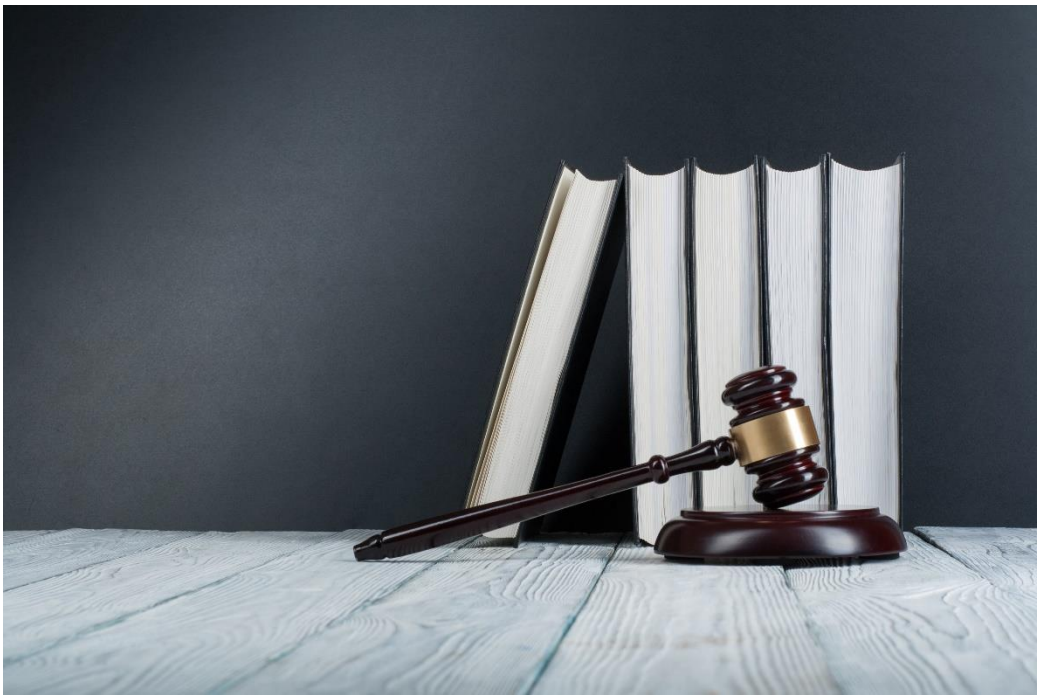
Recent Court Decisions: Are Myanmar Courts Pro-Arbitration?

September 2022 | Myanmar



Introduction

Although more than five years have passed since the enactment of the Myanmar Arbitration Law 2016 ("**MAL**"), there have only been a handful of arbitration-related cases decided in the Myanmar Courts to date.

In this article, we provide a brief summary of three key judgments issued by the Myanmar Courts between 2020 and 2022 concerning provisions of the MAL. We also consider whether they demonstrate a trend towards an increased support for arbitration as an alternative dispute resolution mechanism.

(1) Foreign Arbitral Award Recognised and Enforced

In the first reported decision of its kind, a district court in Myanmar granted an order recognising and enforcing a foreign arbitral award against Myanmar parties on 17 May 2021 in *ARV Offshore Co Ltd vs. Myanmar Offshore Co Ltd and MOL Offshore Pte Ltd*.

Here, a Thai company providing project management services in the oil and gas industry successfully obtained an arbitral award in its favour against a Myanmar defendant and its Singapore parent company in an arbitration administered by the Singapore International Arbitration Centre ("**SIAC**"). Upon the defendants' refusal to pay the amount awarded, the plaintiff successfully enforced the award against the Singapore parent company in the Singapore High Court.

The plaintiff also initiated proceedings under section 46 of the MAL for recognition and enforcement of the foreign arbitral award in Myanmar. In 2021, the Western Yangon District Court passed an order recognising the SIAC award and directed that the execution of the award be carried out in accordance with Order 21, Rule 23(1) of the Myanmar Civil Procedure Code.

This is the first reported successful case of recognition and enforcement of a foreign award in Myanmar since the MAL came into effect on 15 January 2016.

(2) Court Proceedings Stayed in Favour of Arbitration

In December 2020, in *Energy Capital Pte Ltd v Toyo Thai Power Myanmar Co Ltd*, the Yangon Region High Court upheld an order of the Western Yangon District Court to stay a civil suit and refer the dispute to arbitration pursuant to section 10 of the MAL. The relevant part of section 10 states that "*a court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his 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*".

In this case, the plaintiff (a Singapore compressor company) and the defendant (a Thai power company) had entered into an agreement for the purchase of equipment. The defendant made certain payments to the plaintiff for the equipment. However, the payments were fraudulently routed by a third party into a separate account that did not belong to the plaintiff. The plaintiff therefore filed a claim in the Myanmar Courts against the defendant for the outstanding payments.

The relevant purchase order contained an arbitration agreement referring disputes arising out of the purchase order to arbitration administered by the International Chamber of Commerce (ICC) in Singapore. Accordingly, the defendant opposed the civil suit, arguing that the plaintiff's claim should be stayed and the dispute referred to arbitration pursuant to the arbitration agreement and section 10 of the MAL.

At first instance, the Western Yangon District Court took a pro-arbitration stance, allowing the defendant's application and referring the dispute to arbitration. The plaintiff then filed a revision application in the Yangon Region High Court.

The Yangon Region High Court upheld the decision of the Western Yangon District Court on the basis that there were no grounds to interfere with the decision of the lower court.

(3) Court Proceedings Allowed Despite Arbitration Clause

In a case currently remitted back to the Eastern Yangon District Court, the plaintiff was a Myanmar company that had entered into a series of car purchase agreements as the purchaser. The defendant was a Japanese company that was the successor of the original seller. A dispute arose between the parties, with the plaintiff alleging that the cars supplied by the defendant did not meet the required criteria under the relevant contract.

The purchase agreement contained an arbitration clause referring disputes arising out of the purchase agreement to arbitration in Japan administered by the Japan Commercial Arbitration Association ("**JCAA**"). Based on the purchase agreement, the plaintiff commenced arbitration proceedings in Japan for unpaid monies and obtained an arbitral award in its favour.

Notwithstanding the ongoing arbitration proceedings, the plaintiff filed a civil suit in the Eastern Yangon District Court. The defendant opposed the suit on the ground that the dispute between the parties had already been decided by the JCAA in its arbitral award. The Eastern Yangon District Court dismissed the suit under section 11 of the Myanmar Civil

Procedure Code (doctrine of *res judicata*) on the ground that the disputes between the parties had already been decided by the JCAA.

The plaintiff appealed to the Yangon Region High Court. In 2022, the Yangon Region High Court overruled the decision of the Eastern Yangon District Court and allowed the appeal on the ground that the doctrine of *res judicata* was not applicable. For the doctrine of *res judicata* to apply under section 11 of the Myanmar Civil Procedure Code, the subject matter of the dispute must be the same before two different *competent courts*. The Yangon Region High Court ruled that the JCAA could not be considered a court of competent jurisdiction. The case was therefore remanded back to the Eastern Yangon District Court to continue with the trial.

Concluding Remarks

As evidenced above, arbitration in Myanmar appears to be a case of two steps forward and one step back. Both the Western and Eastern Yangon District Courts were in favour of arbitration, having upheld an arbitration agreement and two foreign arbitral awards. However, the Yangon Region High Court took an ambivalent approach, upholding a stay of proceedings in favour of arbitration in one case but declining to do so in another.

Despite some visible progress, some Myanmar courts appear to be less familiar with or receptive to arbitration being used as an alternative to court litigation, resulting in a certain level of unpredictability in outcomes for actions to recognise and enforce foreign arbitral awards in Myanmar.

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