



# LINCOLN LEGAL SERVICES (MYANMAR) LIMITED

To:  
[...]  
Attn.: Ms. [...]  
[...],  
[...]

Yangon, 7<sup>th</sup> September 2018

## Nominee structures in Myanmar

Dear Ms. [...],

You had the following questions on nominee structures:

- “(i) Is there any penalty or legal consequence to the nominee company and the principal under Myanmar law, including directors and shareholders of nominee company and the principal? Any imprisonment or criminal charges? Could you please advise which laws and regulation stipulate the provision related to the nominee structure?”*
- (ii) In case the nominee company is conducting a business which does not open for foreigners, shall there be any penalty or legal consequence to the nominee company and the principal, including directors and shareholders of nominee company and the principal? under such specific law in addition to the law in item (i) above, for example: mining law and land law? The reference to the provisions and regulations would be highly appreciated.”*

Please allow us to answer your questions as follows:

### 1. Statutes on nominee structures

To the extent that we are aware, there are the following statutes on nominee structures in Myanmar that may be relevant to your business:

#### (a) Trusts Act, 1882

[\(English version\)](#)

Section 4: *“A trust may be created for any lawful purpose. The purpose of a trust is lawful unless it is (a) forbidden by law, or (b) is of such a nature that, if permitted, it would defeat the provisions of any law, or (c) is fraudulent, or (d) involves or implies injury to the person or property of another, or (e) the Court regards it as immoral or opposed to public policy.*



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*Every trust of which the purpose is unlawful is void. And where a trust is created for two purposes, of which one is lawful and the other unlawful, and the two purposes cannot be separated, the whole trust is void."*

### **(b) Transfer of Immovable Property Restriction Law, 1987**

#### (English translation)

Section 3: *"No person shall sell, buy, give away, pawn, exchange or transfer by any means immovable property with a foreigner or foreigner owned company.*

Section 4: *"No foreigner or foreign owned company shall acquire immovable property by way of purchase, gift, pawn, exchange or transfer."*

Section 5: *"No person shall grant a lease of immovable property, for a term exceeding one year:*

(a) *To a foreigner or foreigner owned company.*

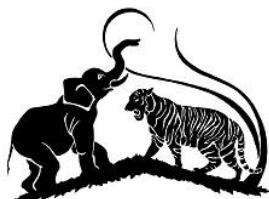
(b) *No foreigner or foreigner owned company shall receive a lease of immovable property, for a term exceeding one year."*

Section 8: *"A foreigner or foreigner owned company must register any immovable property and the location of such immovable property in the state concerned to the respective Township People Council according to the relevant procedure."*

Section 11: *"Whoever contravenes the provisions of section 3 or 4 shall be sentenced to a minimum of three years and a maximum of five years imprisonment and the relevant immovable property shall be confiscated as public property."*

Section 12: *"Whoever contravenes the provisions of section 5 shall be punished with a fine not exceeding three times the rent agreed upon for the entire period of the lease and the relevant immovable property shall be confiscated as public property."*

Section 13: *"Whoever if found, after enquiry by the Township People Council, to have contravened the registration provisions in section 8 or section 9, shall be sentenced to a minimum of one year and a maximum of three years imprisonment and the relevant immovable property in the case shall be confiscated as public property."*



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**(c) Section 25 Myanmar Investment Law 2016 in connection with Myanmar Investment Notification 15/2017 dated 10 April 2017**

[\(English translation\)](#)

Notification 15/2017 among others specifies which businesses foreign investors are not allowed to engage in or are allowed to engage in only when forming a joint venture with a Myanmar citizen.

**(d) Mines Law 2015**

[\(English translation\)](#)

According to section 4(c) and (d) Mines Law 2015, mid and small-scale production and processing permits are only available to citizen investors.

**(e) Burma Immigration (Emergency Provisions) Act 1947**

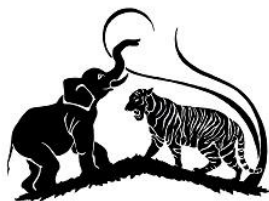
[\(English translation\)](#)

Section 13(1): *“Whoever enters or attempts to enter the Union of Burma or whoever after legal entry remains or attempts to remain in the Union of Burma in contravention of any of the provisions of this Act or the rules made thereunder or any of the conditions set out in any permit or visa shall be punished with imprisonment for a term (which may extend from a minimum of six months to a maximum of five years) or with fine of a minimum of K. 1500 or with both.”*

It may not be apparent from the text, but this provision is interpreted as making it a criminal offence for any foreigner to do anything illegal (as this would be a contravention of the terms and conditions of the foreigner’s visa). “Anything illegal” might be the engagement in a restricted business through a nominee structure.

## **2. Not all nominee structures are illegal**

Not all nominee structures involve trusts and are governed by the Trusts Act, but it is probably fair to say, from the thought expressed section 4 of the Trusts Act, that a nominee structure has to be considered illegal if it (i) is forbidden by law, or (ii) is of such a nature that, if permitted, it would defeat the provisions of any law, or (iii) is fraudulent, or (iv) involves or implies injury to



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the person or property of another, or (v) the Court regards it as immoral or opposed to public policy.

Nominee structures that aim to circumvent the (i) Transfer of Immovable Property Restrictions Law, (ii) MIC Notification 15/2017, (iii) any other law or (iv) public policy would be illegal.

A nominee structure that tries to circumvent administrative practice (e.g., the administrative practice of the Ministry of Hotels and Tourism of granting tour guide licenses only to Myanmar nationals, although the Hotel and Tourism Law has no nationality requirements) would probably also be illegal on the ground of contravening public policy.

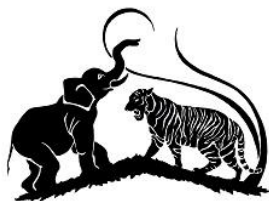
On the other hand, there are nominee structures that are perfectly legal:

- (a) E.g., the new Myanmar Companies Law (which entered into force on 1 August 2018) requires companies to have at least one director who is ordinarily resident in Myanmar. There is nothing wrong with the shareholders of a foreign-invested company appointing a nominee director to satisfy this requirement.
- (b) Or, a Myanmar bank may act as a security agent for a foreign lender and hold a mortgage of immovable property on behalf of the foreign lender (this practice has been confirmed by the Myanmar Central Bank).

### **3. Consequences of setting up an illegal nominee structure**

The consequences of an illegal nominee structure are as follows:

- (a) The nominee agreement is void and cannot be enforced in court.  
  
(Strangely, however, we are aware of cases where a foreign principal cheated by a Myanmar nominee managed to file a criminal complaint against the nominee for “criminal breach of trust”.)
- (b) The shareholders, directors and/or other officers of the foreign principal and of the nominee company may be liable to criminal sanctions for operating an illegal nominee structure (e.g., according to the Transfer of Immovable Property Restrictions Law or the Burma Immigration (Emergency Provisions) Act).
- (c) The shareholders, directors and/or other officers of the foreign principal may be liable to criminal sanctions according a business-specific law for operating a business without a license (if the business requires a specific license that is only available to Myanmar nationals).



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*Example: According to section 30(a) Mines Law 2015, anybody engaging in the production or processing of minerals without a proper permit shall be punished with imprisonment of up to 10 years or a fine of up to Ks. 5 million or both.*

- (d) The shareholders, directors and/or other officers of the nominee company may be liable to criminal sanctions according to a business-specific law for providing false information in the license application (if the business requires a specific license that is only available to Myanmar nationals).
- (e) The MIC may blacklist the foreign principal and preclude him from making investments in Myanmar in the future (section 85(a)(v) [Myanmar Investment Law](#)).

Please note that the links above lead to English translations of laws; the links are provided for the convenience of non-Burmese speakers only; accuracy of the translation is not guaranteed.

Please do not hesitate to contact us should you have any questions.

Kind regards

Sebastian Pawlita  
Managing Director