

On 26 September 2019, VDB Loi held a successful live webinar event featuring insights into arbitration developments from a practical perspective by means of a short series of case studies. The speakers were Mr. Edwin Vanderbruggen, U Aung Myo Kyaw and U Myo Win.

AUTHORS



Edwin Vanderbruggen
Senior Partner

Edwin is the senior partner of VDB Loi and a leading foreign legal advisor living in Myanmar since 2012. A frequent advisor to the Government on transactions and privatizations in energy, transportation and telecom, he is widely recognized for his “vast knowledge” (Legal 500) and his ability “to get difficult things through the bureaucracy” (Chambers, 2016). He advises international financial institutions on their largest Myanmar transactions, oil and gas supermajors, a greenfield multi- billion US\$ telecom project and the Japanese Government on the Thilawa SEZ. He assisted two newly licensed foreign banks setup in Myanmar, acted for the sponsor of an 800MUS\$ urban infrastructure PPP project and worked on 6 out of 7 power deals inked in 2016.



U Myo Win
Senior Legal Associate

Myo Win is a Myanmar qualified higher grade pleader, legally trained in Myanmar and in France, where he completed master degrees in international and human rights law. As a litigator, he represents our clients in Myanmar courts on a wide range of commercial and criminal disputes.



U Aung Myo Kyaw
Senior Legal Associate

Aung is a Myanmar qualified advocate, with nearly 11 year experience in commercial, civil and criminal litigation. He holds a bachelor's degree in law and diploma in maritime law, international law and business law.

MYANMAR ARBITRATION UPDATE

Arbitration in Myanmar – recent developments

On 16 March 2013, Myanmar acceded to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Diplomatic Conference held on 10 June 1958 in New York.

On 5 January 2016, the Union Parliament of Myanmar, Pyidaungsu Hluttaw, enacted a new Arbitration Law 2016 (Law 5/2016), based on the United Nations Commission on International Trade Law (“**UNCITRAL**”) Model Law on Commercial Arbitration 1985 (as amended in 2006) (Uncitral Model Law), by repealing the Arbitration Act 1944. The Myanmar Arbitration Law 2016 replaces the Arbitration Act 1944 and includes the enforcement of foreign arbitral awards in Myanmar in line with the New York Conventions and UNCITRAL Model Law. In a nutshell, for foreign arbitration, this means:

- Parties can agree on arbitration for their commercial disputes and choose the seat of that arbitration to be overseas
- Myanmar courts must recognize and enforce a foreign arbitral award, unless one of the limited grounds for refusal in section 46 of the Arbitration Law 2016 apply

Recently, on 3 August 2019, the Union of Myanmar Federal Chambers of Commerce (“**UMFCCI**”) established the Myanmar Arbitration Centre (“**MAC**”).

Highlights of this note

- ▶ Arbitration in Myanmar – recent developments
- ▶ Are parties free to choose for foreign arbitration under Myanmar law?
- ▶ How to invoke an arbitration clause in Myanmar and apply for a stay of court proceedings under the Myanmar Arbitration Law
- ▶ Does the subject matter of the dispute fall within the scope of the arbitration agreement?
- ▶ What constitutes an arbitration agreement?
- ▶ Typical flow of court cases involving arbitration
- ▶ Injunctions and interim measures under the Arbitration Law 2016
- ▶ Recognition and enforcement of a foreign arbitral award
- ▶ When can a Myanmar court refuse enforcement of a foreign arbitral award?
- ▶ Recognition and enforcement of a foreign judgment
- ▶ Recognition and enforcement – Interim order of a foreign arbitral award
- ▶ Conclusion

Are parties free to choose for foreign arbitration under Myanmar law?

Myanmar courts have no difficulty in accepting the choice of parties to opt for arbitration, including foreign arbitration. Generally speaking, parties are free to agree to opt for arbitration. Also the Union Government is free to opt for foreign arbitration in many of its contracts with foreign parties, such as a Production Sharing Contract for an offshore block for oil and gas operations, a Power Purchase Agreement, etc. However, please note that contracts concluded with the Union Government are typically governed by Myanmar law.

As per section 3(i) of the Arbitration Law 2016, an "international arbitration" is an arbitration where:

"(1) One of the parties to the arbitration has its place of business situated in a country other than Myanmar at the time of execution of the arbitration agreement; or

(2) The place of the arbitration as stated in the arbitration agreement or the place to conduct the arbitration in accordance with the arbitration agreement is situated outside the country in which the parties have their place of business; or

(3) Taking into account commercially-related business obligations, the place where a substantial part of the obligations to be performed or the closest place connected to the subject matter of the dispute, is situated outside the country in which the parties have their place of business; or

(4) The parties to the arbitration agreement have expressly agreed that the subject matter relates to more than one country.

Note:

- 1. If a party has more than one place of business, the party's place of business shall be that which is the closest to the place of execution of the arbitration agreement;*
- 2. If a party does not have a place of business, reference to its place of business shall be the place of its permanent residence."*

This definition is in line with the UNCITRAL Model Law.

To date there have been no challenges yet before Myanmar courts based on the idea that the parties did not have the right to opt for international arbitration.

How to invoke an arbitration clause in Myanmar and apply for a stay of court proceedings under the Myanmar Arbitration Law

The crucial section under the Arbitration Law 2016 is section 10(a) of the Arbitration Law 2016, where it reads that: "A court before which an action is brought in a matter that is the subject of an arbitration agreement shall, if a party so requests not later than when submitting its written statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed." The Myanmar court is required to refer to arbitration if there is an arbitration clause, except if it finds that the agreement is null and void, inoperative, or incapable of being performed. This position in Myanmar Arbitration Law 2016 is largely the same as the UNCITRAL Model Law,

except for the fact that the Myanmar Arbitration Law 2016 does not have a reference to "submit the written statement for the first time."

In practice, when a dispute has arisen between a Myanmar and a foreign party, the Myanmar party might seek to initiate a legal proceeding before a Myanmar court even if there is an arbitration clause. This is how that would work:

1. The court will serve the summons to the defendant (local or overseas). Generally, the plaint must be attached with the summons during the service of summons. However, this rule is not strictly respected by practitioners in practice. As such, the defendant may not be aware of the issue of the dispute.
2. Upon receiving the summons, the defendant is required to appear before the court, and the judge will explain the cause of action. At this stage, the defendant may request a certified true copy of the plaint and may raise an objection orally as soon as he/she is informed of the dispute.
3. If the defendant intends to refer to arbitration, the defendant will usually submit a written application requesting the referral to arbitration during the subsequent hearing.

To invoke the arbitration clause, it is recommended to raise it verbally during the first appearance in the court as well, and to additionally submit a written application, at the latest, upon the following hearing, before any other written submission. In practice, the court will record the party's objection into the court diary. Please note, this will serve as evidence that the objection to the court's jurisdiction has been raised in time. The party may obtain a certified true copy of the extract of the court diary by paying the court the official stamp fees in an amount of MMK200 per page.



On the contrary, the consequences of raising the objection too late will infer that the defendant has accepted the jurisdiction of the Myanmar court. To illustrate, in an actual arbitration case under the previous law, the Myanmar court held that an application for adjournment to file a written submission statement was deemed as taking a step in the proceedings and by implication amounted to a submission to Court's jurisdiction. This interpretation might be different under the new law, but nevertheless, steps such as taking evidence and adjournment, should be handled with care.

Does the subject matter of the dispute fall within the scope of the arbitration agreement?

As a matter of international practice, whether a certain matter falls within the scope is not within the jurisdiction of the Myanmar court to decide. The arbitration tribunal should be left to decide whether some matter is within the scope of the agreement (the principle of "Kompetenz Kompetenz,"). Although this principle is implicit in section 10(a) of the Arbitration Law 2016 and stated explicitly in section 18 of the Arbitration Law 2016, it should be noted that the principle is not systematically respected by Myanmar courts. Some courts follow this principle by indeed leaving the question to the arbitrator and the court will hold itself strictly to decide whether the arbitration agreement is null and void, inoperable, or incapable to be performed. However, the temptation exists where other Myanmar courts have been known to step in to decide whether the matter of the dispute falls under the scope of the arbitration clause.

Case examples demonstrating the Myanmar courts' practice in interpreting "whether the subject matter falls within the scope of the arbitration agreement" are as follows:

- A suit for damages which was based on general principles of law rather than on the fact that the contract was held by a Myanmar court to be outside of the scope of the arbitration agreement.
- A plaintiff argued that a suit which was based on one agreement between the parties, while the arbitration clause was contained in another subsequent agreement, should not be allowed for arbitration. The Myanmar court did not follow this reasoning.

- Whether or not it falls within the subject of the agreement, the Myanmar court may look into the parties. When a suit by a plaintiff against a defendant also includes additional defendants who are involved in the suit, some Myanmar courts may consider that this means the matter is not the subject of an arbitration agreement.

What constitutes an arbitration agreement?

As per section 3(b) of the Arbitration Law 2016, an "arbitration agreement" is defined as "an agreement in writing by the parties to submit to arbitration all or certain disputes which arise or which may arise between them in respect of legal relationship, whether contractual or not." An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement (section 9(b) of the Arbitration Law 2016). This definition is largely consistent with the UNCITRAL Model Law.

A few case studies demonstrating how the Myanmar courts interpreted the "arbitration clause:"

- A plaintiff claimed that "the dispute may be referred to arbitration" means the court also has jurisdiction. This was rejected by the court.
- A plaintiff claimed that the arbitration is inadmissible, as the arbitration clause contained a "condition precedent" which has to be fulfilled before the referral of arbitration. Instead the court decided that the condition was merely an example of a situation where the parties would be allowed to resort to arbitration.
- The Supreme Court refuted a plaintiff's argument regarding the term "the other party" under a clause of the agreement. The Supreme Court opined that "other party" means the "parties to the contract," not "a third party."

Typical flow of court cases involving arbitration

Typically, court cases involving arbitration for a large dispute start at the relevant High Court given the jurisdictional threshold in monetary value more than 1,000,000,000 MMK (approximately 750,000 USD). As per section 10(e) of the Arbitration Law 2016, if the court decides to refer to arbitration, no appeal shall be allowed against such decision



of the court. However, this would not prevent the party from initiating a so-called “revision” application against such decision. A revision is under Myanmar law distinct from an appeal, and can only be based on certain limited grounds of law. On the contrary, the court’s decision refusing to refer to arbitration may be appealed (section 10(f) of the Arbitration Law 2016).

Can the original defendant further appeal against the court’s decision?

If the appellate court upholds the lower court’s decision in refusing the referral of arbitration, the original defendant may submit a special appeal to the Supreme Court of the Union. However, if the Supreme Court decides to uphold the lower court’s decision to allow arbitration, the availability of the option for the special appeal remains unclear.

In summary, even if the court finds in favour of arbitration all the way, parties may still find themselves wound up in Myanmar court proceedings for one to two years even if the Arbitration Law 2016 states that no appeal is allowed if the court referred to arbitration.

Injunctions and interim measures under the Arbitration Law 2016

There are two type of interim measures under the Arbitration Law 2016: (i) urgently needed interim measure (i.e., preservation of evidence) and (ii) not urgently needed interim measure, which can only be applied in Myanmar court with the leave of both parties or of the arbitral tribunal itself. Hence, the scope for the Myanmar court to step up to order interim measures is rather limited.

Section 11 (a) of Arbitration Law 2016 states:

“Unless otherwise agreed by the parties, upon party’s request, the court shall make a decision as its own jurisdiction on:

- *the taking of evidence*
- *the preservation of evidence*
- *the passing of an order related to the property in dispute in arbitration or any property that is related to the subject matter of the dispute*
- *inspection, taking photos for evidence, preservation, seizure of property that is related to the dispute*
- *samples to be taken from, or any observation to be made of or experiment conducted upon, any property that is or forms part of the subject matter of the dispute;*
- *permission to enter the premises owned by or under the control of the parties to the dispute for the purpose of the above-mentioned matters*
- *sale of any property that is the subject matter of the dispute*
- *an interim injunction or appointment of a receiver”*

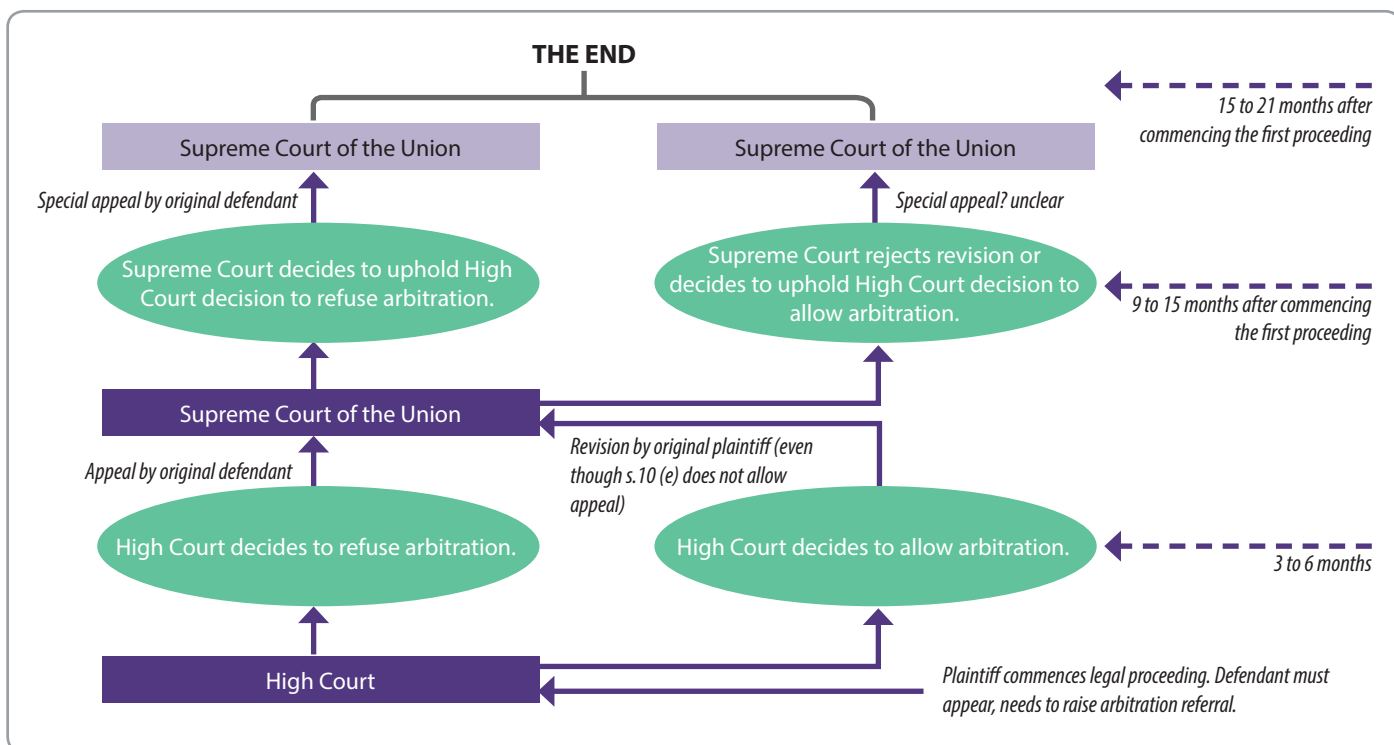
However, in the interpretation of the Myanmar Supreme Court, at least some of the aforesaid interim measures are only possible if applied under an arbitration proceeding. In other words, there must be a pending arbitration proceeding.

Moreover, to apply for an injunction in the Myanmar court under the Civil Procedure Code, the parties must have a main suit pending in the Myanmar court.

Recognition and enforcement of a foreign arbitral award

Section 45 of the Arbitration Law 2016 spells out the formal conditions for the enforcement of a foreign arbitral award in Myanmar:

“(a) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court:



Overview flowchart of court cases involving arbitration and estimated timeframe

1. *The original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;*
2. *The original agreement for arbitration or a duly certified copy thereof; and*
3. *Such evidence as may be necessary to prove that the award is a foreign award.*

(b) Where the award or arbitration agreement required to be submitted under subsection (a) is in a foreign language, the party seeking to enforce the award shall produce a translation in English certified as correct by the ambassador or consular officer of the country to which that party belongs, or certified as correct in such other manner as may be sufficient according to the law in force in the Republic of the Union of Myanmar."

Apart from the requirements under section 45 of the Arbitration Law 2016, there are a few practical considerations of which to take note:

1. Original award and other evidence
2. Apostille procedure – As Myanmar Constitution section 450 states: *"Myanmar language is the official language,"* hence legalisation and notarised translation of the documents are required
3. Execution a power of attorney for the appointment of an advocate in Myanmar
4. Service of summons to the parties (especially to overseas arbitration parties) as part of the recognition process
5. Limitation for enforcing a foreign judgment six years from the date of judgment

When can a Myanmar court refuse enforcement of a foreign arbitral award?

The grounds for a Myanmar court to refuse the foreign arbitral award set out under section 46 of the Arbitration Law 2016 are similar to the UNCITRAL Model Law, whereas it reads:

"(a) Except if an application to enforce the award is refused under subsections (b) and (c), the award shall be enforced under the Code of Civil Procedure in the same manner as if it were a decree of the court.

b) The court may decide not to enforce the foreign arbitral award if the party against whom it is invoked furnishes proof to the court that:

1. *The parties to the relevant arbitration agreement were under some incapacity to comply with the law; or*
2. *The said agreement is not valid under the law [to which the parties have agreed] or, failing any indication thereon, under the law of the country where the award was made; or*
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 its case; or*
4. *The award deals with a dispute not contemplated by or not falling within the terms of the matters to be submitted to arbitration, or it contains decisions on*

matters beyond the scope of those to be submitted 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, that award was made."*

c) Enforcement of the foreign arbitral award may be refused if the court finds that:

1. *The subject matter of the dispute is not able to be settled by arbitration under the law of the Republic of the Union of Myanmar; or*
2. *Recognition would be contrary to the public interest of the Republic of the Union of Myanmar."*

One difference compared to the UNCITRAL Model Law, is the fact that a severable valid decision in the award will not be enforceable under Myanmar law.

Recognition and enforcement of a foreign judgment

It is possible in Myanmar to recognize a foreign judgment if the following conditions as enumerated under section 13 of the Civil Procedure Code are satisfied:

"A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same*



parties, or between parties under whom they or any of them claim, litigating under the same title, except—

- a. where it has not been pronounced by a Court of competent Jurisdiction;
- b. where it has not been given on the merits of the case;
- c. where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of the Union of Myanmar in cases in which such law is applicable;
- d. where the proceedings in which the judgment was obtained are opposed to natural justice;
- e. where it has been obtained by fraud;
- f. where it sustains a claim founded on a breach of any law in force in the Union of Myanmar."

However, in practice, it may take some time for the Myanmar court to accept the foreign judgment. This particular point can be relevant to arbitration practitioners, as some arbitration decisions may consist partly of the foreign judgment and the manners of enforcement in Myanmar, either by way of a foreign judgment as per the Civil Procedure Code or by way of arbitral award under the Arbitration Law 2016.

Recognition and enforcement – Interim order of a foreign arbitral award

Myanmar courts do recognize and enforce foreign interim orders by foreign arbitral tribunal (section 31 of the Arbitration Law 2016). However, section 31(b) of the same law imposes one condition to the enforcement procedure, where it states if the application of the order *"is unable to submit strong evidence that it is the same type of order exercised within the State, the court shall not approve the enforcement."* Hence, the Myanmar court will need to examine whether the order issued by the foreign arbitral tribunal exists within the Civil Court of Procedure. If there is a discrepancy, the Myanmar court might refuse to enforce due to the lack of local authority to make such an order. Please note, the interim order of a foreign arbitral award should not be against the public policy and interest.

This position is different from the UNCITRAL Model Law, whereas it reads *"The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance."*

Conclusion

In conclusion, despite Myanmar enacting a new Arbitration Law in 2016 in line with the UNCITRAL Model Law 2006, implementation by local courts has been varied. Some decisions by Myanmar courts, including some decisions of the Supreme Court, interpret and apply the arbitration agreement in line with settled international UNCITRAL Model Law principles. However, there are also certain decisions, even at times by the Supreme Court, that are difficult to understand from the perspective of settled international opinion.

Furthermore, criminalization of commercial disputes in Myanmar, which sidesteps arbitration, have been known to take place in Myanmar in a minority of cases. There have been some favorable decisions in connection with the authority of local courts to issue interim orders; however, this requires the existence of an actual pending arbitration case. As for the experience with recognition and enforcement, the first-ever case is still pending. In addition, the fact that there are some practical problems, such as translation, should also be kept in mind. Due to the judicial structure of Myanmar, a local court proceeding can still take up to two or even three years despite having a valid arbitration clause (but this does not delay the arbitration itself). Even the Supreme Court may have to decide your case twice, not just once.

DOWNLOADS



The image shows a brochure for VDB | Loi. The header features the logo 'VDB | Loi' and the tagline 'Get to the point.' Below this, the word 'Disputes' is prominently displayed. The main body of the brochure contains several paragraphs of text, a small photograph of a person in a boxing ring, and a list of services: 'Conducts', 'Litigation', 'Legal', 'Arbitration', and 'Enforcement'. At the bottom, there is a small disclaimer and a URL: 'http://bit.ly/2m9DIX8'.

<http://bit.ly/2m9DIX8>

CONTACT

YANGON

Level 10, Unit 01-05, Junction City Office Tower,
Corner of Bogyoke Aung San Road and 27th Street,
Pabedan Township
T +951 9253752~756
F: +951 9253758

NAY PYI TAW

Nilar #2, Business Center, Park Royal Hotel Nay Pyi Taw,
Jade Villa no. 13/14 Hotel Zone,
Dekhina Thiri Township
T: +95 678 106089
F: +95 678 108 092