

Arbitration in Myanmar— The Best Option?

By William D. Greenlee, Jr.

There is a plethora of attractive commercial reasons to invest in Myanmar, including, but not limited to, the country's abundance of natural resources, an economy that is ripe for investment in every sector, a sizeable prospective consumer base with vast untapped opportunities, and a comparative lack of competition. To foster future foreign investment, Myanmar recently updated, modernized, and adopted a new Arbitration Law.

Enacted on January 5, 2016, the new Arbitration Law represents another important development that will lessen the legal risks of investing in a frontier market like Myanmar. For the first time, Myanmar sets out the procedures for the recognition of foreign awards in the country. Enabling and codifying the procedures for the enforcement of foreign awards provides foreign investors with a key conduit to settle potential disputes and thus a more amenable legal environment for their projects in Myanmar.

Promulgating laws like the Arbitration Law is part of the continued effort by the government to provide more legal certainty and lessen legal risks common in frontier markets. The efforts of the government are paying off after a lull toward the end of 2015 and 2016, during which international investors watched to see the results of the election and the economic and foreign investment policies of the new government. Foreign direct investment into Myanmar is again on the rise.

Despite these positive developments, it is still prudent for foreign investors to arbitrate offshore. At this burgeoning stage, the commercial environment and Myanmar courts lack experience in the use and implementation of the Arbitration Law and more generally with arbitration proceedings. Therefore, an arbitration proceeding in a neutral third-party jurisdiction with a fully developed legal system and experience in complex commercial arbitration proceedings may be more transparent and more efficient. Holding arbitration proceedings abroad limits the scope of Myanmar courts' involvement to simply enforcing a foreign arbitrated award, leaving the main benefit of the Arbitration Law of allowing foreign investors to arbitrate offshore. In the future, however, the Arbitration Law will likely coalesce an environment in Myanmar itself that will encourage arbitration in Myanmar.

The New Arbitration Law

The enactment of a new Arbitration Law represented a significant step forward for fostering foreign investment by creating a basic legal framework for dispute resolution that takes into account domestic and foreign

arbitration. This new law gives effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which Myanmar acceded to in 2013. It replaces the Myanmar Arbitration Act of 1944 and is based on the UNCITRAL Model Law on International Commercial Arbitration, which has been adopted and implemented in many countries.

Historical and Political Background

In recent years, the Myanmar government has worked to liberalize policies and encourage foreign investment in the country. This is contrary to pre-2011 military junta policies that some have characterized as socialist and isolationist in nature. The most significant law enacted was the Foreign Investment Law of 2012 (FIL). This was followed by the passing of numerous other laws and regulations, further encouraging foreign investment into the country.

Historic elections in November 2015 ended decades of authoritarian military rule and for the first time awarded the National League for Democracy (Aung San Suu Kyi's party) a majority in parliament. Since the election victory, Myanmar has been bearing witness to vast and sweeping political changes, including a ceasefire agreement with many of the country's armed groups, and initial dialogue to explore constitutional reforms that could reinvigorate Myanmar as an inclusive, multi-ethnic federation. Further laws have been enacted to enshrine international standards and global best practices in the body of local legislation. This is all part of Myanmar's renewed efforts to end over half a century of political and economic isolation, casting off the shadow of its former pariah status and securing the foundations for a revitalized, vibrant, and potentially very successful nation.

Foreign investors demand a stable political environment and clear, unambiguous laws that meet international standards to ensure that their investments are well protected. In this regard, should disputes arise concerning an international investment, it is often best to settle it by way of arbitration.

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Arbitration Framework before the Enactment of the Arbitration Law

Although Myanmar signed the New York Convention in 2013, doubts and confusion persisted as to the enforceability of foreign awards in Myanmar as the Arbitration Law was not enacted until January 2016.

The 1944 Arbitration Act only provided for domestic arbitration and did not provide a framework for the recognition and enforcement of foreign arbitral awards. Under the 1944 Arbitration Act, a Myanmar arbitral award could not generally be enforced abroad and was only enforceable against a foreign party within the country if it had assets in Myanmar. Theoretically, foreign arbitral awards could have been enforced in Myanmar; however, for decades there were no reported cases. Additionally, a foreign award was only enforceable if it was rendered in a country that had signed the Geneva Protocol on Arbitration Clauses 1923 or the Geneva Convention on the Execution of Foreign Arbitral Awards 1927. In reciprocity for the apparent failure of Myanmar to recognize foreign judgments, Myanmar arbitral awards were generally not recognized abroad.

Arbitration Law and Its Application

The new Arbitration Law is primarily based on the United Nations Commission on International Trade Law (UNCITRAL) rules. It is expressly aimed at settling domestic and international commercial disputes in a fair and effective manner, while recognizing and enforcing foreign awards to encourage the settlement of disputes through arbitration. UNCITRAL rules provide well-established international standards for arbitral procedures. In implementing the Arbitration Law, Myanmar has elected to align itself more closely with international norms and provide structures and processes that will be familiar to investors in more developed jurisdictions.

The Arbitration Law makes a distinction between local arbitration, foreign arbitration, and the recognition of foreign awards (as discussed later in this article). In this regard, the Arbitration Law predominantly governs domestic arbitration proceedings, while also recognizing foreign arbitration occurring outside Myanmar. While combined legislation for both domestic and foreign arbitration is common in Asia, this has occasionally resulted in uncertainty in countries like India and Malaysia. The key provisions determining the applicability of the Arbitration Law to foreign arbitration are under Section 2. The most relevant sections regarding foreign arbitration are:

- Section 10: Reference to arbitration and stay of a suit before a court;
- Section 11: Power of the court to intervene in an arbitration proceeding;
- Section 30: Court assisting in taking evidence;
- Section 31: Court enforcement of the interim orders of the arbitral tribunal; and
- Chapter 10: Recognition and enforcement of foreign arbitral award.

Local and Foreign Arbitration

Domestic arbitration is defined as arbitration that is not foreign arbitration. Foreign arbitration is further defined as one where (1) one of the parties to the arbitration has its place of business situated in a country other than Myanmar at the time of execution of the arbitration agreement; (2) the place of the arbitration as stated in the arbitration agreement or the place to conduct the arbitration in accordance with the arbitration agreement is situated outside the country in which the parties have their place of business; (3) taking into account commercially related business obligations, the place where a substantial part of the obligations is to be performed or the closest place connected to the subject matter of the dispute is situated outside the country in which the parties have their place of business; or (4) the parties to the arbitration agreement have expressly agreed that the subject matter relates to more than one country.

Furthermore, the Arbitration Law provides the definition of a “foreign arbitration award” as an award issued in a territory of the New York Convention signatory state other than Myanmar. This will be the most common scenario regarding contracts involving foreign investors, as it is common practice to include an arbitration clause referring to a third country. In Myanmar, contracts often designate Singapore as the foreign seat of arbitration.

Place of Arbitration

Under Section 23 of the Arbitration Law, the parties to an arbitration agreement are free to agree upon the location of any potential arbitration. Should the parties fail to determine a place, the arbitral tribunal (constituted by the parties to the dispute or court in accordance with Section 13 (d) of the Arbitration Law) will make a determination based on the circumstances of the case and the convenience of the parties. The Arbitration Law defines an arbitral tribunal as comprising a sole arbitrator or a panel of them. Subject to other Section 23 stipulations, the arbitral tribunal is free to meet at any place of their choosing for consultation among its members; to hear witnesses, experts, or the parties; or for the inspection of goods, other properties, or documents. However, the parties to an arbitration agreement may preclude this right of the arbitral tribunal, subject to an agreement.

Number of Arbitrators and the Granting of Immunity (Domestic Arbitration)

Referring to arbitration proceedings held in Myanmar, the parties to the arbitration are free to determine the number of arbitrators. Where no determination has been provided in the relevant agreement, the number of arbitrators will be set at one. Unless the parties have agreed otherwise, according to Section 13(a) there is no nationality requirement for the arbitrators. As per Section 13(b), the parties may also agree on the appointment procedures for the arbitrator(s). The language to be used in the proceedings is also left to the mutual discretion of the parties.

Section 13(c) provides that, when a party fails to appoint its arbitrator or, in the case of a panel of three, when there is a

failure to appoint the third arbitrator, either party may require the chief justice to make the necessary appointment. The chief justice refers to either the Chief Justice of the High Court of the Region, the High Court of the State for domestic arbitration, or the Chief Justice of the Union for international arbitration.

Section 20 grants arbitrators immunity for their acts or omissions provided that they act with due care during the arbitration.

Power of the Myanmar Courts to Intervene

Section 11 grants the Myanmar court the power to intervene in arbitration procedures in both domestic and international arbitration proceedings. Unless otherwise agreed to by the parties to the arbitration agreement, the court may, upon a request, grant an interim injunction, appoint a receiver, pass an order regarding the property in dispute, sell the property, and preserve any evidence. As per Section 11 (d) of the Arbitration Law, the Myanmar court will only deal with matters over which the authorized persons of the parties or the arbitral tribunal has no authority or is unable to handle them effectively. The arbitral tribunal or a party to the proceedings (with the arbitral tribunal's prior approval) may apply to the court for assistance in taking evidence. Typically, this option would only be exercised by the parties or the tribunal due to a peculiar situation, for instance, one where the witness cannot travel to the seat of arbitration, the documents cannot be sent to be exhibited to an arbitration tribunal, or the parties deem it necessary for evidence to be examined by a court.

As per Section 31, the Myanmar court will enforce the interim order of the arbitral tribunal as if it were its own decision. However, in relation to arbitration proceedings conducted outside Myanmar, an interim order for such proceedings is only enforceable in Myanmar if the applicant presents strong evidence that similar types of orders are exercised within the country. The Arbitration Law does not define the term "strong evidence."

Section 32 provides that domestic arbitration will be decided according to the laws currently in force at the time of the proceedings, whereas foreign arbitration will be decided according to the governing laws and rules chosen by the parties.

Enforcement of Domestic and Foreign Arbitral Awards

Any domestic arbitral award will be enforced under the Code of Civil Procedure as if it were a decree issued by the court. The court may decide not to enforce a domestic arbitral award if the respondent demonstrates that the arbitral tribunal was not the competent authority to issue this award (Section 40). Such situations would include where the arbitral tribunal either exceeded its jurisdiction or decided a dispute not falling within the matters under arbitration, or the composition or proceedings of the tribunal do not accord with the arbitration agreement.

Regarding foreign arbitral awards, a party applying for the enforcement of one must do so before the court in Myanmar and produce the following documents:

- (i) The original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made; (ii) the original agreement for arbitration or a duly certified copy thereof, and (iii) such evidence as may be necessary to prove that the award is a foreign award.

Furthermore, if the foreign arbitral award is not drafted in English, a translation certified as accurate by the ambassador or consular officer of the party's home country will also be required. The above-listed documents are necessary for the Myanmar courts to accept and decide upon an enforcement application.

Foreign arbitration awards are enforced by court decree under Myanmar's Civil Code of Procedure, and the decree must be made within 90 days of the award's issuance.

The court, according to Section 46, may refuse to recognize foreign awards on the following grounds:

1. One or more of the parties to the arbitration agreement lacked the competence to conclude such an agreement. For instance, a person representing a company in the dispute was not properly authorized to do so or was not of sound mind;
2. The agreement is invalid under the law governing the arbitration agreement or in a situation where no such governing law was provided, under the law of the country where the arbitration award was passed;
3. Due process regarding notice requirements was not followed. This refers to cases where the notices of appointment of the arbitrator or the arbitration proceedings were not provided to the party against whom the award was being enforced against, thus preventing a party from presenting his or her case before the arbitration tribunal;
4. The award concerns a dispute not falling within the matters under arbitration, or it concerns matters beyond the scope of the arbitration proceedings;
5. The composition of the arbitral tribunal or the arbitral procedures were at variance with the agreement of the parties or, lacking such an agreement, were not in accordance with the law of the country where the arbitration took place; and
6. The award has not yet become binding on the parties, has been set aside, or was suspended by a competent authority of the country where the award was made.

Furthermore, a court may decide not to enforce a foreign arbitral award should its enforcement be contrary to Myanmar public policy or if the grounds of the dispute cannot be settled through arbitration within the country. It would be an extraordinary occurrence for a court to make this kind of ruling.

However, the definition of "public policy" is somewhat ambiguous in the enacted Myanmar Arbitration Law, which is written basically in Myanmar language, and can create confusion. The term used is "*Amyo Thar Akyo Si Pwar*,"

which does not translate into “public policy” and is not legal parlance in Myanmar, but rather refers to the benefit of society and morality. It, therefore, remains unclear as to whether an act contrary to Myanmar public policy is limited to a violation of substantive law or extends beyond that.

Entry into Force of the Arbitration Law

Finally, Section 58 expressly states that the Arbitration Law only applies to arbitration procedures commencing after the law’s enactment.

Conclusion

The implementation of the new Arbitration Law in January 2016 certainly represents a significant step forward in achieving dispute resolution in Myanmar. Additional time is needed to assess whether the Arbitration Law can provide a sufficient foundation for arbitration to be adopted as the best approach for settling commercial disputes in Myanmar and whether arbitration would be best conducted in Myanmar or abroad. ♦