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Myanmar Embraces International Commercial Arbitration

Myanmar is entering a new chapter in its commercial arbitration history—on January 5, 2016, the country enacted a new Arbitration Law (Pyihtaungsu Hluttaw Law No. 5, 2016), reforming its domestic legislation to meet its obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). The Arbitration Law of 2016 supersedes Myanmar's Arbitration Act of 1944, which failed to garner support from the international community and struggled to establish reciprocal arbitration arrangements with other countries. In this article, we discuss whether Myanmar's new Arbitration Law addresses these insufficiencies.

The Arbitration Law of 2016

The new Arbitration Law intends to fulfill Myanmar's obligations under the New York Convention. In large part, it is based on the UNCITRAL Model Law on International Commercial Arbitration of 1985. The Arbitration Law of 2016 provides foreign investors with the option to resolve commercial disputes before a domestic or foreign independent tribunal of the parties' contracted choice. It also requires Myanmar courts to enforce and recognize foreign arbitral awards which are generally supported by due process and not in opposition to the national interests or policies of Myanmar.

If a timely application is made, the Myanmar courts now have an obligation to refer matters to arbitration where parties to an action before the court are parties to an arbitration agreement, unless the agreement is legally unenforceable. In addition, the courts have the power to act in support of arbitration by issuing interim orders and taking and preserving evidence. This authority is restricted when the authorized parties to a dispute or the arbitral tribunal/institution have no authority or are not otherwise able to handle these interim duties effectively. The parties to a dispute, with the approval of the arbitral tribunal, may apply for court assistance in matters such as the taking of evidence. The domestic courts have the power to enforce interim orders issued by the arbitral tribunal.

While parties to international arbitration are free to agree on the choice of law and venue, as well as the procedural rules of the underlying arbitration, parties to domestic arbitration are restricted as to the application of law. Specifically, if the place of arbitration is in Myanmar, and the arbitration does not fall within the definition of international commercial arbitration, the tribunal would decide the dispute in accordance with Myanmar law. This essentially excludes domestic arbitrations from resolution under foreign laws. This may be a missed opportunity to guarantee equally independent arbitral proceedings for all parties in legal disputes, not just those involving foreign arbitration.

Although a domestic or foreign arbitral tribunal has the right to make rulings on challenges to its jurisdiction, a party who is not content with the ruling may nonetheless appeal to the Myanmar courts on issues of jurisdiction. The Arbitration Law of 2016 allows any party to make a request to a Myanmar court within a certain time to decide on the jurisdiction of the tribunal, provided that a preliminary determination on jurisdiction has already been made by the tribunal. In this case, the arbitral tribunal may continue the proceedings and subsequently make an award during this period pending decision of the court. There are similar rights to seek court review of the arbitral tribunal's other interim orders.

The Arbitration Law of 2016 also provides a party with the right to petition the Myanmar court to set aside arbitral awards. To do this, the party has to prove that a court did not take into consideration certain procedural matters; the subject matter of the dispute is not capable of settlement by arbitration; or the arbitral award is in conflict with public policy. If a court is satisfied with the enforceability of the arbitral award, the award is deemed to be a decree issued by the court and fully enforceable.

The Role of the Draft Myanmar Investment Law

An important issue that is not addressed in the Arbitration Law of 2016 is what rights foreign parties have against a counterparty that is either the Myanmar state or a state-owned enterprise. Myanmar currently has no domestic legislation that determines whether a state-owned company is entitled to assert state or sovereign immunity. It is important for investors to recognize that an arbitration clause in a contract between an investor and the Myanmar state or a state-owned company is not necessarily a waiver of sovereign immunity for the purposes of execution.

The Myanmar parliament has also published a draft of the new Myanmar Investment Law (MIL). This law intends to consolidate the existing Foreign Investment Law of 2012 and the Myanmar Citizens Investment Law of 2013. The MIL aims to provide both domestic and foreign investors with a transparent, equitable, and nondiscriminatory legal framework to ensure environmentally and socially sustainable economic growth.

In the context of the Arbitration Law of 2016, Section 21 of the draft MIL is particularly significant. Section 21 explicitly states that in the event of any dispute between the Union Government or any government entity and an investor, the investor will have access to a dispute settlement mechanism. It also provides that awards by a foreign arbitral tribunal will be recognized and enforceable in Myanmar according to international law, including the New York Convention.

With its focus on recognizing arbitration in disputes with state entities, the MIL will be a valuable addition to Myanmar's arbitration regime, eliminating the use of sovereign immunity defenses to avoid enforcement of arbitral awards. This will provide foreign investors with additional assurance of access to arbitration in disputes with state entities.

Prospects

Despite retaining some authoritative rights for arbitrations, the role of the local courts has substantially changed. The Arbitration Law of 2016 provides the courts with significantly less power than under the previous Arbitration Act of 1944. The new role of the domestic courts is better characterized as a supporting role rather than an intervening one. This should greatly improve the impartiality and credibility of arbitration in Myanmar as an independent dispute resolution option, and provide assurance that foreign arbitral awards will be enforced.