VDB | Loi

BANKING AND FINANCE MYANMAR UPDATE 2018

Get to the point.

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MYANMAR PRACTICE OVERVIEW

PARTNERS IN MYANMAR

Jean Loi
Managing Partner
jean@vdb-loi.com

Jean is one of the region's most experienced tax and regulatory specialists with more than 12 years of experience in Indochina, Myanmar and Singapore.

She has advised on a large number of project transactions and tax disputes in the specialties of structuring, power plant projects and oil & gas.

As the managing partner of VDB Loi, Jean has extensive experience with projects related to the market entries of companies in the infrastructure, telecommunications and financial services industries in the region, as well as with supply chains. She lives in Yangon.

Edwin Vanderbruggen
Senior Partner
edwin@vdb-loi.com

Edwin is the senior partner of VDB Loi and a leading foreign legal advisor living in Myanmar since 2012. A frequent advisor to the Government on transactions and privatizations in energy, transportation and telecom, he is widely recognized for his "vast knowledge" (Legal 500) and his ability "to get difficult things through the bureaucracy " (Chambers, 2016).

He advised international financial institutions on their largest Myanmar transactions so far, oil and gas supermajors, a greenfield multibillion US$ telecom project and the Japanese Government on the Thilawa SEZ. He assisted two newly licensed foreign banks setup in Myanmar, acted for the sponsor of an 800MUS$ urban infrastructure PPP project and worked on 5 out of 7 power deals inked in 2016. He lives in Yangon since 2012.

GENERAL PRACTICE TEAMS

Corporate M&A Team

Anna Makosa
Team Leader
anna.makosa@vdb-loi.com

Banking and Finance Team

Maxim Kobzev
Team Leader
maxim.kobzev@vdb-loi.com

Licensing Team

Daw May May Kyi
Team Leader
may.kyi@vdb-loi.com

Taxation Team

Daw Honey Htun Wai
Team Leader
honeyhun.wai@vdb-loi.com

SPECIALIZED PRACTICE TEAMS

Energy and Infrastructure Team

Philipp Troesch
Team Leader
philipp.troesch@vdb-loi.com

Telecoms, Media and Technology Team

Edith Ruan
Team Leader
edith.ruan@vdb-loi.com

Disputes Team

U Aye Kyaw
Team Leader
aye.kyaw@vdb-loi.com

Special Project Team

Daw Aye Myat Thu
Team Leader
ayemyat.thu@vdb-loi.com

NEW RULES ON SANITIZING BANK OVERDRAFTS IN EFFECT

In July 2017 the Central Bank of Myanmar ("CBM") introduced a fresh set of four regulations (Notifications 16-19/2017 pertaining to capital adequacy, asset classification and provisioning, large exposures and liquidity ratio requirement respectively). Issued under the Financial Institutions Law 2016 ("Financial Institutions Law 2016"), for the most part these were reinforcements of the existing regulations issued under the erstwhile Financial Institutions Law 1990 ("Financial Institutions Law 1990"), which were not being strictly enforced. There was, therefore, seemingly no cause for concern or raised eyebrows, as it appeared that these new regulations were issued in order to ensure continued implementation and enforcement of prudential norms under the Financial Institutions Law 2016.

Similarly, in line with the existing regulation under the Old Act, the new Asset Classification and Provisioning Regulations (Notification 17/2017) ("Regulation") stated at section 11 that a bank shall ensure that all overdraft loans (such term not being defined) in its books are cleared / paid off in full for a period of two weeks annually. Section 12 went on to state that if an overdraft loan is not cleared / paid in full, such loan must be immediately classified and made specific provision for per the manner mentioned at section 5 in the Regulation. As mentioned, provisions to this effect already existed in the earlier regulation issued under the Financial Institutions Law 1990 but were not enforced.

Section 5 Classification of loans and advances and specific provisions. A bank shall classify and make specific provisions in the following manner:

Sr. No.	Classification Of Loans/ Advances	Days Past Due	Provisions On Shortfall In Security Value
a.	Standard	30 days past due	0%
b.	Watch	31 to 60 days past due	5%
c.	Substandard	61 to 90 days past due	25%
d.	Doubtful	91 to 180 days past due	50%
e.	Loss	Over 180 days past due	100%

The present Regulation came into effect in January 2018 and the implication was that by July, all overdraft loans not complying with the regulation would be declared non-performing. Since an estimated 70% of all lending is presently in the form of overdraft loans, this naturally created quite a stir amongst investors and banks alike. They united in appealing to the CBM to reconsider the stringent timeline. In response (and after much negotiation), the CBM allayed fears in November by issuing Directive 7/2017 ("Directive"), easing the timeline for implementation of the provisions relating to overdraft loans.

Section 7 of the Directive provides a schedule whereby the total volume of overdraft loans shall be reduced to 20% of a bank's total outstanding portfolio, over a phased period of 3 years till July 2020. Banks also must ensure that overdraft loans and term loans are subject to a maximum maturity of one year and three years respectively, with interest payments

at least on a quarterly basis and subject to reasonable amortizations (for term loans) payable at least every three months (Section 2). The CBM also provides a way out for banks saddled with too many overdraft loans under Section 3 of the Directive, whereby banks are allowed to convert their outstanding overdraft loans into term loans (each with a maximum tenor of 3 years), subject to certain conditions.

Importantly, it may be noted that all overdraft loans to the bank's related parties (as defined under the Financial Institutions Law 2016[2]) may be converted to term loans but shall continue to be deducted from capital in accordance with the Capital Adequacy Ratio Regulation (Notification 16/2017), which states at Section 3 that Capital Adequacy Ratio (being a measure of a bank's capital expressed as a percentage of its risk weighted assets) shall be maintained at 8% (this is a relaxation from the earlier 12% as per the regulation issued under the Financial Institutions Law 1990).

Interestingly, the actual wording of the Regulation differs somewhat from the intention attributed to it by CBM officials and the perception of the industry at large. The Regulation required overdraft loans to be cleared for two weeks annually, starting January 2018, so technically this could have been done for two weeks at any time starting January 2018 till January 2019. This in no way implies that the banks needed to clear most of their loans by January 2018, as widely reported.

Section 7 That total volume of overdraft facilities (including temporary overdraft and any kinds of overdraft) as percent of bank's total outstanding loan portfolio shall be reduced in accordance with the schedule below:

Sr. No.	Deadline	As % Of Total Outstanding Loan Portfolio
a.	as of July 6, 2018	50%
b.	as of July 6, 2019	30%
c.	as of July 6, 2020	20%

Section 2 (ii) Related party in relation to a financial institution means-

1. a person who has substantial interest in the financial institution or the financial institution has significant interest in the person;

2. a director or officer of the financial institution or of a body corporate that controls the financial institution;

3. a relative of a natural person covered in paragraphs (1) and (2);

4. an entity that is controlled by a person described in paragraphs (1), (2) and (3);

5. a person or class of persons who has been designated by the Central Bank as a related party because of its past or present interest in or relationship with the financial institution.

DICA RELEASES DRAFT CATEGORY H FORMS FOR REGISTRATION OF MATTERS RELATING TO MORTGAGES AND CHARGES

In preparation for the launch of the new electronic companies' registry system, Myanmar Companies Online ("MyCO"), the Directorate of Investment and Company Administration ("DICA") is preparing a set of prescribed forms to collect the information required to be submitted to the Companies Registrar under the Myanmar Companies Law 2017 ("MCL").

In order to raise public awareness, DICA has on 14 June 2018 released draft forms for different aspects of corporate matters, including draft Category G for registration of matters relating to public companies, draft Category E for registration of matters relating to overseas corporations and draft Category H for registration of matters relating to mortgages and charges.

At present Form MC-1 is used for registration of mortgage or charge, however there exists no prescribed form for modification of charge, satisfaction of charge and the like. This is remedied by the introduction of a slew of new forms under the category of Form H (1-9) for matters related or ancillary to the registration of mortgages and charges. While Form H-1 pretty much correlates to the existing Form MC-1 for registration of mortgage or charge, there are plenty of new aspects hitherto uncovered. These are as follows:

- Form H-2 Registration of mortgage or charge over property acquired by company
- Form H-3 Modification of particulars of mortgage or charge
- Form H-4 Notice of appointment of receiver
- Form H-5 Notice of change of receiver details
- Form H-6 Filing of accounts of receiver
- Form H-7 Notice of cessation of receiver\
- Form H-8 Notice of Court Order for extension of time or rectification of mortgage or charge
- Form H-9 Payment or satisfaction of mortgage or charge

Presently, registration of charge is only possible by filing an application in Form MC-1 with DICA which takes about a month. It remains to be seen how quickly a charge is registered under the new system filing online, but it is widely expected to be much quicker than the existing process.

Of particular interest are the provisions relating to receivers. In practice thus far, a court order is required to appoint a receiver, regardless of the fact that under section 240 of the MCL, parties are free to do so without court intervention. Form H-4 seems to render the process of court intervention for appointment of receiver unnecessary, making things much more streamlined.

All told, the initiative to introduce the new draft category H forms is a welcome step from DICA and it is expected that once the system goes live, it will go a long way in facilitating ease of business.

"VDB Loi's banking and finance team to offer practical solutions for Myanmar's finance sector."
- Chambers and Partners

VDB Loi and Phoe 'Bushido' Thaw Sinage Ceremony
24 July 2018, VDB Loi Office, Yangon

Power Purchase Agreement Workshop for MOEE
9 May 2018, Nay Pyi Taw, Yangon

Myanmar Energy, Infrastructure and Construction Update in Tokyo
20 February 2018, Tokyo

Joint Ventures in Insurance Sector
13 December 2017, VDB Loi Office, Yangon

Public Private Partnership
15 June 2018, The Lake Garden - M

Union Tax
10 May 2018, Pan P

p For Myanmar Toll Roads
Gallery Hotel (Sofitel), Nay Pyi Taw

Law 2018
acific Hotel, Yangon

Structuring Condo Projects Under the Condominium Rules
27 February 2018, VDB Loi Office, Yangon

From MOA to Constitution
15 December 2017, Shangri La Hotel, Yangon

Upcoming Deals and Opportunities in Myanmar
13 September 2017, Park Royal Presidential Suite, Nay Pyi Taw

The New Law and Market Access for Petroleum Products in Myanmar
18 August 2017, Shangri La Hotel, Yangon

FINTECH IN MYANMAR

Cryptocurrency in Myanmar

What is "currency" and "foreign currency" under Myanmar law?

Although the term "currency" is not directly defined under any modern Myanmar statute or regulation, terms such as "foreign currency", "token", "e-money", and "payment instrument" are defined.

Under the Foreign Exchange Management Law (2012) ("**FEML**"), "foreign currency" includes postal orders, cheques, bank drafts, payment orders, traveller's cheques, letters of credit, bills of exchange, and promissory notes, coins and currency notes which are not in MMK.

Although this definition focuses on hard cash and instruments, the FEML and Financial Institutions Law (2016) ("FIL") clearly provide for electronic transfer of currency. For instance, the FIL defines payment services to include, amongst other things (i) money transmission, and (ii) issuance and management of payment instruments – and a "payment instrument" is defined as … "an instrument whether tangible or intangible, that enables a person to obtain money, goods or services or to otherwise make payment". Only a licensed bank or non-bank financial institution may engage in payment services in Myanmar according to the FIL.

Under the FIL, reference is also made to "credit token business", which is narrowly defined, meaning the activity of issuing credit cards, debit cards, store value cards, etc.; and also "e-money", which is defined under the FIL as a "monetary value as represented by a claim on the issuer which (a) stored on an e-device, (b) issued on receipt of the corresponding funds, and (c) accepted as a means of payment by persons other than the issuer." In Myanmar, only licensed banks and non-bank financial institutions can engage in a "credit token business" - and "e-money" is governed by separate regulations which are discussed below, namely the Mobile Banking Directive (2013) ("**MBD**") and the Mobile Financial Services Regulations (2016) ("**MFSR**").

The concept of cryptocurrency is obviously not directly addressed by the above definitions. Notably the above definitions (particularly "token" and "e-money" and "payment instruments") generally contemplate a licensed "issuer" entity, and redemption and/or processing through such issuer, as opposed to a blockchain maintained on a peer-to-peer network.

Nevertheless, cryptocurrency is not expressly excluded from the above definitions. Indeed, the definition of "payment instruments" could have a broad interpretation, whereas for instance, the definition of "securities" under the Securities Exchange Law (2013) ("**SXL**") appears to be largely restricted to traditional forms of securities - of course, in some instances, cryptocurrency may function as a form of security (for instance, in the case of an ICO) and cryptocurrency can also be viewed as a commodity (i.e., acquired purely for price speculation). Clarification is required from the regulators.

Who can perform payment services in Myanmar?

In Myanmar, aside from payments through mobile banking / mobile financial services (discussed in more detail below), payment services may only be performed by licensed banks and non-bank financial institutions. As noted above, payment services include, (i) money transmission, and (i) issuance and management of payment instruments.

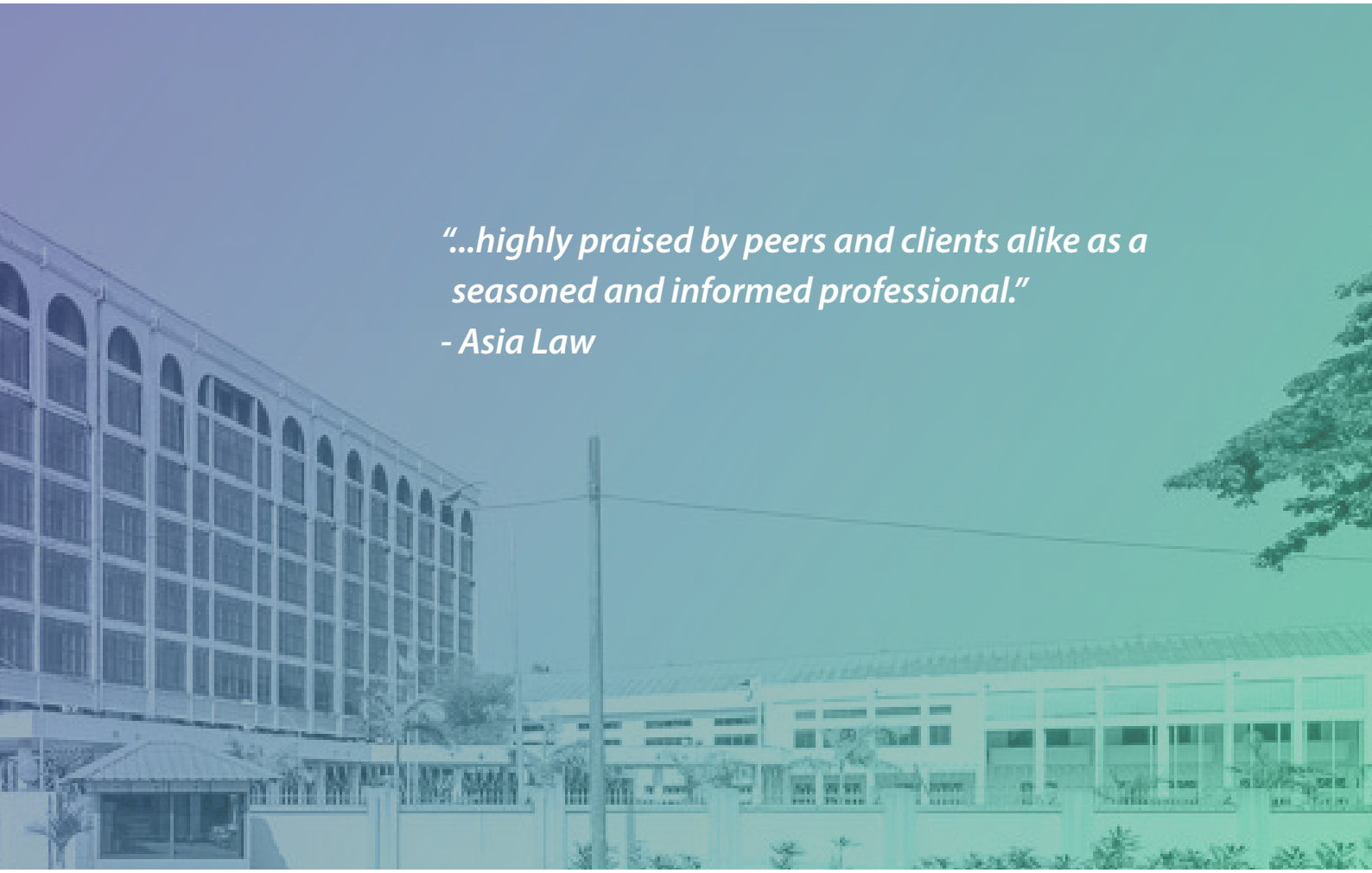
When are online / digital payment services deemed to take place in Myanmar?

This is not clearly provided under Myanmar law.

The MBD and MFSR discussed below clearly focus on the point of receipt/distribution of hard cash (i.e., cashpoint agents). In other words, if there are cashpoints in Myanmar, then the activity would be caught by the Myanmar regulations. This should not be taken to imply that Myanmar regulations are absent in case there are no hard currency exchanges – as noted above, the FIL clearly considers payments services more broadly than this.

From the perspective of an individual or company that possesses a form of cryptocurrency, either via mobile wallet or cold storage, the residence of the individual or company as well as the location of the storage of the cryptocurrency (rather than the 'location' of the transactions) is perhaps most relevant to the authorities in Myanmar, both in terms of tax and FEML implications.

From the perspective of a company that wishes to establish a cryptocurrency exchange or similar



activity in Myanmar, some form of regulatory approval would likely be required, particularly for cash-in/cash-out activities and acting as deposit-holders of the cryptocurrency. The Ministry of Planning and Finance / CBM would seem to the obvious regulator, although other ministries (for instance, the Ministry of Commerce, Ministry of Communications and Information Technology) should have a role to play.

E-Money and Mobile Banking

In Myanmar, e-money is primarily governed by the MBD and the MFSR noted above.

Who can apply?

The MBD provides for a 'bank-led' model meaning that, amongst other things, the license may only be issued to a bank licensed in Myanmar, and currently only local banks have received licenses. It is possible for the bank/licensee to partner with private firms and/or MNOs and engage a network of cash agents for the purposes of implementing the services, but the bank remains liable to the customers and effectively "owns" the customer base, since the bank must open a separate bank account for each customer corresponding to its digital account.

The MFSR provide for a 'non-bank led' model, meaning that a non-bank may receive a license, although the licensee must be a MNO or company established solely for MFS (with its parent company having relevant experience) and must have registered capital of at least 3 billion MMK (currently about US$2.2 million). Although the MFSR does not expressly restrict foreign companies from receiving a license, as a matter of practice at the current time, foreign companies (other than a MNO or in joint-venture with a MNO) may have difficulty in receiving CBM approval, and often-times CBM does not even accept applications from non-MNO foreign companies - although there is some expectation that this could change in the future.

Type of services

Both the MBD and MFSR provide very general definitions of the services authorized in respect of a licensee (i.e., payments using mobile technology). A comparison of the authorized payments for the MBD and MFSR are as follows:

Mobile Banking	Mobile Financial Services
Domestic and international	Domestic
Cash-in and cash out	Cash-in and cash out
Business to individual	Business to individual
Individual to business	Individual to business
Government to individual	Government to individual
Individual to government	Individual to government
Individual to individual	Individual to individual
Business to business*	Business to business

*Actually, the MBD does not mention B to B payments as such, although it is generally interpreted to include such payments.

Application process

The application requirements and processes are to some extent similar under the MBD and MFSR. Under the MFSR, the applicant must establish that it has paid-in capital of at least 3 billion MMK (approx. US$2.2 million on this date) and must include a fee of 3 million MMK (approx. US$2,200 on this date). Otherwise, for both the MBD and MFSR, it is necessary to submit a dossier of supporting documents, including but not limited to, technical/functional details of the mobile financial services to be provided, 3-year business plan, details of board of directors and senior managers, summary of cash-point agents including GPS coordinates, description of cooperation with any MNO and other strategic partners, KYC and anti-money laundering policy, systems to prevent loss, balances reconciliation plan, and customer protection program. The CBM may request further information, and notably, in theory may prescribe a range of fees and charges to avoid anti-competitive behavior, although to date, the CBM has allowed providers to set rates.

Agent networks

Under both the MBD and MFSR, the licensee is allowed to operate through a network of agents (agent exclusivity is not permitted in the case of the MFSR), subject to CBM approval of the agent network based on 3-year projections, to include the geographic coverage of agents, draft agency agreements, services to be provided by agents, policies and procedures, risk assessment report, MFS provider's agent KYC policy.

Assuming approval by CBM, the licensee must make a public list of its agents on its website and keep the CBM notified of the GPS locations of agents/areas of operation. The licensee is legally responsible for the actions of its agents to the extent the actions relate to the scope of the agents' appointment.

Transaction limits

Under the MBD, payments between individuals are limited to (a) 500,000 MMK per transaction, (b) maximum of three transactions per day, and (c) maximum aggregate amount in one day of 1 million MMK. However, some industry experts believe that this should only apply in the case of 'I to I' payments and not 'B to B' payments – the MBD itself does not provide guidance on this issue and CBM has not issued to the public any written clarification.

Under the MFSR, the transaction limits depend on the nature of the transaction and KYC compliance (although payments to merchants, financial institutions, and for utilities, taxes/government fees do not count towards the limits):

Tier	KYC/CDD	Cumulative Transaction Limits Per Day	Cumulative Transaction Limits Per Month	Maximum Balance Limit (based on aggregate of all accounts held)
Level 1 (individuals only)	Presentation of ID is required if and when necessary	50,000 Kyat	1 million Kyat	200,000 Kyat
Level 2 (individuals only)	SIM registration or ID	200,000 Kyat	5 million Kyat	1 million Kyat
Level 3 (for registered businesses only)	Business registration certificate, identification requirements for opening bank accounts	1 million Kyat	50 million Kyat	10 million Kyat

Crowd Funding

The regulatory framework in Myanmar does not address crowdfunding directly and compliance with the regulatory framework may in some instances be impractical.

For instance, under the Myanmar Companies Law (2017) ("**MCL**"), a private company cannot offer "shares or other securities" to the public, and a public company can only do so under a listing or over-counter process. The SXL defines "securities" to include amongst other things, " … shares, stocks, loan instruments and debentures and related privileges, options and warrants". The offering of "shares or securities" would clearly apply to crowdfunding involving equity offerings (i.e., cases in which the offerees would receive shares), and should also apply in cases of debt crowdfunding, although this is less clear in cases in which the crowdfunding platform is based on simple debt arrangements (i.e., without the issuance of any instruments), for instance, a person-to-person a microlending platform such as Kiva. Furthermore, instances of a platform receiving funds without an identified borrower/investee may be considered as taking deposits, which may only be carried-out by a licensed bank in Myanmar.

If the crowdfunding platform will source offshore debt, then the FEML would require CBM approval for each loan or bundle of loans, which can take 4-8 weeks or in some cases longer. Based on its current practice and the published criteria for offshore loans, the CBM considers a number of factors in approving an offshore loan into Myanmar and requires that the borrower submit in its application a repayment schedule.

In other words, the FEML framework generally contemplates a situation in which there is a set facility or facilities with more-or-less set number of tranches and set repayment schedules. However, in the case of certain debt crowdfunding platforms, loans may not be taken in Myanmar through the platform based on fixed tranches but rather through a more flexible schedule and similarly, repayment may be variable and based on the borrower's current balance with the platform.

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- Asia Law

VDB LOI TO ADVISE ON YANGON STOCK EXCHANGE'S SPECIAL TASK FORCE

A Special Task Force has been launched in cooperation with the Japan International Cooperation Agency ("JICA"), to provide consultation services to new companies interested in listing on Yangon Stock Exchange. Companies wanting to list on the YSX have to hire an underwriter, law and accounting firm, and this process can be somewhat difficult. The Special Task Force will provide a one-stop service for these companies to firstly identify possibility and then redirect companies to a panel of professional advisors.

U Yin Zaw Myo, Managing Director of YSX, believes that the formation of the Special Task Force will encourage more companies to register on the YSX. VDB Loi will be one of the advisors for the Special Task Force.

LEASE PAYMENTS NO LONGER SUBJECT TO 2% WITHHOLDING TAX

The Ministry of Planning and Finance has enacted a new Withholding Tax ("WHT") Notification 47/2018 ("Notification 47") on 18 June 2018 which is effective from 1 July 2018. The Notification 47 abolishes 2% WHT for payments to resident citizens and resident foreigners for services rendered, goods purchases and lease payments within Myanmar.

Government organization, ministry and state-owned enterprise are excluded and 2% WHT is still applicable. Accordingly, government organizations, ministries and state-owned enterprises will continue to deduct 2% WHT when making payments to resident citizens and foreigners.

Furthermore, the minimum threshold for deductions of WHT has been changed to MMK 1 million for total payments within a year period. If payments exceed the threshold, companies are required to deduct WHT. We note that there is no threshold for payments made to non-residents.

The Notification 47 still imposes legal obligations on the payer to deduct WHT for payments subject to WHT.

"... incredibly commercial in their approach."
- Chambers and Partners

BANKING AND FINANCE TEAM

Maxim Kobzev
Counsel
maxim.kobzev@vdb-loi.com

Formerly a partner with a leading global law firm in London, Maxim advises on financing in a wide large of sectors, including energy resources and infrastructure.

Vishrut Jain
Senior Legal Associate
vishrut.jain@vdb-loi.com

Vishrut Jain is a legal advisor in our Banking Finance team. With over 5 year experience in the financial services sector, he assists international lenders and corporate borrowers with their financing in Myanmar.

Aung Soe Moe
Senior Legal Associate
aung.soemoe@vdb-loi.com

Aung Soe Moe is a Myanmar qualified senior advisor focusing on financing and financial services. He has extensive experience in micro-finance, foreign exchange and secured lending.

Surath Bhattacharjee
Legal Associate
surath.bhattacharjee@vdb-loi.com

Surath is a legal advisor in the Banking Finance team. He advises international financial institutions, commercial lenders and corporate borrowers. He also focuses on micro financing.

Khin Nilar Tun
Legal Associate
khinnilar.tun@vdb-loi.com

Khin Nilar is a legal advisor and assist clients in the banking and finance sector. She advises international financial institutions, commercial lenders and corporate borrowers. She also focuses on micro financing.

www.vdb-loi.com

Find us on:

Cambodia
No. 33, Street 294
(corner of Street 29)
Sangkat Tonle Bassac
Khan Chamkarmorn
Phnom Penh 12301
T: +855 23 964 430~434
F: +855 23 964 154

Laos
Level 4 Kolao Tower II
23 Singha Road
Nongbone Village
Saysettha District
Vientiane, Laos
T: +856 21 454 679
F: +856 21 454 674

Vietnam
Level 20, Unit 2010
Sun Wah Tower
115 Nguyen Hue Blvd.
District 1
Ho Chi Minh City
T: +84 28 3821 9525

Indonesia
Plaza Bisnis Kemang
Suite 211
Jl. Kemang Raya
No. 2
Jakarta 12730
T: +62 21 718 3415

The Cityloft Sudirman
Suite 1119
Jalan K. H. Mas
Mansyur Kav. 121
Jakarta, 10220
T: +62 21 2555 6611

Myanmar
Level 10, Unit 01-05
Junction City Office Tower
Corner of Bogyoke Aung San
Road and 27th Street
Pabedan Township
Yangon
T: +951 9253 752~756
F: +951 9253 758

ParkRoyal Hotel Nay Pyi Taw
Jade Villa No. 13/14
Hotel Zone
Dekhina Thiri Township
Nay Pyi Taw
T/F: +95 678 106 089