Myanmar Update: The Road to the New York Convention

A Review of the Arbitration Regime
April 2013

Introduction

This note analyses the current Myanmar regime for arbitration and enforcement of foreign awards and considers the likely future developments necessitated by accession to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "**New York Convention**").

Legislative Support for the New York Convention

On 6 March 2013, official state media reported that the Pyingdaungsu Hluttaw, or the Union Assembly of Myanmar, approved a resolution to sign the New York Convention.

The Government of Myanmar has been contemplating this for some time. As noted in our client alert dated 5 April 2012, Minister of Energy, U Than Htlay, mentioned during the Myanmar Oil, Gas and Power Summit on 28 to 29 March 2012 that the government was actively considering acceding to the New York Convention. Please also see the link to our Myanmar Legal Developments alert dated March 2013.

The timing for accession has yet to be determined, however. The next step is for the Office of the President to approve the resolution.

Even after accession to the New York Convention, the Union Assembly will need to amend Myanmar's domestic arbitration laws and regulations to ensure the judicial enforcement of foreign arbitral awards issued in New York Convention states.

The announcement comes at a time when Myanmar is conveying a mixed picture about its social stability and the rule of law to the international community. On the one hand, the eruption of communal violence between Buddhists and Muslims has spread beyond Rakhine State to the city of Meiktila and the suburbs of Yangon. On the other hand, the government has kept its historic promise to remove controls on print media. On 1 April 2013, the authorities relaxed official censorship procedures for the first time in over fifty years. Accordingly the willingness to accept modern international dispute resolution concepts is a further positive sign in the country's efforts at reconstruction.

Arbitration in Myanmar

Arbitration within Myanmar is subject to the Arbitration Act 1944 (the "**Arbitration Act**"), which sets out provisions dealing with *inter alia* the appointment of arbitrators, enforcement and appeal of awards and the role of the Myanmar courts. All arbitrations that take place in Myanmar are 'domestic arbitrations' – irrespective of whether the arbitration is between Myanmar companies only or involves foreign parties.

The Arbitration Act is based on the English Arbitration Act 1934 and has not benefitted from the many subsequent revisions to English legislation. The Myanmar Arbitration Act is closely aligned to the old Indian Arbitration Act 1940, which has been criticised for encouraging a strongly interventionist approach by Indian courts in the use of their supervisory powers.

Under Myanmar law, it is not possible for parties to oust the jurisdiction of the Myanmar courts entirely and agree to arbitration as an exclusive remedy. The Myanmar courts have the discretionary power to stay legal proceedings where the dispute is covered by an arbitration agreement, but they retain a supervisory role over the conduct of the arbitration and enforcement of the award.

For certain contracts, there are restrictions on the parties' ability to choose the governing law and forum for dispute resolution. For example, the Myanmar Export/Import Rules and Regulations require that sales and trading contracts involving foreign companies must be governed by Myanmar law and prohibit disputes arising in relation to such contracts from being referred to arbitration outside Myanmar.

In contracts for its state entities, the Government of Myanmar typically insists on Myanmar substantive law and arbitration as a matter of course. Nonetheless, in some large deals (usually concerning energy, minerals or finance) with foreign investors, the Government of Myanmar has conceded to foreign governing law and international arbitration outside Myanmar (under, for example, ICC or UNCITRAL rules). Foreign investors in a strong bargaining position as against the Government of Myanmar may wish to consider pursuing such an option. While the enforceability of foreign awards by Myanmar courts is open to question, international arbitration outside Myanmar may at least permit a reasoned and unbiased decision on the merits of the case.

Enforcement of Foreign Awards under the Geneva Convention

Myanmar is not a signatory to the New York Convention, but it is party to its predecessors, the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 (the "**Geneva Convention**") and the Geneva Protocol on Arbitration Clauses 1923. These are enacted in Myanmar law through the Arbitration (Protocol and Convention) Act 1937, which provides for the recognition and enforcement of certain foreign arbitration agreements and awards in Myanmar.

The Geneva Convention continues to apply to signatory countries and is not superseded by the New York Convention unless both signatory countries have signed up to the New York Convention. In theory, therefore, an arbitral award made in a Geneva Convention state is enforceable before Myanmar courts.

The Geneva Convention only provides limited comfort to foreign parties involved in a dispute with a Myanmar counterparty. First, the Geneva Convention refrains from limiting State power and permits the judicial supervision of arbitration proceedings, thus reflecting early twentieth century uneasiness with non-judicial dispute resolution forums. Second, there are only some thirty odd state parties to the Geneva Convention. Further, Myanmar only recognises awards made in Geneva Convention countries having 'reciprocal arrangements' with Myanmar. The number of such 'reciprocating territories' is smaller yet and includes the UK, France and the Netherlands, but not Japan or Hong Kong (even though they are signatories to the Geneva Convention). The United States, Australia and Singapore are not parties to the Geneva Convention.

Even in cases where the Geneva Convention is applicable, the process of enforcement is convoluted and problematic. In particular, the Geneva Convention requires that an award has become 'final' in the originating country. This has been interpreted to mean the enforcing party must first obtain recognition of the award from the courts in the country of origin before making a further application for recognition and enforcement before the courts in the jurisdiction in which the award is to be enforced. This problem (known as 'double *exequatur*') was addressed by the New York Convention, which requires instead that the award has become 'binding'.

Given the lack of reported cases on enforcement of foreign arbitral awards, it is difficult to predict the likely response of the Myanmar courts to an enforcement action brought pursuant to the Geneva Convention.

Investor Protection

Myanmar is an ASEAN member state and has acceded to the ASEAN Comprehensive Investment Agreement 2009 (the "**ACIA**"), which provides investor protections as a well as a dispute resolution mechanism, including referral to foreign arbitration, for commercial activities in five economic sectors. However the ACIA has been untested to date. Further Myanmar is not a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which makes available binding arbitration for investment disputes involving individual entities and foreign states administered by the International Centre for Settlement of Investment Disputes.

In an effort to attract foreign investment to Myanmar, the Union Assembly enacted the new Foreign Investment Law ("**FIL**"), replacing the earlier 1988 Law. The FIL is of broader scope than ACIA and offers protection to a wider body of foreign investors.

In addition to guaranteeing that foreign investments will not be nationalised for the duration of the investment permit and easing the restrictions on leasing of land by foreigners, the FIL provides that disputes shall be settled in accordance with the mechanism specified in the agreement. While this suggests a willingness of the Government of Myanmar to accept the resolution of disputes by international arbitration if the contract parties so agree, the FIL does not conclusively remove domestic law obstacles for the recognition and enforcement of foreign arbitral awards.

A further encouraging development is the news that Japan and Myanmar began official negotiations for a bilateral investment treaty ("**BIT**") in December 2012. If concluded, the BIT should allow Japanese investors to settle any disputes with the Myanmar state by way of international arbitration.

Looking Forward

Myanmar's accession to the New York Convention will offer some comfort to foreign parties looking to do business with Myanmar counterparties. However, it is important to recognise that Myanmar still has a long way to go.

There is as yet no indication of the likely time frame within which Myanmar will sign the New York Convention. It also remains to be seen whether Myanmar will make any reservations on its accession to the New York Convention which would compromise the New York Convention's remit. A number of countries, such as India, have made a reservation on reciprocity, for example, and will only enforce awards made in those jurisdictions designated as reciprocating territories.

More importantly, Myanmar's outdated legislation will require an overhaul to incorporate the provisions of the New York Convention in domestic law and provide a framework for international arbitration and the enforcement of recognition of foreign awards.

Even once new enabling legislation has been passed, it is important to remember that responsibility for enforcement will rest with the local judiciary, whose approach to such actions is difficult to predict. Much will depend on the Myanmar judiciary's attitude and the extent of their alignment with international practice. As we have seen in other jurisdictions, the interpretation by local courts of, for example, the public policy exception has not always been consistent with the prevailing pro-arbitration approach adopted in other New York Convention states.

It is also uncertain whether Myanmar will continue to rely upon an absolute interpretation of sovereign immunity. If so, this raises concerns that the Government of Myanmar can raise this defence in the context of a commercial agreement with a private party. In addition, it is not clear whether State-owned enterprises may avail themselves of this defence as well.

In the meantime, international companies should recognise that the Myanmar legal system still regards the judiciary as the primary forum for the resolution of disputes and has not incorporated the legal developments in arbitration that have taken place since the civil unrest in the early 1960s. However, when a foreign contract party does enjoy leverage because the underlying deal is eagerly sought by the Government of Myanmar, it may wish to consider arbitration in a foreign jurisdiction under a foreign substantive law. While this approach is not free from uncertainty and enforcement obstacles are likely to be protracted, it at least provides a chance to obtain a well-considered decision from international arbitrators who will not be subject to political bias.

Lastly, foreign parties may wish to consider drafting arbitration clauses that will permit the parties to submit disputes to an arbitral forum in a New York Convention country upon Myanmar's accession to the New York Convention. This may be useful for a contract with a long term. While it is unknown if Myanmar courts will enforce such "creatively drafted" provisions, they will nonetheless give the foreign party a basis to seek more sophisticated forums for the resolution of its disputes.

Patric McGonigal
Partner, Tokyo
patric.mcgonigal@hoganlovells.com
+81 3 5157 8130

Rosemary Villar
Associate, Tokyo
rosemary.villar@hoganlovells.com
+81 3 5157 8266

Michael Aldrich
Partner, Ulaanbaatar
michael.aldrich@hoganlovells.com
+976 7012 1020

Further Information

If you would like further information on any aspect of this note please contact a person mentioned below.

Michael Aldrich
Partner, Ulaanbaatar
michael.aldrich@hoganlovells.com
+976 7012 1020

Patric McGonigal
Partner, Tokyo
patric.mcgonigal@hoganlovells.com
+81 3 5157 8130

Crispin Rapinet
Regional Managing Partner, Asia and Middle East
crispin.rapinet@hoganlovells.com
+44 20 7296 5167

Anthony Raven
Partner, Tokyo
anthony.raven@hoganlovells.com
+81 3 5157 8302

Brad Roach
Partner, Singapore
brad.roach@hoganlovells.com
+65 6302 2556

Rosemary Villar
Associate, Tokyo
rosemary.villar@hoganlovells.com
+81 3 5157 8266