

Arbitration in Myanmar

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Abstract

" Arbitration" means a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding. "Arbitration clause" means a contractual provision mandating arbitration and thereby avoiding litigation of disputes about the contracting parties, rights, duties and liabilities. Arbitration proceedings are a non-judicial means for submitting a controversy to a third person or persons for a binding decision. There are various arbitration systems in the field of international commerce. Some trading countries have their own system of arbitration, others apply internationally recognized arbitration rules and the rest applied the arbitration rules which are combination of international arbitration institutions. Arbitration has a long history in Myanmar, with reported Court decision and appeals from arbitrations as early as 1883 and the specific arbitration legislation introduced in Myanmar as early as 1899. The Arbitration law applicable in Myanmar is the Arbitration Act, 1944. But this act is repealed by the Arbitration law, 2016. In most countries, the use of arbitration is very common in domestic disputes arising out of contracts, sale of goods and other commercial transactions. An arbitration is almost essential in a business agreement.

Keywords: Arbitration, Award , Arbitral Tribunal

Introduction

The Republic of the Union of Myanmar is the largest land area in the mainland of South East Asia. It has a long coast line of 2,8328 kilometers. It could be classified as a country rich in natural and human resources because of her vast cultivable land and a long coastline, navigable river systems, lush forests, abundant minerals, gems and literate population. What she really needs to reap the benefits of such endowment is capital exploiting the same to her advantage and the state of art technology accompanying it. In this regard it is evident that foreign investment can play a significant role. Due to lack of investment, especially foreign investment, the natural resources cannot be fully explored and exploited for the development of the Nation. The Nation is therefore cannot keep abreast with other developed nations of the region. In order to attract foreign investment, the nation must have effective economic and business laws to protect the investor's rights and liabilities. An investor would like to know what kind of security he will have for his investment if there is a breach of contract between the business partners. Although there are Courts in the country to decide the grievances caused to them by a party, mostly the investors do not want to resort to the Courts. They want to avoid the Court litigation for the dispute resolution. Therefore they used to find a dispute settlement in the Nation's ²laws which can avoid the litigation of the Court. Dispute resolution means Arbitration, in other words. If the businessmen find the Arbitration Law of a country is favourable to them, they would like to invest in that country.

Materials / Methods

A review has been made on Arbitration Laws namely the Arbitration Act, 1944 and the Arbitration Law 2016, of Myanmar. The relevant provisions and comments also studied towards the arbitration agreements which are essential in the business contracts.

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Findings

Although Myanmar has the Arbitration Act 1944, it was enacted before the independence and it seems to be archaic. Yet, it stands operatively more than half century. The essential legal points also similar to the English Arbitration Act 1950. As the Nation adopts market economy system and extending for foreign investment, a new effective law has been in need for years. This need is fulfilled by enacting this law in view of attracting local and foreign investment.

Historical Background

Judging by the fact that there existed a number of reported cases on arbitration in the late nineteenth century, it may be said that the system of settlement of disputes by arbitration, as applied and practiced in Myanmar in modern times, is derived from the English legal system, after the second Anglo Burmese war in the middle of the nineteenth century. There is also in England an ancient origin of settlement of disputes by arbitration. The Myanmar people relied on arbitration in settling their disputes may be that the Myanmar people were not accustomed to the English laws at that time. But, in arbitration, the parties to the disputes may appoint persons of their own choice as arbitrators, who are experts in the Myanmar laws. Further, they had the advantage of capability of enforcing the arbitral awards in the courts like decrees of the courts.

Definition

According to the Black's Law Dictionary defines that " Arbitration" means a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding. "Arbitration clause" means a contractual provision mandating arbitration and thereby avoiding litigation of disputes about the contracting parties, rights, duties and liabilities. Arbitration proceedings are a non-judicial means for submitting a controversy to a third person or persons for a binding decision. According to section 2(a) of the Arbitration Act 1944, "Arbitration agreement means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. By section 3(b) of the Arbitration Law 2016, "Arbitration agreement" means a written agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Myanmar Arbitration Laws

Myanmar has its own Arbitration Act, 1944 which has quite similarities with the English Arbitration Act of 1950. But it was dormant during Revolutionary Council and Socialist Governments for some years. It has been active since the adoption of market economy system from 1988. It has gained momentum since the Constitution of the Republic of the Union of Myanmar in 2008. This Act is designed as an Act similar to those with the other Common Law Countries. The appointment of arbitrators, the supervision of the Court for their removal, the award or the enforcement of awards in the Civil Courts, appeal from an award to the Supreme Court are all mentioned in this Act. This Act was repealed on 5th January 2016.

The new Arbitration Law was enacted on 5th January 2016 with three objectives:

- (a) to settle domestic and international commercial disputes fairly and effectively;
- (b) to recognize and enforce foreign arbitral awards made in arbitral proceedings; and
- (c) to encourage resolving disputes by arbitration.

According to Section 3(c) of this Law. "Arbitration means settlement of dispute by arbitration conducted either by an arbitrator or an arbitral tribunal".

According to Section 9 (a) and (b) of the Arbitration Law 2016, arbitration agreement is defined in details:

- (a) With respect to the written Arbitration Agreement defined in sub-section (b) of Section (3), such agreement shall be deemed to be in writing, if -
 - (1) It is signed by the parties (to the dispute)
 - (2) The information data in electronic communication may be used as consequential reference
 - (3) The statements of claim contain an allegation of the existence of an arbitration agreement and not defined by the other party in his statements of defense.
- (b) An arbitration agreement may be made in the form of an arbitration agreement contained in a contract or in the form of a separate agreement.

Arbitration Clause

Arbitration Clause means a contractual provision mandating arbitration and thereby avoiding litigation of disputes about the contracting parties, rights, duties and liabilities. To solve a dispute arises from the parties can be settled without resorting to the Courts if there is an arbitration clause in the deed of agreement or contract. Without any arbitration clause in the deed of agreement or contract a party cannot object taking the disputes to the Court by any party. So it is essential to insert an arbitration clause. There are different ways of arbitration clauses in the agreement.

Arbitration can be made between the disputed parties. According to the arbitration clause or dispute resolution clause included in the business agreement, businessmen when they do business, have to make deed of agreement or contract with their agreed terms and conditions. The deed of agreement and contract will contain various conditions to carry out the business between the parties. In that agreement or contract, they have to agree stipulating an Arbitration clause. This Arbitration clause must say that if a dispute arises during the transaction of business to settle it with arbitration or dispute resolution without resorting to the Courts. They have to mention in the clause how many arbitrators they would like to appoint and the way to perform the arbitration. This matter is provided in Chapter 5 of the Law entitled "Composition of the Arbitral Tribunal".

The following is as standard arbitration clause between Production Sharing Contract (PSC) between Myanmar Oil and Gas Enterprise (MOGE)

"Any and all disputes controversies or claims between the parties arising out of or relation to this contract or the performance, breach, termination, or invalidity thereof shall be finally settled under the UNCITRAL Arbitration Rules as at present in force.

According to the above arbitration and arbitration clause, PSC agreement on natural gas and oil the parties chose unilateral Arbitration Rules other than Arbitration Act, 1944.

Place of Arbitration

According to the Section 23 of the Law, place of arbitration is as follows:

- (a) The parties are free to agree to determine the place of arbitration

- (b) Failing any agreement referred to in sub-section (a) the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
- (c) Notwithstanding sub-section (a) or sub-section (b), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

Taking Administration Assistance

Section 8 of the Law says: in order to facilitate the conduct of the arbitral proceedings, the parties or the arbitral tribunal with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

According to Section 30 of the Law (a) the arbitral tribunal or a party may apply to the Court for assistance in taking evidence, (b) the names and address of the parties and arbitrators and general nature of the claim and the relief sought (c) the name and address of any person to be heard as witness (d) the document to be produced (e) the court may execute the request by transferring the evidence and (f) the court may issue the same processes to witnesses as it may issue in suits.

Stay of Suit by the Court

In Chapter 4 , Section 10 (a), it is provided that where legal proceedings are brought before a Court in respect of a matter which is the subject matter of an arbitration agreement, a party may, not later than when submitting his first statement on the substance the dispute, apply to the Court (to which the proceedings have been brought) for referral to arbitration. On the application so made, the Court shall, unless it finds that the agreement is null and void, inoperative or incapable of being performed, refer the parties to arbitration, (b) where an action referred to in sub-section (a) has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the Court. (c) if the Court refuses to refer the party to arbitration, no decision (of the arbitral tribunal) passed in respect of any matter in the arbitration agreement shall have effect in the legal proceedings. (d) the Court shall grant stay of legal proceedings pending before it, if it refers the parties to arbitration. (e) no appeal shall lie from the order of the Court, made on the application under subsection (a), to refer the parties to arbitration. (f) the order of refusal by the Court, made on the application, under sub-section (a) is appealable.

Discussion

The new law of Arbitration Law 2016 is a short, effective and updated one . Yet, it is complete the provisions needed for disputes fairly and equitably. It contains assistance from administrative departments, stay of suit in courts, jurisdiction of arbitral tribunals, place of arbitration, making arbitral awards, recognition of foreign arbitral awards and so on. As the Law embodied the essential matters of the arbitration, the parties can be sought on this Law without resorting to the Courts. The functions of the arbitrator or arbitral tribunal where mention in the Law and administrative assistance can also be sought in order to facilitate the conduct of the tribunal proceedings.

Conclusion

The businessmen mostly do not want to take their dispute to the Courts for reasons such as elapse of time, wastage of money and nuisance of mind. Therefore, they seek arbitration to solve the disputes peacefully by appointing arbitrator or arbitral tribunal. According to the section 7 of the present Arbitration Law, no Court shall intervene in matters governed by this Law. However, according to Section 11 of this Law, the Court shall have powers to decide as a suit in the Court matters such as taking evidence, keeping in custody of any exhibit, making order with respect to any property, inspecting, taking photograph, keeping in custody and detaining of any property and so on. According to section 31 of the Law, it is also provided that enforcement of interim decisions of arbitral tribunal can be made by the Court. Furthermore according to Section 39 of the Law., it is provided that powers of Court relating to domestic arbitration and according to section 47, the right of appeal lies in the Court. By seeing the above provisions, without intervention of the Court, an arbitration settlement is hard to be achieved. Arbitration by this Law cannot be fulfilled the satisfaction of the parties as they have expected when entering arbitration clause in the arbitration agreement or contract. In view of this some of the Court's interventions should be relaxed in order to conduct a dispute settlement in a reasonable time between the parties.

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Brief history of the Researcher

Dr. Than Than Soe was born to U Soe Nyunt and Daw Mya Hla in Myawlamyaing, 1967. She passed matriculation exam in 1984. She was conferred LL.B degree in 1992 and LLM degree in 1997. She was appointed as a Tutor in Dagon University, 2002. In 2005, she was transferred to Dawei University. In 2007, she was bestowed Ph.D Degree. In 2006, she was assigned to Dagon University. In 2010, she was promoted to Assistant lecturer post. In 2012, she was assigned to Dawei University again. In the year 2014, she was retransferred to Dagon University. And then, she was promoted to the post of lecturer in 2014. Now she is serving as Associate Professor in Monywa University.