

# Kluwer Arbitration Blog

## Myanmar Accedes to the New York Convention

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On 15 July 2013, Myanmar formally acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “**New York Convention**”). The New York Convention obliges Myanmar’s Courts to give effect to contractual provisions which provide for disputes to be resolved by arbitration and enforce foreign arbitral awards. While a number of uncertainties remain with respect to Myanmar’s implementation of the Convention, Myanmar’s accession represents a significant step by the Myanmar Government in creating a legal environment attractive for foreign investment.

Since March 2011, the Myanmar Government has engaged in a broad programme of political, economic and legal reform. For example, the Government introduced a new Foreign Investment Law (the “**FIL**”), which came into force in November 2012. The FIL, along with the Foreign Investment Rules and the notification on restricted economic activities issued by the Myanmar Investment Commission earlier this year, provides the legal framework for foreign investment and identifies the forms of investment allowed, permitted sectors for investment, foreign ownership restrictions, and tax and duty incentives. Further legal reform is expected in a number of areas in the near future.

### Accession to the New York Convention

Myanmar deposited its instrument of accession to the New York Convention on 16 April 2013. The accession formally took effect on 15 July 2013, when Myanmar became the 149<sup>th</sup> party to the Convention (the Democratic Republic of the Congo is expected to become the 150<sup>th</sup> party to the Convention shortly). The New York Convention is considered to be one of the most successful international conventions and an essential component in establishing a strong framework for foreign investment. The Convention requires contracting parties to recognise and enforce foreign arbitral awards in their jurisdiction, subject to limited exceptions. The Convention also requires parties to give effect to contractual provisions which provide for the resolution of disputes by arbitration. The Convention therefore enables investors to choose a neutral offshore forum for the resolution of investment disputes in preference to the local courts, if the parties have contractually agreed to arbitration.

While Myanmar is yet to introduce domestic legislation giving effect to its obligations under the New York Convention, its accession adds an important piece to Myanmar’s investment framework.

The FIL introduced in November 2012 explicitly recognises investors' rights to agree contractually on their dispute resolution mechanism. While the FIL therefore allows foreign investors to agree to refer disputes to offshore arbitration (for example, arbitration seated in a recognised arbitration centre such as Hong Kong or Singapore), to date, there has been no reliable legal mechanism for enforcing foreign arbitral awards through the Myanmar Courts. Myanmar's accession to the New York Convention demonstrates the Government's intention to fill that gap. However, as explained below, a number of uncertainties remain regarding how Myanmar's accession will operate in practice.

In addition, Myanmar is a party to a number of multilateral and bilateral investment treaties with countries in the Asian region, including the ASEAN Comprehensive Investment Agreement (the "ACIA") and the ASEAN-Australia and New Zealand Free Trade Agreement (the "ASEAN-ANZ FTA"). The ACIA and the ASEAN-ANZ FTA grant applicable investors a range of investor protections and establish mechanisms for resolving investment-related disputes. Many foreign investors will seek to structure their investments in Myanmar to take advantage of the protections afforded by these agreements. Subject to the challenges identified below, Myanmar's accession to the New York Convention will establish a route for applicable foreign investors to enforce the protections granted by the ACIA and the ASEAN-ANZ FTA to investments in Myanmar.

### **Challenges Remain**

Although Myanmar's accession to the New York Convention represents a very significant development, there remain grounds for caution. While Myanmar has not made any reservations to the Convention, the enactment of domestic legislation implementing Myanmar's obligations under the Convention is likely to be a pre-requisite to the successful enforcement of a foreign arbitral award in Myanmar. We understand that a new draft arbitration law has been prepared, which is based on the UNCITRAL Model Law on International Commercial Arbitration and will deal with the recognition of contractual provisions for arbitration and the enforcement of foreign arbitral awards. However, a large number of draft laws are currently pending consideration by Myanmar's Parliament and it is not known when the new arbitration law will be enacted.

As a practical matter, the rule of law in Myanmar has been significantly impacted by five decades of military rule. We are not aware of any foreign arbitral award having been enforced in Myanmar previously. Under the New York Convention, domestic courts may refuse to enforce a foreign arbitral award on the basis that it would be contrary to the public policy of that country. This exception has generally been interpreted narrowly. Countries whose courts adopt an expansive interpretation of "public policy" are generally considered less investor-friendly. How the Myanmar Courts will interpret this exception, particularly in respect of awards involving the Myanmar state, or state-owned enterprises, remains to be seen. However, we understand that efforts to train judges in Myanmar in dealing with New York Convention awards are already underway.

Corruption within Myanmar also remains a significant concern for foreign investors. In 2012, Myanmar ranked 172 out of 176 countries on Transparency International's Corruption Perception Index. The Myanmar Government has indicated its intent to tackle the problem. In December 2012, Myanmar ratified the United Nations Convention against Corruption. To comply with its obligations under the Convention, the Government has established a committee to combat bribery and corruption in the public sector and is preparing an anti-corruption law.

## Conclusion

Myanmar's accession to the New York Convention represents a significant step in the reform programme initiated by the Myanmar Government. This development demonstrates the Government's intention to establish a friendly environment for foreign investment by enabling foreign investors to resolve commercial and investment-related disputes offshore and enforce foreign arbitral awards within Myanmar. The most urgent task for the Government now is to incorporate the provisions of the New York Convention into Myanmar's domestic laws by enacting new arbitration legislation. The first application to enforce a foreign arbitral award before the Myanmar Courts will also be highly anticipated. While foreign investors will continue to adopt a cautious approach in contemplating investments in Myanmar, Myanmar's accession to the Convention and reports of further anticipated reforms are highly encouraging.

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