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Myanmar





Myanmar

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A. Legislation and rules

A.1 Legislation

Arbitration in Myanmar is governed by the Arbitration Law 2016 (Union Law No. 5/2016) (“Arbitration Law”), which came into force on 5 January 2016. The Arbitration Law repealed the previous Arbitration Act 1944 (“1944 Act”), which was based on the English Arbitration Act 1934 and was closely aligned with the Indian Arbitration Act 1940. The Arbitration Law is based on the UNCITRAL Model Law (“Model Law”).

Myanmar acceded to the New York Convention in July 2013. The Arbitration Law gives effect to the New York Convention and provides for the enforcement of arbitral awards under the New York Convention.

The old enforcement regime was governed by the Arbitration (Protocol and Convention) Act 1937, which applied to awards that were enforceable under the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 (“Geneva Convention 1927”). However, Article VII of the New York Convention provides that the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention 1927 shall cease to have effect when a state becomes party to the New York Convention. Section 49 of the Arbitration Law expressly excludes the application of the Arbitration (Protocol and Convention) Act 1937.

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The Arbitration Law provides a modern international arbitration framework for arbitrations in and relating to Myanmar. Awards made in Myanmar will be enforceable in other New York Convention countries, and vice versa.

The Arbitration Law expressly provides that its objectives are to resolve effectively domestic and international business and commercial disputes, recognize and enforce international arbitral awards in resolving disputes in arbitration, and encourage dispute resolution by arbitration (Section 4, Arbitration Law).

Arbitrations seated in Myanmar now follow the familiar UNCITRAL Model Law regime, subject to a few modifications. Some noteworthy variations to the Model Law, such as the distinction between domestic and international arbitrations, are mentioned below.

Subsidiary legislation, such as procedural rules, regulations and directives, may be issued by the Union Supreme Court in accordance with this new law to implement the Arbitration Law.

A.1.1 International and domestic arbitration

Unlike the Model Law, the Arbitration Law provides for both international commercial arbitration and domestic arbitration.

An arbitration is defined as being international if:

- (a) The place of business of one of at least one party is outside Myanmar.
- (b) The place of arbitration is outside Myanmar and that place is different to the parties' place of business.
- (c) The place with the closest connection to the commercial relationship or the dispute is outside Myanmar and that place is different to the parties' place of business.



- (d) The parties expressly agree that the subject matter of the arbitration agreement is related to more than one country (Section 3, Arbitration Law).

The Arbitration Law provides that a domestic arbitration is an arbitration that is not an international arbitration (Section 3). In domestic arbitrations, the parties may request the Myanmar courts to determine any question of law arising out of the arbitral proceedings (Section 39). This is comparable to provisions found in the English Arbitration Act 1996 and in the Singapore Arbitration Act 2002 in relation to domestic arbitrations, and is not available to international arbitrations.

Domestic arbitrations are to be decided in accordance with Myanmar law. International arbitrations are to be decided in accordance with the law to which the parties have agreed. If the parties have not agreed on a law, the tribunal shall decide on the appropriate law to apply. The tribunal may also decide the dispute *ex aequo et bono* if so empowered by the parties. (Section 32, Arbitration Law).

A.1.2 Role of the Myanmar courts in arbitration

As with the Model Law, the Arbitration Law seeks to balance the role of the Myanmar courts in the arbitration process (Section 7). It restricts the intervention by the courts by expressly providing that the courts may only intervene in arbitration proceedings in relation to the matters set out in the Arbitration Law. This provision is consistent with the doctrine of minimal curial intervention expressed in Article 5 of the Model Law.

At the same time, the Arbitration Law sets out the circumstances in which the Myanmar courts may support and supervise the arbitral process by, for example, granting orders in relation to interim measures, the taking of evidence and staying court proceedings in favor of arbitration.

A.1.3 Power to stay court proceedings and interim measures

The Arbitration Law empowers the Myanmar courts to stay court proceedings pending the outcome of an arbitration unless the arbitration agreement is null and void, inoperative or incapable of being performed (Section 10, Arbitration Law, which is similar to Article 8 of the Model Law). However, it also provides that a decision of the court to refer to arbitration cannot be appealed, but a decision by the court rejecting the application for reference to arbitration is appealable.

The Arbitration Law includes provisions that empower both the tribunal and the court to order interim measures in certain circumstances.

Section 19 empowers the tribunal to order interim measures (similar to Article 17 of the Model Law). However, Section 31 of the Arbitration Law provides for the enforcement of interim measures issued by the arbitral tribunal by the courts in Myanmar. The Myanmar courts will enforce such an interim measure as an order of the court, irrespective of whether the arbitral tribunal is seated in or outside Myanmar, provided that it is the type of interim measure that may be issued by the Myanmar courts.

Section 11, however, also empowers the court to grant certain interim measures (similar to Article 9 of the Model Law). Although the stipulated judicial interim measures are not exactly the same as those that the tribunal is expressly empowered to make, there is overlap. Section 11(d), however, provides that the court will only order interim measures if the arbitral tribunal or other person authorized by the parties cannot effectively order such measures. Accordingly, there is potential for concurrent jurisdiction of the court and the tribunal over interim measures.



A.1.4 The award

Section 35 is similar to Article 31 of the Model Law relating to the form and contents of an award. Section 35(f) has been added and provides for the costs of the arbitration.

Section 38 provides that the arbitral award is final and binding on the parties, similar to Article 35 of the Model Law.

A.1.5 Recognition and enforcement of an arbitral award

Section 40 provides for the enforcement of a domestic arbitral award, which is to be in accordance with the Code of Civil Procedure. The grounds for setting aside a domestic arbitral award are set out in Section 41. They are comparable to those under the Model Law, and to the New York Convention for refusal of enforcement of a foreign award.

In addition, there is a right of appeal against a domestic arbitral award on a question of law. The threshold for leave to appeal is similar to that found in England (under the Arbitration Act 1996, which applies to domestic and international arbitrations) or Singapore (under the Arbitration Act 2002, which applies to domestic arbitrations only).

The recognition and enforcement of a foreign award is covered in Sections 45 and 46 of the Arbitration Law. A foreign award is to be recognized and enforced unless certain stipulated grounds listed under Section 46(b) and (c) are established. Those grounds are similar to those found in the New York Convention.

No separate or distinct provision is made for the enforcement or setting aside of an international arbitration award that is made in Myanmar, namely in an arbitration seated in Myanmar. Such an award would not be a foreign award enforceable under the New York Convention as provided in Sections 45 and 46 of the Arbitration Law.

A.1.6 Supplementary provisions

Chapter XI (Sections 50 to 58) sets out supplementary provisions. Section 50(a) refers to the confirmation of enforcement of the award under the New York Convention: “the Union Chief Justice may appoint an officer of the Union Attorney General office or a person or any responsible personnel of an organization by Notification ...” Section 56 provides for the application of the Limitation Act. Section 58 provides that, unless the parties have agreed otherwise, the Arbitration Law will apply to arbitrations commenced after its enactment, ie, the Arbitration Law will apply to arbitrations commenced on or after 5 January 2016 and the 1944 Act will continue to apply to arbitrations that commenced prior to 5 January 2016.

A.2 Institutions, rules and infrastructure

There is no arbitration institution based in Myanmar. The Union of Myanmar Federation of Chambers of Commerce and Industry (UMFCCI) had set up an arbitration committee to look into the formation of a Myanmar Arbitration Centre. This committee is conducting some training and seminars to senior local lawyers and other interested administrative personnel, with the assistance of the International Chamber of Commerce and other regional and international arbitration institutions.

Parties entering into arbitration agreements with respect to projects or transactions relating to Myanmar will often agree to have the arbitration seated in a neutral venue in the Asia Pacific region, such as Singapore or Hong Kong. The parties may then agree to have the arbitration governed by the Arbitration Rules of, for example, the Singapore International Arbitration Centre, the Hong Kong International Arbitration Centre or the International Chamber of Commerce.

B. Cases

There were no significant cases related to arbitration in Myanmar in 2016, nor during the last 10 years. There are some very old reported



cases during the past decades that relate to domestic arbitration under the old 1944 Act. While some of these are related to trade disputes, many are related to non-commercial matters such as the allocation of property, divorce, labor disputes and disputes relating to inheritance. Some of the cases related to setting aside awards in commercial and non-commercial matters.

C. Trends and observations

The Arbitration Law is a major step forward, bringing Myanmar into the fold of the modern international arbitration network. There is a growing interest in arbitration in Myanmar among the legal and business community. Arbitration is the most appropriate form of dispute resolution for foreign investors. Investment protection may also be available for foreign investors, as discussed below.

C.1 Growing interest in arbitration in Myanmar

Since the promulgation of the new Arbitration law, there has been a growing interest in arbitration in the legal and business community. In addition, interest in arbitration in Myanmar is being shown by international arbitration institutions and chambers of commerce, such as the International Chamber of Commerce, the Singapore International Chamber of Commerce and the Singapore International Arbitration Centre. Many of these international arbitration institutions have visited Myanmar to study the developments in arbitration and its potential in Myanmar, and to assist with training and seminars for the local legal and business community.

As indicated above, the UMFCCI has set up an arbitration committee. In addition, young local lawyers have formed an arbitration club, the International Arbitration Club Myanmar (IACM), to organize and sponsor arbitration-related training and conferences.

In August 2016, the ICC organized a two-day conference and training event on arbitration with the support of the UMFCCI, UNCITRAL, the International Arbitration Club Myanmar and other organizations. There have been more arbitration seminars and training events since

August 2016, reflecting the growing interest in arbitration within the legal and business community.

C.2 Arbitration is the most appropriate form of dispute resolution for foreign investors.

Arbitration is likely to be the most appropriate form of dispute resolution in the event that the parties are unable to negotiate an amicable settlement of a dispute that arises out of a transaction in Myanmar. Note however that there may still be some requirement that some contracts be governed by Myanmar law. Sales contracts, government contracts and contracts relating to land and natural resources within Myanmar are potential examples of such contracts.

The enactment of the new Arbitration Law and implementation of the New York Convention has been eagerly awaited. Foreign investors may now have some confidence that if they agree to refer disputes to international arbitration outside Myanmar, an award may be enforced by the Myanmar courts under the Arbitration Law.

However, it remains to be seen how the Myanmar courts will apply the new Arbitration Law in practice. There have been training events and seminars for judges of the Myanmar courts to boost their knowledge of arbitration and their competency to address arbitration issues, particularly issues relating to the recognition and enforcement of judgments. This training is ongoing and it will take some time for the courts to become familiar with arbitration issues.

Notably, the new Myanmar Investment Law 2016 (MIL), which is a combination of the Foreign Investment Law and the Myanmar Citizen Investment Law, and the Special Economic Zone Law 2014 (“SEZ Law”) require parties to first attempt to negotiate an amicable settlement of a dispute. If they are unable to do so, then the dispute may be settled in accordance with the dispute resolution mechanism in the underlying contract.

The new MIL and SEZ Law permit foreign investors to choose international arbitration outside Myanmar to resolve disputes (unless



otherwise required by Myanmar law or regulation to refer disputes to the Myanmar courts or arbitration in Myanmar).

C.3 Investment protection for foreign investors

In addition, foreign investors may be able to rely on the investment protections provided in a bilateral investment treaty or a free trade agreement. Although Myanmar is not party to many bilateral investment treaties, it is a member of ASEAN. As such, it has entered into the ASEAN Comprehensive Investment Agreement and a number of free trade agreements, such as the Australian - ASEAN - New Zealand Free Trade Agreement (AANZFTA). The ASEAN Comprehensive Investment Agreement and the ASEAN free trade agreements incorporate investment chapters that provide investment protections to certain foreign investors and provide for international arbitration to resolve investment disputes.

For example, under AANZFTA, Myanmar must provide certain investment protections to foreign investors from other states that are party to AANZFTA, such as Australia and New Zealand. These investment protections include fair and equitable treatment, full protection and security, national treatment and most favored nation treatment, and no expropriation without compensation.

Accordingly, foreign investors investing in Myanmar may be able to take advantage of AANZFTA or one of the other ASEAN free trade agreements, depending on the nationality of the foreign investor. Such investment protection, if available to the foreign investor, may be used to bring a claim in international arbitration in the event that a government or regulatory body interferes with the investment.

Notably, Myanmar is not yet a party to the ICSID Convention. This means that if the free trade agreement or investment treaty so stipulates, an international arbitration may be brought under the UNCITRAL Arbitration Rules or the Additional Facility of the ICSID Convention or brought before any other specified arbitral institution.

An award issued by a tribunal in an investment arbitration is enforceable in Myanmar under the New York Convention. Enforcement of the award may be challenged by Myanmar on one of the limited grounds provided in the New York Convention, as implemented in the new Arbitration Law. Myanmar may also claim state immunity when it comes to the execution of the award against its assets.

C.4 Conclusion

The recent developments in Myanmar have been significant, particularly the accession to the New York Convention and the enactment of the new Arbitration Law.