

An Overview of Arbitration in Myanmar

Ei Ei Khin

要 旨

仲裁は、当事者間の合意から権限を得、その決定が当事者を拘束する一人又は複数の仲裁人により紛争を解決する方法である。ミャンマーにおいては、これが基本的な紛争解決方法である。仲裁に関する基本的な規定は、1944年仲裁法 (the Arbitration Act, 1944) に定められている。この法律においては、1944年の規定では、裁判所の介入のある仲裁と裁判所の介入のない仲裁の二つの選択肢が用意されている。仲裁契約は、当事者が現在又は将来の紛争を仲裁に付することを約する書面による契約である。一定の場合においては、裁判所が仲裁に関与する場合がある。当事者は、仲裁条項に従って仲裁人と審判人 (umpire) を選定できる。正義と公正の確保のため、仲裁人と審判人の選定と解任は裁判所の監督の下に行われる。特定の場合について、この法律は裁判所に仲裁判断を修正することや、仲裁判断の再審理のため仲裁人又は審判人に付託することを許している。さらに、裁判所は仮命令を発し、仲裁判断を執行する権限を有する。当事者の一方が仲裁人の仲裁判断に満足しない場合は、当該事項を審理する管轄権を有する裁判所に上訴することが許されている。本稿の目的は、ミャンマーの仲裁制度における紛争解決を分析することである。仲裁における仲裁審判所及び裁判所の役割並びに仲裁判断の執行を中心とする。なかんづく、外国仲裁判断の執行に焦点をあてる。

Keywords: Arbitral Tribunal, The Role of Courts with regards to Arbitration, Enforcement of Foreign Arbitral Awards

Introduction

1. Arbitration in Myanmar
 - 1.1. Historical and Cultural Background
 - 1.2. Basic Provisions of the Arbitration Act 1944
2. Arbitration Agreement
3. Arbitral Tribunal

- 3.1 Composition of Arbitral Tribunal
 - 3.2 Jurisdiction of Arbitral Tribunal
 - 3.3 Arbitral Awards
 - 4. The Role of Courts with regards to Arbitration
 - 4.1. Court Intervention
 - 4.1.1. Court involvement relating to Arbitrators and Umpire
 - 4.1.2. Court involvement after an Arbitral Award
 - 4.2. Court Jurisdiction and Procedure
 - 4.3. Power of the Court to stay Legal Proceedings
 - 4.4. Power of the Supreme Court to make Rules
 - 4.5. Appeal
 - 5. Enforcement of Arbitral Awards
 - 5.1. Enforcement of Domestic Arbitral Awards
 - 5.2. Enforcement of Foreign Arbitral Awards
- Conclusion

Introduction

The legal system of Union of Myanmar is unique combination of Common Law and Civil Law Systems. The legal system belongs to the Common Law legal family and thus the principles of Common Law practice though statutes which are the backbone of Myanmar legal system. These statutes employ core aspects of Common Law principles especially in the area of disputes resolution.¹

Arbitration is one of the fundamental ways in which contractual disputes may be settled in Myanmar. The fundamental statute concerning arbitration, the Arbitration Act, 1944 was promulgated on the 1st March 1946.² The 1944 Act has basic provisions which will be assumed to be included in an arbitration clause unless different intentions are expressed by the parties.³ This Act provides for the appointment of the arbitrators and the umpire, the court⁴ stepping in if there is a dispute concerning their appointment and their powers. To maintain justice and equity, the court has power to remove the arbitrators and umpire in case of unjust circumstances. The Act also gives the court power to modify the award and thus, law suit will not take place as a parallel action when arbitration is made. Finally, there is a system of appeal with the court going through point of law so that there will be no miscarriage of justice.⁵

The purpose of this paper is to analyze the settlement of disputes under Myanmar arbitration mechanism. It is chiefly concerned with the role of arbitral tribunal and the courts in arbitration as well as the enforcement of awards. The main emphasis is on enforcement of foreign arbitral awards.

1. Arbitration in Myanmar

1.1. Historical and Cultural Background

The system of settlement of disputes in Myanmar is well established based on its culture and common law principles with proper statutes.⁶ Myanmar has flourished its own culture and historical background which can be seen through material evidences from very ancient times. With the history of ancient Myanmar, some people say that Myanmar judiciary started so early as in the 5th century B.C⁷ but that is perhaps too early. Myanmar civilization achieved a high level of development at *Bagan* era from middle of the 11th century to the end of 13th century.⁸ In 12th century A.D., the Myanmar traditional judiciary had, as evidenced by reliable records, established itself in the judicial system. During the reign of Myanmar King, the *Dhammathats* (Legal Texts), *Yazathat* (Royal Edicts), *Phyatthons* (Judicial Rulings) and traditional customs were sources of laws.⁹

The purpose of Myanmar traditional justice is to achieve harmony and peace in society.¹⁰ The judges and arbitrators exist primarily to give patient ear to the litigants and generally guide them to compromise. During the era of Myanmar kings, the settlement of disputes between Myanmar citizens was encouraged. The parties settled disputes amicably, sometimes face to face or through a mediator. When the dispute was settled, both parties sat down to have a snack of “*Laphet*” or tea leaves in the traditional Myanmar manner.¹¹ The procedures were neither formal nor rigid. Decisions were made by considerations of what was good for the peace and harmony of the village or the family. The system of mediation and arbitration has survived in the village, with some modifications, and not only in family problems but in the general social problems of the village, however the system has been subjected to drastic changes as laws get modernized and the judicial hierarchy becomes more formal and organized.¹²

In the traditional hierarchy of Myanmar justice, judges were divided into six classes. The parties themselves, if they could argue out their disputes and reach agreement, were recognized as the best judges in their own course. Alternatively, they could appoint one or more *ad hoc* arbitrators of their own. Then, there was unpaid but officially appointed and recognized arbitrators, whose court was “*Khon*” (Tribunal). Above

this class there was the district officer as judge. Then the chief civil court at the capital and finally in the kings-“the mighty fountainhead of justice,” though he was not himself above the law- and the Hluttaw, Supreme Court and Privy Council combined.¹³

Judicial administration in the “*Konbaung*” period (1753-1885) was the traditional in nature with much of the traditional legal principles and procedures accepted and practiced. It is clear that there were two kinds of arbitrators at that time. The first is one who could be appointed voluntarily by both parties and the second is one who was appointed by the king.¹⁴ The arbitrator appointed by royal authority could sit at the “*Khon*” (Tribunal).¹⁵ *Yaysagyo-Khon Taw* was a famous Arbitral Tribunal. Moreover, the decision of *Yaysagyo-Khon Taw* was well-known ruling as the selected awards of the *Yaysagyo* Arbitral Tribunal.

In civil cases, if the two parties were satisfied with the judgment they would eat pickled tea (*Laphet*) together and the judgment became final. A refusal to eat the pickled tea indicated dissatisfaction with the judgment and an intention to appeal.¹⁶ Even though the appeal was allowed, appeal cases were seldom. Perhaps it was because the essence of law was arbitration rather than litigation.¹⁷ This spirit of amicable settlement has its basis not only in common law legal principles but also in Myanmar History and Culture. This idea is used by modern Myanmar jurist and commercial contract, and an amicable settlement has been encouraged. It can thus be said that the settlement of disputes in Myanmar is based on strong culture and legal tradition.¹⁸

1.2. Basic Provisions of Arbitration Act, 1944

The main procedural law for arbitration in Myanmar is the Arbitration Act 1944 (hereinafter as "the 1944 Act"). The 1944 Act, provides for two alternatives of procedures. One is arbitration without the intervention of the court, and the other is arbitration with the intervention of the court. The parties concerned may choose either of the two alternatives. However, arbitration with the intervention of the court is provided in two separate chapters. One is intervention where there is no suit pending, and other is as arbitration in suite.¹⁹

The 1944 Act includes basic provisions which will be assumed to be included in an arbitration clause unless different intentions are expressed by the parties. Unless otherwise stated, there should be a sole arbitrator. If there are more than one arbitrator, an umpire should be appointed. The arbitrator or arbitrators make the award within four months of appointment, unless such period is extended by a court. If the arbitrators cannot agree within the allotted time, the umpire’s decision is determinative. The parties must

produce all evidence under their control requested by the arbitrators. The arbitral award is final and binding, and costs, including attorneys' fees, can be awarded at the discretion of the arbitrators. Arbitrators or umpire might make interim awards as they think fit.²⁰

All the provisions of the Code of Civil Procedures and the Myanmar Limitation Act (hereinafter as "the Limitation Act") apply to arbitration in the same way as in the proceedings in the court. Since arbitration is enforced through court proceedings, the same limitation periods apply to arbitrations as in lawsuits. For example, under Article 158 of the Limitation Act, an application to set aside an award should be made within 30 days from the date of service of the notice of filing the award. An application made over four months after service of the notice is barred by the Limitation Act.²¹ Arbitration is deemed to have been commenced for the purposes of the Limitation Act where one party serves the other with notice requiring the appointment of an arbitrator, or when, in accordance with the terms of the agreement, a dispute is submitted to an arbitrator named or designated in the agreement.²² When a court sets aside an arbitration award, it has no effect on the parties, the period between the commencement of the arbitration and the date of the court's order doing so are excluded in calculating the period prescribed under the Limitation Act for any proceedings with respect to the subject-matter of the disputes.²³ Article 178 of the First Schedule of the Limitation Act provides that the period of limitation for the filing in court of an award under section 14(2) of the 1944 Act is 90 days from the date of service of the notice of the award.²⁴

Arbitration in Myanmar is not affected by the death of the party to an agreement which has chosen arbitration. Despite the death of the party to an agreement in which there is an arbitration clause, an arbitration award may be enforced against the party's representative. Moreover, the authority of an arbitrator is not revoked by the death of the party who appointed the arbitrator.

In general, insolvency does not affect the rights of the parties to an agreement in which arbitration has been employed. If a receiver does not otherwise repudiate an entire agreement, the receiver is bound by the terms of its arbitration clause. If a party to a contract which employs arbitration becomes insolvent, any party to the contract or the receiver may, before the commencement of insolvency proceedings, apply to the court in Myanmar having jurisdiction for an order that the arbitration take place in accordance with the terms of the contract.²⁵

2. Arbitration Agreement

Arbitration agreement is as a written agreement to refer present or future disputes to arbitration.²⁶ It is evidence of the consent of the parties to have their differences resolved through arbitration, thus establishing a binding contractual obligation between them. If there are multiple parties to a contract, the arbitration agreement must be extended to include the intents of all of the parties concerned.²⁷ Moreover, an arbitration agreement outlines the authority of the tribunal, which may only exercise such power as parties confer upon it. The rest of an arbitration agreement is provided according to the underlining principle for a court to suspend its jurisdiction.²⁸

3. Arbitral Tribunal

3.1. Composition of Arbitral Tribunal

There are no restrictions on or requirements as to who can be appointed by the parties as an arbitrator.²⁹ A common arrangement is for each party to appoint his or her own arbitrator. The parties can appoint sole arbitrator according to the arbitration agreement.³⁰ The court itself can make appointment if either party fails to appoint or mutual consent to the appointment fails. Furthermore, in the event of the two arbitrators failing to make a unanimous award, an umpire will be appointed, either by the parties or by the court to make the ultimate decision.

In case of a three-arbitrator tribunal in which one arbitrator is to be appointed by each party and the third to be appointed by the two nominated arbitrators, the agreement is deemed to have appointed one umpire among them.³¹ The award of majority is binding unless the agreement provides otherwise.³² In the event that the parties who are required to appoint an arbitrator or arbitrators or umpire fail to appoint, the court has the power to make such an appointment on their behalf.³³

The 1944 Act does not provide about what kind of formal qualifications an arbitrator should process. However, in practice, a validity of appointed arbitrator must meet the requirements set forth by the arbitration agreement, and the 1944 Act in turn enforces any such express agreement regarding the required qualification. More importantly, an arbitrator should not have any relationship with either of the parties or any connection with the arbitration disputes so that there can be no ground of objection based on the lack of impartiality of the arbitrator.³⁴

3.2. Jurisdiction of Arbitral Tribunal

The 1944 Act confers limited powers to the arbitrator and umpire. Unless the contrary intention is expressed in the arbitration agreement, the arbitrator or umpire has the power to:³⁵

1. obtain the opinion of the court on any point or, if necessary, on the whole subject of the award;
2. correct any clerical mistakes or errors arising from any accidental slip or omission in an award;
3. administer oaths to all parties appearing in the arbitration;
4. allow the parties to be represented by advocates/lawyers should they deem it desirable;
5. make interim awards; and
6. award costs.

The duties of an arbitrator are to:

1. see that his/her appointment is in order;
2. fix a time for the hearing;
3. act impartially;
4. abide by the terms of the arbitration agreement/reference;
5. hear all the evidence;
6. arrive at the decision and deliver the award with due diligence; and
7. give a decision on all matters referred, whether points of law or fact.³⁶

Where there are joint arbitrators they must act together, be present at all proceedings and must all sign the award.³⁷ An arbitrator cannot delegate his/her authority to the arbitrator(s). The umpire has the same powers and duties as an arbitrator, his/her duties commencing from the date when he/she is called upon to act in consequence of the inability of the arbitrators to agree.³⁸

However, where the reference is to three arbitrators, the unanimous award is rendered by the three arbitrators, and not by the umpire. In such event, the award must be the unanimous decision of the arbitrators unless the submission provides for a majority decision to be binding.³⁹

Unless otherwise specified in the arbitration agreement, the following terms will apply to the arbitration:⁴⁰

- a. The reference will be to a sole arbitrator;
- b. If the reference is to an even number of arbitrators the arbitrator shall appoint an

- umpire within one month of their appointment;
- c. The award must be made within four months of the reference to the arbitrator(s);
- d. If time expires without an award having been delivered, the matter will be referred to an umpire who must make an award within a further two months;
- e. The party to the arbitration will submit to examination under oath/affirmation produce all requested documents within their possession or power;
- f. The award will be final and binding on the parties ; and
- g. The cost of the arbitration will be at the discretion of the arbitrator(s)

3.3. Arbitral Awards

After hearing both parties and their witnesses, the arbitrator makes his/her decision in the form of an award. The general principle is that an award is final and assumed to be valid, and that there can be no appeal from it.⁴¹ A valid award must be:⁴²

- a. in writing;
- b. final and giving a decision on all matters referred;
- c. certain and in accordance with directions in the arbitration agreement;
- d. possible of performance and reasonable;
- e. legal;
- f. *intra vires*, that is in conformity with the powers contained in the arbitration agreement; and
- g. correctly stamped for duty.

4. The Role of Courts with regards to Arbitration

The notion of arbitration is conceived as a substitute for court litigation. The arbitrators/ umpire are given wide discretion as to the *modus operandi* of the proceedings. The purpose of this mechanism is to give the nature of informality to arbitration proceedings. In certain cases however the right is given for application to a civil court for interim orders or interlocutory proceedings during the course of arbitration proceedings. This procedure permits the arbitrator(s)/umpire to approach the court to resolve the issue.⁴³ The functions of the court in arbitrations can be summed up as follows:⁴⁴

1. The courts assist in the constitution of the arbitral tribunal and make available to it the judicial measures which are not at the disposal of the arbitrator.
2. They intervene if the arbitrator commits an irregularity or misconducts by himself or proceedings.
3. They allow access to the courts if it is appropriate to stay the arbitration proceedings.
4. Subject to certain strict conditions, they admit a judicial review on issues of law.
5. They control the enforcement of domestic and foreign awards.

4.1. Court Intervention

According to above mentioned provision, arbitration is informal, and arbitrators do not need to be professional lawyers. Thus, when the questions of law arise, it is necessity of the intervention of the courts. The courts have the power of intervention relating to the arbitrators and arbitral award.

4.1.1. Court involvement relating to Arbitrators and umpire

The courts have the power to appoint and remove the arbitrators and umpire.

a. Appointment of an arbitrator or umpire

The court will appoint an arbitrator or umpire, (where relevant) for the parties where:⁴⁵

1. the contract does not name the arbitrator the arbitrator or specify the mechanism by which the arbitrator is to be chosen and the parties do not concur in the appointment of an arbitrator;
2. the named/chosen arbitrator neglects or refuses to act; or
3. the parties or arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him/her.

b. Removal of an arbitrator or umpire

The court will exercise its jurisdiction to revoke the authority of an arbitrator or umpire:⁴⁶

1. who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award,
2. who has misconduct himself or the proceedings.

“Misconduct” sufficient to warrant the revocation of an arbitrator’s authority includes:

- a. contravening the principles of natural justice by, for example, failing to give one of the parties to the arbitration the opportunity to be present and put their case before the

arbitrator;⁴⁷ and

- b. such mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice.⁴⁸

Misconduct will also likely include any failure to act impartially or where the arbitrator has a secret interest or bias in the result of the proceedings.⁴⁹

4.1.2. Court involvement after an Arbitral Award

Upon the rendering of an award by the arbitrators or umpire, they must sign it, give written notice to the parties and claim their fees.⁵⁰ The parties, upon the payment of the fees, must request that the arbitrators or umpire file the signed copy of the award with the court, which must then give notice of the filing of the award to all parties.⁵¹

Under the 1944 Act, the court has power to:

- order modify or correct an award;
- remit or refer back the award;
- set aside the arbitral award;
- pass interim order after the filing of the award;
- order supersede the reference;
- challenge the existence or validity of an award;
- pronounce judgment and decree;
- appeal against the orders; and
- enforce the arbitral award.

a. Power to order modify or correct the award

Under the 1944 Act, the court may order to modify or correct an award where:⁵²

1. it appears that a part is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or
2. the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or
3. the award contains a clerical mistake or an error arising from an accidental slip or omission.

b. Power to remit or refer back the award

The court may remit an arbitral award to the arbitrator or umpire:

upon such terms as think fit:⁵³

1. where the award has left undetermined any of the matters to arbitration, or where it determines any matters not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred; or
2. where the award is so indefinite as to be incapable of execution; or
3. where an objection to the legality of the award is apparent upon the face of it.⁵⁴

In all cases of reference from arbitration to or upon filing of the award with the court, the court may remit matters to the reconsideration of the arbitrator or umpire. Where an award is remitted, the arbitrators or umpire must make their award within the time fixed by the court.

c. Power to set aside the award

The court may only set aside an award where:⁵⁵

1. there has been misconduct by the arbitrator or umpire;
2. the award is uncertain or inconsistent, not final or contains a mistake of law or fact;
3. the arbitrator has refused to hear evidence relevant to the matter in dispute; or
4. the award has been improperly procured.

Misconduct is a question of fact and is decided on a case-by-case basis. The evaluation of evidence by an arbitrator is not normally questioned nor thus is not considered by a court. Examples of “improperly procured” in accordance with Section 30 (c) of the 1944 Act are arbitrators who take jurisdiction without proper appointment⁵⁶ and who exceed their authority.⁵⁷

The court may only set aside an award on the grounds mentioned in the 1944 Act and does not have the right to take the task of being a judge of the evidence put before the arbitrator.⁵⁸ The High Court has held that under the 1944 Act, the court has very limited jurisdiction to review awards passed by arbitrators or umpires:

“A court cannot set aside an award of an umpire as perverse simply because it has formed an opinion and drawn conclusions different from those formed and drawn by the umpire on questions of fact.”⁵⁹

In summing up, where there is corruption or fraud on the part of the arbitrator, excess of jurisdiction, or where an error of law appears on the award, the court will interfere at the request of the party or arbitrator.⁶⁰ In practice, these grounds are considered quite narrow and seldom, if ever used. If a court in Myanmar wishes to question an arbitration award, it would rely on the criteria set forth in section 30 of

the 1944 Act.

There are a few cases which define misconduct sufficient to allow a court to set aside an arbitrators' decision.

In *U Sein Win and Co Ltd. v. The State Agricultural Marketing Board*,⁶¹ it was held that:

“it is not necessary to allege any dishonesty or moral turpitude to attribute legal misconduct on the part of an arbitrator, which term does not really amount to much more than such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice.”

d. Power to pass interim order after filing of the award

At anytime after filing the award, if the court is satisfied that it is just and necessary for the speedy execution of the award, the court may pass interim order as it deems fit.⁶²

e. Power to supersede the reference

When an award has become void or has been set aside, the court may by order supersede the reference and shall order that the arbitration agreement shall cease to have effect with respect to the difference referred.⁶³

f. Power to challenge the existence or validity of an award

Any party to an arbitration agreement or any person claiming under his desiring to challenge the existence or validity of an award or to have the effect of either determined shall apply to the court and the court shall decide the question on affidavits. And if court deems it just and expedient, it may set down the application for the hearing on affidavits. And if court deems it just and expedient, it may set down the application for the hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit.⁶⁴

g. Power to pronounce judgment and decree

Where the court sees no cause to remit or set aside the award and after the expiry of 30 days from the date of filing, the court will pronounce judgment in terms of the award.⁶⁵

After the pronouncement of the judgment, a decree⁶⁶ from the court is issued.⁶⁷ No appeal can be made against such judgment, unless the appeal is based on the ground that the judgment is in excess of or not otherwise in accordance with the award.⁶⁸

The grounds for court intervention are, however, considered to be limited. For example, the Supreme Court of Myanmar stated:

“The courts have very limited jurisdiction to review awards passed by arbitrators or umpire. They

have not the jurisdiction of a court of appeal while reviewing the decision of an inferior court.”⁶⁹

The 1944 Act clearly provides that no suit should be brought on any ground in connection with the existence, effect or validity of an arbitration agreement or award nor should such agreement or award be set aside, amended or modified except as provided in the 1944 Act.⁷⁰ Any party questioning the validity or existence of an arbitration agreement or award must apply to the court on affidavits. The court may hold hearings and make any orders in connection with discovery it deems necessary to make such determination. Moreover, only the court in which the award under the agreement has been, or may be filed, may decide questions regarding the validity, effect of existence of an award or an arbitration agreement.

Literally, this provision could be interpreted as enabling the parties in the arbitration clause to severely limit the role of the court in the arbitration process. To date, this provision has been interpreted only to limit the ability of the court to change the outcome of an arbitrator's award as a result of procedural maneuvering in the absent of any agreement in contrary to the arbitration clause. In *Ramanand v. U.N. Menon*, for example, the fact that a court did not give proper notice of the filing of an arbitral award was not grounds for another court setting aside the award.⁷¹

4.2. Court Jurisdiction and Procedure

An application to a court under the 1944 Act, including one for the enforcement of an award, may be filed with any court having jurisdiction over the matter to which the arbitration relates. Once such application is filed, however, the court with which the filing has taken place has jurisdiction over all matters relating to the arbitration in question.⁷²

Procedure in all court actions in connection with arbitration is controlled by the Code of Civil Procedure.⁷³ The 1944 Act also provides for a specific list of orders by a court which are permitted in relation to arbitration.⁷⁴ In addition to the applicable provisions of the Civil Procedure, the 1944 Act provides for fundamental notice procedures⁷⁵ and procedures for courts to compel the testimony of parties and witnesses required by arbitrators or umpire.⁷⁶

4.3. Power of the Court to stay Legal Proceedings

The court has the power to stay legal proceedings where the fact that a lawsuit is brought in connection with the subject-matter of arbitration does not render the arbitration invalid.

If one of the parties to an agreement in which an arbitration clause exists brings a lawsuit there

upon, one or more of the remaining parties may apply to the court to stay the lawsuit at any time before filing a written statement or taking any other steps in the lawsuit.⁷⁷

An order to stay will be refused where the circumstances are such that the court would have granted leave to revoke the arbitrator's authority, if an application for such had been made, and there is good ground for believing that the arbitrator will not act fairly in the matter or that, for some other reason, it is improper that the arbitrator should arbitrate the dispute.

The court will usually grant a stay if the following conditions are fulfilled:

1. the arbitration agreement is in writing, valid and the matter in question in the legal proceedings for which a stay is sought is within the scope of the arbitration agreement;
2. the application for the stay is made by a party to the arbitration agreement;
3. the application has taken no "step" in the proceedings after appearance;
4. the applicant satisfies the court that he/she is and was, at the time of the commencement of the proceedings, ready and willing to do everything necessary for the proper conduct of arbitration; and
5. there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement.⁷⁸

Furthermore, the court is obliged to order a stay of legal proceedings, unless satisfied that the arbitration agreement has become inoperative or cannot proceed or that there is not in fact any dispute between the parties with regard to a matter agreed to be referred, where:

1. the arbitration agreement is one to which the Geneva Protocol 1923 on arbitration clauses applies and the reference to arbitration relates to matters considered commercial under Myanmar Law;
2. the legal proceedings are brought by a party to the arbitration agreement in respect of a matter agreed to be referred; and
3. the application is made after appearance, but before any other step in the proceedings is taken by the applicant.⁷⁹

4.4. Power of the Supreme Court to make Rules

The Supreme Court of Myanmar has the right to make rules relating to:⁸⁰

1. the filing of awards and all proceedings consequent there on or incidental thereto;

2. the filing and hearing of special cases and all proceedings consequent thereon or incidental thereto;
3. the staying of any suit or proceedings in contravention of an arbitration agreement;
4. the forms to be used for the purposes of the 1944 Act; and
5. all proceedings in court under the 1944 Act, generally.

4.5. Appeal

No judicial order with arbitration may be appealed unless specific statutory provision permits. The followings are the situations in which an appeal is made against a court order in connection with arbitration.⁸¹ Appeals of judicial arbitration orders are to the appeal court authorized by the laws to hear appeals from original decrees of the court which issues the order, where a judicial order exists:

1. superseding an arbitration;
2. on an award stated in the form of a special case;
3. modifying or correcting an award;
4. filing or refusing to file an arbitration agreement;
5. staying or refusing to stay legal proceedings where there is an arbitration agreement; and
6. setting aside or refusing to set aside an award.

Once appealed, no further appeals can be made, except to the Supreme Court of Myanmar. In general, the Supreme Court may evaluate both facts and law in appellate cases. Practically, however, evaluation of factual evidence by the arbitrator never becomes a matter which the court questions and considers.⁸²

5. Enforcement of Arbitral Awards

When the award is finally stated to be binding (unless otherwise specified in the arbitration agreement), enforcement of the award is achieved through the courts.⁸³ An award is supposed to be final for both parties.

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has not been adhered to by Myanmar. There is, however, the Arbitration (Protocol and Convention) Act, Myanmar Act VI 1937 of 19th Jan, 1939. This Act formed as a domestic legal promulgation of two

international instruments namely, the Protocol on Arbitration Clauses, 1928 known as the Geneva Protocol and Convention on the Execution of Foreign Arbitral Awards 1927.

The Arbitration (Protocol and Convention) Act 1939 provides for the enforcement of foreign awards in Myanmar made either by action or in the same manner as a domestic award is enforced. These treaties have had an important effect upon uniformity in the recognition and enforcement of foreign awards among their signatories.⁸⁴ They are the important sources of law of Myanmar regarding international commercial arbitration. The Arbitration (Protocol and Convention) Act 1939 applies to all arbitration agreements in relation to commercial matters between the parties subject to the jurisdiction of different signatory countries, irrespective of the place of the arbitration.⁸⁵ However, reciprocal provisions regarding enforcement of arbitral awards have been made for each such country by Myanmar and that there has been formal notification thereof published in Myanmar's Official Gazette.⁸⁶ Thus, only few foreign arbitral awards can be enforced under 1939 Act.

5.1. Enforcement of Domestic Arbitral Awards

When an award has been made by arbitrators/umpire, it can only be implemented through the powers of the civil court. In Myanmar, the civil court is given the power to enforce the award like a judgment and decree passed by a civil court.

There are usually two ways in which judgment or court order of enforcement can be obtained by a domestic award or by an application⁸⁷ made by decree-holder. Such a decree can be enforced by one or more of the parties in accordance with the Code of Civil Procedure, Order.21 (Execution of Decrees and Orders). If a decree is for the payment of the money, the court may, on the oral application of the decree-holder at the time of the granting of the decree, order immediate execution thereof by the arrest of the judgment-debtor.⁸⁸

Where the property of the judgment-debtor is located outside Myanmar, award enforcement will inevitably require judicial assistance from the relevant foreign court. The foreign court will be entrusted by Myanmar court to execute against the property of the judgment-debtor. This judicial assistance is normally based on the international agreements that the Myanmar has signed. Both a Myanmar court and a foreign court may mandate each other to pursue certain legal actions on each other's behalf.⁸⁹

In the case of "Agricultural and Food Product Trading Corporation",⁹⁰ the award was not enforced.

"In Myanmar, a foreign company (Hong Kong) and the Agricultural and Food Products Trading Corporation (Myanmar) entered into two agreements to build vessels, providing arbitration clauses under the

Myanmar Arbitration Act (1944). The tribunal delivered an award in favour of the Trading Corporation. The foreign company filed an appeal at the Supreme Court but was rejected. The foreign company had no assets in Myanmar to enforce the award. The foreign company built the vessels in Singapore and could not confer the vessels within the time limits of the agreement.”

At that time, there was no bilateral or multilateral treaty between the Government of Myanmar and Singapore or Hong Kong regarding the enforcement of arbitral awards, Myanmar efforts to enforce the award in the foreign country failed.

This case would be the best illustration for Myanmar to consider the participation in modern international conventions such as the 1958 New York Convention and the UNCITRAL Model Law.⁹¹

5.2. Enforcement of Foreign Arbitral Awards

A foreign award may be enforceable if:

1. it has been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed;
2. it has been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties;
3. it has been made in conformity with the law governing the arbitration procedure;
4. it become final in the country in which it was made;
5. it has been in respect of a matter which may lawfully be referred to arbitration under the law of Myanmar; and
6. it is not contrary to the public policy or the law of Myanmar.⁹²

Enforcement can be refused if the court dealing with the case is satisfied that:

1. the award has been annulled in the country in which it was made, or
2. the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case or was under some legal incapacity and was not properly represent, or
3. the award does not deal with all the questions referred or contains decisions or matters beyond the scope of the agreement for arbitration.

Conclusion

The Myanmar arbitration system is analyzed from the historical and cultural view of the Myanmar King era and to present situation. As an alternative and a better choice in courts, businessmen and merchants often prefer to refer disputes to arbitration. In Myanmar, however, only a few cases have been referred to arbitration. Most of the differences are concerned with Myanmar unique culture. In Myanmar, a time honored old saying as “let the graver offences be mitigated and the smaller ones be settled”, and “let amity be ever-lasting and enmity be ephemeral”.⁹³ As an Asian country, Myanmar reserves and encourages the good attitudes that confrontation should always be avoided by kindness and compromise.

The 1944 Act gives the court powers to complement the arbitral process. The courts assist the arbitration process by staying the legal proceedings and referring them to the arbitration in favor of implementation of an arbitration agreement. Some experts argue that Myanmar 1944 Act opens too wide room for court intervention than arbitration laws of other countries. In practice, the court normally maintains a measure of supervision to the minimum necessary and the role of the court is limited. The court only assists the arbitration process and controls the enforcement of awards.

Myanmar has adopted Market-Oriented Economic System since 1988, and the foreign investors and domestic entrepreneurs or governments have been making investment in Myanmar. In order to flow the route of foreign investment, speedy and smoothly it is important to build adequate legal infrastructure. As the economic trend changes, the settlement of dispute mechanism needs to be changed together with the economic system. Thus, many international rules relating to arbitration should be studied in detail to learn updated condition of international standard.

There are other obstacles in the case of the execution of arbitral award decided in Myanmar in the relevant foreign countries. The system of other countries has developed differently than the system in Myanmar. New York Convention is the most widely recognized convention for enforcement of arbitral awards and thus it could facilitate enforcement of awards in all contracting states. Furthermore, the UNCITRAL Model Law of 1985 provides for a code for resolving commercial disputes by means of arbitration with the aim of unification and harmonization of international common practices in an easily accessible form. In the face of the lack of enforcement of foreign award, Myanmar arbitration laws and system should be added with the theory of modern arbitration and the current trends in international arbitration. In order to reinforce arbitration system itself, Myanmar should consider of becoming a

contracting party of model international conventions relating to arbitrations.

Endnotes

- 1 See, Dr. Tun Shin, "Legal Framework of the Practical Settlement Disputes in the Union of Myanmar" <www.myanmar.gov.mm/Perspective/persp1996/leg.htm>, accessed on September, 14, 2006.
- 2 James Finch and Saw Soe Phone Myint, "Arbitration in Myanmar", *International Arbitration Journal*, p.89, Vol.14 (4), 1997, The Myanmar legal system is decent from that of England and is a common law system in which the principles of *stare decisis* is applicable. The laws which have been enacted in the Union of Myanmar divided into five main categories, according to the period in which they were enacted: (i) the Colonial Period Laws (before 1948); (ii) the Parliamentary Laws (1948-62); (iii) the Revolutionary Council Laws (1962-74); (iv) the Pyithu Hluttaw Laws (1974-88) (the legal which was exercise during the Period is called the Socialist Legal System); (v) the State Law and Order Restoration Laws (18 September 1988 to the present day).
- 3 *Ibid*, p.89, and see, Section 3 of 1944 Act.
- 4 *Ibid*, p.89, once a court takes proper jurisdiction, it has original jurisdiction for all questions related to a particular arbitration. The judicial system of Myanmar is divided into four levels. These are the Supreme Court, the State or Divisional Courts (divided into two sub-levels), the District Courts and the Township Courts (divided into two sub-levels).
- 5 See, Dr. Tun Shin, "Legal Framework of the Practical Settlement Disputes in the Union of Myanmar" <www.myanmar.gov.mm/Perspective/persp1996/leg.htm>, accessed on September, 14, 2006.
- 6 *Ibid*. See [http](http://), accessed on September, 14, 2006.
- 7 Dr. Maung Maung, "Law and Custom in Burma and the Burmese Family", The Hague and Martinus Nijhoff, p.14, 1963.
- 8 Ministry of Information, "Myanmar Facts & Figures", p.8, 2002.
- 9 Ba Thaug ,U, "Judicial Courts and their functioning in Konbaung Period, 1752-1885", Myanmar Historical Research Journal Number (7), Universities Historical Research Centre, p.48, June, 2001.
- 10 Dr., Maung Maung, *supra* at p.14.
- 11 See, Dr. Tun Shin, "Legal Framework of the Practical Settlement Disputes in the Union of Myanmar" <www.myanmar.gov.mm/Perspective/persp1996/leg.htm>, accessed on September, 14, 2006.
- 12 Dr., Maung Maung, *supra* at p.15 (For example, the village judges, appellate judges, the judges being permanent residents of the village and the ministers or judges).
- 13 *Ibid*, p.15.
- 14 Ba Thaug, U, *supra* at p.48.
- 15 Dr., Maung Maung, *supra* at p.15.
- 16 *Ibid*, p.15.
- 17 Dr., Than Tun, Burma (Myanmar) "The Legal System in Burma (Myanmar), A.D. 1000-1300", The Burma (Myanmar) Law Institute Journal, Vol. I (2), Yangon, June 1953, p.172.
- 18 See, Dr. Tun Shin, "Legal Framework of the Practical Settlement Disputes in the Union of Myanmar" <www.myanmar.gov.mm/Perspective/persp1996/leg.htm>, accessed on September, 14, 2006 .
- 19 Chapter 2, 3, 4, of the 1944 Act.
- 20 James Finch and Saw Soe Phone Myint, *supra* at p.89 .
- 21 *Ibid*, p.99, (For example, under Article 158 of the Limitation Act, an application to set aside an award should be made within 30 days from the date of service of the notice of filing the award. An application made over four months after service of notice is barred by the Limitation Act.), and see, U Aye Maung v. Daw Aye Khin and Others, 1965, BLR, (CC), 75.
- 22 Section 37(3) of the 1944 Act.
- 23 Section 37(5) of the 1944 Act.
- 24 Daw Hnin v. U Kyaw and Others, 1952, BLR, (HC), 101, and see, Kada Shariff v. U Ohn Maung and four Others, 1968, BLR, (CC), 218.
- 25 James Finch and Saw Soe Phone Myint, *supra* at pp.89-90.
- 26 Section 2(a) of the 1944 Act.
- 27 Dr. Tin May Tun, "A Comparative Approach of the Arbitration Act in Myanmar" *Journal of Office of the Attorney General*, Vol. V (2), p152, December, 2003.
- 28 *Ibid*, p152.
- 29 Alec Christie & Suzanne Smith, "Foreign Direct Investment in Myanmar", P.249, 1997.

- 30 Section 3 and First Schedule of the 1944 Act.
- 31 Section 10 (1) of the 1944 Act.
- 32 Section 10(2) of the 1944 Act.
- 33 Section 8 of the 1944 Act.
- 34 Dr., Tin May Tun, *supra* at pp.153-154.
- 35 Section 13 and 27 of the 1944 Act.
- 36 Alec Christie & Suzanne Smith, *supra* at pp.250-251.
- 37 B.S.M.A.K Halim Sahib v. Moideen Oillay, (1954), BLR, (HC), 227.
- 38 Alec Christie & Suzanne Smith, *supra* at p.251.
- 39 *Ibid*, p.251, and see, Section 10(a) of 1944 Act.
- 40 *Ibid*, p.249, and see, Section 3 and the First Schedule if the 1944 Act.
- 41 *Ibid*, p.252, and see, Paragraph 7 of the First Schedule to the 1944 Act, and see also, Ramanand v. U.N.Mehon, (1953), BLR, (H.C), 390, and U Ba Saing v. U Aui Hoke Shaung, (1978), BLR, 79.
- 42 *Ibid*, p.252, and see, Section 14 to 16 of the 1944 Act.
- 43 Dr. Tun Shin, and U May Din, "Arbitration in Myanmar", Journal of Office of the Attorney General Vol. II (1), P.116, 2000.
- 44 Clive M, Schmitthoff, "Export Trade", p.67, 1990.
- 45 Section 8 of the 1944 Act.
- 46 Section 11 of the 1944 Act.
- 47 Aishabhaihaji Tahir Mohamed v. Mohamed Yacoob Yunus Jamal, (1960), BLR, (HC), 452.
- 48 U Sein Win and Co. Ltd v. The State Agricultural Marketing Board, (1954), BLR, (HC), 200.
- 49 Burma Indo-Ceylon Rice Corporation Ltd v. The State Agricultural Marketing Board, (1958), BLR, (HC), 68.
- 50 Section 13 (b) of the 1944 Act.
- 51 Section 14 (2) of the 1944 Act, and see also, In the case of Mg Own Maung and One v. Ma Net Pon and Three Others, 1956, BLR, (HC), 469, it was decided that failure to reduce an arbitration award to a judgment rendered it judicially unenforceable at the later date.
- 52 Section 15 of the 1944 Act.
- 53 Section 16 of the 1944 Act.
- 54 James Finch and Saw Soe Phone Myint, *supra* at pp. 96-97, and see, Re B.S.M.A.K. Halim Sahib v. Moideen Pillay, 1954, BLR (HC) 227, where a case could not be remitted to arbitration by a court if 5 of the 11 members who made the original award were no longer available to sit as arbitrators in the case.
- 55 Section 30 of the 1944 Act.
- 56 U Aye and One v. U Ko Gyi and Two Others, 1959, B.L.R. (H.C.), 152, a case in which the members of an association without authority appointed themselves as arbitrators and made the award.
- 57 James Finch and Saw Soe Phone Myint, *supra* at p.95, and see, Daw Mi (Deceased), her Representatives, Ma Pu and five Others v. Muti, 1966, BLR (CC), 878, a case in which the arbitrators had decided on rights of succession in a matter which, in fact, did not fall within the power of the arbitrators. The award was considered to be within the scope of S. 30(c) and was held invalid.
- 58 Burma Indo-Ceylon Rice Corporation Limited v. The State Agricultural Marketing Board, (1958), BLR, (HC), 68.
- 59 Alec Christie & Suzanne Smith, *supra* at p.254, and see (Burma Indo- Ceylon Rice Corporation Limited v. The State Agricultural Marketing Board, (1958), BLR, (HC), 68).
- 60 Section 15, 16, and 30 of the 1944 Act, and see, Laljee Jesaung v. Chander Bhan Shukul, 9 Ran. 39, and Daw Mi (deceased) v. Muratee, (1966), BLR, (CC), 878.
- 61 1954, B.L.R. (HC), 200.
- 62 Section 18 of the 1944 Act.
- 63 Section 19 of the 1944 Act.
- 64 Section 33 of the 1944 Act.
- 65 Alec Christie & Suzanne Smith, *supra* at p.253 .
- 66 A decree is formal expression of an adjudication which, as to the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. A decree can be either preliminary or final. [Code of Civil Procedure, S.2 (2)].
- 67 James Finch and Saw Soe Phone Myint, *supra* at p.96, and see Section 17 of the 1944 Act, (A party has 30 days, under Art. 158 of the Limitation Act, for filing an application to set aside an award or to get an award remitted for reconsideration. When the period has expired, under Section 17 of the 1944 Act, the court may under, issue a decree. Where the court issues a decree before such period expires, the decree can be set aside.), and see, (Romanand v. U.N. Menon, 1951, BLR, (HC) 192).
- 68 Section 17 of the 1944 Act, and see also, Municipal Corporation of Rangoon v. The Sooratte Bura Bazaar Co Ltd, (1952), BLR, (HC), 134, and U Chin Maung, (1986), BLR (CC), 28.
- 69 James Finch and Saw Soe Phone Myint, *supra* at p. 96.
- 70 *Ibid*, p.91.
- 71 *Ibid*, p.91, and see also, Ramanand v. U.N. Menon, 1951, BLR, (HC), 192, Daw Toke and One v. Maung Po Cha and

- others, 1948, BLR., 47, and Municipal Corporation of Rangoon v. The Sooratee Bara Bazaar Co. Ltd, 1952, BLR, (HC), 134.
- 72 Section 31 of the 1944 Act.
- 73 Section 41(a) of the 1944 Act.
- 74 James Finch and Saw Soe Phone Myint, *supra* at p.92, (These are (1) the preservation, interim custody and sale of any goods which are the subject-matter of the reference; (2) securing the amount in difference in the reference; (3) the detention, preservation or inspection of evidence and gathering of information and entering on real property parties to the arbitration and the taking of samples and experimentation for information or evidentiary purposes; (4) interim injunctions or the appointment of the receiver; (5) the appointment of a guardian for a minor or person of unsound mind.), and see, Section 41(b) and Second Schedule of the 1944 Act.
- 75 Section 42 of the 1944 Act.
- 76 Section 43 of the 1944 Act.
- 77 The Union of Burma v. P. James, 1958, BLR. (HC), 691, and see, The Myanmar Agricultural Products Trading v. Integrated Business Success, 2000, BLR, 198, and Daw Mi (Deceased), her Representatives, Ma Pu and Five Others v. Muti, 1966, BLR, (CC), 878.
- 78 Alec Christie & Suzanne Smith, *supra* at p.247, and see, Section 34 of 1944 Act.
- 79 Alec Christie & Suzanne Smith, *supra* at p.248, 1997.
- 80 Section 44 of the 1944 Act.
- 81 James Finch and Saw Soe Phone Myint, *supra* at p.99. (If the decree is in excess of the award or not otherwise in accordance with the award, an appeal can lie under Section 17 of the 1944 Act. Appeal from decree is allowed under section 96 of Civil Procedure Code and Appeal against certain orders under Section 104 of the Civil Procedure Code.).
- 82 *Ibid.* p.99, and see, 1958, BLR, (HC), 68.
- 83 Alec Christie & Suzanne Smith, *supra* at p.253.
- 84 Section 4(1) of the Arbitration (Protocol and Convention) Act, 1939.
- 85 Alec Christie & Suzanne Smith, *supra* at p.255.
- 86 James Finch and Saw Soe Phone Myint, *supra* at p.101, and see, Section (2) of the Arbitration (Protocol and Convention) Act, 1939 .
- 87 Section 5 (1) of the Arbitration (Protocol and Convention) Act, 1939.
- 88 James Finch and Saw Soe Phone Myint, *supra* at pp.96-97, (Code of the Civil Procedure Order 21, Rule 11(1). Save as otherwise provided by that sub-rule, every application for a execution of a decree should be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and should according to R. 11(2) contain the following in a tabular form: (a) the number of the suit; (b) the names of the parties; (c) the date of the decree; (d) whether an appeal has been preferred from the decree; (e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree; (f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results; (g) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed; (h) the amount of the costs (if any) awarded; (i) the name of the person against whom execution of the decree is sought; (j) the mode in which the assistance of the court is required, whether; (1) by the delivery of any property specifically decreed; (2) by the attachment and sale, or by the sale without attachment, of any property; (3) by the arrest and detention in prison of any person; (4) by the appointment of a receiver; (5) otherwise, as the nature of the relief granted may require.).
- 89 Dr. Tin May Tun, *supra* at p.162.
- 90 Agricultural and Food Product Trading Corporation (Myanmar) v. Ennitra Co. Ltd (Hong Kong), 1981, Civil Regular Suit No.118 of Yangon Division Court, 1982, 1st Appellate Suit No. 29 of the Supreme Court.
- 91 Daw Than Nwe, Professor, Seminar Paper on “Commercial Arbitration and Enforcement of Award”, Yangon, Union of Myanmar, 2000.
- 92 Section 7 of the 1939 Act.
- 93 Dr. Maung Maung, *supra* at p.15.

主指導教員（沢田克己教授） 副指導教員（山崎公士教授・中村哲也教授）