VDB | *Loi*

MYANMAR ARBITRATION LAW

Arbitration Law 2016 (VDB Loi annotated translation) | Analysis

4 March 2014

VDB Loi

Table of Contents

I. ARBITRATION LAW 4

CHAPTER 1: TITLE, SCOPE OF APPLICATION AND DEFINITIONS (s. 1) 4

Scope of Application (s. 2) 4

Definitions (s. 3) 4

CHAPTER 2: OBJECTIVES OF THIS LAW (s. 4) 5

CHAPTER 3: GENERAL PRINCIPLES 5

Receipt of written communications (s. 5) 6

Objection and waiver of right to object (s. 6) 6

Extent of court intervention (s. 7) 6

Administrative assistance (s. 8) 6

CHAPTER 4: THE ARBITRATION AGREEMENT (s. 9) 6

Reference to arbitration and stay of suit before a court (s. 10) 7

Power of the court to intervene in an arbitration proceeding (s. 11) 7

CHAPTER 5: COMPOSITION OF ARBITRAL TRIBUNAL 8

Number of arbitrators (s. 12) 8

Appointing arbitrators (s. 13) 8

Grounds for challenging an arbitrator (s. 14) 9

Procedure for a challenge (s. 15) 9

Termination of the mandate of an arbitrator and appointment of a substitute arbitrator (s. 16, 17) 10

CHAPTER 6: JURISDICTION OF THE ARBITRAL TRIBUNAL 10

Competence of the arbitral tribunal to rule on its own jurisdiction (s. 18) 10

Power of arbitral tribunal to issue interim orders (s. 19) 11

Immunity of the arbitrator (s. 20) 11

CHAPTER 7: CONDUCT OF ARBITRAL PROCEEDINGS AND EQUAL TREATMENT OF THE PARTIES (s. 21) 11

Determining the rules of procedure (s. 22) 12

Place of arbitration (s. 23) 12

Commencement of arbitral proceedings (s. 24) 12

Language (s. 25) 12

Statements of claim and defense (s. 26) 12

Hearings and written proceedings (s. 27) 13

Default of a party (s. 28) 13

Experts appointed by the arbitral tribunal (s. 29) 13

Court assistance in taking evidence (s. 30) 13

Court enforcement of the interim orders of the arbitral tribunal (s. 31) 14

CHAPTER 8: MAKING OF ARBITRAL AWARDS AND TERMINATION OF THE PROCEEDINGS 14

Rules applicable to the substance of the dispute (s. 32) 14
Decision making by the panel of arbitrators (s. 33) 15
Settlement (s. 34) 15
Form and content of an award (s. 35) 15
Termination of proceedings (s. 36) 16
Correction and interpretation of awards and additional awards (s. 37) 16
Effect of the arbitral award (s. 38) 16
CHAPTER 9: POWER OF THE COURTS RELATING TO DOMESTIC ARBITRATION 17
Determination of preliminary issues of law (s. 39) 17
Enforcement of Domestic Arbitration (s. 40) 17
Particulars for setting aside a domestic arbitral award (s. 41) 17
Appeal against domestic arbitration (s. 42, 43) 18
Effect of the appellate court order upon domestic arbitration (s. 44) 19
CHAPTER 10: RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS 19
Award particulars to apply for recognition or enforcement of a foreign arbitral award (s. 45) 19
Recognition and enforcement of foreign arbitral awards (s. 46) 20
Appeals (s. 47, 48) 20
No application of the Arbitration (Protocol and Convention) Act (s. 49) 21
CHAPTER 11: MISCELLANEOUS (s. 50 to 59) 21
II. ANALYSIS 23
1. What changes with the New Arbitration Law? 23
2. To which extent can Myanmar courts intervene in foreign arbitration? 23
3. Interim measures: by Myanmar courts or by the tribunal? 24
4. Can a foreign tribunal's decision on jurisdiction or temporary measures be challenged in a Myanmar court? 24
5. What happens when a claim is lodged before a Myanmar court even though the contract provides in foreign arbitration? 25
6. Can two Myanmar-registered companies choose for arbitration overseas instead of arbitration with a seat in Myanmar? 25
7. Can two Myanmar-registered companies choose to have their contract governed by foreign law? 25
8. Can Myanmar courts refuse to recognize foreign awards? The formal grounds 26
9. Which disputes cannot be settled by arbitration in Myanmar? 27
10. Myanmar's "public policy" exit 27
11. What does this mean for the Myanmar situation? 28
12. Is there anything you can do if a Myanmar court refuses to enforce your foreign award? 28

I. ARBITRATION LAW

[Unofficial translation by VDB Loi – version dated 04/03/2016]

The Pyidaungsu Hluttaw Law No. 5/2016
The 10th Waning Day of Nadaw 1377 ME
5th January 2016

The Pyidaungsu Hluttaw hereby enacts the following Law:

CHAPTER 1: TITLE, SCOPE OF APPLICATION AND DEFINITIONS

1. This law is called the Arbitration Law.

Scope of Application

2. (a) This law applies to all arbitration proceedings held within the Republic of the Union of Myanmar arising out of any agreement entered into in the Republic of the Union of Myanmar or foreign countries.

   (b) If the place of arbitration is situated in a country other than the State, or the place of arbitration is not specified or not determined, Sections 10 [Reference to arbitration and stay of a suit before a court], 11 [Power of the court to intervene in an arbitration proceeding], 30 [Court assisting in taking evidence] , 31 [Court enforcement of the interim orders of the arbitral tribunal] and Chapter 10 [Recognition and enforcement of foreign arbitral awards suit before a cour] , shall be applicable.

   (c) This law shall not affect any existing law in force in the State which restricts the settlement of disputes by means of arbitration.

Definitions

3. The expressions used in this law shall have the following meanings:

   (a) “State” means the Republic of the Union of Myanmar;

   (b) “arbitration agreement” means an agreement in writing by the parties to submit to arbitration all or certain disputes which arise or which may arise between them in respect of legal relationship, whether contractual or not;

   (c) “arbitration” means any arbitration administered by an arbitrator or arbitral tribunal;

   (d) “arbitrator” means a person or a panel of arbitrators appointed with the consent of the parties to administer the disputes by arbitration;

   (e) “award” means a decision of the arbitral tribunal and includes any interim award;

   (f) “arbitral tribunal” means a sole arbitrator or a panel of arbitrators;

   (g) “court” means the District Court or High Court of the State or Region of original jurisdiction, having jurisdiction to decide the questions in dispute of the arbitration as if it is exercising its original civil jurisdiction;

   (h) “domestic arbitration” is an arbitration which is not an international arbitration;

(i) An "international arbitration" is an arbitration 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; or

(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; or

(3) Taking into account commercially-related business obligations, the place where a substantial part of the obligations 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.

Note:

1. If a party has more than one place of business, the party's place of business 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 its place of business shall be the place of its permanent residence.

(j) "New York Convention" means the convention relating to the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Diplomatic Conference held on 1958 June 10 in New York;

(k) "foreign arbitral award" means an award made in the territory of a New York Convention member state other than the State, in accordance with the arbitration agreement;

(l) "place of arbitration" means the place where the arbitration is administered legally, which is determined by the persons in dispute, or an arbitration agreement or a person authorized by the person in dispute or arbitral tribunal or arbitration institution;

(m) "party" means a party to an arbitration agreement; and

(n) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting.

CHAPTER 2: OBJECTIVES OF THIS LAW

4. The objectives of this law are as follows:

(a) To settle domestic commercial disputes and international commercial disputes in a fair and effective manner;

(b) To settle disputes by means of arbitration, and to recognize and enforce foreign awards; and

(c) To encourage settlement of disputes through arbitration.

CHAPTER 3: GENERAL PRINCIPLES

Receipt of written communications

5. (a) Unless otherwise agreed by the parties:

    (1) Any written communication is deemed to have been received on the date of delivery, if it is delivered to the addressee personally or if it is delivered to their place of business, habitual residence, or mailing address;

    (2) If none of those described in subsection (1) can be found after making a reasonable inquiry, a written communication is deemed to have been received on the day it is so delivered, if it is sent to the addressee's last-known place of business, habitual residence, or mailing address by registered letter or any other means providing a record of the attempt to deliver it.

   (b) The provisions of this article do not apply to communications in court proceedings.

Objection and waiver of right to object

6. (a) A party who is involved in an arbitration proceeding or in processing the arbitration shall raise the below objections without undue delay, or if a time is provided by this law or arbitration agreement or arbitral tribunal, within such period of time:

    (1) The arbitral tribunal has no jurisdiction;

    (2) Procedural defect in arbitration process;

    (3) Failure to comply with the arbitration agreement or provisions of this law;

    (4) Detrimental impact on the arbitral tribunal or arbitration due to a procedural defect.

   (b) Any party who proceeds with the arbitration without stating its objection under subsection (a), is deemed to have waived its right to object.

Extent of court intervention

7. Notwithstanding anything contained in any other law for the time being in force, in matters governed by this law, no court shall intervene except where so provided in this law.

Administrative assistance

8. The parties, or the arbitral tribunal with the agreement of the parties, may make arrangements to obtain the assistance of any suitable institution or person to facilitate administration of the arbitral process.

CHAPTER 4: THE ARBITRATION AGREEMENT

9. (a) With respect to the arbitration agreement, "agreement in writing" as referred to in Section 3 (b) means:

    (1) An arbitration agreement shall be deemed to be in writing if it is signed by the parties;

    (2) If the information contained in an electronic communication is accessible so as to be useable for subsequent reference, such arbitration agreement by means of electronic communication shall be deemed to be in writing;

    (3) An arbitration agreement is in writing if it is contained in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not

denied by the other;

(b) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

Reference to arbitration and stay of suit before a court

10. (a) A court before which an action is brought in a matter that is the subject of an arbitration agreement shall, if a party so requests not later than when submitting its written statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed;

(b) In the case of an action referred to in subsection (a) of this article, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

(c) If the court refuses to refer the parties to arbitration, any decision made before filing a suit relating to any matter of the arbitration contained in the arbitration agreement, shall not have effect on the suit.

(d) If the court refers the parties to arbitration, it shall order to stay the suit before the court.

(e) Where the court decides to refer to arbitration as per subsection (a), no appeal shall be allowed against such decision of the court.

(f) The court's decision refusing to refer to arbitration may be appealed.

Power of the court to intervene in an arbitration proceeding

11. (a) Unless otherwise agreed by the parties, upon a party's request, the court shall have the power to make a decision as its own jurisdiction on:

(1) the taking of evidence;

(2) the preservation of any evidence;

(3) the passing of an order related to the property in dispute in arbitration or any property that is related to the subject matter of the dispute;

(4) inspection, taking photos for evidence, preservation, and seizure of the property that is related to the dispute;

(5) samples to be taken from, or any observation to be made of or experiment conducted upon, any property that is or forms part of the subject matter of the dispute;

(6) permission to enter the premises owned by or under the control of the parties to the dispute for the purpose of the abovementioned matters;

(7) sale of any property that is the subject matter of the dispute;

(8) an interim injunction or appointment of a receiver.

(b) If an interim measure is needed urgently in an arbitration proceeding, the court may, as required, pass an order relating to the preservation of evidence and the property related to the proceedings upon application by a party.

(c) If an interim measure is not needed urgently, the court shall deal with such matter upon

application by a party in the arbitration after delivering a notice to the other party and the arbitral tribunal, and with the approval of the arbitral tribunal or with the written consent of the other party.

(d) The court shall only deal with matters for which the authorized person of the parties or arbitral tribunal or arbitral institution or other institution has no authority or is not able to handle effectively.

(e) An appeal can be filed against court decisions mentioned in this section.

(f) An order made by the court shall cease to have effect in whole or in part if the arbitral tribunal issues an order which expressly relates to the order under subsection (a).

CHAPTER 5: COMPOSITION OF ARBITRAL TRIBUNAL

Number of arbitrators

12. (a) The parties are free to determine the number of arbitrators. However, if the number of arbitrators is more than one, it shall not be an even number.

(b) Failing such determination as mentioned in subsection (a), the number of arbitrators shall be one.

Appointing arbitrators

13. (a) Unless otherwise agreed by the parties, an arbitrator of any nationality may act as an arbitrator.

(b) The parties are free to agree on a procedure for appointing the arbitrator or arbitrators, subject to the provisions of subsection (e) of this article.

(c) Where an appointment procedure has been agreed upon by the parties, the appointment should comply with such procedure. If a party fails to appoint an arbitrator or if both parties or the two arbitrators fail to agree on the third arbitrator, or an entrusted third party or an institution fails to perform any function, and if the appointment procedure is not provided in the arbitration agreement, any party may request that the Chief Justice or any person/institution selected by him/her take the necessary measures.

(d) Failing an agreement as mentioned in subsection (b),

(1) In an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal. If a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made, upon the request of a party, by the Chief Justice or any person/institution selected by the Chief Justice.

(2) In an arbitration with a sole arbitrator, the Chief Justice or any person/institution selected by him/her shall, upon the request of a party, appoint the sole arbitrator if a party fails to appoint the sole arbitrator within 30 days of receipt of a request to do so from the other party.

(e) In appointing an arbitrator, the Chief Justice or any person/institution selected by the Chief Justice, shall give due regard to the qualifications required of the arbitrator by the agreement of the parties, and to such considerations as being an independent and impartial arbitrator.

(f) The Chief Justice or any person/institution selected by him/her may perform the appropriate functions entrusted to him/her by subsections (c) and (d) of this section.

(g) In appointing a sole or third arbitrator for international arbitration in which the parties are of different nationalities, the Chief Justice or any person/institution selected by him/her may take into account appointing an arbitrator of a nationality other than those of the parties.

(h) Any decision on a matter entrusted to the Chief Justice or any person/institution selected by him/her under subsections (c) and (d) of this section shall not be subject to appeal.

[*Note: The Chief Justice mentioned in this section refers to the Chief Justice of the High Court of the Region or High Court of the State within their jurisdiction for domestic arbitration and refers to the Chief Justice of the Union for international arbitration.*]

Grounds for challenging an arbitrator

14. (a) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.

(b) If an arbitrator did not inform the parties of such circumstances as mentioned in subsection (a), from the time of his appointment and throughout the arbitral proceedings, he shall disclose any such circumstances to the parties without delay.

(c) An arbitrator may be challenged only if:

(1) Circumstances exist that give rise to justifiable doubts as to his impartiality or independence; or

(2) He does not possess the qualifications agreed upon by the parties.

(d) A party may challenge an arbitrator appointed by itself, or in whose appointment it has participated, only for reasons of which it becomes aware after the appointment has been made.

Procedure for a challenge

15. (a) The parties are free to agree on a procedure for challenging an arbitrator.

(b) Failing such agreement in subsection (a), a party that intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in subsection 14(c), send a written statement of the reasons for the challenge to the arbitral tribunal.

(c) Unless the challenged arbitrator per subsection (b) withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(d) If a challenge under the procedure agreed upon by the parties is unsuccessful or the arbitral tribunal decides subject to subsection (c) that there is no reason for the challenge based upon the procedure in subsection (b), the challenging party may apply to the court to decide upon the challenge within 30 days from the date such decision is made.

(e) Although an application under subsection (d) is pending before the court, the arbitral tribunal shall continue the arbitral proceedings and make an award.

(f) If the arbitral award has been set aside subsequent to the application made under subsection (d), the court may decide whether the challenged arbitrator is entitled to any fees or not.

Termination of the mandate of an arbitrator and appointment of a substitute arbitrator

16. (a) The mandate of an arbitrator shall terminate if:

    (1) He becomes legally or actually unable to perform his functions (as a matter of law or as a matter of fact) or for other reasons fails to act without undue delay;

    (2) He resigns from office or the parties agree on the termination.

    (b) If a controversy remains concerning matters specified in subsection (a)(1), any party may, unless otherwise agreed by the parties, apply to the court to decide on the termination of the arbitrator's mandate. The decision regarding the termination of an arbitrator's mandate shall not be subject to appeal.

    (c) If, under this subsection (a)(1) or subsection (c) of Section 15, an arbitrator resigns from office or a party agrees to the termination of an arbitrator's mandate, this does not imply acceptance of the validity of any grounds referred to in this subsection (a)(1) or subsection (c) of Section 14.

17. (a) Where the mandate of an arbitrator terminates under Sections 15 or 16, or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

    (b) If an arbitrator is replaced as per subsection (a), the hearings that took place prior to the replacement may be repeated at the discretion of the arbitral tribunal, unless otherwise agreed by the parties.

    (c) If an arbitrator is replaced as per this section, the orders and decisions made before the substitution of the arbitrator shall not be deemed invalid due to the re-composition of the arbitral tribunal, unless otherwise agreed by the parties.

CHAPTER 6: JURISDICTION OF THE ARBITRAL TRIBUNAL

Competence of the arbitral tribunal to rule on its own jurisdiction

18. (a) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose:

    (1) An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract;

    (2) A decision by the arbitral tribunal that the contract is null and void shall not affect the validity of the arbitration clause under that contract.

    (b) A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than the submission of the statement of defense. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator.

    (c) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

    (d) The arbitral tribunal may admit a later plea referred to in subsections (b) and (c) if it considers the delay justified.

(e) The arbitral tribunal may rule on a plea referred to in subsections (b) and (c) as a preliminary issue or as an arbitral award. If the arbitral tribunal rules regarding whether or not it has jurisdiction, any party harmed by the arbitral award may appeal to the court, subject to Section 43, subsections (d) (1) and (2) and Section 47, subsection (b) (1), within 30 days from the date of receiving such decision.

(f) Although the application is pending before the court, the arbitral tribunal shall continue the arbitral proceedings and make an award.

Power of arbitral tribunal to issue interim orders

19. (a) Unless otherwise agreed by the parties, an arbitral tribunal shall have power to issue a decision, order or instruction 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 that 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 that 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.

(b) An arbitral tribunal may have the power to administer oaths to the parties and witnesses.

(c) An arbitral tribunal may have the power to adopt inquisitorial procedures as it considers appropriate.

(d) The power of the arbitral tribunal to order a claimant to provide security for costs as referred to in subsection (a)(1) shall not be exercised solely because the claimant is:

(1) An individual ordinarily residing outside the Republic of the Union of Myanmar;

(2) A corporation or an association incorporated or formed under the laws of another country.

(e) A court may be applied to for enforcement of all decisions, orders or instructions made by an arbitral tribunal in the course of an arbitration, in accordance with Section 31[Court enforcement of the interim orders of the arbitral tribunal].

Immunity of the arbitrator

20. An arbitrator shall not be liable for any acts or omissions that are done with due care as an arbitrator during the course of an arbitration.

CHAPTER 7: CONDUCT OF ARBITRAL PROCEEDINGS AND EQUAL TREATMENT OF THE PARTIES

21. The parties shall be treated with equality and each party shall be given a full opportunity to

present its case.

Determining the rules of procedure

22. (a) Without contradicting the provisions of this law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

    (b) Failing such agreement as specified in subsection (a), the arbitral tribunal may, subject to the provisions of this law, conduct the arbitration in such manner as it considers appropriate.

    (c) In conducting arbitral proceedings as per subsection (b), the power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality, and weight of any evidence.

Place of arbitration

23. (a) The parties are free to agree on the place of arbitration.

    (b) Failing such agreement as specified in subsection (a), the place of arbitration shall be determined by the arbitral tribunal with regard to the circumstances of the case, including the convenience of the parties.

    (c) Notwithstanding the provisions in subsections (a) and (b), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Commencement of arbitral proceedings

24. Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Language

25. (a) The parties are free to agree on the language or languages to be used in the arbitral proceedings.

    (b) Failing such agreement as specified in subsection (a), the arbitral tribunal shall determine the language or languages to be used in the arbitral proceedings.

    (c) This agreement or determination, unless otherwise specified in subsection (a) or (b), shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

    (d) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Statements of claim and defense

26. (a) The parties may agree to the particulars to be stated in the claim or defense. Failing such agreement, the claimant shall state the facts supporting its claim, the points at issue and the relief or remedy sought, and the respondent shall state its defense in respect of these particulars and apply to the arbitral tribunal within the period of time agreed by the parties or determined by the arbitral tribunal.

(b) The parties may submit with their statements all documents they consider to be relevant and other evidence or may add a reference to the documents they will submit.

(c) Unless otherwise agreed by the parties, either party may amend or supplement its claim or defense during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment, having regard for the delay in making it.

Hearings and written proceedings

27. (a) Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(b) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(c) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also, any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Default of a party

28. Unless otherwise agreed by the parties, if, without showing sufficient cause:

(a) A claimant fails to communicate its statement of claim in accordance with Section 26, subsection (a), the arbitral tribunal shall terminate the proceedings;

(b) A respondent fails to communicate its statement of defense in accordance with Section 26, subsection (a), the arbitral tribunal shall continue the proceedings. However, such failure in itself shall not be treated as an admission of the claimant's allegations;

(c) Any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make an award on the evidence before it.

Experts appointed by the arbitral tribunal

29. Unless otherwise agreed by the parties, the arbitral tribunal:

(a) May appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) May require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his/her inspection.

(c) If a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his/her written or oral report, participate in a hearing. In doing so, the parties shall have the opportunity to put questions to the expert and to present evidence on the points at issue.

Court assistance in taking evidence

30. (a) The arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the court for assistance in taking evidence.

(b) The application shall specify the following particulars:

(1) The names and addresses of the parties and the arbitrators;

(2) The general nature of the claim and the relief sought;

(3) The name and address of any person to be heard as a witness or expert witness, and a statement of the subject matter of the testimony required;

(4) The documents to be submitted or a description of the documents to be produced or property to be inspected.

(c) The court may, within its competence and according to its rules on taking evidence, execute the request that the evidence be provided directly to the arbitral tribunal.

(d) The court may, while making an order under subsection (c), apply the same process to witnesses as it may apply in suits tried before it.

Court enforcement of the interim orders of the arbitral tribunal

31. (a) In relation to arbitration, courts may enforce interim orders passed by an arbitral tribunal inside or outside the State as their own orders and decisions.

(b) Except that, in relation to arbitration exercised outside the State, when an applicant who files for an interim order for enforcement is unable to submit strong evidence that it is the same type of order exercised within the State, the court shall not approve the enforcement.

(c) When approval is granted according to subsection (a), the court shall enforce such an order.

(d) There shall be no right of appeal of the court's decision to grant approval according to subsection (a), or to refuse to do so.

[*Note: The interim order referred to in this section includes the arbitral tribunal's decisions, orders and instructions.*]

CHAPTER 8: MAKING OF ARBITRAL AWARDS AND TERMINATION OF THE PROCEEDINGS

Rules applicable to the substance of the dispute

32. (a) If the place of arbitration is the Republic of the Union of Myanmar:

(1) In domestic arbitration, the arbitral tribunal shall decide on the dispute which is to be settled by arbitration in accordance with the substantive law in force of the Republic of the Union of Myanmar.

(2) In international commercial arbitration:

aa) The arbitral tribunal shall decide on the dispute in accordance with such rules of law as are chosen by the parties;

bb) Any designation of the law or legal system of a given State shall be construed, unless otherwise agreed by the parties, as directly referring to the substantive law of that State and not to its conflict of laws rules;

cc) Failing any designation as per this subsection's clause (aa) by the parties, the arbitral tribunal shall apply the rules of law which it considers applicable.

(b) The arbitral tribunal shall decide the dispute with justice, equity and good conscience if the parties have expressly authorized it to do so [*Note: These terms refer to the Myanmar Laws Act s.13*].

(c) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Decision making by the panel of arbitrators

33. (a) In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members.

(b) However, notwithstanding anything contained in subsection (a), questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

Settlement

34. (a) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(b) An award on agreed terms shall be made in accordance with the provisions of Section 35 and shall state that it is an arbitral award.

(c) Such award on agreed terms has the same status and effect as any other award on the merits of the case.

Form and content of an award

35. (a) The award shall be made in writing and shall be signed by the arbitrator or arbitrators.

(b) In arbitral proceedings with more than one arbitrator for the purpose of subsection (a), the signatures of a majority of all arbitrators of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(c) Unless the parties have agreed that no reasons are to be given or unless the award is an award on agreed terms, the award shall state the reasons upon which it is based.

(d) The award shall state its date and the place of arbitration as determined in accordance with Section 23. The award shall be deemed to have been made at that place.

(e) After the award is made, a signed copy shall be delivered to each party.

(f) Unless otherwise agreed by the parties:

1) The costs of an arbitration shall be fixed by the arbitral tribunal;

2) The arbitral tribunal shall specify the party entitled to costs, the party who shall pay the costs, the amount of costs and method of determining that amount, and the manner in which the costs shall be paid.

[*Note: For the purpose of subsection (f) (1), "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.]

Termination of proceedings

36. (a) The arbitral proceedings shall be terminated by the final award or by an order of the arbitral tribunal in accordance with subsection (b) of this section.

(b) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(1) The claimant withdraws its claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on its part in obtaining a final settlement of the dispute;

(2) The parties agree on the termination of the proceedings;

(3) The arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(c) Subject to the provisions of Section 37, the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings pursuant to Section 34, subsection (a), and this section.

Correction and interpretation of awards and additional awards

37. (a) Within 30 days from the date of award, unless another period of time has been agreed upon by the parties, a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of a similar nature.

(b) If the arbitral tribunal considers the request made as per subsection (a) to be justified, or, on its own initiative, it may correct any error of the type referred to in subsection (a) and such correction shall be delivered to the parties.

(c) If so agreed by the parties, a party may, with notice to the other party, request the arbitral tribunal to give an interpretation of a specific point or part of the award.

(d) If the arbitral tribunal considers the request made as per subsection (c) to be justified, it shall give the interpretation within 30 days of receipt of the request. The interpretation shall form part of the award.

(e) Unless otherwise agreed by the parties, a party may, with notice to the other party, request, within 30 days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

(f) If the arbitral tribunal considers the request made as per subsection (e) to be justified, it shall make the additional award within 60 days from the receipt of such request.

(g) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under subsections (b), (d) or (e).

(h) The provisions of Section 33 shall apply to a correction or interpretation of the award or to an additional award.

Effect of the arbitral award

38. 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.

CHAPTER 9: POWER OF THE COURTS RELATING TO DOMESTIC ARBITRATION

Determination of preliminary issues of law

39. (a) Unless otherwise agreed by the parties, the court may, on the application by one of the parties to the arbitral proceedings who has given notice to the other party, determine any issue of law which arises in the course of the proceedings that the court deems sufficient to substantially affect the rights of one or more of the parties.

(b) The court shall not accept to consider an application according to section (a) above, when it is not applied with the consent of the disputed parties or in the case that it is not applied with the permission of the arbitral tribunal and if the court finds that the determination of the legal issue would cause delays and increase costs.

(c) The application of subsection (a) shall identify the issue of law to be determined and, except where made with the agreement of all parties, shall state the grounds on which it should be decided by the court.

(d) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.

Enforcement of Domestic Arbitration

40. (a) The domestic award shall be enforced under the Code of Civil Procedure in the same manner as if it were a decree of the court.

(b) If the respondent in a suit for enforcement of a domestic arbitral award proves that the arbitral tribunal is not competent to make a domestic arbitral award, the court shall not enforce the domestic arbitral award.

(c) This section shall apply for the enforcement of any domestic arbitral award.

Particulars for setting aside a domestic arbitral award

41. (a) Upon an application to set aside a domestic arbitral award by one of the parties, the court may do so 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 its case; or

(4) The award deals with a dispute not contemplated by or not falling within the terms of matters to be submitted to arbitration, or contains decisions on matters beyond the scope of those submitted to arbitration.

Proviso: If the decisions on matters submitted to arbitration can be separated from those not so 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 was not in accordance with this law.

Proviso: That such agreement was not in conflict with a provision of this law from which the parties cannot derogate; or

(6) The subject matter of the dispute cannot be settled by arbitration under the existing law; or the award is in conflict with the public interest of the Republic of the Union of Myanmar.

(b) An application for setting aside an award may not be made by the party making the application later than three months from the date of the award or, if a request has been made under Section 37, from the date on which that request was disposed of by the arbitral tribunal.

(c) The court, when asked to set aside an award as per subsection (a), may, where appropriate and so requested by a party, adjourn the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

Appeal against domestic arbitration

42. (a) A party in dispute may, upon notice to the other party and to the arbitral tribunal, appeal to the court on an issue of law arising out of an award made in the proceedings.

(b) According to subsection (a), there is a right of appeal upon the award of the arbitral tribunal. However, if there is a written agreement between the parties not to appeal, there shall be no right of appeal to the court under this section.

(c) If there is an agreement in writing between the parties that it is not required to write down the reasons for the award, there shall be no appeal on such grounds according to this section.

(d) A decision made on an appeal according to this section shall be effected according to Section 44.

(e) When filing an appeal according to this section, a party shall identify the issue of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(f) Regardless of whether the court accepts or refuses the right of appeal under this section, there shall be no second appeal.

43. (a) The court, if satisfied and in agreement with the following facts, shall accept the appeal:

(1) The arbitral tribunal's decision on the issue in dispute substantially affects the rights of a party or parties ;

(2) The decision of the arbitral tribunal on the issue in dispute is obviously wrong.

(b) When deciding on an appeal according to this section, the court can issue any of the following orders:

(1) Approve the award;

(2) Amend the award;

(3) Return the decision to the arbitral tribunal to review and reconsider all or part of the award;

(4) Set aside all or part of the arbitral award.

(c) An appeal can be filed with the court of competent jurisdiction for the following court orders:

(1) An order refusing to refer to arbitration according to Section 10 subsection (f);

(2) An order granting or refusing to take any one of the interim measures according to Section 11;

(3) An order passed on an issue of law according to Section 39 subsection (a);

(4) An order setting aside or refusing the set aside of a domestic arbitral award according to Section 41.

(d) An appeal can be filed with the court of jurisdiction on the following orders issued by an arbitral tribunal:

(1) An order accepting an application according to Section 18 subsections (b) and (c);

(2) An order by the arbitral tribunal on whether or not it has jurisdiction, according to Section 18 (e);

(3) An order granting or refusing to take any interim measures according to Section 19.

(e) There shall be no second appeal of an order issued on an appeal filed according to this section.

Effect of the appellate court order upon domestic arbitration

44. When the appellate court issues an order relating to an award according to Section 43 subsection (b):

(a) If it decides to amend an award, such amended decision shall be effected as part of the award;

(b) If it issues an order remitting the award in whole or in part to the arbitral tribunal for reconsideration and revision, the arbitral tribunal shall revise such matters and issue a new decision;

(c) The necessary timing for the arbitral tribunal to review and issue a decision may be recommended.

CHAPTER 10: RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Award particulars to apply for recognition or enforcement of a foreign arbitral award

45. (a) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court:

(1) The original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

(2) The original agreement for arbitration or a duly certified copy thereof; and

(3) Such evidence as may be necessary to prove that the award is a foreign award.

(b) Where the award or arbitration agreement required to be submitted under subsection (a) is in a foreign language, the party seeking to enforce the award shall produce a translation in English certified as correct by the ambassador or consular officer of the country to which that party belongs, or certified as correct in such other manner as may be sufficient according to

the law in force in the Republic of the Union of Myanmar.

Recognition and enforcement of foreign arbitral awards

46. (a) Except if an application to enforce the award is refused under subsections (b) and (c), the award shall be enforced under the Code of Civil Procedure in the same manner as if it were a decree of the court.

(b) The court may decide not to enforce the foreign arbitral award if the party against whom it is invoked furnishes proof to the court that:

(1) The parties to the relevant arbitration agreement were under some incapacity to comply with the law; or

(2) The said agreement is not valid under the law [to which the parties have agreed] or, failing any indication thereon, under the law of the country where the award was made; or

(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 its case; or

(4) The award deals with a dispute not contemplated by or not falling within the terms of the matters to be submitted to arbitration, or it contains decisions on matters beyond the scope of those to be submitted 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.

(c) Enforcement of the foreign arbitral award may be refused if the court finds that:

(1) The subject matter of the dispute is not able to be settled by arbitration under the law of the Republic of the Union of Myanmar; or

(2) Recognition would be contrary to the public interest of the Republic of the Union of Myanmar.

(d) If an application for setting aside or suspension of an award has been made to a competent authority referred to in subsection (b)(6) of this section, 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.

Appeals

47. For any party to a dispute:

(a) The following orders passed by a competent court may be appealed:

(1) An order granting or refusing to take any measure under Section 10;

(2) Any order under Section 11;

(3) An order to cancel or refuse to cancel an award under Section 46, subsections (b) and (c);

(b) The following orders passed by an arbitral tribunal may be appealed to the competent court:

(1) An order determining whether or not the arbitral tribunal has jurisdiction under Section 18, subsection (e);

(2) An order granting or refusing to take the interim measures under Section 19.

48. Nothing in this chapter shall prejudice any rights that any person would have had of enforcing a foreign arbitral award in the Republic of the Union of Myanmar or of availing himself of such award prior to the enactment of this law.

No application of the Arbitration (Protocol and Convention) Act

49. Enforcement of a foreign arbitral award under this chapter shall not apply to the enforcement under the Arbitration (Protocol and Convention) Act, 1937.

CHAPTER 11: MISCELLANEOUS

50. (a) In order to enforce an award made in any signatory of the New York Convention, the Chief Justice of the Union 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 organization to certify or authenticate the copy of the arbitration agreement or arbitral award.

(b) The person, who is appointed per subsection (a), shall:

(1) Comply with the rules determined by the Chief Justice of the Union; and

(2) Not reveal, directly or indirectly, to others any facts of the arbitral award or arbitration agreement, including the personal information of the parties, without the written consent of the parties.

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

52. (a) The arbitral tribunal may fix the amount of a 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 counterclaim has been submitted to the arbitral tribunal, it may fix separate amounts of deposit for the claim and counterclaim.

(b) The deposit referred to in subsection (a) shall be payable in equal shares by the parties. Where one party fails to pay its share of the deposit, the other party may pay that share. Where the other party also does not pay the aforesaid share in respect of the claim or the counterclaim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counterclaim, 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.

53. (a) The arbitral tribunal shall have a lien on the arbitration for any unpaid costs.

(b) If an arbitral tribunal refuses to deliver an award because of any party's refusal to pay the costs to the arbitral tribunal, by application of other party, the court may inquire as necessary and order that payment shall be made to the arbitral tribunal by the responsible party and the

court may order the arbitral tribunal to deliver the arbitral award accordingly.

(c) An application under subsection (b) may be made by any party unless the fees demanded have been fixed by written agreement between it and the arbitral tribunal.

(d) 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.

54. (a) An arbitration agreement shall not be discharged by the death of any party thereto, either as respects the deceased or any other party, but shall in such event be enforceable by or against the legal representative of the deceased.

(b) The authority of an arbitrator shall not be revoked by the death of any party by whom he was appointed.

55. 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.

56. The provisions under the Limitation Act which refers to the Arbitration Act (1944), shall be deemed to refer to this law.

57. The Supreme Court of the Union may issue necessary rules, regulations, bylaws, notifications, orders, directives, procedures and manuals in accordance with this law.

58. (a) Unless otherwise agreed by the parties in the arbitration agreement or other documents, the provisions of this law shall not apply to an arbitration which commenced in accordance with an arbitration agreement before this law was enacted.

(b) Subject to the provisions of subsection (a), if an arbitration commenced before this law had been enacted, the pending arbitration shall proceed in accordance with the law selected by the parties to the arbitration agreement.

59. The Arbitration Act, 1944 is repealed by this law.

I hereby sign in accordance with the Constitution of the Republic of the Union of Myanmar.

(S/d) Thein Sein
President
Republic of the Union of Myanmar

II. ANALYSIS

A CRITICAL FIRST LOOK AT MYANMAR'S NEW ARBITRATION LAW

Myanmar has early this year enacted an entirely new Arbitration Law 2016 (Law 5/2016 – the Arbitration Law) to replace the Arbitration Act 1944, thus implementing the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("the NYC"). Although the Arbitration Law by and large follows the Uncitral Model Arbitration Law ("Uncitral Model Law"), which reflects worldwide consensus on key aspects of international arbitration practice and procedure, it would be surprising if there were no special Myanmar points of attention. So, in this note we line up the strengths and weak spots of the new Arbitration Law, and we examine just how far Myanmar courts can still interfere with foreign arbitration.

1. What changes with the New Arbitration Law?

Myanmar has now ratified the NYC without reservation. In a nutshell, for foreign arbitration, this means that:

- Parties can agree on arbitration for their commercial disputes and choose the seat of that arbitration to be overseas;
- If so, Myanmar courts must refer to such arbitration proceeding instead of hearing the case when any of the parties applies to the court;
- Myanmar courts must recognise and enforce a foreign arbitral award, unless one of the limited grounds for refusal in Article V of the New York Convention can be established (more on this below)…
- All other signatory countries of the NYC are under the same obligation to enforce, so you could take your award to any of nearly 160 states for enforcement.

The Arbitration Law implements these principles with clarity. The legal basis for settling disputes through foreign arbitration in Myanmar is finally there, and its, as far as we can tell right now, pretty much solid as in most NYC countries.

2. To which extent can Myanmar courts intervene in foreign arbitration?

The Arbitration Law is not only about foreign arbitration, but also about arbitrations with seat in Myanmar. Key provision section 2 b) Arbitration Law determines which provisions of the law apply to arbitration with a seat outside of Myanmar.

"The List: section 2 b) Arbitration Law's list of provisions of the Law which apply to foreign arbitrations:
s. 10 "Reference to arbitration and stay of a suit before a court"
s. 11 "Power of the court to intervene in an arbitration proceeding"
s. 30 "Court assisting in taking evidence"
s. 31 "Court enforcement of the interim orders of the arbitral tribunal"
chapter 10 "Recognition and enforcement of foreign arbitral awards

The same combination of domestic and foreign arbitration in one law is not uncommon internationally. But in such case one needs a clear determination which provisions apply to which type of arbitration. If not, this will result in significant uncertainty, as was the case in Malaysia and India (see the various Bhatia International cases in India).

Section 2 Arbitration Law does make it clear that The List applies to foreign awards. One of the fundamental rules which was in our view missed in that line up, is section 7 Arbitration Law which is the equivalent of art. 5 Uncitral Model Law:

There is no doubt that this provision applies to arbitrations with seat in Myanmar. And there is a very good basis in an ordinary reading of the text to argue that section 2 b) Arbitration Law should not be read in an exclusionary way, i.e. the provisions on the List are not the only ones which apply to foreign arbitration. After all, would not section 3 "Definitions" (including the definition of international arbitration) and the general principles of Chapter 3 apply anyway? But if that is true, we have the problem that all provisions of the Arbitration Law might potentially be applied to a foreign award, even those which we really want to reserve only for domestic arbitrations (such as a court challenge to an appointment of an arbitrator). That is not an attractive interpretation either.

So, either way there is uncertainty here which could have been avoided in the text. We really would have rather seen section 7 Arbitration Law mentioned in section 2 b) Arbitration Law. It would have made the case against interventionism (courts interfering with foreign arbitrations) stronger, and it would have brought the Arbitration Law better in line with Uncitral Model Law and the NYC.

3. Interim measures: by Myanmar courts or by the tribunal?

The Arbitration Law supports both (i) Myanmar courts enforcing interim measures issued by the tribunal, including in case of an arbitration with seat outside of Myanmar, and (ii) parties applying to Myanmar directly for such measures.

A party can apply to a Myanmar court for various measures in terms of taking evidence, safeguarding or even selling property, appointing a receiver and other interim measures (s. 11). However, the parties can generally contractually opt out of this power for the court (in s. 11 a) Arbitration Law, but apparently not "for urgent measures" referred to in section 11 b) Arbitration Law. The Myanmar courts seem to keep an original jurisdiction for "urgent measures relating to the preservation of evidence and property" upon the application by a party, even in connection with foreign awards. Nevertheless, the Arbitration Law has made sure that courts do not intervene in the foreign arbitration too much, by limiting its power to urgent cases, and by subjecting the court order to subsequent orders by the tribunal on the same issue (s. 11 c) through f) Arbitration Law).

Interim measures by a tribunal may but do not have to be recognized and enforced by a Myanmar court. The interim measure would have to be assimilated with a court order, and courts are limited by their own prescriptions in the Civil Procedure Code. The burden of proof is apparently on the applicant that the measure sought falls square within the authority of the court.

4. Can a foreign tribunal's decision on jurisdiction or temporary measures be challenged in a Myanmar court?

Typically, arbitration tribunals have the authority to decide themselves about their own jurisdiction. That is also the case under the Arbitration Law. The Uncitral Model Law provides in the possibility for a court to intervene immediately on that decision upon the request of a party. That would almost exclusively be the case in a court in the country where the arbitration takes place. However, section 47 b) "Appeals" in Chapter 10 "Recognition and enforcement of foreign arbitral awards" states that a "competent court" may hear appeals against an order by an arbitration tribunal determining whether it has jurisdiction. The same is provided for an order by the tribunal to grant or refuse temporary measures. So, who is this "competent court"?

As art. V 1. E of the NYC and section 46 b) 6) of the Arbitration Law provide, the competent authority to set aside or suspend a foreign award would be the one in the country where it was made. There is ample authority for this in international arbitration law as quoted in the White Industries Australia Limited v. The Republic of India case (Steel Corp. of the Philippines v. International Steel Services, Inc., U.S. District Court for the Western District of Pennsylvania, 6 Feb. 2008 (United States); Empresa Colombiana de Was Ferreas v. Drummond Ltd., Colombian State Council, 24 Oct. 2003 and 22 Apr. 2004 (Colombia); Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, High Court of the Hong Kong Special Administrative Region, 27 Mar. 2003 (Hong Kong).

It seems clear to us that "competent court" would have to be read as "competent court in of the country in which the award was made", which eliminates the possibility that a Myanmar court might provide a second forum for a party to challenge an interim award on jurisdiction. It is a pity that the text not simply say so, particularly given the definition in section 3 g) Arbitration Law of "court" which only refers to Myanmar courts. One can imagine, given the ambivalent wording, that there will be parties at some stage in the future whom might want to test this issue before a Myanmar court.

5. What happens when a claim is lodged before a Myanmar court even though the contract provides in foreign arbitration?

Obviously, it is key to the functioning of the NYC that in such a case, the Myanmar court would not allow the court case to proceed, and would just refer to that arbitration mechanism. The Arbitration Law provides in the same key principle in section 10, which applies to arbitrations with seat within and outside Myanmar. For this to happen, one of the parties must bring it up, though. The court cannot bring it up itself.

A Myanmar court wishing to continue the court case, would have to find that the arbitration agreement is null and void, or cannot be applied. Such a court decision would in any event be subject to appeal. The decision to stay the case is not subject to appeal. The Arbitration Law thus has a baked-in preference in favour of international arbitration.

6. Can two Myanmar-registered companies choose for arbitration overseas instead of arbitration with a seat in Myanmar?

According to the letter of the Arbitration Law, even two Myanmar national or resident parties can pretty much choose for international arbitration rather than an arbitration with a seat in Myanmar. By simply choosing an arbitral site outside of Myanmar, or by "expressly agreeing that the subject matter relates to more than one country", the arbitration becomes "international" by definition. As such, those powers of Myanmar courts which only apply to arbitration proceedings with a seat in Myanmar, are ruled out. For example, a party cannot apply to a Myanmar court in order to set aside an award, or to challenge an arbitrator.

Other laws may prevent Myanmar parties from agreeing to arbitration overseas, or any arbitration at all. At this time, the Myanmar Companies Act 1914 still provides that companies and persons may agree to arbitration under the (Myanmar) Arbitration Act, which until 2016 only provided in arbitration with seat in Myanmar. It was never clear if the reference was exclusive ("may" or "may only"), and an argument could be made that the freedom of choosing dispute settlement mechanisms in Foreign Investment Law 2012 has abrogated that provision as far as foreign investors are concerned. There can be little doubt now that companies and shareholders can use foreign or domestic arbitration.

7. Can two Myanmar-registered companies choose to have their contract governed by foreign law?

I would normally say "yes" to this question. There are very few Myanmar laws which prescribe the governing law of a contract between two parties, although there are of course contracts that are at least to some extent governed by Myanmar law, regardless what parties have agreed. The Arbitration Law brings a potentially high-impact new element to this discussion. In section 32 Arbitration Law it is provided that in case the seat of arbitration is in Myanmar, and it is a domestic arbitration, "the arbitral tribunal shall decide on the dispute which is to be settled by arbitration in accordance with the substantive law in force of the Republic of the Union of Myanmar".

It is important not to read this as if all disputes between Myanmar parties (which could include Myanmar-registered subsidiaries of foreign investors) have to be decided under Myanmar law. According to the Arbitration Law, one can perfectly have an international arbitration with a seat in Myanmar. A dispute between a foreign based party and a Myanmar based party, where parties have chosen for arbitration with seat in Myanmar, is an international arbitration with seat in Myanmar, for

example. Those parties may perfectly choose for their contract to be subject to English law. That is just a plain reading application of s. 3 (i) (definition of international arbitration) and section 32 Arbitration Law.

It becomes less comfortable when two Myanmar parties have a contract governed under English law, and (i) they chose the arbitral seat in Myanmar and (ii) none of the elements defining an international arbitration of section 3 (i) apply. Because now, section 32 says quite clearly that this is a domestic arbitration with seat in Myanmar, and it will have to be decided with Myanmar law as the substantive law. This issue is not dramatic. The same parties can simply opt for international arbitration with seat outside Myanmar to safeguard their application of foreign law to the contract. But if Myanmar wants to develop its own domestic arbitration industry in due course, the legislator might consider fixing this.

8. Can Myanmar courts refuse to recognize foreign awards? The formal grounds

Courts of any signatory country of the NYC can, if they really want to, invoke one or more of the grounds for refusal to block the enforcement of a foreign award. The rationale of the NYC is that Myanmar courts are obligated to enforce foreign awards, except in case of a limited list of grounds for refusal. That fundamental principle is also found in Myanmar's implementation of the NYC. The limited grounds are found in section 46 b) and c) of the Arbitration Law, and these are essentially just translated from the Uncitral Model Law.

Rephrased, the formal grounds for refusing a foreign award are the following:

1) One or more of the parties to the arbitration agreement was incapable to conclude such agreement. This could be the case when the person agreeing to arbitration on behalf of a company did so without proper authority (see for example, s. 152 Myanmar Companies Act). Internationally we also often see issues when a party is a state-owned enterprise, but in Myanmar there are no general rules preventing a state-owned enterprise from agreeing to arbitration. This question would presumably have to be decided by a Myanmar court with reference to the choice-of-law rules of Myanmar law.

2) The arbitration agreement is not valid. This is the most frequent ground for a challenge to arbitration. A party could argue there was no consent, for example pursuant to a misrepresentation or fraud. It is also common for parties to claim that the language of the arbitration agreement is not sufficiently clear and thus inoperative. It is important to note that under the Arbitration Law, in following of the Uncitral Model Law, the validity of the agreement must be tested under the law applicable to the agreement, or, subsidiarily, under the law of the arbitral seat. So, the law to apply would rarely be Myanmar law.

3) Lack of due process: the party was not given proper notice of the various steps in the arbitration proceedings or was not able to present its case. Failing to show up as such, by intention, obviously does not suffice as long as one was given ample notice (Overseas Cosmos Inc v. Vessel Corp. 148 F.3d 51 (2d Cir. 1998). Some parties try to claim that they had insufficient time to present their case, but such claims are usually not successful (Carters Ltd v Fransesco Ferraro, YCA Vol. 4, pp. 275; Obergericht Basle, 3 June 1971, YCA vol. 4 1979, pp. 309).

4) The award deals with a dispute not contemplated by or not falling within the terms of the matters to be submitted to arbitration, or it contains decisions on matters beyond the scope of those submitted to arbitration. That means the tribunal has decided claims not considered by the parties or outside the arbitration agreement. For example, the award also decided on extra-contractual liability when parties only referred a question on contractual liability to the tribunal, or the award used English law where the arbitration agreement referred to Myanmar law. Another example would be a case where the award was made outside of the time limit set by the parties in the arbitration agreement.

5) The composition or proceedings of the tribunal are not in accordance with the arbitration agreement or with the law of the arbitral site. If the agreement called for an arbitrator with certain qualifications, e.g. an architect, a Myanmar court could refuse to enforce the award if this was ignored by the appointing authority. It is not difficult for the losing party to claim that some procedural rule was infringed, but internationally courts do not easily agree that some imperfection is a sufficient reason not to enforce an award. In Tongyuan v. Uni-Clan, the High Court of Justice decided that even though the agreement called for arbitration in Beijing, the proceedings which took place in Shenzen were found not to be a violation given that the respondent had not shown any interest to show up anyway (YCA, vol. 26 2001, pp. 886).

6) The award is not yet in force or has been set aside. Myanmar courts have the authority under the Arbitration Law to adjourn its decision on enforcement if an application has been made to a court in the arbitral site to set aside the award.

9. Which disputes cannot be settled by arbitration in Myanmar?

In addition to the formal grounds, there are two separate so-called ex-officio grounds which Myanmar courts can use to refuse enforcing a foreign award. The first one is that the subject matter is not capable of being settled through arbitration.

The Arbitration Law in following of the Uncitral Model Law, provides that if a Myanmar court finds that the subject matter of the dispute is not capable of settlement by arbitration under Myanmar law, the award does not have to be enforced. Myanmar law reserves certain matters for dispute settlement by the judiciary or by administrative proceedings. Such reservations exist in a number of areas such as employment relations, competition, criminal cases and bankruptcy. When the law states or implies that arbitration cannot be used by the parties, the court is allowed not to enforce the award.

10. Myanmar's "public policy" exit

Signatories of the NYC do not have to enforce foreign awards if the court finds that doing so would be contrary to the "public policy" of the country. The Uncitral Model Law and the NYC provide in a potentially wide escape route for local enforcement through this exception. In the Arbitration Law, which follows the same idea very closely, we have translated the corresponding term as "public interest". Unlike in Malaysia (s. 37 par 2 Arbitration Act 2005), New Zealand (s. 34 First Schedule New Zealand Arbitration Act 1996) and Singapore (s. 24 Singapore International Arbitration Act 1994), the drafters of the Arbitration Law did not take the opportunity to provide some additional guidance as to what is included in "public policy/interest". That being said, it is well recognized that the concept is not defined in any exhaustive manner in those countries either.

The Myanmar term used ("Amyo Thar Akyo Si Pwar") is not much used in connection with laws or rules, and more with society's benefit and morality. This raises the question if "public interest" in Myanmar means something different from "Myanmar law". Interestingly, the distinction between rules of law developed by courts in the public interest and the meaning of public policy has been drawn before by the New Zealand Court of Appeal (Amaltal Corporation v. Maruha (NZ) Corp Ltd [2004] NZCA 17). In other jurisdictions, a violation of "public policy" has, among other notions, been equated with a violation of substantive law (Oil and Natural Gas Corp Ltd v, Saw Pipes Ltd 2003 (5) SCC 705).

It is noteworthy that as far as the recognition and enforcement of foreign judgments is concerned, Myanmar's Civil Code of Procedure has an exception for violation of "natural justice", not "public interest" or "public policy". The statutes we referred to above from Malaysia, New Zealand and Singapore also provide that a breach of natural justice is comprised within the concept of public policy. Internationally, the "public policy" issue has the potential of being used by national courts to escape having to enforce foreign awards. The better view is that "the exception is only applicable when enforcement would violate the forum state's most basic notions of morality and justice" (US Disctrict Court of Pennsylvania CBS and others v. Wak Orient Power & Light Ltd, Decision of 12 April 2001, No. 99-2996).

Some countries have a reputation of being more likely to obstruct foreign awards based on "public policy" than others. How will Myanmar courts interpret and apply these grounds? Unfortunately, there is no way of knowing for sure until we have a body of test cases decided before the Myanmar courts. The Supreme Court could lend a helping hand before it gets to that stage, though. Under section 57 Arbitration Law, the Supreme Court is permitted to issue guidance to the courts under its authority. It would be very much appreciated if the Supreme Court could use this power to restrict the judiciary's freedom of interpretation of "public interest" in advance to appropriate extreme and rare situations.

11. What does this mean for the Myanmar situation?

A number of the above grounds for refusal, such as the validity of the arbitration agreement and the legality of the arbitral proceedings, require a Myanmar court to make an assessment under foreign law when a party brings up the issue. That may be difficult for Myanmar courts to assess. For example, for an award about a sales agreement under New York law, the losing party might claim before a Myanmar court that the arbitration agreement was not even valid under New York law. The Myanmar court would then have to decide on such question. Normally the Tribunal, possibly with seat in the US, would have looked into such an argument earlier. Obviously the Tribunal with seat in the US or with US arbitrators would be much better placed to decide on such a US law question. It is hard to see what can be gained from letting a Myanmar court revisit this issue. But, this is the NYC system. Whether it makes sense or not, Myanmar's implementation is in line with the Uncitral Model Law.

Similarly, the losing party to a Singapore award might claim that some procedural error was made under Singapore law. Again, the Myanmar court would have to come to a finding on this.

More pressingly, what does "public interest" mean? This is a new term, and I can imagine some parties holding their breath the first time a district court or a high court will define the notion. Is this going to be given a wide application or a restrictive one? Luckily, given the jurisdiction thresholds I presume we will mostly have to deal with High Courts when it comes to international arbitration (District Courts decide cases from 10,000,000 MMK up to 500,000,000 MMK, High Courts get involved from 500,000,000 MMK). Since the term is not defined, one can almost guarantee an appeal to the Supreme Court the first time a High Court gives meaning to the term.

12. Is there anything you can do if a Myanmar court refuses to enforce your foreign award?

The decision by a Myanmar court not to enforce a foreign award can be appealed to its appellate court. Assuming the first court was the High Court, the aggrieved party can lodge an appeal with the Supreme Court, in the hope of a different outcome.

Even if the Myanmar courts negate a foreign award improperly there are recourses for the injured party, as became clear in an interesting ICSID case involving nearby Bangladesh (Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07). In this case Italian company Saipem commenced arbitration proceedings against government-owned Petrobangla in connection with a construction contract in the oil and gas sphere. This contract had an arbitration clause, with seat in Bangladesh. During the arbitration, Petrobangla requested several procedural measures about witness statements, which were denied by the arbitration tribunal. Petrobangla then applied to the local courts against those orders, and obtained a decree from the local court that the Tribunal's authority to conduct the arbitration is revoked. Nevertheless, the Tribunal continued proceedings, and finally made an award in favour of Saipem. The Supreme Court of Bangladesh later decreed that the award was null and void, and cannot be enforced.

Saipem then commenced an investment treaty arbitration case before ICSID on the basis of the Bangladeshi-Italian bilateral investment treaty. Saipem's main argument was that through the illegal actions of its courts, Bangladesh has expropriated Saipem's property (a contract claim) in Bangladesh. The ICSID Tribunal agreed with Saipem and ordered Bangladesh to pay the compensation of the arbitration award plus interests.

A somewhat similar case developed in connection with India. In the Uncitral arbitration White Industries Australia Limited v. The Republic of India of 30 November 2011, White Industries had prevailed in an international arbitration over Coal India, a state-owned enterprise. However, the Calcutta High Court set aside the award. An appeal by White Industries before the Supreme Court has been pending since 2004. The international tribunal found that India had violated the India-Australia Bilateral Investment Treaty's Most Favoured Nation provision.

In the end, it remains to be seen how the Myanmar courts will interpret this ground of refusal.