

# Kluwer Arbitration Blog

## Myanmar Joins the UNCITRAL Model Law Asian Vanguard\*

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Since 2011, Myanmar has seen a renewed effort at reforming its political, social and economic landscape. As part of the reforms, on 15 July 2013, Myanmar formally acceded to the New York Convention 1958. Myanmar had however not enacted local legislation or revised its archaic Arbitration Act of 1944 to give effect to its international law obligations under the New York Convention. This gap has now been plugged. Recognising the importance of providing a strong and certain dispute resolution framework to foreign investors in the country, on 5 January 2016, the Myanmar Union Parliament adopted the Arbitration Law (Union Law No. 5/2016) (the “**Arbitration Law**”). Much of Myanmar’s Arbitration Law is based on the UNCITRAL Model Law on international commercial arbitration (the “**MAL**”).

However, not all MAL jurisdictions are equal and while Myanmar seeks to incorporate most of the MAL into its provisions, there are a few modifications. There may however be some lack of precision in the wording of the provisions, primarily due to translation from English to Burmese and vice versa.

We set out below a brief summary of the main features of the Arbitration Law.<sup>1)</sup>

### Structure of the Arbitration Law

– The Arbitration Law is a composite piece of legislation applicable to domestic arbitrations, international commercial arbitrations and enforcement of foreign awards. Chapters 1 to 8 of the Arbitration Law incorporate the provisions of the MAL and govern the conduct of arbitrations seated in Myanmar. Chapter 9 governs the powers of courts in relation to domestic awards.

### Enforcement of foreign awards

– The Arbitration Law incorporates Articles IV and V of the New York Convention on the requirements to be met by a party applying for recognition and enforcement; and the grounds for refusal of recognition and enforcement of a foreign award by a local court. The Arbitration Law therefore paves the way for the potential enforcement of foreign awards from 155 other New York Convention signatories in Myanmar.

### Scope of application of the Arbitration Law

– Section 2(a) of the Arbitration Law incorporates Article 1(2) of the MAL to clarify that the

intended law will apply where the place of arbitration is Myanmar. Even though Section 23 of the Arbitration Law is an ostensible adoption of Article 20 of the MAL, the reference to “*venue of arbitral proceedings*” in Section 23 as opposed to the “*place of arbitration*” may be misinterpreted. However, the recognition of the primacy of the seat of the arbitration in the Arbitration Law is fairly apparent.

– In addition, Section 2(b) provides that certain provisions relating to grant of interim measures of protection, court assistance in securing evidence in support of arbitration and, for enforcement of a tribunal’s orders and directions continue to apply even where the place of arbitration is not in Myanmar.

– The Arbitration Law further defines an ‘international arbitration’ in substantially similar terms as Article 1(3) of the 2006 MAL version.

### **Party autonomy and independence of the arbitral process**

– Section 8 of the Arbitration Law incorporates Article 6 of the MAL which, read with Section 22 (incorporating Article 19 of the MAL), now recognises the principle of party autonomy in providing free choice to parties to select the rules and procedure to be applied to the arbitration. This is also recognition of the right to select an institutional set of arbitration rules.

– The Arbitration Law also recognises and codifies the principles of *kompetenz-kompetenz* i.e. the power of the tribunal to rule on its own jurisdiction; and of separability i.e. the arbitration agreement is a distinct agreement from the substantive contract. These are important and internationally accepted principles of international arbitration law, and Myanmar’s adoption of these principles is a welcome step.

– Interestingly, the Arbitration Law adopts the Singapore IAA position, in granting a right of appeal against both positive and negative determinations of jurisdiction by an arbitral tribunal within 30 days of such a ruling

– The Arbitration Law also recognises that in an ‘international arbitration’ i.e. where a foreign element is involved, parties are free to choose a substantive law of the contract of their choice. However, a similar provision provides that in a domestic arbitration i.e. where both parties are from Myanmar, the tribunal shall decide the dispute in accordance with the prevailing substantive law of Myanmar. There is no equivalent provision in the MAL and as such, this provision must be carefully applied particularly if courts are dealing with subsidiaries of foreign companies in Myanmar who are contracting parties. A similar provision in the [Indian] Arbitration Act has been misread as implying that two Indian parties (irrespective of whether they were in fact representative or subsidiaries of a foreign entity) could not contract to select a seat of arbitration outside India. Myanmar courts would do well to avoid any similar confusion while interpreting the Arbitration Law.

### **Court support for domestic and foreign arbitrations**

– Section 7 recognises the important principle enshrined in Article 5 of the MAL that a court shall not intervene in any matters governed by the Arbitration Law except as provided therein.

– The Arbitration Law adopts Article 8 of the MAL and requires a court before which an action is brought, that is otherwise the subject matter of an arbitration agreement, to refer parties to

arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed. Such a decision of the court is not appealable. Importantly, the provision applies irrespective of whether the seat of arbitration is in Myanmar or not.

– Section 11 of the Arbitration Law expands on Article 9 of the MAL and sets out in some detail the nature of interim measures of protection that may be ordered by a court in aid of arbitration. The provision clarifies that an order of the court granting interim measures of protection shall cease to have effect if a tribunal makes an order on the same issues.

– Section 30 contains detailed provisions on the ability to seek the assistance of courts in obtaining evidence. The powers granted are wider than those contemplated under Article 27 of the MAL. The Arbitration Law specifically confers powers upon the courts to obtain testimony, issue subpoenas for examination of witnesses and production of documents, and to send any such evidence gathered directly to the arbitral tribunal.

– Pursuant to Section 2(b), a Myanmar court has the jurisdiction to exercise powers under Section 11 (concerning interim measures) and Section 30 (obtaining evidence) even in the case of an arbitration seated outside Myanmar. The inclusion of these provisions is a progressive step given that the availability of such powers to courts has been an issue that has seen some limelight in other MAL jurisdictions such as Singapore and India.

– It is also notable that pursuant to Section 2 (b) read with Section 31, the Arbitration Law adopts the spirit of Article 17 H of the 2006 MAL version empowering the Myanmar Courts to enforce (interim) awards, orders and directives of an arbitral tribunal seated within and outside Myanmar. Very few jurisdictions globally have similar provisions in their arbitration legislations.

### **Recourse against award**

– The Arbitration Law adopts Article 34 of the MAL in entirety in setting out the grounds for setting aside an award by a court in an arbitration seated in Myanmar. Given the jurisprudence on Article 34 in several MAL jurisdictions, this provision will hopefully provide certainty to the manner in which the courts of Myanmar apply the standards to consider challenges to awards.

– In addition, the Arbitration Law also permits a party to appeal to a court on an issue of law against a domestic award on certain limited grounds. An important aspect to consider when drafting an arbitration clause with a seat in Myanmar is that the Arbitration Law allows parties to contractually exclude the remedy of an appeal against a domestic award.

### **Adoption of MAL on other aspects**

– The Arbitration Law also adopts the MAL in respect of other areas concerning the conduct of the arbitration including the appointment of arbitrators, challenges to arbitrators, removal of arbitrators, filings, hearings, form and content of the award, termination of proceedings, among other matters.

Coming on the heels of the new draft foreign investment law released in 2015, there is much hope that the Arbitration Law is a step in the right direction in creating a positive impact on foreign investment by building investor confidence in the government’s efforts to harmonise Myanmar’s laws and update them to international best practices. Equally, there is hope that Myanmar will now be “in the vanguard” of the development of international arbitration law and practice and

contribute equally to the emergence of a “global free-standing body of substantive arbitration law”, to use the words of Chief Justice Sundaresh Menon of Singapore (then the attorney general) in his keynote address to the ICCA Congress in Singapore in June 2012.

*\*The phrase is thanks to Dr Julian Lew QC who spoke in October 2012 at the Hong Kong Arbitration Week, of the shift of economic power from the West to the East and predicted that countries that have adopted the UNCITRAL MAL will be at the vanguard of developing international arbitration law and practice for times to come.*

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### References

- <sup>1</sup> The summary presented in this article is based on an unofficial English translation of the Arbitration Law (from the Burmese original) available on file with the authors.

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