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Myanmar

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Introduction

Since its historic election in late 2015, Myanmar's new government has spent the past year easing into its role. Some laws that were in the making have since been promulgated and the country continues to take steps to welcome and enhance foreign investment. However, there is uncertainty in every transition, and legislative reforms in general remain steady but slow.

Since the passing of the Arbitration Law in January 2016, no subsidiary rules and regulations to the Arbitration Law have yet been passed. Nonetheless, Myanmar has passed the new Myanmar Investment Law[1] on 18 October 2016, as part of its objectives to attract foreign direct investment and stimulate its economy in accordance with international standards.[2] Of significance is its promotion of arbitration as an alternative dispute resolution mechanism for investors.[3] The Myanmar Investment Law is expected to come into force with full effect in April 2017.[4]

While our chapters in the 2016 and 2017 editions of this review elaborated on Myanmar's nascent arbitration landscape, and subsequently the passing of the important Arbitration Law 2016, this chapter will explore the impact that the new Myanmar Investment Law 2016 will have on the arbitration landscape in Myanmar. It will further analyse the challenges that lie ahead, with a view to how Myanmar may overcome them and establish an arbitration regime that is strong and reliable.

Myanmar Investment Law 2016

The implementation of the new Myanmar Investment Law 2016 speaks volumes of the government's hopes of tapping into the country's enormous potential for economic growth,[5] especially viewed in the context of several radical changes made to the Myanmar investment framework after nearly three decades of incremental adjustment.

Key highlights

To begin with, instead of preserving the distinction between local and foreign investors previously provided in the Myanmar Citizen's Investment Law and the Myanmar Foreign Investment Law respectively, the government consolidated the two separate investment regimes into one.[6] This ended Myanmar's status as the only member of the Association of Southeast Asian Nations with separate investment laws for citizens and foreigners.[7] Although foreign investors are still not awarded certain privileges, these restrictions relate to privileges resulting from international agreements on economic free trade or bilateral treaties,[8] and limitations expressly provided in other Myanmar laws.[9]

In addition, the Myanmar government provides clear guarantees to both local and foreign investors that they will receive 'fair and equitable treatment' in respect of (i) the right to obtain information on any measures or decisions that significantly impact their direct investment, and (ii) the right to due process of law and the right to appeal.[10] The government also guarantees not to nationalise any investment carried out in accordance with the law, or to take any measures that expropriates the investment, directly or indirectly.[11]

Lastly, the framework for obtaining an investment permit from the Myanmar Investment Commission (MIC) has been revamped. The Myanmar Investment Law 2016 now clearly stipulates the types of investment businesses that the MIC Permit may be sought for.[12] Land use rights[13] not otherwise available to foreigners are granted, and tax incentives[14] are extended to both foreign and local investors alike.

The law reinforces the legal framework in which investors can operate, thus allowing investors to enter the frontier market with more ease and confidence.[15]

Dispute resolution mechanism

In the Myanmar Foreign Investment Law that was enacted in 2012 (ie, the key investment law in Myanmar prior to the Myanmar Investment Law 2016), the dispute resolution mechanism was provided as such:

> *Chapter XIX – Settlement of Dispute*
> *43. If any dispute arises in respect of the investment business:*
> *(a) Dispute arisen between the disputed persons shall be settled amicably;*
> *(b) If the dispute cannot be settled under sub-section (a);*
> *(i) It shall be complied and carried out in accord with the existing laws of the Union if the dispute settlement mechanism is not stipulated in the relevant agreement;*
> *(ii) It shall be compiled and carried out in accord with the dispute settlement mechanism if it is stipulated in the relevant agreement.*

While no express reference was made to arbitration, it was understood that it could be provided as the dispute resolution mechanism in a contract. The Arbitration Act 1944 was in place at the time, and prior to the enactment of the Arbitration Law 2016, there was no domestic procedure in place to enforce foreign arbitral awards.

As foreign investment and legal reforms progressed, a draft Myanmar Investment Law, which, as aforesaid, consolidated the investment laws governing citizens and foreigners, was contemplated. In the draft Myanmar Investment Law (24 February 2015), the language of the dispute resolution mechanism found at section 21 was analysed to be a promising movement towards arbitration in Myanmar, as it expressly provided that investors, both foreign and domestic, have access to arbitration as a dispute resolution mechanism against the government and government entities. Viewed against the backdrop of Myanmar's formal accession to the New York Convention, it assures foreign investors of Myanmar's positive intentions and commitment to arbitration. Section 21 of the draft Myanmar Investment Law (superseded) is set out below:

(1) In the event of any dispute between the Union Government or any Government Entity and an Investor in relation to the Investor's Investment where the Investor has incurred loss or damage by reasons of an alleged breach of any rights conferred by this Law with respect to the Investment of that Investor, the Investor shall have access to a dispute settlement mechanism, either domestic court or tribunal or arbitration or other procedures, under the existing laws of the Union or the relevant laws which will be enacted in due course.

(2) In the event of any dispute referred to in sub-section (1) above is between the Union Government or any Government Entity and a Foreign Investor, the disputing Foreign Investor may submit a claim referred to in sub-section (1) above to:

(a) Domestic courts or administrative tribunals; or

(b) Arbitration under relevant Myanmar law; or

(c) Arbitration under the Rules of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules; or

(d) Arbitration under the International Convention on the Settlement of Investment Disputes (ICSID) between States and Investors

Provided that resort to any arbitration rules or fora under sub-section (2) shall exclude resort to the other.

(3) In any case arising from sub-section (1) above, the Union Government and the Government Entities are assumed to have given express advanced consent to court proceedings, arbitration or any other dispute settlement procedures.

(4) …

(5) In the event of any award made by a foreign arbitral tribunal, such award shall be recognized and enforceable in the Union according to international law, including the New York Convention on the Recognition of Foreign Arbitral Awards 1958.

The wording of the proposed section 21 has since changed and now mirrors the language in the Myanmar Foreign Investment Law a little more closely. The dispute resolution mechanism (Chapter XIX clauses) in the Myanmar Investment Law 2016 now reads as follows:

Chapter XIX – Settlement of Dispute

82. In effective implementation of this Law, the Commission shall establish and manage a grievance mechanism to resolve, prevent the occurrence of disputes, and carry out the relevant inquiries for the investment issues before reaching at the stage of legal disputes.

83. Before any investment dispute between the investor and the Union or between the investors is brought to any court or arbitral tribunal, all disputing parties shall use due attempts to settle the disputes amicably.

84. If investment disputes are not able to be settled amicably:

(a) if the dispute settlement mechanism is not stipulated in the relevant agreement, it shall be settled in the competent court or the arbitral tribunal in accord with the applicable laws;

(b) if the dispute settlement mechanism is stipulated in the relevant agreement, it shall be complied with and carried out in accord with the mechanism.

The four key changes are in relation to the inclusion of the requirement for parties to attempt to settle the dispute amicably as the first port of call; the exclusion of any express references to arbitration, international or otherwise, as a dispute resolution mechanism; the exclusion of the government and government entities' express advanced consent to any dispute settlement procedures, including arbitration; and the exclusion of express reference to the enforceability of foreign arbitral awards in Myanmar in accordance with the New York Convention.

At first glance, the Chapter XIX clauses appear to be a step backwards for Myanmar in its arbitration framework. For instance, despite the Myanmar government's willingness to give guarantees in relation to national expropriation,[16] it ultimately refused to give express advanced consent to court proceedings or arbitration in the event of such a dispute under the Myanmar Investment Law 2016. Furthermore, the initial proposed inclusion of a clause on enforceability of foreign arbitral awards and the subsequent decision to exclude the said clause raises questions as to the government's stance as to enforcement in Myanmar, although this is expressly provided in the Arbitration Law. Lastly, the references to international arbitration rules such as the UNCITRAL Arbitration Rules and arbitration under the ICSID Convention were amended to a reference of an 'arbitral tribunal', thus causing uncertainty as to whether arbitration under the Chapter XIX clauses may be international arbitration held outside of Myanmar.

However, the wording of the Chapter XIX clauses does mitigate these concerns to a certain extent. In relation to the Myanmar government's sovereign immunity, section 83 of the Myanmar Investment Law 2016 states that the dispute must be 'between the investor and the Union' (the Myanmar government).[17] As such, where the government or its entities have agreed to arbitration in the relevant agreement or where arbitration is required under the applicable laws,[18] it appears unlikely that the government would be able to invoke or rely on the defence of sovereign immunity.

In addition, although there are no references to international arbitration in Chapter XIX, section 83 does allow the dispute to be brought to 'any … arbitral tribunal', which is arguably wide enough in scope to include international arbitration. Further, section 84(b) allows parties to stipulate the dispute settlement mechanism in their agreements without any restriction – international arbitration is thus arguably allowed under the Chapter XIX clauses. Section 84(a) also appears to allow the parties to opt for arbitration (as opposed to domestic court proceedings) after the dispute has arisen, even where there was no arbitration clause in the investment agreement. In the circumstances, the Myanmar Investment Law 2016 still signifies Myanmar's second step towards establishing a supported and strong arbitration framework.

Myanmar's arbitration future

Despite Myanmar's positive and energetic efforts to revamp its arbitration framework in recent years, the strain on Myanmar to persist in its endeavours is beginning to show. For instance, despite the Union of Myanmar Federation of Chambers of Commerce and Industry's (UMFCCI) plan to set up and expand arbitration centres[19] in conjunction with and following the passing of the Arbitration Law 2016, there has been little progress in that aspect. In addition, few changes have been made to strengthen or rebuild Myanmar's judiciary.

Although this chapter is unable to make any definitive statements on the future of Myanmar's arbitration landscape, it provides an analysis that an ambitious Myanmar government, in seeking democracy, could and should apply to further attract foreign direct investment, which, as a corollary, will strengthen the arbitration framework in Myanmar.

Notwithstanding its efforts to improve the laws in Myanmar, the government is also cognisant of the fact that the legal framework is only one factor considered by foreign investors when evaluating Myanmar as a potential market.[20] The judicial system that the investment laws are embedded in plays a crucial role in

ensuring the stability and integrity of the laws, of which such stability is currently lacking.[21] This is one of the main reasons why, while Myanmar is investing substantial effort and resources to reform Myanmar's judiciary and its courts, foreign investors prefer to resolve their disputes in neutral, international venues.

Myanmar wishes to tap into the potential of economic growth, inter alia, by way of foreign direct investment, so there is strong incentive for the government to resolve concerns of their judicial system. Overall, it appears that Myanmar has adopted a three-pronged approach to address these concerns:

- first, because foreign investors favour international arbitration to resolve their investment disputes, the Myanmar government is striving to improve on the current legal framework to be more supportive of arbitration, international or otherwise;
- second, they are implementing long-term plans to draw international arbitration back to Myanmar; and
- third, Myanmar will rebuild its judicial system and restore confidence in it alongside the expansion of its arbitration framework.

Supporting arbitration

There is a need for Myanmar to cater to foreign investors' preference for arbitration as a dispute resolution mechanism. This is recognised by the government, which is attempting to make its current legal framework more inclusive of arbitration as an alternative to the Myanmar courts.

One of the steps taken to improve the legal framework, which was discussed in our first chapter for this review in 2015, was Myanmar's decision to formally accede to the New York Convention on 16 April 2013 and grant it force of law on 15 July 2013.

As discussed above, the introduction of the dispute resolution mechanism in the Myanmar Investment Law 2016[22] also marks Myanmar's willingness to provide a supportive environment for the arbitration process. It will further encourage domestic reliance on arbitration and confidence of foreign investors if government-owned entities adopt and incorporate arbitration agreements in their own contracts.[23] While Myanmar law may still be the law of choice when it comes to contracts between private investors and government-owned entities, the openness to having the dispute arbitrated abroad or by a foreign tribunal would still be seen to be a positive step.

Bringing arbitration back to Myanmar

The establishment of a legal framework complementary to arbitration, absent a strong judicial system in Myanmar, will see foreign investors seeking to arbitrate their disputes in international venues. Therefore, to further encourage economic growth, Myanmar should aspire to and is implementing plans to compete as a viable arbitration forum. This can only be done by strengthening their domestic arbitration regime and establishing a strong rule of law.

One solution currently being implemented, as highlighted in our second chapter for this review in 2016, is the UMFCCI's plans to set up arbitration centres to deal with economic disputes in the country. Since the publication of this review in 2016, UMFCCI has set up a task force committee,[24] which is currently in discussions to set up an independent arbitration centre to deal with economic disputes across the country. Ultimately, the first arbitration centre set up by UMFCCI will mark Myanmar's journey towards a strong arbitration system.

However, Myanmar will also require a body of well-trained arbitration practitioners to complement and support its arbitration system. In that regard, Myanmar has been seeing a wave of interest in arbitration as an alternative dispute resolution method. Arbitration training workshops and seminars held and conducted by foreign law firms and entities such as the Singapore International Arbitration Centre, the International Chamber of Commerce and the International Centre for Settlement of Investment Disputes are generally well attended by Myanmar lawyers.[25] The International Arbitration Club Myanmar was also established in 2016.

Myanmar should also take steps to enhance its judges' expertise in relation to arbitration. This is because, notwithstanding the fact that arbitration serves as an alternative dispute resolution mechanism to court litigation, it ultimately requires the courts to exercise supervisory jurisdiction in certain matters, such as enforcement and setting aside of arbitral awards, stay of proceedings and the grant of interim measures.[26] To that end, unless the Myanmar judiciary's expertise is enhanced, it would be 'a matter of chance as to whether or not an arbitral award (foreign or domestic) would be referred to a judge with knowledge of and exposure to the convention or to a judge with no such knowledge and exposure'.[27]

Rebuilding its judicial system

In the long term, there will still be a need for Myanmar to strengthen its rule of law and enhance its judicial system. As stated by the International Bar Association 'rules are only ever as sturdy as the mechanisms that apply or enforce them'.[28]

In relation to the judicial system, court rules and procedures may need to be amended to accommodate both domestic and international arbitration within its framework.[29] For example, it may be desirable for international arbitration matters to automatically be directed to higher courts, and to provide rules stipulating the scope of the judges' powers in relation to arbitration.

On the need for a strong rule of law, the Myanmar Investment Law 2016 provides a suitable example: section 83 provides for parties to undergo attempts to settle their dispute amicably first, before turning to the dispute resolution mechanism. Though attractive in theory, Robert San Pe highlights the pertinent issue that arises where an influential body, as the 'mediator', may impose an arbitrary decision on the weaker body for certain reasons, thus leading to a highly unjust result.[30]

Taking a step backwards, this situation would not be a concern if Myanmar had a strong rule of law – the administration of justice would be transparent and accountable to the public, and influential entities with power would be governed with adequate checks and balances implemented in the legal framework.

Furthermore, international parties may not want local courts to intervene in the arbitration proceedings unnecessarily or arbitrarily. Again, wider reform to ensure transparency, accountability, efficiency and perceived neutrality is crucial to Myanmar's success as a desirable international arbitration forum.[31] Therefore, in the big picture, a strong, well-educated and independent judiciary guided by the rule of law will be capable of creating huge waves of change in Myanmar, legally, economically, politically and otherwise.

Conclusion

Case study: Cambodia and its arbitration system

The process of Cambodia establishing its first arbitration centre, the National Commercial Arbitration Centre of the Kingdom of Cambodia (NCAC), and establishing a rigorous legal framework for arbitration, serves as helpful guidance in determining the potential timeline that Myanmar will adhere to.

Cambodia's Commercial Arbitration Law entered into force in 2006 and the NCAC was conceived within the same year.[32] However, it was not until 2010 that the Commercial Arbitration Law was amended to accommodate the inception of the NCAC, which was officially launched in 2013.[33] The NCAC's Arbitration Rules were only finalised in July 2014, and it was only in May 2015 that the NCAC received its first notice of arbitration.

It should be noted that, in order to ensure the availability of a body of well-trained arbitration practitioners to complement and support its arbitration system, the Commission – established by the Commercial Arbitration Law – sent members of the NCAC for training by internationally renowned arbitration experts associated with the Singapore International Arbitration Centre.[34] Today, Cambodia is considered by many to be an increasingly arbitration-friendly jurisdiction, which gives it an edge over other emerging markets in the South East Asian region.[35]

Moving forward

Considering that Cambodia's arbitration regime properly kick-started nine years after its conception, Myanmar is arguably on track with its plans to be an arbitration-friendly jurisdiction. What appears crucial to Cambodia's success, though, is the government's persistence in developing the country into a commercial arbitration hub. Myanmar's incentive is to develop its arbitration framework in light of its desire and need to maximise its potential for economic growth.

Notes

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Christopher Chuah heads the infrastructure, construction and engineering practice, and is partner in the China and Myanmar practices. Christopher's main areas of practice encompass both front-end drafting and advice, and construction disputes concerning litigation and arbitration. He has acted as leading counsel in numerous reported landmark cases on construction law and has also acted for subcontractors, main contractors and developers in numerous domestic and international arbitration disputes. Christopher is appointed to the panel of arbitrators of the Singapore International Arbitration Centre (SIAC) and the Kuala Lumpur Regional Centre for Arbitration (KLRCA). He is a Fellow of the Singapore Institute of Arbitrators and Chartered Institute of Arbitrators, as well as the Chartered Institute of Building. Christopher is an accredited adjudicator under the Building and Construction Industry Security of Payment Act (Cap 30B), and was part of the first group of such appointments. He is a member of the Construction Adjudicator Accreditation Committee that was formed by the Singapore Mediation Centre to assist with the training and accreditation of adjudicators.

Goh Wanjing is partner in the infrastructure, construction and engineering practice at WongPartnership LLP, and was the firm's country representative for Myanmar. Wanjing actively engages with inbound clients from Singapore who are looking to set up and invest in Myanmar and the firm's Myanmar clients who are involved in numerous industries such as property development, construction and hospitality, as well as government projects such as power plant, and oil and gas projects.

Having been based in Myanmar, Wanjing has had the opportunity to witness the extensive developments in the country, and has taken the chance to speak on this during various seminars and forums in Yangon and Nay Pyi Taw, where she has spoken on the development in foreign investment policies and laws in Myanmar, as well as on construction law and the possibility of public-private partnerships.

In the infrastructure, construction and engineering practice, her main areas of practice encompass both front-end advisory work for various construction and infrastructure projects, as well as contentious work involving owner-developers, consultants and contractors at various stages of proceedings and fora such as court litigation, arbitration and adjudication.

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