

Arbitration of Commercial Disputes: Myanmar's Evolution

Written by: Michael Ramirez

Myanmar is in the throes of substantial political and economic reform. Investors are eager to engage in the economic opportunity Myanmar has on offer, but are understandably concerned about the lack of certainty in the legal process and particularly when it comes to the resolution of commercial disputes. One reason for such caution is the fact that during its extended period of isolation, there has been a substantial and near total absence of large scale commercial litigation in the Myanmar courts. There are also concerns that domestic court procedures are time consuming, unpredictable and may not ultimately lead to recovery.

ALTERNATIVE DISPUTE RESOLUTION - ARBITRATION

Contracting for arbitration offers a means by which investors may limit the uncertainty of the dispute resolution process. Historically, the use of arbitration in Myanmar contracts has been limited. This is due, in part, to the fact that enforcement of foreign arbitral awards has not been generally recognized by the Myanmar courts. Further, Myanmar's current arbitration law, the Arbitration Act of 1944, while laying down clear guidelines for reference of disputes, conduct and appeals of arbitral award, also allows the courts the discretion to oversee the arbitration itself.

These rules, while offering a means for arbitration of disputes, can encumber the ability of parties to an investment contract

to adequately tailor private arbitration of commercial disputes to an international standard. A fundamental relaxation of the arbitration rules and of the domestic enforcement process is a requisite for open and committed foreign investment.

MYANMAR ACCEDES TO THE NEW YORK CONVENTION

Recognizing the necessity for reform, on July 15, 2013, Myanmar formally acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). The New York Convention will require Myanmar's courts to recognize and enforce foreign arbitral awards. It also requires the courts to recognize the agreements of parties to privately contract for the resolution of commercial disputes through agreed arbitration mechanisms. Such recognition is a requirement, subject to some limited exceptions permissible on mostly due process or public policy grounds.

Myanmar's accession to the New York Convention is an essential development to encourage and provide stability for interested foreign investors, as it provides parties with the freedom to contract for arbitration conducted in a jurisdiction and forum of their choice, under agreed upon organizational rules and applying local or foreign law. This is critical, as it allows investors to reduce risk components and to control some of the variables in the dispute resolution process. It should also be noted that the recently enacted Foreign Investment Law specifically

recognizes the rights of foreign investors to contract for dispute resolution.

While Myanmar has acceded to the New York Convention, it has yet to introduce domestic legislation that will give effect to its obligations as signatory to the New York Convention. Until such time that the domestic legislation is implemented, Myanmar is not subjected to its obligations under the New York Convention. This essentially means that the Myanmar courts do not yet recognize and will not enforce foreign arbitral awards, regardless of the contractual intent of parties to a dispute.

The good news is that a draft Arbitration Act is currently in the works and is expected to be passed within the next several months. This will provide the much needed domestic legislation required to give effect to Myanmar's obligations as signatory to the New York Convention.

In the interim period before full recognition of Myanmar's obligations under the New York Convention, investors should be mindful of the need to account, not only for the current dispute resolution framework provided under the Arbitration Act of 1944 and those provided in applicable multilateral and bilateral investment treaties, but for arbitration mechanisms permissible under the New York Convention.

Given the complexities in structuring agreements that straddle the fence between the current arbitration regime and that supporting Myanmar's commitments under the New York Convention, it is advisable that parties seeking to invest and contract in Myanmar seek advice of counsel on how best to minimize risk in contracting for desired dispute resolution mechanisms. ■

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