

# ClientAlert

## Regulatory Developments in Myanmar

August 2013

### Myanmar accedes to New York Convention

#### Summary

On July 15, 2013, Myanmar acceded to the New York Convention on the Recognition of Enforcement of Foreign Arbitral Awards 1958 (the "**New York Convention**"). The next step is for Myanmar's parliament to implement domestic legislation setting out the necessary framework for the Myanmar courts to give effect to dispute resolution mechanisms contractually agreed between parties and for the enforcement of foreign arbitral awards in Myanmar.

Pending such implementation, the current arbitration regime as set out below will continue to apply. In their selection of the dispute resolution mechanism to be applied in respect of their investments in Myanmar, foreign investors would need to consider the potential impact of the current investment regime as well as the transitional period prior to the full implementation of the New York Convention.

#### Analysis

##### Current Arbitration Regime

Arbitration in Myanmar is subject to the Arbitration Act 1944 ("**Arbitration Act**"). Under Myanmar law, agreements to submit to arbitration under the Arbitration Act are not exclusive and the Myanmar courts have the discretion to retain a supervisory role over the conduct of the arbitration and enforcement of the award.

Arbitration outside of Myanmar in disputes involving a Myanmar party is theoretically possible, but the difficulty is that Myanmar law currently does not provide satisfactorily for the enforcement of agreements to submit disputes to arbitration outside Myanmar or for the recognition of foreign awards. Investors may draw limited comfort from the current patchwork of enforcement and protection mechanisms but, in practice, these mechanisms suffer from limitations.

For example, although Myanmar is a signatory to the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 ("**Geneva Convention**"), the two main constraints are first, the limited number of signatories to the convention who are "reciprocating territories" and second, even if the Geneva Convention is applicable, the enforcing party must still obtain recognition of the award from the courts in the country of origin before making a further application for recognition of the award from the courts in the jurisdiction in which the award is to be enforced (i.e. Myanmar). The latter issue does not arise under the New York Convention.



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The other possible protections that are often cited are the ASEAN Comprehensive Investment Agreement 2009 and a small number of bilateral investment treaties, to which Myanmar is party. To date, we understand that enforcement of foreign arbitral awards under these mechanisms is untested and it is therefore difficult to predict the outcome of such enforcement actions in the Myanmar courts.

It is also important to note that Myanmar's recently enacted Foreign Investment Law expressly recognizes that disputes can be settled in accordance with the mechanism specified by the parties in the agreement but does not go so far as to set out a framework for the recognition and enforcement of foreign arbitral awards.

#### Transition to New York Convention – Caution required

In respect of the New York Convention, there are two significant developments that should be watched closely by investors.

First, the domestic legislation adopted by the Myanmar parliament to comply with Myanmar's obligations under the New York Convention. We understand that the new draft arbitration law will be based on the UNCITRAL Model Law on International Commercial Arbitration but there is no certainty as to the specific provisions of the new draft arbitration law and the timing of its enactment.

Second, and perhaps more fundamental to the arbitration regime in Myanmar, is the domestic courts' attitude towards the enforcement of foreign arbitral awards in Myanmar. Under the New York Convention, domestic courts retain the discretion to refuse to enforce a foreign arbitral award on the basis that it would be contrary to public policy of that country. How the Myanmar courts interpret this exception ultimately will determine the effectiveness of the New York Convention for arbitral awards to be enforced in Myanmar.

#### Conclusion

Myanmar's accession to the New York Convention is a move welcomed by many foreign investors. However, given the nascent stage of the implementation of the New York Convention and the grey areas highlighted above, foreign investors evaluating investments in Myanmar should consult their advisors to fully understand these changes and their possible application to particular situations.

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