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Myanmar

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A. Legislation and rules

A.1 Legislation

Arbitration in Myanmar is governed by the Arbitration Law 2016 (Union Law No. 5/2016) ("Arbitration Law"), which came into force on 5 January 2016. The Arbitration Law repealed the previous Arbitration Act 1944, which was based on the English Arbitration Act 1934 and was closely aligned with the Indian Arbitration Act 1940. The Arbitration Law is based on the UNCITRAL Model Law ("Model Law").

Myanmar acceded to the New York Convention in July 2013. The Arbitration Law gives effect to the New York Convention and provides for the enforcement of arbitral awards under the New York Convention.

The old enforcement regime was governed by the Arbitration (Protocol and Convention) Act 1937, which applied to awards that were enforceable under the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 ("Geneva Convention 1927"). However, Article VII of the New York Convention provides that the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention 1927 shall cease to have effect when a state becomes party to the New York Convention. Section 49 of the Arbitration Law expressly excludes the application of the Arbitration (Protocol and Convention) Act 1937.

The Arbitration Law provides a modern international arbitration framework for arbitrations in and relating to Myanmar. Awards made

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in Myanmar will be enforceable in other New York Convention countries, and vice versa.

The Arbitration Law expressly provides that its objectives are to resolve effectively domestic and international business and commercial disputes, recognize and enforce international arbitral awards in resolving disputes in arbitration, and encourage dispute resolution by arbitration (Section 4, Arbitration Law).

Arbitrations seated in Myanmar now follow the familiar UNCITRAL Model Law regime, subject to a few modifications. Some noteworthy variations to the Model Law, such as the distinction between domestic and international arbitrations, are mentioned below.

Subsidiary legislation, such as procedural rules, regulations and directives, may be issued by the Union Supreme Court in accordance with this new law to implement the Arbitration Law.

A.1.1 International and domestic arbitration

Unlike the Model Law, the Arbitration Law provides for both international commercial arbitration and domestic arbitration.

An arbitration is defined as being international if:

(a) The place of business of at least one party is outside Myanmar.

(b) The place of arbitration is outside Myanmar and that place is different to the parties' place of business.

(c) The place with the closest connection to the commercial relationship or the dispute is outside Myanmar and that place is different to the parties' place of business.

(d) The parties expressly agree that the subject matter of the arbitration agreement is related to more than one country (Section 3, Arbitration Law).

The Arbitration Law provides that a domestic arbitration is an arbitration that is not an international arbitration (Section 3). In

domestic arbitrations, the parties may request the Myanmar courts to determine any question of law arising out of the arbitral proceedings (Section 39). This is comparable to provisions found in the English Arbitration Act 1996 and in the Singapore Arbitration Act 2002 in relation to domestic arbitrations, and is not available to international arbitrations.

Domestic arbitrations are to be decided in accordance with Myanmar law. International arbitrations are to be decided in accordance with the law to which the parties have agreed. If the parties have not agreed on a law, the tribunal shall decide on the appropriate law to apply. The tribunal may also decide the dispute *ex aequo et bono* if so empowered by the parties (Section 32, Arbitration Law).

A.1.2 Role of the Myanmar courts in arbitration

As with the Model Law, the Arbitration Law seeks to balance the role of the Myanmar courts in the arbitration process (Section 7). It restricts intervention by the courts by expressly providing that the courts may only intervene in arbitration proceedings in relation to the matters set out in the Arbitration Law. This provision is consistent with the doctrine of minimal curial intervention expressed in Article 5 of the Model Law.

At the same time, the Arbitration Law sets out the circumstances in which the Myanmar courts may support and supervise the arbitral process by, for example, granting orders in relation to interim measures, the taking of evidence and staying court proceedings in favor of arbitration.

A.1.3 Power to stay court proceedings and interim measures

The Arbitration Law empowers the Myanmar courts to stay court proceedings pending the outcome of an arbitration unless the arbitration agreement is null and void, inoperative or incapable of being performed (Section 10, Arbitration Law, which is similar to Article 8 of the Model Law). However, it also provides that a decision of the court to refer to arbitration cannot be appealed, but a decision

by the court rejecting the application for reference to arbitration is appealable.

The Arbitration Law includes provisions that empower both the tribunal and the court to order interim measures in certain circumstances.

Section 19 empowers the tribunal to order interim measures (similar to Article 17 of the Model Law). However, Section 31 of the Arbitration Law provides for the enforcement of interim measures issued by the arbitral tribunal by the courts in Myanmar. The Myanmar courts will enforce such an interim measure as an order of the court, irrespective of whether the arbitral tribunal is seated in or outside Myanmar, provided that it is the type of interim measure that may be issued by Myanmar courts.

However, Section 11 also empowers the court to grant certain interim measures (similar to Article 9 of the Model Law). Although the stipulated judicial interim measures are not exactly the same as those that the tribunal is expressly empowered to make, there is overlap. Section 11(d), however, provides that the court will only order interim measures if the arbitral tribunal or other person authorized by the parties cannot effectively order such measures. Accordingly, there is potential for concurrent jurisdiction of the court and the tribunal over interim measures.

A.1.4 The award

Section 35 is similar to Article 31 of the Model Law relating to the form and contents of an award. Section 35(f) has been added and provides for the costs of the arbitration.

Section 38 provides that the arbitral award is final and binding on the parties, similar to Article 35 of the Model Law.

A.1.5 Recognition and enforcement of an arbitral award

Section 40 provides for the enforcement of a domestic arbitral award, which is to be in accordance with the Code of Civil Procedure. The grounds for setting aside a domestic arbitral award are set out in Section 41. They are comparable to those under the Model Law, and to the New York Convention for refusal of enforcement of a foreign award.

In addition, there is a right of appeal against a domestic arbitral award on a question of law. The threshold for leave to appeal is similar to that found in England (under the Arbitration Act 1996, which applies to domestic and international arbitrations) or Singapore (under the Arbitration Act 2002, which applies to domestic arbitrations only).

The recognition and enforcement of a foreign award is covered in Sections 45 and 46 of the Arbitration Law. A foreign award is to be recognized and enforced unless certain stipulated grounds listed under Section 46(b) and (c) are established. Those grounds are similar to those found in the New York Convention.

No separate or distinct provision is made for the enforcement or setting aside of an international arbitration award that is made in Myanmar, namely in an arbitration seated in Myanmar. Such an award would not be a foreign award enforceable under the New York Convention as provided in Sections 45 and 46 of the Arbitration Law.

A.1.6 Supplementary provisions

Chapter XI (Sections 50 to 58) sets out supplementary provisions. Section 50(a) refers to the confirmation of enforcement of the award under the New York Convention: "*the Union Chief Justice may appoint an officer of the Union Attorney General office or a person or any responsible personnel of an organization by Notification ...*" Section 56 provides for the application of the Limitation Act. Section 58 provides that, unless the parties have agreed otherwise, the Arbitration Law will apply to arbitrations commenced after its enactment, ie, the Arbitration Law will apply to arbitrations

commenced on or after 5 January 2016 and the 1944 Act will continue to apply to arbitrations that commenced prior to 5 January 2016.

A.2 Institutions, rules and infrastructure

There is no arbitration institution based in Myanmar. The Union of Myanmar Federation of Chambers of Commerce and Industry set up an arbitration committee to look into the formation of a Myanmar Arbitration Centre. This has not yet been set up as of the time of writing.

In addition, young local lawyers have formed an arbitration club, the International Arbitration Club Myanmar, to organize and sponsor arbitration-related training and conferences.

Parties entering into arbitration agreements with respect to projects or transactions relating to Myanmar will often agree to have the arbitration seated in a neutral venue in the Asia Pacific region, such as Singapore or Hong Kong. The parties may then agree to have the arbitration governed by the Arbitration Rules of, for example, the SIAC, HKIAC or the ICC.

B. Cases

It remains to be seen how the Myanmar courts will apply the new Arbitration Law in practice. There are no reported cases under the new Arbitration Law. There are some very old reported cases during the past decades that relate to domestic arbitration under the old 1944 Act, many of which were on non-commercial disputes.

C. Funding in international arbitration

While there has been a growing interest in arbitration in Myanmar among the legal and business community, particularly with the adoption of the Arbitration Law, there has not yet been a public consultation on third-party funding in arbitration proceedings. Nor are there clear laws on the circumstances in which third-party funding is permissible.