Myanmar – a new law for a new era

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Mahdev Mohan and **Clive Myint Soe** of Providence Law Asia in Singapore, **Hnin Ei Ei Aung** of U Tin Yu and Associates in Yangon and **Jaya Anil Kumar** of Singapore Management University discuss the finer details of Myanmar's new arbitration law passed at the start of the year.

Schwedagon Pagoda, Myanmar

On 5 January, Myanmar's parliament enacted the Arbitration Law 2016 – Union Parliament Act No. 5 of 2016 – which repeals and replaces the Myanmar Arbitration Act 1944 and represents an important step forward in creating a legal environment that is attractive for investment and commerce.

Building on a bill tabled before Myanmar's parliament in 2014, the much anticipated new law expresses the country's desire to settle domestic and international commercial disputes in a fair and effective manner by means of arbitration, and to ensure recognition and enforcement of foreign arbitral awards.

The law silences fears that Myanmar's accession to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 2013 would not be supported by enabling legislation. It gives effect to Myanmar's obligations under that convention and makes clear that the Arbitration (Protocol and Convention) Act 1937, which permitted limited enforcement of foreign arbitral awards, is otiose.

Foreign arbitral awards from more than 150 New York Convention states may now be enforced in Myanmar, subject to limited exceptions. This is a significant development as the erstwhile Arbitration Act 1944 applied to only domestic arbitrations. Even if a foreign arbitral award were obtained, there was no guarantee that a Myanmar court would have recognised and enforced it. After all, the Myanmar Arbitration Act 1944 referenced the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 – which was implemented through Myanmar's Arbitration (Protocol and Convention) Act 1937 – an unpopular predecessor to the New York Convention.

Moreover, under the Arbitration Act 1944, Myanmar courts had wide powers and could determine if an arbitral award should be modified or corrected, reconsidered or set aside at either parties' request. We understand that

these powers often contributed to protracted and costly proceedings and were a cause for concern for foreign commercial parties and investors who typically want arbitration in a neutral Model Law jurisdiction and with commercial arbitrators of their choice, rather than settlement of their disputes by Myanmar judges with more limited experience of complex commercial disputes.

The Arbitration Law has now alleviated concerns about undue court intervention, separately categorising domestic and international arbitrations and making them subject to very different levels of curial oversight. For instance, as in other Model Law jurisdictions, the act allows the Myanmar courts to determine a preliminary issue of law for a domestic arbitration, but not an international arbitration.

The 2014 draft bill and accession to the New York Convention

The Arbitration Law must be analysed in the context of the Draft Arbitration Bill, which was tabled almost two years ago, and Myanmar's accession to the New York Convention in April 2013. The New York Convention obliges Myanmar’s courts to give effect to arbitration agreements or contractual clauses which provide for disputes to be resolved by arbitration and to recognise and enforce foreign arbitral awards.

In 2014, the Myanmar parliament considered the draft bill which was meant to enable and implement Myanmar’s obligations under the New York Convention. The bill was based on the UNCITRAL Model Law on International Commercial Arbitration, and proposed the legislative framework for arbitration that other Model Law (and common law) jurisdictions in the region – such as Australia, India, Malaysia and Singapore – have adopted.

Although there were doubts as to whether the draft bill would ever be passed into law, owing primarily to the significant number of bills that have been tabled before Myanmar's parliament in the last two years, it appears that the country's legal policy-makers, including the Attorney-General’s Office of Myanmar, ensured that it took precedence over other bills. Clearly, priority was given to the need to align Myanmar’s arbitration regime with the international procedural and enforcement standards contained in the Model Law and the New York Convention.

Compliance with the Model Law

The Arbitration Law has incorporated key provisions found in the UNCITRAL Model Law, with which we are all familiar. Arbitrators, practitioners and judges may thus now refer to case law from Model Law jurisdictions to interpret and apply provisions of the law that comport with the Model Law.

For example, the law follows the Model Law in providing for interim relief, which is useful in protecting parties' rights pending the resolution of a dispute. Parties to both international and domestic arbitrations may apply to

the courts of Myamar for interim relief and the arbitral tribunal also has the power to issue such relief (as in the Model Law). Under the Arbitration Law, the courts may take or preserve evidence or grant an interim injunction. *Ex parte* relief may be granted only for the preservation of evidence and related properties.

Interim orders of the arbitral tribunal will be enforced by the Myanmar courts, regardless of whether they arise from an international or domestic arbitration. Court-ordered interim relief for domestic arbitrations may be appealed to a Myanmar court of competent jurisdiction.

The Arbitration Law also contains provisions for the appointment of arbitrators, which are substantially similar to those found in the Model law. For international arbitrations, the Arbitration Law allows the Chief Justice of the Union of Myanmar to appoint an arbitrator, or request a person or institution to do so, if the parties or a delegated third party or institution fails to undertake this task. Where the arbitration agreement contemplates a panel of three arbitrators and the parties fail to agree on the appointment of a third, the chief justice can also make the appointment.

The provisions naming the chief justice as the appointing authority for arbitrators use language echoing that in the Model Law, which suggests that the court should only step in and become the appointing authority in the event the parties are at deadlock.

In our opinion, the Arbitration Law supports party autonomy. The Chief Justice's power to request an arbitral institution to appoint an arbitrator in his place may also indicate that Myanmar is setting the stage for the establishment of its own arbitration centre. In the meantime, the chief justice can look to other arbitral institutions.

Other provisions in the law also make reference to arbitral institutions. For example, parties or the arbitral tribunal may make arrangements to acquire assistance from any suitable institution or person to facilitate administration of the arbitral process.

Further, the law's definition of an international arbitration is similar to that in the Model Law and thus to the laws of other Model Law jurisdictions, such as Singapore. The law states that an international arbitration arises in four circumstances:

- If one party's place of business and trading activity at the time of execution of the arbitration agreement is outside Myanmar;
- If the place of arbitration or the place where the arbitration is conducted, as stipulated in the parties' arbitration agreement, is outside Myanmar;
- If a substantial proportion of contractual obligations are located outside Myanmar;
- If the parties expressly agree that the subject matter relates to more than one country, in which case the arbitration will be international.

As indicated above, the parties may agree in limited circumstances to classify the arbitration as an international one under the Arbitration Law. This provision is uncontroversial and has a counterpart in the Singapore International Arbitration Act. Indeed, both section 3(i)(4) of the Arbitration Law and section 5(2)(c) of the Singapore act allow parties to "opt-in" to the international arbitration regime if they have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

However, it is noteworthy that section 5(1) of the Singapore act further allows parties to "opt-in" to the Model Law by agreeing in writing that the act applies to the arbitration. While the Singapore act also allows parties to "opt-out" of international arbitration so that the procedure will be considered a domestic one, the Arbitration Law does not – as both international and domestic arbitrations are governed by the Arbitration Law.

Three points bear further mention about the distinct domestic and international arbitration regimes the Arbitration Law creates.

First, on a plain reading of the law, the *lex causa* in domestic arbitrations is Myanmar Law. While parties may select the *lex causa* of their choice in international arbitrations, they have no such right in domestic arbitrations. In other words, where an arbitration does not fall within the definition of an international arbitration under the Arbitration Law, it is considered a domestic one and the parties will have to apply Myanmar Law as the law that governs the dispute.

When drafting dispute resolution clauses, international lawyers should take note of this provision and consult with Myanmar lawyers in respect of the application of Myanmar law as the *lex causa.*

Second, the Arbitration Law contains explanatory notes which give guidance on how a party's place of business may be determined, if there is more than one place of business, or if the party does not have a place of business. These explanations resemble those in the Model Law. Parties whose businesses are in multiple places may wish to have regard to the type of business vehicles they use when investing in Myanmar, which would have an impact on whether an arbitration is deemed to be domestic, or international.

Third, the Myanmar courts have a broader scope for intervention in the domestic arbitral process, as compared to the international arbitral process. For example, parties may appeal to the Myanmar courts for matters in domestic arbitrations (for example, for points of law arising out of domestic awards), but not for international arbitrations.

Bearing this in mind, if parties intend to resolve their disputes through international arbitration, they should, as stated above, expressly include into their contracts the 'opt-in' provision found in section 3(i)(4) of the Arbitration Law.

Other provisions of the Arbitration Law that are similar to the Model Law include chapter 6 (on the jurisdiction of the arbitral tribunal), chapter 7 (on the conduct of arbitral proceedings) and chapter 8 (on the making of an arbitral award and termination of proceedings).

Where the Arbitration Law has taken measures to underscore the primacy of Myanmar law, we believe this was intended to further the growth of the local commercial arbitration bar and to create a corpus of arbitration case law in due course. Having said that, parties should be aware of these measures and the implications such measures may have on their arbitrations.

Giving effect to the New York Convention

The Arbitration Law has defined foreign arbitral awards as those made in a state which has signed the New York Convention and gives effect to Myanmar's obligations under the convention. The Arbitration Law devotes two sections to the enforcement of foreign arbitral awards. It also allows an order made by a Myanmar court for setting aside, or refusing to set aside, a foreign arbitral award, to be appealed to a competent court. In other words, the Arbitration Law has entrenched the New York Convention into Myanmar's legislative framework.

Myanmar is no stranger to international commercial arbitration under the Arbitration Act 1944. In 2013, a high-profile arbitration was commenced between Singapore-based Fraser & Neave brewery and Union of Myanmar Economic Holdings, a government entity. The dispute involved Fraser & Neave's majority stake in Myanmar's largest beer brewery, to which the government entity claimed a right under a joint venture agreement that it accused Fraser & Neave of breaching. The joint venture agreement and other associated agreements that were the subject matter of the dispute were governed by Myanmar Law.

The arbitral tribunal held that the government entity had a right to Fraser & Neave's stake in the brewery and that the company would have to sell, with the disputed valuation of its stake determined by an independent assessor.

Following the independent valuation, the stake was eventually sold to the government entity's nominee for a sum of US$560 million.

Arbitration cases such as this one case appear to have strengthened Myanmar's commitment to arbitration as a means of dispute resolution and paved the way for the Arbitration Law. Although no known foreign arbitral award has to date been enforced in Myanmar, cases the state has been involved in seem to have underscored the value of arbitration as a form of dispute resolution and as an essential component in establishing a strong framework for business and foreign investment.

Myanmar's implementation of the New York Convention should bolster investor and business confidence, signalling future foreign arbitral awards

involving Myanmar-linked entities will be enforceable in Myanmar. Notably, a foreign award may not be enforced if the Myanmar court finds that the enforcement of the award would be contrary to the public policy of Myanmar, pursuant to chapter 10 of the Arbitration Law, which mirrors Article V of the New York Convention. In arbitration case law, this exception to the enforcement of foreign awards has usually been applied narrowly, with countries that adopt an expansive interpretation of “public policy” considered less investor-friendly.

It remains to be seen how the Myanmar courts will interpret this provision, particularly in respect of awards involving the state, or state-owned enterprises, such as the Fraser & Neave’s case.

Well-timed

In encouraging the settlement of disputes by means of arbitration, the Arbitration Law supports Myanmar’s position, expressed by its Attorney-General **Tun Shin** at a recent event in Bangkok, that foreign investors will be attracted to the country “if there are proper dispute resolution laws in acceptance of universal rules" such as those of UNCITRAL, the ICC International Court of Arbitration and the ICSID and New York Conventions.

The timing of the Arbitration Law’s passage is also significant. First, it was passed at a time of political transition. Second, it came as countries in Asia are seeking to minimise legal and regulatory uncertainty, as became clear at the recent launch of the Singapore-based Asian Business Law Institute, founded by representatives from China, India, Australia, Hong Kong and Singapore. Ensuring the enforcement of foreign arbitral awards is one way to promote certainty, as Singapore’s Chief Justice **Sundaresh Menon** noted at the launch.

Third, the Arbitration Law should be viewed against the backdrop of the formation of the ASEAN Economic Community, the Asian Infrastructure Investment Bank and China's "One Belt, One Road" initiative and the entry into force of the Trans-Pacific Partnership Agreement. These infrastructure, trade and investment developments benefit from a coherent arbitration framework for the settlement of commercial and investment disputes.

With the law now in place, Myanmar should look to further strengthen its arbitration regime, for example by taking steps to accede to the ICSID Convention and establishing a local arbitral institution that would give businesses and investors the convenience and cost-savings of local arbitration with a mixture of Myanmar and international counsel and arbitrators.

The Myanmar government, for its part, is confident that the new law will stand it in good stead. Approached by the authors, the director general of the Union of Myanmar's Attorney General's Office, **Kyaw San**, said the law is "in line

with the best international arbitration practice."

"It can be applied not only for domestic or foreign arbitrations, as per arbitration agreements, but also for cases where the venue of the arbitration is Myanmar," he said. "In cases where the agreements are silent or broadly worded as to the venue of arbitration, sections 10, 11, 30, 31 and Chapter 10 [on the] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards are instructive."

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