



MYANMAR TO SIGN NEW YORK CONVENTION

After months of speculation, Myanmar's Parliament has approved plans to sign the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). This is another step by the formerly reclusive regime to liberalize the economy. It follows promising reforms in other key areas, including foreign investment and censorship laws.

The proposal is good news for foreign investors, who will appreciate the greater certainty that foreign arbitral awards will be enforceable in Myanmar. That said, it remains to be seen how any international obligations will be implemented under Myanmar's current legal framework.

IMPLICATIONS

The New York Convention dates back to 1958 and currently has 148 contracting states. It requires state parties to recognize written arbitration agreements as binding and to enforce foreign arbitral awards as if they were domestic awards. Enforcement of an award

may be refused only in very limited circumstances, such as where the award goes beyond the scope of the submission to arbitration. This means that it is often much easier to enforce a foreign arbitral award in a contracting state than it is to enforce a foreign court judgment.

Although Myanmar is a state party to the 1929 Geneva Convention on the Execution of Foreign Arbitral Awards, which is a precursor to the New York Convention, that treaty has practical limitations and relatively few state parties. Myanmar's existing arbitration laws date back to the colonial era and do not provide for international arbitration. When Myanmar accedes to the New York Convention, it will be obliged to update its domestic legislation to ensure that:

- If a matter comes before a Myanmar court in respect of which the parties have entered into a written arbitration agreement, the court must, at the request of one of the parties, refer the matter to arbitration; and

- If a foreign investor obtains a foreign arbitration award against an entity that has assets in Myanmar, the Myanmar courts will be obliged to recognize and enforce that award (except in very limited circumstances).

PROBLEM OF IMPLEMENTATION

The best laws in the world are useless if they are not properly applied. Aung San Suu Kyi, who was part of the parliamentary committee that recommended signing the New York Convention, was quoted in the state-run newspaper, *The New Light of Myanmar*, as stating:¹

To make the economy a success, it all depends on trust. No matter what legislation is enacted and no matter what agreement is signed, no potential investor would make an investment unless they have confidence in [the political] landscape of the country.

Even if Myanmar accedes to the New York Convention and passes effective domestic legislation, there is no certainty that the new laws will be implemented consistently or impartially. According to the United Nations Special Rapporteur, Myanmar judges are not independent, and lawyers who act for dissidents are often arbitrarily disbarred.² Like many other sectors of the economy, the judiciary and legal profession suffers from a severe skills shortage. The United Nations Special Rapporteur emphasized this problem in a report dated March 2012:³

Regardless of the efforts made to reform legislation, under the current Constitution, Myanmar lacks an independent, impartial and effective judiciary.... In his meeting with the Chief Justice and other justices of the Supreme Court, the Special Rapporteur noted limited acknowledgement of challenges and gaps in capacity or functioning, and a lack of willingness to address his previous recommendations.

The situation does not appear to have improved in the past year. In a draft report released earlier this month, the Special Rapporteur noted that he:⁴

[s]ees no evidence that the judiciary is developing any independence from the executive branch of government.... He urges the Government to pay more attention to this aspect in Myanmar's reform process, on which he has made previous recommendations.

POLITICAL RISK

More broadly, foreign investors in Myanmar still face acute political risk. The hotels of Yangon are full, and enterprising street vendors are hawking copies of the new Foreign Investment Law, but there are enormous challenges ahead. The military retains 25 percent of the seats in the new Parliament and holds a veto over constitutional reform. Liberalization is a slow process, and if destabilization is to be avoided, it will need to satisfy both popular demand and vested interests.

CONCLUSION

The proposal to sign the New York Convention is an encouraging development and, together with other reforms, gives reason to be cautiously optimistic about Myanmar's future. Provided the treaty is implemented properly and the judicial system improves over time, foreign investors will have some certainty that arbitration agreements and awards are likely to be respected in Myanmar.

Of course, there is no reason why foreign investors cannot continue to enforce foreign arbitral awards against a Myanmar entity's assets in other countries that are parties to the New York Convention. For that reason, foreign investors would be prudent to insist, if possible, on arbitration in a neutral location, such as Singapore or Hong Kong, rather than submitting disputes to the jurisdiction of the Myanmar courts.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com.

Phillip Georgiou

Hong Kong / Singapore
+852.3189.7312 / +65.6233.5992
pgeorgiou@jonesday.com

Matthew J. Skinner

Singapore
+65.6233.5502
miskinner@jonesday.com

John Rainbird

Singapore
+65.6233.5512
jrainbird@jonesday.com

ENDNOTES

- 1 Justin Heifetz, “New hope for foreign investment as Myanmar signs Convention,” *The Myanmar Times* (March 7, 2013), available at <http://www.mmtimes.com/index.php/business/4462-new-hope-for-foreign-investment-as-myanmar-signs-convention.html>.
- 2 Tomás Ojea Quintana, *Progress report of the Special Rapporteur on the situation of human rights in Myanmar* (United Nations General Assembly, A/HRC/19/67, March 7, 2012) at [12-13].
- 3 *Ibid* at [12].
- 4 Tomás Ojea Quintana, *Report of the Special Rapporteur on the situation of human rights in Myanmar—Advance Unedited Version* (United Nations General Assembly, A/HRC/22/58, March 6, 2013) at [63].