

risk challenge under the due process provisions of the New York Convention.<sup>87</sup> However, the possibility became more real after an experienced tribunal in ICC proceedings seated in New York dismissed a core defence very early in proceedings (albeit after conducting one hearing), yet English courts declined to refuse outright the enforcement of the consequent award.<sup>88</sup>

The arguments for and against introducing a 'summary arbitration award' procedure into Arbitration Rules continue to be debated. However, now that SIAC has taken the plunge in its 2016 Rules<sup>89</sup> and the Stockholm Chamber of Commerce is also considering a summary procedure in its own draft new Rules,<sup>90</sup> other arbitral institutions will need to pay closer attention to this possibility.<sup>91</sup>

87 'Ned Beale, Lisa Bench Nieuwveld and Matthijs Nieuwveld, 'Summary Arbitration Proceedings: A Comparison Between the English and Dutch Regimes' (2010) 26 Arbitration International 139; Lisa Bench Nieuwveld, 'Why Not Give the Clients What They Want?', *Kluwer Arbitration Blog* (17 December 2012) <<http://kluwerarbitrationblog.com/2012/12/17/why-not-give-the-clients-what-they-want/>>.

88 In *Travis Coal Restructured Holdings LLC v Essar Global Fund Limited*, [2014] EWHC 2510, the Court decided to suspend enforcement until the seat court had ruled on similar challenges, but that proceeding subsequently settled. See Claire Morel de Westgaver, 'Summary Judgment in International Arbitration No Longer Dismissed' *Kluwer Arbitration Blog* (19 September 2014) <<http://kluwerarbitrationblog.com/2014/09/19/summary-judgment-in-international-arbitration-no-longer-dismissed/>>.

89 Rule 29 provides that a party may file an application for the early dismissal of a claim or defence that is manifestly without legal merit or outside the tribunal's jurisdiction. If the Tribunal allows the application to proceed, the Tribunal shall generally make an order or award within 60 days of the application's filing.

90 Anja Havedal, 'Draft New SCC Rules: What's New?' *Kluwer Arbitration Blog* (15 June 2016) <<http://kluwerarbitrationblog.com/2016/06/15/draft-new-scc-rules-whats-new/>>. Drafts of both regular and expedited Rules allow a party to request the tribunal to decide issues of fact or law by a summary procedure without following the usual procedural steps. The request can cover jurisdiction, admissibility or merits, and be made at any stage of proceedings.

91 Cf generally Dipen Sabharwal and Rebecca Zaman, 'Vive la difference? Convergence and Conformity in the Rules Reforms of Arbitral Institutions: The Case of the LCIA Rules 2014' (2014) 31 *Journal of International Arbitration* 715.

## INTERNATIONAL ARBITRATION UNDER MYANMAR'S ARBITRATION LAW

by James Finch and Thida Aye\*

### A. BACKGROUND AND GENERAL PRINCIPLES.

#### 1. Legislation

On 5 January 2016 the Myanmar *Pyidaungsu Hluttaw* (Parliament) passed Law No 5/2016 the Arbitration Law (the 'Law'). The primary objective of the Law is to implement Myanmar's accession to the Convention Relating to the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Diplomatic Conference held on 10 June 1958 at New York (the 'New York Convention'), which Myanmar did on 16 April 2013. Despite the accession to the New York Convention nearly three years ago, until implementing legislation was passed, foreign arbitral awards from countries that were signatories of the New York Convention other than Geneva Convention countries having a reciprocal arrangements with Myanmar were not judicially enforceable in Myanmar. The Law was enacted to enable foreign arbitral awards to be enforced in Myanmar.

The Law is based on the UNCITRAL model law (the 'Model Law'), with a few significant changes. Overall principles of the Law are expressed in its Chapters 2 and 3. The general objectives of the Law are stated in Chapter 2 as follows: (a) to settle domestic and international commercial disputes fairly and effectively; (b) to recognise and enforce arbitral foreign awards; and (c) to encourage dispute settlement via arbitration.

\* Partners, DFDL Legal & Tax, Myanmar. Authors of Myanmar chapter, *Arbitration in Asia*, JurisNet LLC, Huntington, NY 2008, as updated; Myanmar Chapter, *Asian Arbitration Handbook* edited by Michael Moser and John Choong, Oxford University Press, 2011, as updated.



## 2. Waiver of Objections

Section 6<sup>1</sup> provides that parties that do not raise the following objections to the institution of an arbitral proceeding 'within due time' or as otherwise provided in the Law to the effect that: (1) The Arbitral tribunal has no jurisdiction; (2) There is one or more procedural defects in the arbitration process; (3) There has been failure to comply with the arbitration agreement or provisions of this Law; (4) There has been a harmful impact on the arbitral tribunal or arbitration due to procedural defect such objections will be deemed waived.

## 3. Court Intervention

Also, section 7 states that in matters governed by the Law no court may intervene other than as provided in the Law. By 'court' the definitions of the Law mean the Myanmar District Court or High Court of the State or Region of original jurisdiction in Myanmar that would have jurisdiction if it were exercising original civil jurisdiction.<sup>2</sup>

Of course the judicial intervention issue is critical. An arbitration act will encourage foreign investment to the extent that it properly limits local judicial interference. Foreign investors prefer foreign arbitration to involvement of the local judiciary because they fear both bias in local judges in favor of the local party and corruption. Accordingly, the instances in which Myanmar judicial intervention is allowed under the Law will be highlighted below.

The intention of the Law is to provide a forum where the final decision on the issues arbitrated will be decided. Section 38 states:

Unless otherwise agreed by the parties, the award made by the arbitral tribunal pursuant to the arbitration agreement, shall be final and binding on the parties and persons claiming under them respectively.

<sup>1</sup> Unless otherwise stated, all references to sections herein will be to sections in the Law.

<sup>2</sup> Section 55 provides: Notwithstanding anything contained elsewhere in this Law or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Law has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

## 4. International v Domestic Arbitration

An important distinction in the law is that between international arbitration and domestic arbitration. International arbitration is defined in section 3(i) as arbitration in which (1) one party's place of business and trading activity is outside Myanmar; or (2) the place the parties agree to conduct the arbitration outside the country where the parties have their places of business; or (3) the place a substantial part of the obligations under the agreement are to be performed or the closest place connected to the subject matter of the dispute is outside the country where the parties have their place of business; or (4) the parties to the arbitration have agreed that the subject matter relates to more than one country.<sup>3</sup>

In short, in the typical international case in which there is a contract between a foreign and a Myanmar party containing an arbitration clause, the arbitration will, under the Law, be considered international arbitration. As a practice suggestion, and for absolute clarity as to the intention of the parties to have the arbitration considered international arbitration under the Law, the parties should state in the contract's arbitration clause that they agree that the subject matter of the contract relates to more than one country.

Section 3(h) defines 'domestic arbitration' as arbitration that is not international arbitration, as defined above. A typical example of this would be arbitration between two parties of Myanmar nationality over a dispute that arose over a subject matter entirely within the borders of Myanmar.

Because of the definitions mentioned above, the concepts of international and domestic arbitration are mutually exclusive.

Another definition is important because of its tendency to be confused with international arbitration, above. Section 3(k) defines a foreign arbitration award as an arbitration award made pursuant to an arbitration agreement in a country that is a member of the New York Convention. The difference in how these awards may be enforced will be discussed below.

<sup>3</sup> An explanatory note to the definition provides: 1. If the place of business of a party is more than one place, the place of business of the party shall be that which is the closest to the place of execution of the arbitration agreement; 2. If a party does not have a place of business, reference to his place of business shall be its permanent residing place.



## B. THE ARBITRATION AGREEMENT

### 1. Definition of Arbitration Agreement

Section 9 defines what is considered an arbitration agreement for the purposes of the Law. An arbitration agreement may be either a separate agreement to arbitrate between the parties or an arbitration clause in a contract containing other provisions. The agreement must be signed by the parties, unless contained in electronic communication usable for subsequent reference.

### 2. Referral

A local court must, under section 10, refer a matter to arbitration if an arbitration agreement is in place and one of the parties requests arbitration. This must be done by the party requesting arbitration before its first written statement such as an answer is due on the substance of the matter or the right is waived. The court is not bound to refer the matter to arbitration as requested if it determines the agreement to arbitrate is null and void, inoperative or incapable of being performed.

Myanmar is essentially a common law jurisdiction. The Myanmar Contract Act of 1872 (the 'Contract Act') does not give definitions for 'null and void', 'inoperative' and 'incapable of being performed'. The Contract Act does, however make analogous provisions. As to 'null and void', under the Contract Act, an agreement not enforceable by law is said to be void. An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract. A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable. Under section 56 of the Contract Act, an agreement to do an act impossible or illegal is void.<sup>4</sup> Under the Contract Act, there are, moreover, two general principles that might make an agreement unenforceable with respect to its content: (i) An agreement the object of which is unlawful, or which is entered into with the object of committing an illegal act, is unenforceable, (ii) A Myanmar court will not enforce a contract which is prohibited by statute.<sup>5</sup>

<sup>4</sup> Under section 56 of the Contract Act, an agreement to do an act impossible in itself is void. A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

<sup>5</sup> Section 23 of the Contract Act provides as follows:

The consideration or object of an agreement is lawful, unless—  
It is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to

### 3. Stay

Section 10 also provides that arbitration on a matter may be commenced while the court is deliberating on whether to refer the same matter to arbitration. If, after such deliberation, the court does refer the matter to arbitration, the suit will be stayed.

### 4. Appeal

Finally, section 10 provides that if the court refers the matter to arbitration, this decision is unappealable. If, on the other hand, the court decides not to refer the matter to arbitration, the decision not to do so is appealable.

## C. ORGANISATIONAL AND PROCEDURAL RULES

### 1. General Rules

The Law provides a number of standard organisational and procedural rules for the conduct of the arbitration, among them:

- Immunity for arbitrators for acts or omissions done with due care during the course of the arbitration (section 20).
- Equal treatment of the parties (section 21).
- The parties may agree on the procedure to be followed in arbitration but, failing this, the arbitral tribunal may conduct the proceedings in a manner it deems appropriate (section 22).
- The place of arbitration may be agreed between the parties, but, failing this the place shall be determined by the arbitral tribunal, taking into account the circumstances of the case (section 23).
- The date of commencement of the arbitral proceedings shall be considered to have been the date on which the request be referred to arbitration is received by the respondent (section 24).
- The parties are free to determine the language of the arbitral proceeding and if they do not the arbitral tribunal shall determine this. The arbitral tribunal may order translation into the language of the proceeding of documentary evidence (section 25).
- The parties may agree on the particulars of the claim or defense. Failing this, the claimants shall state the facts stating their claims, which may

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

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.



- be supplemented with documentary evidence and add to this during the course of the arbitration (section 26).
- Unless otherwise agreed by the parties the arbitral tribunal shall decide whether to have oral hearings or whether to conduct the proceedings based on documents and other materials. The parties shall be given sufficient notice of hearings. All documents shall be provided to all parties (section 27).
  - If the claimant, after commencing the proceedings does not communicate the statement of claim, the proceedings shall be terminated. If the respondent does not timely communicate the defense, the proceedings shall be continued. Such failure to communicate the defense is not, however, treated as an admission of the facts in the claim. If a party fails to appear at a hearing or produce documentary evidence the court may continue the proceedings and make an award based on the evidence before it (section 28).
  - The arbitral tribunal may appoint one or more expert witnesses or require expert testimony from a party. The parties shall, at a hearing, have the opportunity to examine the expert witness or witnesses (section 29).
  - The arbitral tribunal may request assistance of the Court in taking evidence. The Court may then execute the request in accordance with its competence and the relevant rules of evidence. The court may issue process to witnesses in the same manner it does for lawsuits. A plain reading of this provision, however, is that the execution of the request from the arbitral tribunal to the Court for such evidence is discretionary with the Court. Section 30 says the court may issue such process, suggesting doing so is discretionary.<sup>6</sup>

## D. INTERIM MEASURES

### 1. Powers of Court

Section 11 provides that unless otherwise agreed by the parties, at the request of a party, the Court will have the following powers with respect to interim measures:

- (1) taking evidence;
- (2) the preservation any evidence;
- (3) pass an order related to the property in disputes in arbitration or any property which is related to the subject-matter of the dispute;

<sup>6</sup> The Supreme Court of Canada held that 'the granting of an order for examination, being discretionary, will depend on the facts and particular circumstances of the individual case.'

- (4) inspection, taking photo for evidence, preservation and seizure of the property which is related to the dispute;
- (5) samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute;
- (6) allow to enter in the premises owned by or under the control of the parties to disputes for the purpose of above mentions matters;
- (7) sale of any property which is the subject-matter of the dispute;
- (8) an interim injunction or appointment of a receiver.

In fact, the above powers are not specifically referred to as strictly interim measures and the fact that they are interim measures at all is only to be inferred from the language of the section following the above list. It should be pointed out that these powers are quite broad and some, such as the sale of any property that is the subject matter of the dispute, could be considered more than interim measures. The language following the above list of powers significantly limits them.

It is also provided in section 11 that unless the measure is needed urgently, the court will not grant it without notice to the parties and approval of the arbitral tribunal. This section also limits the court's ability to act to situations in which the parties or the arbitral tribunal have no power to do so or cannot handle effectively. Of course the concept of 'handle effectively' is subjective, and opens the proceeding to interference from courts contending that they can better handle these matters. Finally, section 11 states that interim court orders will cease to have effect if the arbitral tribunal issues an order on the same subject.

### 2. Interim Orders

Under section 19 the arbitral tribunal may also issue interim orders, which include decisions, orders and instructions.<sup>7</sup> In particular, it should be pointed out that the arbitral tribunal may make orders for securing the amount in dispute. This could, therefore, include ordering a party to pay the amount in dispute to the hands of a third, neutral party until the resolution of

<sup>7</sup> 19. (a) Unless otherwise agreed by the parties, an arbitral tribunal shall have powers to make decision, order and instructions to any party for: (1) security for costs; (2) discovery of documents and interrogatories; (3) giving of evidence by affidavit; (4) the preservation, interim custody or sale of any property which is part of the subject-matter of the dispute; (5) samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute; (6) the preservation and interim custody of any evidence for the purposes of the proceedings; (7) securing the amount in dispute; (8) an interim injunction or any other interim measure.



the proceedings. Myanmar law allows for pre-judgment attachment, garnishment and injunctions. These will, however, be subject to the rules or procedures to be issued under the Law. Such an order could be enforced by the court pursuant to sections 11(3), (7) and (8), mentioned above. Section 19 also provides that the arbitral tribunal may administer oaths and adopt inquisitorial procedures it deems appropriate. It specifically mentions that security for costs cannot be required of a claimant solely because that party resides outside of Myanmar or is a corporation formed outside Myanmar.

### 3. Enforcement

Section 19 specifically provides that the arbitral tribunal may apply to the court for enforcement of all decisions, orders and instructions made by the arbitral tribunal in the course of the arbitration in accordance with section 31.

As to getting interim orders by an arbitral tribunal enforced by a court in Myanmar, section 31(a) provides that such orders, whether passed within or outside Myanmar, may be enforced by the court. Section 31(b) states that if such an order comes from an arbitral tribunal outside of Myanmar, however, and the proponent cannot prove 'that it is the same type of order exercised within Myanmar', the court shall not approve enforcement. The concept of 'the same type of order' is unclear from the Law. If the order in question is a prejudgment order containing similar terms to those required in Myanmar to get a prejudgment order, this would be enforceable.

Section 31 is unclear on one point. Following the limitation stated above in 31(b) it states in 31(c) 'When approval is granted according to subsection (a) the Court shall enforce such order.' The underlined reference to subsection (a) may in fact be a typographical error that should be a reference to subsection (b).

Finally, section 31 states that there is no appeal from either the court's decision either to enforce or not enforce an interim order from the arbitral tribunal.

## E. COMPOSITION OF ARBITRATION TRIBUNAL

### 1. Number of Arbitrators

If the number of arbitrators is not mentioned in the arbitration agreement, section 12 of the Law states that there shall be one arbitrator. If more than one are decided upon, the number must be an odd number. Section 33 provides that decisions of the arbitral tribunal must be by a majority of its members, except for questions of procedure, which may be decided by the presiding arbitrator if authorised by the parties or all members of the arbitral tribunal.

### 2. Nationality of Arbitrators

Section 13 provides that, unless agreed otherwise by the parties, the arbitrators may be of any nationality. Likewise any arbitral procedure for appointment of arbitrators adopted by the parties is acceptable. In the event that the parties do not take action to follow this procedure, however, either party may apply to the Chief Justice of the Union of Myanmar or other person to make the proper appointment. In the event there is no procedure agreed upon for appointment, section 13 provides a specific procedure for the appointment of arbitrators both in the case where there is a single arbitrator and that in which there are three. The decision of the Chief Justice as set forth above is not subject to appeal.

### 3. Impartiality

Under section 14 a candidate to be an arbitrator must disclose circumstances that would give rise to doubts as to that person's impartiality or independence. The only grounds for challenge of an arbitrator are either that (a) circumstances exist that would give rise to such doubts and (b) the arbitrator does not possess the qualifications agreed upon by the parties. A party who has appointed an arbitrator may challenge the arbitrator on these grounds only if he or she becomes aware of them after the appointment.

### 4. Procedure for Challenging an Arbitrator

Section 15 first states that the parties may agree as to such a procedure. If no such agreement exists, the party wishing to make the challenge must send a written statement to this effect to the other party. Unless the other party agrees to the removal of the arbitrator or the arbitrator withdraws, the arbitral tribunal will decide on whether to remove the arbitrator in question. The party wishing to make the challenge may make the application to the court, though the arbitration proceedings may continue during the pendency of the court's decision.

### 5. Grounds for Termination

Once an arbitrator is appointed, section 16 provides the grounds by which his or her mandate shall be terminated, namely if the arbitrator (a) becomes unable to perform the functions required or (b) fails to act in the capacity of arbitrator without delay or (c) resigns or is removed by agreement of the parties. If the parties disagree concerning the ability of the arbitrator to perform, a party may make application to the court with respect to removal. The court's decision is not subject to appeal.



## 6. Replacement

Section 17 makes provision for the replacement of an arbitrator for the reasons discussed above to the effect that a substitute arbitrator shall be appointed according to the rules applicable to the appointment of the arbitrator being replaced. At the discretion of the tribunal, unless otherwise agreed by the parties, former hearings may be repeated.

## 7. Ruling on Jurisdiction

The arbitral tribunal may rule on its own jurisdiction, including objections with respect to the existence or validity of the arbitration agreement. Section 18 provides that an arbitration clause shall be treated as an agreement independent of the remainder of the contract and that the decision by the tribunal that the contract is null and void shall not, for the purposes of the Law, affect the validity of the arbitration clause. Also provided for in section 18 is that objections to the tribunal's jurisdiction must be raised before a party's statement of defense is due. Merely participating in the appointment of arbitrators before this time will not preclude such objections.

### F. JURISDICTION AND COMPOSITION

#### 1. Awards and Errors of Arbitral Tribunal

Section 18 also provides that objections that the arbitral tribunal exceeded its authority must be raised at the time the tribunal has allegedly done so, but that objections based on jurisdiction of the tribunal and that the tribunal has exceeded its authority may be raised later than the limits mentioned above if the tribunal considers the delay justified. Finally, under section 18, if an arbitral tribunal rules in favor or against jurisdiction, an aggrieved party must appeal this decision to the court in accordance with the provisions discussed below within 30 days of receiving such ruling. Even if the ruling is being appealed, the arbitral tribunal shall continue with its proceedings.

#### 2. Choice of Law for International Arbitration

Section 32 provides that in case of international arbitration, the arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties. If the parties have not so chosen, the arbitral tribunal shall apply the rules of law it considers applicable. Any designation of the law or legal system of a given State shall be construed by the arbitral tribunal, unless otherwise agreed by the parties, as referring to the substantive law of that State and not to its conflict of laws rules.

## 3. Law in Domestic Arbitration

Likewise, section 32 provides that in the case of domestic arbitration the substantive law applied shall be that of the Union of Myanmar.

## 4. Termination

If the parties reach settlement during the course of the arbitration, under section 34 the arbitral tribunal shall terminate the proceedings and, if agreed by the parties and the arbitral tribunal, enter an award in accordance with the settlement. The award shall have the same legal effect as an award on the merits of the case. Likewise, under section 34, (a) if the claimant withdraws the claim without the objection of the respondent or (b) the parties otherwise agree to terminate it or (c) arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible, the arbitral tribunal shall terminate the proceedings.

## 5. Form of Award

Section 35 makes provision for the form of the award. The award must be in writing and signed by a majority of the arbitrators. The reason any arbitrator's signature is omitted must be given. The award must state the reasons for the award, unless the parties have agreed otherwise. The award must state the date and place of its making and be delivered to each party. The arbitral tribunal will determine costs,<sup>8</sup> how they were calculated and what party or parties have to pay them.<sup>9,10</sup>

8 'Costs' means reasonable costs relating to:

- (1) fees and expenses of arbitrators and witnesses; (2) legal fees and expenses;
- (3) any administration fees of the institution supervising the arbitration; and
- (4) any other expenses incurred in connection with the arbitral proceedings and the arbitral award.

9 Section 51 states that a sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate applied in the court decree for payment of money, from the date of the award.

10 Section 52 provides as follows:

52. (a) The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in section 35, subsection (f), which it expects will be incurred in respect of the claim submitted to it. Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amounts of deposit for the claim and counter-claim.

(b) The deposit referred to in subsection (a) shall be payable in equal shares by the parties. Where one party fails to pay his share of the deposit, the other party may pay that share. Where the other party also does not pay



The arbitral tribunal shall have a lien on the arbitration for unpaid costs in accordance with the terms of section 53.<sup>11</sup>

### 6. *Errors in the Award*

Errors in an arbitral award are covered by section 37. Computation or clerical errors or typographical or similar errors may be corrected at the request of one of the parties or at the initiative of the arbitral tribunal. The parties may, moreover, request an interpretation of a specific point or part in the award and the arbitral tribunal may give this if it considers the request justified. Finally, a party, with notice to the other parties may request an additional award that has been presented in the arbitral proceedings and that has been omitted from the award. If the arbitral tribunal considers this request justified it shall make an additional award.

### 7. *Death*

Article 54 provides that an arbitration agreement shall not be discharged by the death of any party, but shall be enforceable against the legal representative of the deceased. Likewise, the authority of an arbitrator shall not be revoked by the death of any party who appointed that arbitrator.

the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.

(c) Upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties, as the case may be.

<sup>11</sup> Article 53 further states that if an arbitral tribunal refuses to deliver an award because of any party refuse to pay the costs to the arbitral tribunal, by application of other party, the Court may inquire as necessary and order that there shall be paid to the arbitral tribunal by the responsible party and Court may order the arbitral tribunal to deliver the arbitral award accordingly. Also, such an application may be made by any party unless the fees demanded have been fixed by written agreement between him and the arbitral tribunal. Finally, the Court may make such orders as it thinks fit regarding the costs of the arbitration where any question arises respecting such costs and the arbitral award contains no sufficient provision concerning them.

## G. POWER OF THE COURT RELATING TO DOMESTIC ARBITRATION

### 1. *Background*

Please note that the provisions in sections 39 through 44, discussed below, apply to domestic arbitration, not international arbitration as defined in section A above. The reader should be aware, however, that a ruling on domestic arbitration may be reduced to a foreign arbitral award as is also defined in section A above. Therefore the provisions discussed in this section G should be read together with the provisions discussed in section H below on foreign arbitral awards.

### 2. *Determining Issues of Law*

Under section 39, the court may, on the application of a party, determine an issue of law. This must, however, have been at the agreement of the parties or with the permission of the arbitral tribunal. During the pendency of this determination the arbitral deliberation may proceed and even make an award.

### 3. *Enforcement*

Section 40 provides that a domestic award shall be enforced under the Code of Civil Procedure in the same manner as if it were a decree of the court, unless the respondent can prove that the arbitral tribunal was not competent to make the award.

### 4. *Set Aside*

The court may set aside a domestic arbitral award only if:

- (1) a party to the arbitration agreement was under some incapacity; or
- (2) the arbitration agreement is not valid under the law to which the parties have agreed or, failing any indication thereon, under the law of the Republic of the Union of Myanmar; or
- (3) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (4) the award deals with a dispute not in accordance the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.

Proviso: If the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award



- which contains decisions on matters not submitted to arbitration may be set aside; or
- (5) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or does not comply with this Law.  
Proviso: Such agreement shall not be in conflict with a provision of this Law which the parties cannot derogate.
  - (6) the subject-matter of the dispute is not capable of being settled by arbitration under the existing law; or
  - (7) the award is in conflict with the national interest of the Republic of the Union of Myanmar.

It should be pointed out that the last criteria affords the court the widest possible discretion in deciding to set aside a domestic arbitral award.

### 5. Limitation

Section 41 also contains a limitation period after which the applicant may not move to set aside a domestic arbitral award.<sup>12</sup> With the agreement of the parties the court may adjourn the arbitral proceedings in order to give the arbitral tribunal time to eliminate the grounds for setting aside the award.<sup>13</sup>

### 6. Appeal

Under section 42, an issue of law in a domestic arbitral award may be appealed to the court by a party, unless (a) the parties have previously agreed in writing that no such appeal may be taken or (b) the parties have previously agreed in writing that the arbitral award need not memorialise reasons for the award in writing, then no such appeal may be taken. Whether the court accepts or refuses such appeal, there will be no further right of appeal. In addition to appeals to the Court on legal issues after an award in domestic arbitration, section 43 provides that appeals to the court from domestic arbitral awards may be allowed in the following situations: (1) The award of the arbitral tribunal for the dispute causes a major negative effect on

12 (b) An application for setting aside of the award may not be made after three months have elapsed from the date on which the award is made or, if a request had been made under section 37, after three months from the date on which that request had been dealt with by the arbitral tribunal.

13 (c) The court may if it find the request to set aside award as per subsection (a) as justified, where appropriate and with agreement of the parties, adjourn the arbitral proceedings for a period of time as required, in order to give the arbitral tribunal an opportunity to resume progress of the arbitral proceedings or to take such other action necessary to eliminate the grounds for setting aside.

a party or parties' rights (2) The award of the arbitral tribunal for the dispute shows an obvious mistake. The court may approve the arbitral award, amend it, send it back in whole or part to the arbitral tribunal for reconsideration or set it aside in whole or part.<sup>14</sup> Once such an appeal has been taken, no further appeal will be allowed by the party on the same issue.

## H. RECOGNITION AND ENFORCEMENT OF A FOREIGN ARBITRAL AWARD IN MYANMAR COURT.

### 1. Application

As alluded to above, this section H applies both to international and domestic arbitration as defined in section A above for which the arbitration has taken place outside of Myanmar.

### 2. Procedure

Section 45 provides that a foreign arbitral award or a copy thereof, to be enforced in court in Myanmar, must be authenticated in the manner required by the law of the country where it was made. This must be submitted with the original or a duly certified copy of the agreement for arbitration to the Court. Where the above documents are in any language other than Myanmar, translations into Myanmar, certified as a correct in accordance with Myanmar law or by the ambassador or consulate in Myanmar, must also be submitted to the Court.<sup>15</sup>

14 (c) Appeal can be filed to the Court of competent jurisdiction for the following court order: (1) The order to deny getting arbitral proceedings according to Paragraph 10, Section (f)(2) The order to allow or deny carrying out a method to interrupt according to 11(3) The order of the court to decide legal issues according to Paragraph 39, Section(a)(4) The order to deny terminating the domestic arbitration under Paragraph 41(d) The following arbitral awards can be appealed to the court with the power .

(1) The order that receives the application described in Paragraph 18, Section (b) and (c)

(2) The order that says that the arbitral tribunal can or cannot proceed according to Paragraph 18, Section (e)

(3) The order that grants or refuses to perform any interrupting methods according to Paragraph 19

15 Section 50 (a) provides that in order to enforce the award made in contracting State of the New York Convention, the Chief Justice of the Union of Myanmar may appoint, by notification, any officer from the Office of the Supreme Court of the Union or any person or any individual in charge of any organisation to certify or authenticate the copy of the arbitration agreement or arbitral award.



### 3. *Enforcement*

Following the above submission, section 46 of the Law provides that the award shall be enforced under the Myanmar Code of Civil procedure as if a court decree except:

... the court may refuse to recognize the award if the party against the award is sought to be enforced presents to the court proof that (1) the parties to the arbitration agreement referred was under some incapacity; or (2) the said agreement is not valid under the law to which the parties have subjected to it or, failing any indication thereon, under the law of the country where the award was made; (3) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (4) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; or (5) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (6) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made;<sup>16</sup>

### 4. *Refusal to Enforce*

Section 46 also provides that the court may refuse to enforce the arbitral award if it determines that (1) the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Republic of the Union of Myanmar; or (2) the enforcement of the award would be contrary to the national interest (public policy) of the Republic of the Union of Myanmar.

The above grounds for non-recognition or refusal to enforce a foreign arbitral award follow the language of the Model Law.

### 5. *Rules and Regulations, etc*

The Supreme Court of the Union may issue necessary rules, regulations, by-law, notification, orders, directives, procedures and manuals, in accordance with this Law, according to section 57. This provision may result in

<sup>16</sup> If an application for setting aside or suspension of an award has been made to a competent authority referred to in subsection (6), the court may, if it considers it proper, adjourn its decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to provide appropriate security.

delays while the courts of Myanmar await the issuance of such rules and notifications.

## I. APPEALS.

### 1. *Orders Appealable*

Under Section 47, the following court orders may be appealed from the court with competent jurisdiction to a higher court:

- (1) An order resolving not to refer a matter to arbitration under section 10, discussed above.
- (2) An interim order under section 11, as discussed above.
- (3) A refusal to recognise or enforce a foreign arbitral award under section 46, as discussed above.

Also, section 47 provides that the following orders passed by arbitral tribunal may be appealed to the competent Court:

- (1) The arbitral tribunal's jurisdiction, including objections with respect to the existence or validity of the arbitration agreement as discussed above.
- (2) An order granting or denying interim measures pursuant to section 19, as discussed above.

### 2. *Non-Prejudicial Provision*

The Myanmar version of the Law provides to the effect that no provision in this Chapter shall prejudice any right of any person who has obtained a foreign arbitral award and has the right to enforce the same in Myanmar before the enactment of this Law or any right of any person against whom the right to enforce has been void.

### 3. *The Arbitration (Protocol and Convention) Act*

Myanmar's has enacted the Arbitration (Protocol and Convention) Act, 1937 (the 'Act') pursuant to the Geneva Convention, of which is a signatory. Section 49 provides that enforcement of arbitration under the Act shall not be allowed under the applicable provisions of the Law. There has, however, been no arbitration on record pursuant to the Act.

### 4. *The Arbitration Act of 1944*

Prior to the enactment of the Law, arbitration in Myanmar was conducted under the Arbitration Act of 1944 (the '1944 Act'). Although section 59 of the



Law repeals the 1944 Act, the provisions of the Limitation Act, previously applicable to the 1944 Act are, under section 56, applicable to the Law. The relevant provisions of the Limitation Act are Articles 158 and 178. Pursuant to Article 158 of the Limitation Act, an application to set aside an award must be made within 30 days from the date of service of the notice of filing the award. Under Article 178 of the First Schedule to the Limitation Act, an application for filing of award at a court must be filed within 90 days from the date of service of the notice of the making of the award.

## J. CONCLUSION

The Law follows a workable model and is quite clear on its face. As discussed above, the Law gives substantial discretion to the Myanmar court in enforcing foreign arbitral awards, both for interim and final awards, but this is in accordance with the suggestions of the Model Law. Time and precedent will, however, determine how the Law is applied and its effect on the changes that are rapidly occurring in Myanmar.

## BOOK REVIEW

by Piergiuseppe Pusceddu\*

**A Guide to the SIAC Arbitration Rules**, by Mark Managan, Lucy Reed and John Choong (Oxford University Press, 2014); 365pp, hardcover; ISBN 978-019-965-721-6

*There was a time when arbitration was viewed disdainfully as an inferior process of justice. Those days are now behind us. An unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore<sup>1</sup>*

Singapore is a modern and efficient country playing a pivotal role in Asia: it is business friendly; multicultural; corruption is absent; its Government and Courts are renown for integrity, competence and, last but not the least, for being supportive of arbitration.<sup>2</sup> The book under review, as the title suggests, is a guide on the Arbitration Rules of the Singapore International Arbitration Centre ('SIAC'). The authors are highly respected practitioners in the field of International Arbitration and their contribution takes after several years of experience. The work is divided into sixteen chapters, touching upon different aspects related to arbitration in Singapore.

\* Admitted to practice law in Italy. LLM, New York University, School of Law – National University of Singapore, Faculty of Law; Laurea in Giurisprudenza, University of Cagliari, Faculty of Law. E-mail: piergiuseppe.pusceddu@gmail.com

<sup>1</sup> *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR 732, at [28].  
<sup>2</sup> Michael Pryles, *Singapore – The Hub of Arbitration in Asia*, Contemporary issues in International Arbitration and Mediation: the Fordham papers 2013, edited by Arthur W Rovine (2014, Brill).