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Landmark Recognition and Enforcement of a Foreign Arbitral Award in Myanmar

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When investing in developing countries, many foreign investors have concerns as to their remedies in the event of a dispute that is to be tried in the local courts. Whilst investment in Myanmar has increased profoundly in recent years, parties are still unfamiliar with the approach of the courts in Myanmar to commercial disputes. As such, parties regularly opt to use arbitration as their dispute resolution mechanism.[1]

Even where parties do negotiate to utilise arbitration in the event of a dispute, however, foreign investors may still retain a level of doubt as to the eventual ability to have an arbitral award recognised and enforced in Myanmar. This doubt may well be fueled, in part, by Myanmar only having recently become a Contracting State to the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("**New York Convention**") in April 2013,[2] which was only then adopted into the Myanmar Arbitration Law (Union Law No. 5/2016) ("**Myanmar Arbitration Law**") in 2016.[3]

In this client alert, we recount our recent experience with a successful application for recognition and enforcement of a foreign arbitral award in Myanmar - the first reported successful application of its kind.

1. The Underlying Arbitration

In the present case, our client, a Japanese sales company, sold used items to a Myanmar purchaser under a series of sales and purchase agreements - these agreements were each subject to a fairly standard, unambiguous arbitration agreement in the terms and conditions. Whilst the purchaser paid sums owed under the vast majority of the agreements, it failed to do so under certain agreements, thereby resulting in the parties entering into a side agreement and, eventually, the Japanese company being forced to commence arbitration with the Japan Commercial Arbitration Association ("**JCAA**") to recover the debt.

From the outset of the arbitration, the respondent refused to participate in any way, aside from purportedly challenging jurisdiction. The respondent merely declared that the tribunal did not have jurisdiction before refusing to play any further part in the arbitral proceedings, seemingly in an attempt to circumvent the tribunal's power to rule on its own jurisdiction, under both Japanese law and the JCAA Rules. Despite the respondent's refusal to appear, the arbitration proceeded to an interim decision in which the tribunal decided it had jurisdiction to decide the claims brought by the claimant, before the claimant was eventually

[1] A. BRIGGS, *Private International Law in Myanmar*, (2015) Oxford University Faculty of Law, at p. 16 ("*in countries in which there is not (or not yet) great confidence in the quality of the courts, of which Myanmar is probably one, arbitration may be an attractive option for the resolution of disputes.*")

[2] See list of Contracting States to the New York Convention at: http://www.newyorkconvention.org/list+of+contracting+states.

[3] See English translation of the Myanmar Arbitration Law 2016 at: http://www.unionsupremecourt.gov.mm/sites/default/files/supreme/the_arbitration_law_2017.pdf .

awarded the entirety of the sums claimed, together with interest on those sums and the lion's share of the claimant's legal fees and expenses.[4]

In common with many disputes, however, successfully obtaining a final award in positive and unequivocal terms was not sufficient to ensure voluntary repayment by the respondent. Consequently, the now-judgment creditor was compelled to make an application for recognition and enforcement in the Myanmar courts.

2. Our Experience of Applying for Recognition and Enforcement of a Foreign Arbitral Award

(i) Application Requirements and Grounds for the Court to Refuse to Recognise and Enforce a Foreign Arbitral Award

Before considering our experience of applying for recognition and enforcement in Myanmar, it bears repeating that arbitration as a concept in Myanmar is rarely utilised and the country only recently became a Contracting State to the New York convention (April 2013). By way of comparison, Japan's accession to the New York Convention came in June 1961.

Helpfully from an international arbitration practice standpoint, the Myanmar Arbitration Law reflects both the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration 1985 ("**Model Law**").[5] As such, the procedural requirements for a party seeking recognition of a foreign arbitral award in the Myanmar courts set out below mirror fairly closely the wording of Article IV of the New York Convention and Article 35 of the Model Law:

i. the original award or duly certified copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

ii. the original arbitration agreement or duly certified copy thereof; and

iii. the evidence as may be necessary to prove that the arbitral award is a foreign arbitral award.[6]

From a practical standpoint, we note that, while the Myanmar Arbitration Law only requires translations of the above documents into English,[7] we found that translations from English into Burmese were also required when making an application in the Myanmar courts.

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[4] The tribunal took into account the respondent's arguments on jurisdiction and the merits as asserted in its correspondence prior to the respondent's refusal to take part in the arbitration when deciding the arbitration.

[5] The Model Law can be found at: http://www.newyorkconvention.org/uncitral/model+law.

[6] Under Article 45(a) of the Myanmar Arbitration Law, a party seeking recognition and enforcement of a foreign arbitral award in the Myanmar courts shall provide: "*(i) the original award or duly certified copy thereof, duly authenticated in the manner required by the law of the country in which it was made; (ii) the original arbitration agreement or duly certified copy thereof; and (iii) the evidence as may be necessary to prove that the arbitral award is a foreign arbitral award*." For clarity, under Section 3(k) of the Myanmar Arbitration Law: "***Foreign Arbitral Award** means an arbitral award made in the territory of a member country of the New York Convention other than the State pursuant to an arbitration agreement[.]*"

[7] Article 45(b) of the Myanmar Arbitration Law states, "*[w]here the arbitral award or arbitration agreement to be produced under sub-section (a) is in a foreign language, the party applying for enforcement of the arbitral award shall produce a translation into English[.]*"

In common with the procedural requirements, the Myanmar Arbitration Law parallels closely Article V of the New York Convention and Article 36 of the Model Law with respect to the grounds on which the Myanmar courts may refuse to recognise and enforce a foreign arbitral award,[8] with one notable exception. This exception is that recognition and enforcement may be refused where it "*would be contrary to the national interests (public policy) of [Myanmar][,]*"[9] (Emphasis added) as compared to recognition or enforcement being contrary only to "*public policy[,]*"[10] as set out in the New York Convention. Given the lack of reported cases, we are not aware of this exception having been applied in the Myanmar courts, but one may envisage that this distinction in wording was likely deliberate at the time of drafting the Myanmar Arbitration Law and may be pertinent in future enforcement actions.

(ii) Our Experience of Enforcement in the Myanmar Courts - Takeaways

Preliminarily, it is worthy of note that we found the application process under the Myanmar Arbitration Law to be relatively straightforward, perhaps due in part to the extent to which the law mirrors the New York Convention and the Model Law.

As compared to similar applications in other Contracting States, however, there were several notable 'takeaways' from our experience in Myanmar:

i. Content of Our Application

Our application set out succinctly the background of the arbitration and sought to explain in summary form the relationship between the Myanmar Arbitration Law, the New York Convention and the Model Law. Here, it was necessary for us to emphasise the observations of certain key commentators as regards recognition and enforcement of foreign arbitral awards by other national courts as, given the relative youth of the Myanmar Arbitration Law and relative lack of such applications in the past.

ii. The Respondent's Duplicative Civil Suit

In an apparent attempt to obfuscate the claimant's arbitral proceedings, the respondent had filed an entirely duplicative civil suit in the Myanmar courts after we commenced arbitration. Here, we found that the judge's approach in Myanmar was reasonable and logical, in that we argued

[8] Article 46(b) of the Myanmar Arbitration Law states that, "*[t]he court may refuse to recognize the foreign arbitral award if the party against whom it is invoked furnishes to the court proof that: (1) the parties to the arbitration agreement referred was under some incapacity; (2) the said agreement is not valid under the law to which the parties have subjected to it or, failing any indication thereon, under the law of the country where the award was made; (3) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (4) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; or (5) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (6) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made[.]*" Further, Article 46(c) of the Myanmar Arbitration Law states that, "*[e]nforcement of the foreign arbitral award may be refused if the court finds that: (1) the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Republic of the Union of Myanmar; or (2) the enforcement of the award would be contrary to the national interest (public policy) of the Republic of the Union of Myanmar.*"

[9] See Section 46(c), Myanmar Arbitration Law.

[10] See Article V (2) (b), New York Convention.

that the litigation should be dismissed on grounds of *res judicata*, *i.e.*, the case had already been adjudicated by a competent court, and the judge made this a preliminary threshold issue. Whilst we will not go into detail on the particulars of *res judicata* in this article, the judge accepted our arguments on *res judicata* and dismissed the civil suit.

iii. Civil Law-style Procedure

Having lodged the relevant documents, a series of hearings ensued, held in roughly two to four week intervals, at which the judge considered distinct issues from the respondent's civil suit alongside our application for recognition and enforcement. This format or system will be a known quantity to those from certain civil law jurisdictions (including Japan), but may be unusual for some from some common law jurisdictions.

iv. Lack of Opportunity for Advocacy

To most lawyers, whether common or civil law qualified, the manner in which the aforementioned hearings were undertaken may appear somewhat peculiar in that they were largely for the parties to lodge documents requested of them at the prior hearing - there was little or no room for the parties to conduct any advocacy. On the face of it, the application and the respondent's civil suit appear to have been dealt with predominantly on a 'documents-only' basis. In this particular case, this style of hearing was not problematic, but we would envisage there may be cases in which there may be more nuance to draw out from the documents and bring to the judge's attention and therefore the 'documents-only' approach may be far from ideal.

v. Lengthy Decision-making Process

Whether due to the side-by-side approach to our application and the respondent's civil suit or otherwise, it took around eight months for the courts to recognise the arbitral award - this may appear lengthy in comparison to certain other jurisdictions. Notably, whilst the extent of the judges' analysis of the legal arguments in our pleadings was unclear, the judge appeared reasonably comfortable with the enforcement principles and provisions under the Myanmar Arbitration Law.[11]

At the time of publication, the respondent has filed an appeal to both the decision to dismiss its civil suit on the basis of *res judicata* and the claimant's application for recognition and enforcement of the arbitral award. We understand from Myanmar counsel that these appeals are unlikely to be heard before, say, six months to one year from the lodging of the appeals. During this period, we are informed that the claimant will not be allowed to enforce the arbitral award, which presently stands as recognised in Myanmar.

3. Conclusion

Whilst Myanmar's adoption of arbitration is in its relative infancy and the application in question appears to be the country's first foray into recognising and enforcing a foreign arbitral award, parties seeking to invest, or currently

[11] Following recognition, we lodged an execution application by which it was necessary to plead how we wished for enforcement to take place. Whilst largely procedural, this process involved requesting sums from the respondent by way of lump sum payment and requesting, should such payment not be possible, that our client be allowed to seize the respondent's assets to sell via auction.

investing, in Myanmar may draw some comfort from the court's decision to recognise and enforce a foreign arbitral award.

The judgment bodes well for the future for parties who have negotiated arbitration as the dispute resolution mechanism in their contracts when dealing with Myanmar counterparties.

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If you would like to discuss any of the issues raised in this alert, please contact us.

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