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Myanmar's New Investment Law and its Confidence in International Arbitration

Maximilian Clasmeier (White & Case LLP) · Wednesday, January 25th, 2017

Introduction

"The world is curious about Myanmar", said U Htay Aung, Union Minister of Hotels and Tourism of Myanmar at the World Economic Forum on East Asia in 2013. And indeed, he is right. This article serves as evidence. Myanmar has managed to take a number of important steps in gradually opening up its economy, attracting investment and creating growth for the benefit of its people. The new Myanmar Investment Law ("**MIL**") with its confidence in international arbitration is yet another step in that direction. Since 1944, the year of Myanmar's first Arbitration Act, arbitration's popularity has grown particularly in the country's neighboring ASEAN countries. For Myanmar, it was thus a logical imperative to accede to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") on 16 April 2013 after approval by the Assembly of the Union. Honoring its international obligations under the New York Convention, Myanmar has adopted the Union Law No. 5/2016 (the "**New Arbitration Law**") on 5 January 2016, repealing the former Arbitration Act of 1944. It is based upon the 2006 UNCITRAL Model Law and many of its provisions thus constitute familiar territory for international arbitration's users.

New Myanmar Investment Law

The MIL will come into force with full effect in April 2017. The government has worked closely with the World Bank Group's International Finance Corporation to level the playing field for local and foreign investors. As Myanmar is currently the single ASEAN country with two distinct investment laws for domestic and foreign investors, this effort constitutes a major change. It abandons a divisive regime that even in Southeast Asia is only of historic rather than contemporary importance. While the final version of the MIL has not yet been published, the draft provides an insight into the government's policy aimed at increasing investor confidence. Specifically, Sec. 3(b) MIL describes the protection of investors and their investments as one of the new law's objectives.

Chapter 11 then deals with the substantive treatment of investors. Sec. 48(a) MIL sets out that with

respect to the expansion, management, operation, and the sale or other disposition of direct investments, which are subject to the provisions of the MIL, foreign investors and direct investments made by them, shall be accorded treatment no less favorable than that accorded to Myanmar's domestic investors. Furthermore, the MIL provides for a most-favored-nation clause as well as fair and equitable treatment.

Chapter 16 of the MIL also sets out responsibilities of investors. These range from respect for customs, traditions and culture, an obligation to report the finding of antique objects or treasures, proper accounting to compliance with local labor laws. In this regard, the MIL constitutes a modern approach in balancing the interests of investors with those of the state in order to achieve growth for the mutual benefit.

Investor-state arbitration

The synchronization of foreign and domestic investors' rights encompasses the possibility to refer disputes between state entities and investors to dispute settlement. Sec. 83 MIL envisages the erection of a mechanism "to allow for claims and settlement of losses, which will allow the conduct of inquiries in order to resolve issues before they become legal disputes and to prevent the occurrence of disputes." Responsible for the mechanism will be the newly created Myanmar Investment Commission.

Sec. 85 MIL furthermore allows for respective dispute resolution agreements between a state entity and an investor. If parties then enter into, e.g., an arbitration agreement, that agreement shall prevail: "(b) If the method of dispute resolution in the relevant agreement is stated, an investor shall follow in accordance with this method of dispute resolution." The provision thereby ensures that respective individual arbitration agreements will be enforced in order to give investors access to arbitration as opposed to local courts.

On the other hand, the MIL does not contain a standing offer to arbitrate. Apart from investment contracts, investors may thus only avail themselves of those standing offers that currently exist in Myanmar's investment treaty regime, namely its BITs with China, India, Japan, Laos and Thailand. Myanmar's BITs with Israel, Korea and Vietnam likewise provide such standing offers, but are not yet in force. Sec. 85(b) MIL thus requires that an arbitration agreement is already in existence, which will then be enforced. Investors who may not take advantage of standing offers contained in the abovementioned treaties are thus well-advised to incorporate arbitration clauses into their investment contracts.

In the absence of an arbitration clause, an investor may encounter a rather nebulous scenario in attempting to resolve disputes: Sec. 85(a) MIL provides that "[i]f the method of dispute resolution in the relevant agreement is not stated, investment disputes shall be settled in the court or arbitral

tribunal in accordance with the laws of the Union." In other words, investment disputes may be heard in a local court or before an arbitral tribunal. The provision, however, remains silent on the exact prerequisites and circumstances of either scenario. By way of interpretation, it appears though, as if Sec. 85(a) MIL simply clarifies the enforceability of post-dispute-arbitration-agreements: The term "relevant agreement" cannot refer to the arbitration agreement itself. If it did refer to the arbitration agreement, Sec. 85(a) MIL would read: "[i]f the method of dispute resolution in the relevant *arbitration* agreement is not stated […]". That cannot be right. If an arbitration agreement or any dispute resolution agreement is already at hand, there already is clarity as regards the method of dispute resolution. Rather, the term "relevant agreement" refers to a respective investment contract. If that investment contract then does not state a method of dispute resolution, "investment disputes shall be settled in the court or arbitral tribunal in accordance with the laws of the Union." Sec. 85(a) MIL then merely allows the parties to the dispute to opt for arbitration after the dispute has arisen. This interpretation is in line with Sec. 9(b) of the New Arbitration Law, according to which the arbitration agreement "may be in the form of an arbitration clause in a contract or in the form of a separate agreement." If the parties do not opt for arbitration, the dispute may be referred to the local courts.

What creates uncertainty is the broad wording "in accordance with the laws of the Union." A plainly textual approach to Sec. 85(a) MIL is not sufficient. The provision could firstly constitute a sole clarification that any arbitration seated in Myanmar is to be conducted in accordance with domestic law. However, from a systematic perspective, it would then remain unclear why Sec. 85(b) MIL, declaring arbitration agreements enforceable, does not set up the same requirement. Regardless of the timing of the arbitration agreement, Myanmar will have an interest in an arbitration seated on its territory to be conducted in compliance with its laws.

Secondly, Sec. 85(a) MIL could provide for a mandatory Myanmar seat, in case of a post-dispute-arbitration-agreement. However, such interpretation would run contrary to Sec. 10(a) of the New Arbitration Law which renders arbitration agreements enforceable, "unless [a court] finds that the agreement is null and void, inoperative or incapable of being performed" and Sec. 23(a) of the New Arbitration Law that determines parties' freedom in choosing the seat of the arbitration.

Thirdly, the provision could determine Myanmar law as the substantive law. Especially when read together with the New Arbitration Law, this interpretation appears more plausible, if the arbitration is purely domestic. Sec. 32(a)(1) of the New Arbitration Law provides that the substantive law shall be Myanmar law, if a domestic arbitration is at hand. An arbitration is domestic, if it is not international pursuant to Sec. 3(i) of the New Arbitration Law. However, whenever a foreign investor acts as claimant, the arbitration will be international. In that case, "[I]n accordance with the laws of the Union" will refer to the whole of Sec. 32(a) of the New Arbitration Law, including (2), which allows parties the choice of the substantive law. For foreign investors, this wording is then likely to be of little practical relevance.

Conclusion

The objectives of the MIL are clearly geared towards attracting foreign investment and enhancing economic growth, e.g., aiming for “citizens to be able to work alongside with the international community” and to “cause to emerge businesses and investments that meet international standards.” (Sec. 3(h), (i) MIL). The MIL is another noteworthy step for Myanmar towards becoming an arbitration-friendly jurisdiction in line with its investment objectives. The terms of the new MIL at times remain vague and ambiguous, but it is now primarily the courts that will determine the practical impact of the legislative changes. Over time, Myanmar may then provide assurance to investors that economic reality reflects the country’s modern policies. The world, and especially the international arbitration community, will be watching future steps and do so with a bit more curiosity each time.

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