

**Dear Readers,**

Welcome to a new edition of our newsletter.

**1. Foreign invested companies exempt from forced conversion**

CBM Letter No. FE-1/2861(Ka) dated 30 December 2022 ([English translation](#)) exempts all companies with more than 35% foreign ownership from compulsory conversion of foreign currency in their bank accounts. However, if such companies wish to remit foreign exchange abroad for a non-commercial transaction, this may only be done with prior approval from the Foreign Exchange Supervisory Committee.

The letter furthermore states that companies with more than 35% foreign ownership may not trade and export agricultural products that are not value-added.

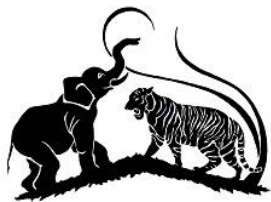
The CBM in 2022 briefly allowed companies with 10% or more foreign investment to keep their foreign currency, but this exemption was revoked after less than one month.

**2. Trademark Law (2019) “planned to be enforced in March 2023”**

The Ministry of Commerce [rather cryptically announced](#) on 13 January 2023 that the Trademark Law (2019) was “planned to be enforced in March 2023”.

Claims to trademark ownership were (and still are) traditionally recorded by filing a declaration of ownership on paper with the Registration of Deeds Office. In October 2020, the initial, limited version of an online filing system went live: It allows trademark owners to upload a scan of their registered declaration of ownership online, thereby notifying the newly created Intellectual Property Department of their intent to re-register their trademark once the online filing system is fully operational.

Trademark owners wishing to proceed with re-registration will have to appoint a representative and pay the official fees once they are announced; we understand from the Ministry of Commerce announcement mentioned above that this is scheduled to happen in March 2023. The online filing system is expected to be fully operational from 26 April 2023, at least according to an international intellectual property firm operating in Myanmar.



### 3. Directive on recall procedures

On 10 December 2022, the Department of Consumer Affairs issued Directive 3/2022 on “the recall of dangerous goods, the temporary or permanent ban on their sale and distribution, and the temporary or permanent ban on dangerous services”. Please contact us if you wish to receive an English translation (for a fee).

### 4. INGOs

We haven't checked recently, but as of two or so weeks ago, it still was not possible to file applications for INGO registration, in spite of news to the contrary. INGOs wishing to register are advised to notify the Ministry of Home Affairs (Union Minister) of their intention to do so.

### 5. Recent DICA directive on nominee directors and nominee shareholders

#### (a) Foreign investors not required to send directors to Myanmar

According to the Myanmar Companies Law, a company must have at least one director who is ordinarily resident in Myanmar. This person may be a Myanmar national or a foreigner, provided that he or she resides in the country for at least 183 days in each 12-month period following incorporation.

Not all foreign investors can or want to appoint a resident director from within their own organisation and instead appoint a nominee in order to fulfill the Companies Law's residence requirements.

State-owned The Global New Light of Myanmar [reported on 20 January 2023](#) that this practice became illegal due to a recent Directorate of Investment and Company Administration (“DICA”) directive ([English translation](#)) allegedly prohibiting the use of nominee directors (and nominee shareholders), thus forcing “the owners of foreign companies ... to stay in the country instead of the nominal director”.

This is, however, not correct. The DICA directive only prohibits the illegal use of nominee directors (“the appointment of nominee directors which is not in accordance with the law will not be allowed”), thereby not doing more than stating the obvious.

There is nothing in the Myanmar Companies Law or any other law that would indicate that the appointment of a nominee director in order to fulfill residence requirements is illegal. When a nominee structure is illegal and when it is not is explained in [this memo](#).



### (b) Illegal and legal appointment of nominee directors

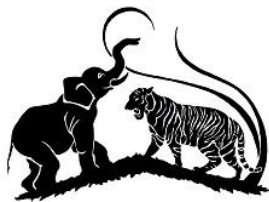
Generally speaking, nominee directors are appointed in the following circumstances:

- The company owner thinks that the company's business might be unlawful or at least risky and appoints someone else as director to have a fall guy in case something goes wrong, or the company owner is disreputable and appoints someone else as director to hide his involvement in the company's management, or the company owner has other reasons for wanting to stay in the background:

We somehow think that it is these situations that DICA had in mind when drafting its directive. Even before the directive, such arrangements did not shield the company owner from liability for acts done by the nominee at the company owner's behest as the Myanmar Companies Law (section 1(c)(x)(B)) considers a person who controls a director behind the scenes to be a director himself, irrespective of whether this person is officially appointed. The directive simply emphasises that a company owner may not legally appoint a nominee director to hide the company owner's involvement in the company's management.

- Nominee directors are often appointed in parallel to the insertion of nominee shareholders as otherwise the disguise of the real shareholders might be incomplete. Just as in the bullet point above, the real shareholders may not legally appoint nominee directors to hide their involvement in the company's management, and they may not escape liability for acts done at their behest if they do it nevertheless.
- Foreign company owners who cannot or do not want to appoint a resident director from within their organisation appoint nominee directors to fulfill residence requirements. We do not see anything wrong with that, even after DICA's recent directive.

It should be noted in this context that the biggest risk taker among all persons involved is usually the nominee director as he is, by default, the person to whom blame attaches as he is officially the director, although he often has no way of knowing what is going on in the company behind his back.



### (c) Nominee shareholders and beneficial ownership

DICA previously made attempts at identifying “beneficial owners” of companies (i.e., the individuals who ultimately own or control a company). This was in a first step [limited to the extractive industries](#), but it was probably planned to expand it at some point in the future to [all companies](#). DICA’s recent directive, which states that “only the person/legal entity submitted to the registrar and entered into the register of members kept by the company shall be considered to be beneficial owners” seems to scrap these previous attempts.

The directive furthermore states that nominee shareholders may not be registered as members. This is often not more than stating the obvious, as many trust and similar agreements appointing nominee shareholders are void according to section 4 Trusts Act for being forbidden by law, circumventing a law, being fraudulent, doing damage to another person, or being opposed to public policy.

This is because nominee shareholders are often inserted by disreputable business owners wishing to deceive business partners about the real ownership of the business, by fugitives from creditors needing to hide assets, or by investors trying to get around investment restrictions (e.g., by foreign investors wishing to invest in a sector where foreign investment is restricted).

In some cases, it may be less obvious why a trust or similar agreement should be void for appointing a nominee shareholder: A business owner might, from the perspective of Myanmar law, have a legitimate interest in hiding his identity, e.g., because he is subject to foreign sanctions, or wants to hide his assets from greedy relatives. Nevertheless, one probably now has to consider corresponding nominee agreements to be void for going against DICA Directive 7/2023 and thereby being opposed to public policy.

We hope that you have found this information useful.

Sebastian Pawlita  
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## LINCOLN LEGAL SERVICES (MYANMAR) LIMITED

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### About Lincoln Legal Services (Myanmar) Limited

Lincoln Legal Services (Myanmar) Limited provides the full range of legal and tax advisory and compliance work required by investors. We pride ourselves in offering result-oriented work, high dependability and a fast response time at very competitive prices. Please do not hesitate to contact us:

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