The legal regime of foreign and domestic arbitration in Myanmar has been reset with an entirely new Arbitration Law. Now fully implementing the New York Convention in line with the Uncitral Model Law, which ways remain for Myanmar courts to intervene in or support foreign arbitrations?

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.

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

Highlights of this note

- What changes with the New Arbitration Law?
- To which extent can Myanmar courts intervene in foreign arbitration?
- Interim measures: by Myanmar courts or by the tribunal?
- Can a foreign tribunal's decision on jurisdiction or temporary measures be challenged in a Myanmar court?
- What happens when a claim is lodged before a Myanmar court even though the contract provides in foreign arbitration?
- Can two Myanmar-registered companies choose for arbitration overseas instead of arbitration with a seat in Myanmar?
- Can two Myanmar-registered companies choose to have their contract governed by foreign law?
- Which disputes cannot be settled by arbitration in Myanmar?
- Myanmar's "public policy" exit
- What does this mean for the Myanmar situation?
- Is there anything you can do if a Myanmar court refuses to enforce your foreign award?

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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.

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 s. 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).

S. 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 s. 7 Arbitration Law which is the equivalent of art. 5 Uncitral Model Law:

"NOTWITHSTANDING ANYTHING CONTAINED IN ANY OTHER LAW FOR TIME BEING IN FORCE, IN MATTERS GOVERNED BY THIS LAW, NO COURT SHALL INTERVENE EXCEPT WHERE SO PROVIDED IN THIS 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 s. 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 s. 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 s. 7 Arbitration Law mentioned in s. 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 and the NYC.

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 Arbitration Law). 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 s. 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

The Supreme Court of the Union
Nay Pyi Taw

issue (in sections 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.

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, s. 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 s. 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 s. 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.

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

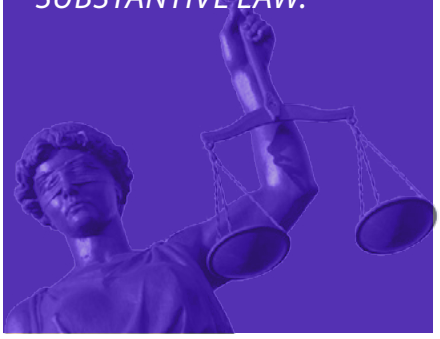
Obviously, it is key to the functioning of the NYC that in such a case, the Myanmar court would not allow the court case to proceed, and would just refer to that arbitration mechanism. The Arbitration Law provides in the same key principle in s. 10, which applies to arbitrations with seat within and 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.

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

DOMESTIC ARBITRATION WITH SEAT IN MYANMAR WILL HAVE TO BE DECIDED WITH MYANMAR LAW AS THE SUBSTANTIVE LAW.



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.

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 s. 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 s. 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

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INTERIM MEASURES BY A TRIBUNAL MAY BUT DO NOT HAVE TO BE RECOGNIZED AND ENFORCED BY A MYANMAR COURT.

an international arbitration of s. 3 (i) apply. Because now, s. 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.

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 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

IT IS IMPORTANT TO NOTE THAT UNDER THE ARBITRATION LAW, IN FOLLOWING OF THE UNCITRAL MODEL, THE VALIDITY OF THE AGREEMENT MUST BE TESTED UNDER THE LAW APPLICABLE TO THE AGREEMENT, OR, SUBSIDIARLY, UNDER THE LAW OF THE ARBITRAL SEAT.

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, subsidiarly, 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.

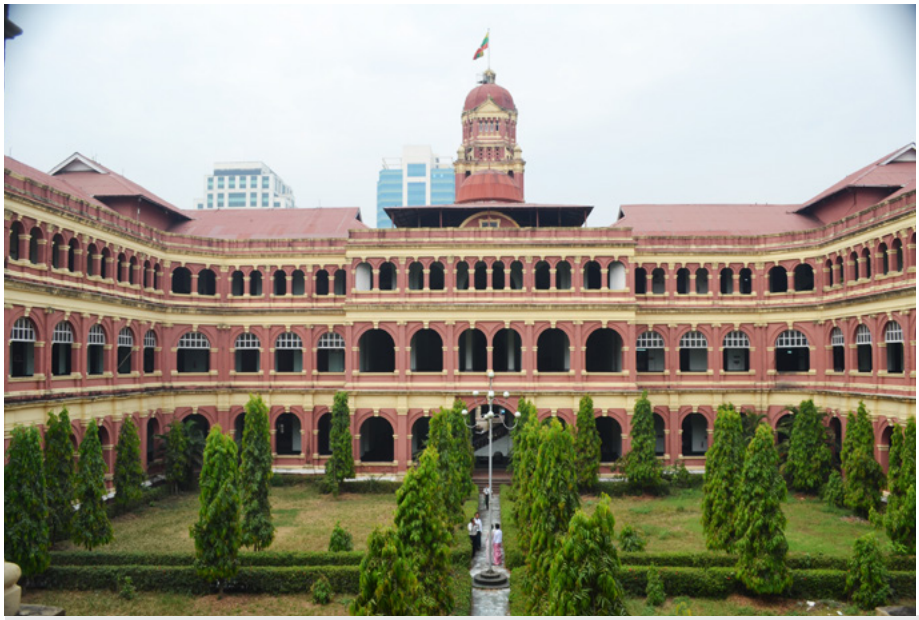
5) The composition or proceedings of the tribunal are not in accordance with the arbitration agreement or with the law of the arbitral site. If the agreement called for an arbitrator with certain qualifications, e.g. an architect, a Myanmar court could refuse to enforce the award if this was ignored 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.

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



Regional High Court of Yangon

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.

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)*.

UNDER S. 57 ARBITRATION LAW, THE SUPREME COURT IS PERMITTED TO ISSUE GUIDANCE TO THE COURTS UNDER ITS AUTHORITY.

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 s. 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.

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.

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.

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.

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.

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He has assisted a large number of projects from start to finish, including manufacturers in the Thilawa SEZ, power plants, mobile network operators, global beer brands, oil and gas supermajors, and infrastructure developers.

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