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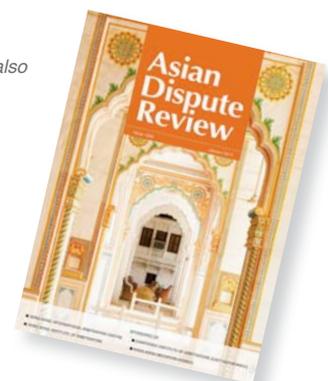
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EDITORIAL

2016 was a year of change for *Asian Dispute Review*. Our newly created Supervisory and Editorial Advisory Boards have strengthened the range and depth of content in the journal, as has our new Jurisdiction Focus section. In another first, the journal is now available online at Kluwer Arbitration.

This issue commences with an article in which **Jonathan Lee QC** considers how to manage expert evidence in arbitration, from the perspective of tribunals and parties. This is followed by an article by **Robert Pé** which reviews Myanmar's progress to date in reforming its international commercial and investment arbitration regimes. **John Fellas** and **Rebeca Mosquera** then explore practical considerations for Chinese parties when notifying respondents as to the commencement of an arbitration, before **Eric Ng** weighs up the recent debate on whether international arbitration hinders the development of commercial law. Our 'In-House Counsel Focus' article by **Ernest Yang** and **Valerie Li** considers Hong Kong's position on winding-up companies pursuant to arbitral awards.

Recent arbitration developments in South Korea are summarised by **Ben Hughes** in the Jurisdiction Focus section. Finally, **Robert Morgan** reviews a new edition of a text on Singapore's arbitration legislation.

We take this opportunity to wish our readers all the very best for 2017.

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Myanmar Arbitration: Progress Made and the Way Ahead

Robert San Pé

This article discusses the progress made by Myanmar in establishing a suitable legal framework and infrastructure for international arbitration and identifies the additional work that is still required.

Introduction

On 7 October 2016, President Obama issued an Executive Order officially revoking US sanctions on Myanmar. On 18 October 2016, Myanmar enacted a new Investment Law aimed at harmonising the investment regimes for foreign and domestic investors and being transparent about where there were remaining differences between those regimes. On 22 October 2016, State Counsellor Daw Aung San Suu Kyi gave the keynote address at an economic policy event in which she reiterated that Myanmar was open for business and welcomed responsible foreign investment. In light of the above, it is not surprising that Myanmar has the fastest growing economy in the region, the IMF having projected growth of 6.5% in 2016. With all this investment comes the prospect of an increase in commercial disputes. Foreign investors will prefer to resolve

disputes with local partners through international arbitration and not in the domestic courts.

Only a few years ago, there were already a number of surprising and significant moves towards political and economic liberalisation in Myanmar and it became apparent that serious change was afoot. In late 2010, Daw Aung San Suu Kyi was finally released from house arrest and on 1 April 2012 her party participated in and achieved a stunning victory in national elections. Hotel rates were increasing, roads in downtown Yangon were becoming gridlocked, foreign visitors were more visible and wi-fi was more readily available. After decades of military rule and long periods of isolationism, there was a concerted push to encourage foreign direct investment into the country.

Developing knowledge of modern international commercial arbitration

In May 2012, a seminar was held at the Chatrium Hotel in Yangon with speakers from the Hong Kong International Arbitration Centre (HKIAC), the International Chamber of Commerce (ICC), the Singapore International Arbitration Centre (SIAC), the author's then law firm and a major multinational that had begun to do business in the country. The seminar was organised in collaboration with the Union of Myanmar Federation of Chambers of Commerce and Industry (UMFCCI), the audience comprising Myanmar businesspeople and lawyers who were interested in learning more about arbitration and demonstrating their existing knowledge of the subject. It became apparent at the seminar that there was some confusion about the differences between arbitration and mediation and that most domestic commercial disputes were being resolved through an informal and imperfect quasi-mediation process. The seminar proved an excellent opportunity to clarify how arbitration should work and to start an ongoing engagement with interested parties in Myanmar. The seminar was told that a draft Arbitration Law was being prepared but that sight of it could not be had because at the time it was still 'illegal' to share draft laws with unauthorised individuals. Thankfully, consultation in respect of draft legislation has become much more common in the years that have followed.

Accession to the New York Convention and a new Arbitration Law

Following the Yangon seminar, a delegation made a day trip to Myanmar's capital, Naypyitaw, during which meetings were held with the then Minister for Industry and the then Attorney General. During these meetings, the delegation lobbied for Myanmar to accede to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). The author had been apprehensive about whether or not (i) these meetings would go ahead (as it was common for ministerial-level meetings to be confirmed or cancelled only at the very last moment), and (ii) the delegation would receive a fair hearing. At the time, a number of lawyers – both local and (a few)

international – had asserted that the New York Convention was not that important for Myanmar because the country was already a party to the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 (the Geneva Convention). The reality was that the Geneva Convention was far inferior to the New York Convention, in terms both of the limited number of countries that had acceded to it and of the procedures for enforcement, which often led to an entire rehearing of the substantive merits of the case in the enforcement jurisdiction.

“ Myanmar deposited its instrument of accession to the New York Convention on 16 April 2013 and accession formally took effect on 15 July 2013. ”

Thankfully, both the Minister for Industry and the Attorney General were receptive to the delegation's submissions in favour of acceding to the New York Convention and no doubt others also lobbied them about this. Accordingly, Myanmar deposited its instrument of accession to the New York Convention on 16 April 2013 and accession formally took effect on 15 July 2013.

In June 2013, shortly before accession to the New York convention took effect, a workshop organised by the author was held for a select group of Myanmar judges and lawyers on the enforcement of foreign arbitral awards. It was run under the auspices of Myanmar's then Parliamentary Committee for Rule of Law (chaired by Daw Aung San Suu Kyi, who visited the workshop in person) and supported by, among others, the HKIAC, the ICC, the International Council for Commercial Arbitration (ICCA), the International Bar Association (IBA), the SIAC and the Singapore judiciary.¹ It was an intensive and rewarding few days as the participants were taken through the basics of the New York Convention and a number of participatory role playing exercises were

conducted that were in stark contrast to the rote learning methods typically adopted in Myanmar.

Following Myanmar's accession to the New York Convention in July 2013,² no domestic implementing legislation was immediately enacted. The existing Arbitration Law dated back to 1944 and, by international standards, was outmoded in terms that it gave the courts extensive powers to interfere with arbitrations. As alluded to above, it was clear that a new draft Arbitration Law was in the works and it became apparent that Myanmar's Supreme Court had taken responsibility for driving it (the separation of powers not being at the forefront of its mind). It was important that once the draft Arbitration Law was submitted to the Parliament or *Hluttaw*, its members should know how best to approach it. A number of arbitration workshops were held for parliamentarians, during which the key message was driven home that Myanmar should stick closely to the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) and not depart from it in any material respect. Alarming rumours were heard at various stages that Myanmar was looking to adopt an Arbitration Law with 'Myanmar characteristics' and later that it planned to follow the old Indian Arbitration Act 1940. Thankfully, those who were advising the Myanmar Supreme Court – staff at the Court, external law firms and others – prevailed upon it to stick closely to the text of the Model Law. The new Arbitration Law (the 2016 Law) was enacted in January 2016.

Modern Myanmar laws are enacted in the Myanmar language and typically no official English translation is published at the time of enactment. Sometimes, a 'quasi-official' translation may be published long after a law is enacted. Among other things, the 2016 Law serves as the domestic implementing legislation giving effect to Myanmar's accession to the New York Convention. There has been some debate around whether the 2016 Law has departed from the New York Convention by allowing Myanmar courts to decline to enforce a foreign arbitral award on the ground that it is contrary to Myanmar's 'national interest' to do so, rather than contrary to its 'public policy'. The prevailing view is that this is simply a

translation issue and that the reference to "national interest" in the 2016 Law can be read as being to 'public policy'.

Developing an arbitration-friendly judiciary

Myanmar's accession to the New York Convention and its enactment of the 2016 Law were significant steps in the right direction and will help build foreign investors' confidence. However, it also remains important to ensure that a sufficient number of Myanmar lawyers and judges are familiar with international arbitration and with the enforcement of awards. In addition to the seminars and workshops referred previously, further arbitration workshops have been held in the country by the Chartered Institute of Arbitrators, various private law firms and others. In August 2016, the ICC held a two-day workshop and a seminar in Yangon. Events such as these should be welcomed and encouraged.

“ It is absolutely crucial that there should be a group of Myanmar judges who are able to deal competently and confidently with the enforcement of foreign arbitral awards under the New York Convention. ”

It is absolutely crucial that there should be a group of Myanmar judges who are able to deal competently and confidently with the enforcement of foreign arbitral awards under the New York Convention. A number of arbitral institutions and organisations are willing and able to provide more intensive capacity building in this field. However, at the moment it appears uncertain whether or not an arbitral award (foreign or domestic) would be referred to a judge with knowledge of and exposure to the New York Convention or to one with no such knowledge and exposure. It would make sense for Myanmar to establish an 'arbitration list' for the competent courts and for a suitably qualified judge or judges to be designated to that list.

Development of an arbitration centre

There is also a need to establish a Myanmar Arbitration Centre (MAC), which could then serve as a focal point for the various arbitration activities that are under way in the country and which could support the proper accreditation of arbitrators and mediators. The Myanmar government has tentatively identified a building in downtown Yangon, the ground floor of which would be suitable for conversion for use by MAC. International arbitral institutions and other arbitration bodies would be willing to provide guidance and support on incorporation, the MAC's relationship with the government, administering arbitrations and building a business. The immediate and most pressing issue is, however, to raise funding for the renovation and conversion of the building. It is hoped that this can be done promptly and that the MAC can serve as an effective flagship, thereby giving foreign investors further confidence in Myanmar.

Investment treaties and investor-State arbitration

Myanmar is also seeking to enter into more bilateral and multilateral investment treaties, thereby providing additional protections to and encouraging increased investment by entities and individuals from counterparty jurisdictions. It is crucial that Myanmar's government and civil service keep in mind that investment treaties are not merely a symbolic gesture that Myanmar is 'open for business', but that they create legally binding obligations. A particular bilateral investment treaty may, for example, prohibit 'performance requirements' by which a foreign investor is required to acquire a certain percentage of raw materials from within Myanmar or to export a certain percentage of the finished product out of the country. It has been relatively common for the Myanmar Investment Commission to include such performance requirements in licences issued to manufacturing businesses. Where an investment treaty prohibits this, Myanmar must be careful to comply with the prohibition (and the other provisions of the treaty) or it will find itself on the receiving end of an investor-State arbitration.

“It is crucial that Myanmar's government and civil service keep in mind that investment treaties are not merely a symbolic gesture that Myanmar is 'open for business', but that they create legally binding obligations. ... Myanmar also needs to develop a carefully formulated and drafted template that it can put forward as the starting point for its investment treaties.”

Such claims have become increasingly common globally over the past three decades and many countries have fallen victim to them. According to the United Nations Conference on Trade and Development (UNCTAD), there were 739 known investor-State dispute settlement (ISDS) cases in the period 1987-2016.³ Between 1990 and 2013, the average amount awarded where an award was made in favour of an investor was US\$81.5m, excluding interest.⁴ It is worth emphasising that this data relates to known cases and that the real numbers may be significantly higher. Subsequently to these statistics being gathered, there have been awards for much larger amounts. Further, not only are the levels of damages high but so are the legal costs of defending such claims: costs can run into tens of millions of US dollars and the reality is that without high quality legal advice and representation, a respondent nation will struggle to prevail.

“The fact that Myanmar is focusing on new investment treaties when, until recently US sanctions were still in place, is striking. It demonstrates, among other things, how rapidly and significantly the country is moving forward.”

As has been widely reported, several countries in Latin America have been on the receiving end of multiple high-value awards and are seeking to terminate their investment treaties. Likewise, countries in Asia, including Indonesia and the Philippines, have also had the same experience and are now very cautious about entering into new treaties. It is important that Myanmar learns from the experience of other nations. It should be selective about the countries with which it enters into investment treaties and should not rush the negotiations. The recently adopted EU-Canada Comprehensive Economic and Trade Agreement took seven years to negotiate, notwithstanding that it was between two close allies and trading partners.

Myanmar also needs to develop a carefully formulated and drafted template that it can put forward as the starting point for its investment treaties. Departures from the template must be permitted only in limited circumstances. In developing

such a template and in negotiating treaties, Myanmar needs to obtain high-quality legal advice; several individuals and organisations have offered their services. Myanmar must also be methodical in adopting processes and procedures to ensure that it complies strictly with the legally binding obligations it has undertaken.

The fact that Myanmar is focusing on new investment treaties when, until recently US sanctions were still in place, is striking. It demonstrates, among other things, how rapidly and significantly the country is moving forward. [1](#)

- 1 Editorial note: see Myanmar: Judicial workshop on the New York Convention [2013] Asian DR 157.
- 2 Ibid.
- 3 Source: UNCTAD, Investment Dispute Settlement Navigator, available at <http://investmentpolicyhub.unctad.org/ISDS>.
- 4 Source: International Institute for Sustainable Development (IISD) table based on UNCTAD data, in Investment Treaty Arbitration and Investment Treaty Arbitration Reporter, available at <https://www.iareporter.com>.



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