising the main points to note here:

- (aa) Companies can be set up with one shareholder and one director;
- (bb) authorised capital and par (nominal) value are abolished;
- (cc) companies may provide security (including real estate) to foreign lenders;
- (dd) a company with a foreign ownership ratio of up to 35% is not a foreign company (although government departments outside of DICA do not seem to take note yet);
- (ee) a company must have at least one ordinarily resident director; a branch or rep office must have at least one ordinarily resident officer (**we provide nominee services to those clients that retain us as company secretary**);
- (ff) there is significant minority protection;
- (gg) a tailor-made constitution with flexible design of shares is possible;
- (hh) directors have significant obligations;
- (ii) overseas companies are - at least according to the law - prohibited from doing most business (**e.g., installing and commissioning machines; doing construction work; performing services for more than a month**) in Myanmar without setting up a branch, rep office or subsidiary;
- (jj) a branch or rep office must report many of the changes that occur at the level of the headquarters.



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3. Re-registration of an existing company, branch or rep office

Re-registration has to be done until 31 January 2019 (with form B-1 - private company limited by shares, or form B-6 - branch or rep office). An entity failing to re-register until the deadline may be deleted from the registry (but an “undelete” function is available at DICA’s discretion).

In a nutshell, we think that the following is of note concerning re-registration. **Please do not hesitate to contact us if you require assistance.**

(a) Changing the number of shareholders and directors

The current Companies Act 1914 requires that a private company limited by shares have at least two shareholders and two directors. In contrast, it may be set up with one shareholder and one director under the new Companies Law. Investors may therefore decide to take re-registration as an opportunity to reduce (or otherwise change) the number of directors and shareholders.

Ordinarily, one would assume that one has to (i) re-register the company (form B-1) first in order to obtain a new company registration number and then (ii) conduct proceedings to change the number of shareholders and directors (in particular, file forms C-3 and D-1) with the new registration number.

DICA suggests, however, that changing the number of shareholders and directors may be done without filing forms C-3 and D-1 (<https://tinyurl.com/ycnt4u6b>).

(b) Keeping the current memorandum and articles of association or adopting a new constitution

A company will have to tick whether it will use (i) DICA’s new model constitution (<https://tinyurl.com/ydz9x9w2>) or (ii) its own constitution.

A company wishing to keep its current memorandum and articles of association would tick “own constitution”. Keeping the current memorandum and articles of association at least for a while may be a good idea as it contains the company’s objects (which licensing authorities and/or business partners might expect to see until they get used to the fact that the default mode under the new Companies Law is for a company not to have specific objects).



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Anything that deviates from a company's current memorandum and articles of association would have to be approved by a special resolution (at least 75% of the votes) of the company's shareholders.

(c) Foreign companies

Much has been said about the new Companies Law providing that a company with an ownership ratio of up to 35% is treated as a Myanmar company (with the consequence that such a company should be able to acquire real estate, import and export goods, conduct trade, etc.). However, we enquired with the most important ministries and other government departments in this respect, and the answer was always that there were currently no plans to change administrative practice to treat any company with the tiniest foreign ownership ratio as a "foreign company".

Nevertheless, a company with a foreign ownership ratio of not more than 35% would tick "no" in the section of the re-registration form that enquires whether the company will be a foreign company upon re-registration.

(d) Small companies

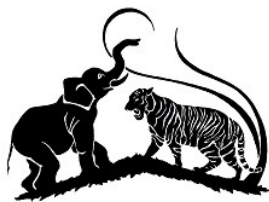
A company has to tick whether it will be a "small company" upon re-registration. A small company is a company with not more than 30 employees and an annual revenue in the prior financial year of less than Ks. 50,000,000. Small companies are exempt from holding annual general meetings and, theoretically, from preparing audited annual financial statements (although, in practice, they currently still have to prepare audited annual financial statements for tax-filing purposes).

(e) Resident director or authorised officer

The new Companies Law provides that a company must have at least one ordinarily resident director and a branch or rep office at least one ordinarily resident authorised officer.

A person is "ordinarily resident" if this person is either a (i) permanent resident or (ii) person residing in Myanmar for at least 183 days in each 12 month period commencing from 1 August 2019 (existing entity) or the date of registration (new entity).

Existing companies, branches and rep offices have until 31 July 2019 to find an ordinarily resident director or authorised officer (section 469(b), (c) Companies Law). There should



therefore be no need to include an ordinarily resident director or authorised officer in the re-registration forms.

(f) Re-registering a branch or rep office

A branch or rep office has to provide all sorts of information about its headquarters and notify DICA of all subsequent changes. It has to translate the headquarters' evidence of incorporation and constitutional documents to Myanmar and, if the original documents are not in English, provide an English summary.

4. Labour arbitration

According to an internal directive dated 27 June 2018 (copy not provided), individual labour disputes are - in line with section 23 of the Settlement of Labour Disputes Law, but contrary to previous administrative practice - apparently not referred to arbitration anymore, but progress to the ordinary courts if mediation fails.

Apart from court proceedings, individual employees may still avail themselves to the proceeding according to sections 12(b), 13(a) Payment of Wages Law according to which they may request the Factories and General Labour Law Inspection Department to order the employer to pay outstanding salary. However, this procedure only works for the actual salary, not for fringe benefits like accommodation allowance. Furthermore, employees cannot claim a job loss allowance according to Ministry of Labour Notification 84/2015 in these proceedings, and they cannot claim reinstatement for unfair dismissal.

5. Electricity and energy news

- (a) Next bidding round:** Local companies with expertise encouraged to cooperate with foreign firms (see MoEE announcement here: <https://tinyurl.com/ybd68rku>), but joint ventures apparently not compulsory for foreign bidders (<https://tinyurl.com/y7v9jex3>)
- (b) PTTEP intends to participate in the upcoming bidding round, build mid-sized power plant in southwest Yangon supplied by surplus gas from Zawtika field:** <https://tinyurl.com/y9bnj5hv>
- (c) EGATi wants to build small-sized power plants fired by LPG with local partners:** <https://tinyurl.com/y8psrezr>

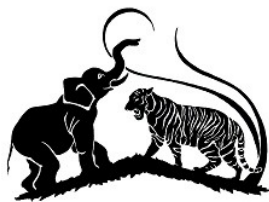


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6. Market access and other news

- (a) **UMFCCI requests tax benefits:** <https://tinyurl.com/ycvpfrzi> (abolition of 2% corporate income tax advance on oil, fuel and essential goods imports and on all exports; to reconsider the tax amnesty; to reduce stamp duty on loan agreements by 0.5% (i.e., abolition); to reduce commercial tax and customs duties for local factories in industrial zones)
- (b) **China and Myanmar agree on MoU for economic corridor:** <https://tinyurl.com/yd4sk26a>
- (c) **Myanmar to ask China to downsize Kyaukphyu project:** <https://tinyurl.com/ycuffjg8>
- (d) **Government approves sites for three “economic cooperation zones” in Kachin State’s Special Region 1; Kokang Self-Administered Zone; Muse Township:** <https://tinyurl.com/ybz6z8z4> (The sites are all located at the Chinese border; the zones will be established across the border. The projects are coordinated by a joint committee set up by the Chinese and the Myanmar government.)
- (e) **China-Myanmar high-speed railway project quietly back on track:** <https://tinyurl.com/y8ktjfcc>
- (f) **Interesting articles on state-owned enterprises:** <https://tinyurl.com/y87fw63c>, <https://tinyurl.com/yd2xexsq>
- (g) **11 airlines to switch from terminal 2 to terminal 1 at Yangon International Airport:** <https://tinyurl.com/yb9c6mym>
- (h) **Thonburi Healthcare Group to open a USD 70 million hospital in Yangon with joint venture partner:** <https://tinyurl.com/y9ojp7al>, while JICA is funding a USD 77 million neuro and cardio hospital: <https://tinyurl.com/y7cb4gwy>
- (i) **Ngwe Pin Le Integrated Logistics Zone and IWT Jetty Link Dry Port apparently delayed due to concerns by regional parliament:** <https://tinyurl.com/y8eovam6>
- (j) **Myanmar “high risk, high return” for start-ups:** <https://tinyurl.com/y7dqhq3>
- (k) **MPs object to re-appointment of Central Bank governor:** <https://tinyurl.com/ybq6kixy>
- (l) **Three domestic airlines shut down (but foreign airlines - well, at least ANA - still interested in the market):** <https://tinyurl.com/ya97ri29>



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- (m) **Mandalay regional government wants to review tender winners for New Mandalay Resort City project:** <https://tinyurl.com/ydd9opgf>
- (n) **Hanthawaddy airport “not needed”:** <https://tinyurl.com/y87vy44s>
- (o) **Local tourism feeling impact of fewer Western tourists:** <https://tinyurl.com/y9xgagmx>
- (p) **“Myanmar to allow visa-free travel for tourists from Japan and South Korea”:** <https://tinyurl.com/y7nva4> (Not so sure if this is really “visa-free”, or a visa on arrival scheme with tourists from Japan and South Korea being exempt from the visa fee (but still obliged to show that they have at least USD 1,000 with them per person). Tourists from mainland China, Hong Kong and Macao may obtain a visa on arrival for USD 50 and have to show USD 1,000.)
- (q) **Memories Group acquires two hotels, island development rights:** <https://tinyurl.com/yc4wfjei>
- (r) **Myanmar’s foreign debt - the big picture:** <https://tinyurl.com/y9hp4hzp>
- (s) **Construction sector to submit its own “apartment law” to parliament:** <https://tinyurl.com/y9rk7h9g> (and, a couple of months ago, the Yangon Region government invited expressions of interest for drafting an apartment law just for Yangon Region. This all in addition to the Condo Law and the Condo Rules - which apparently are in parliament again, only shortly after finally having been released. What a mess.)

7. Tenders

- (a) **Department of Electric Power Planning:** purchase of electricity poles for National Electrification Project: <https://tinyurl.com/yaerbyso>
- (b) **Department of Power Transmission and System Control:** Design, supply and installation of a 230kV substation extension in Thaketa and three new substations at Kyaikasan, South Oakalapa and New University: <https://tinyurl.com/y7qpytgb>
- (c) **Myanma Oil and Gas Enterprise:** Purchase of equipment and spare parts: <https://tinyurl.com/ybqj2bht>
- (d) **Myanma Railways:** Purchase of a track recording car EM 80 and small track maintenance machineries (deadline extension): <https://tinyurl.com/ybuco9r2>



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- (e) **Myanma Economic Bank:** Cooperation with companies able to provide technology for money transfer services: <https://tinyurl.com/y8up8ob9>

We hope that you have enjoyed reading our newsletter and found it useful.

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Managing Director

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Director