

## THE RULE OF LAW AND COMMERCIAL LITIGATION IN MYANMAR

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*Abstract:* After nearly thirty years of self imposed isolation, Myanmar has re-emerged as a significant potential destination for foreign investment. One of the key attractions of Myanmar as a destination for foreign investment is its legal system and historical commitment to the rule of law. With ASEAN membership and increasing levels of foreign investment in Myanmar, use of its legal system by foreign investors and their counsel has grown. The aim of this article is to outline, for both investors and legal professionals in other countries throughout the region, Myanmar's legal system and its practical operation in the area of commercial litigation, including the enforcement of foreign judgments and arbitral awards.

### I. INTRODUCTION

Since gaining independence from Great Britain in 1948, the Union of Myanmar, formerly Burma,<sup>1</sup> has seen its economy move from a market-oriented system to a socialist system and, in 1988, back to a market-oriented economic system. After gaining independence, the country was managed as a market economy, with the private sector occupying an important role. However, after the assumption of power by the Revolutionary Government in 1962, a centrally planned economy was adopted under a policy called the "Burmese Way to Socialism." The new socialist government led to the effective isolation of the country and a lack of information and analysis outside of the country regarding the structure and operation of Myanmar's legal system.<sup>2</sup>

Today, Myanmar's economy is again market-oriented and has successfully attracted foreign investment. In September 1988, rebellion against the Revolutionary Government led to a military coup in which the State Law and Order Restoration Council ("SLORC") seized power. The SLORC officially abandoned the socialist economic system and redirected Myanmar towards a market-oriented economy, allowing the private sector to

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<sup>1</sup> Burma was the name given to the country in colonial times by the British.

<sup>2</sup> For the impact of this period on Myanmar's legal system, see U MAUNG MAUNG KYI, *A NEW APPROACH TO LAW AND LIFE IN BURMA* 73-75, 99-112 (3d. 1968).

develop alongside the State sector. The State Peace and Development Council ("SPDC") has continued this push towards a market economy.<sup>3</sup> As a result, trade opportunities are now available to both domestic and foreign private entrepreneurs. Myanmar has been particularly successful in its efforts to attract foreign investment. It is expected that foreign investment in Myanmar will increase for several reasons: Myanmar's membership in the Association of Southeast Asian Nations ("ASEAN"); its English-based legal system; its historical commitment to the rule of law; and its significant, untapped natural and human resources.

The aim of this article is to outline Myanmar's legal system and its practical operation in the area of commercial litigation. Part II provides a historical background of Myanmar's legal system. Part III outlines Myanmar's legal system as it exists today. Part IV discusses the country's civil procedure requirements. Part V examines the enforceability of foreign judgments, and Part VI describes the enforceability of foreign arbitral awards in Myanmar.

## II. MYANMAR GOVERNMENTS AND CONTINUITY OF THE LAW

In order to appreciate the current structure of Myanmar's legal system, it is necessary to briefly recount the types of governments in Myanmar since colonial times and their impact on the continuity of Myanmar laws.<sup>4</sup>

### A. *Colonial Governments*

On May 1, 1897, Burma became a Lieutenant-Governorship as a province of Britain's "Indian Empire."<sup>5</sup> The Lieutenant-Governor was the head of the administration of Burma and exercised the powers of local government.<sup>6</sup> The Legislative Council assisted the Lieutenant-Governor in his duties by preparing and passing legislation regarding local and provincial requirements.<sup>7</sup> Legislation became law if it received the sanction of the

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<sup>3</sup> The change from the State Law and Order Restoration Council ("SLORC") to the State Peace and Development Council ("SPDC") occurred on November 15, 1997, with the aim of developing a "democratic system in the State and build a new peaceful, tranquil, and modern developed nation."

<sup>4</sup> For a comprehensive review of Myanmar government since colonial times, see Kyaw Sein, *A Brief Legal History of Myanmar*, 1 LAW JOURNAL, June 1999; A. EGGAR, *THE LAWS OF INDIA AND BURMA* (Rangoon 1929).

<sup>5</sup> SIR J.G. SCOTT, *BURMA: A HANDBOOK OF PRACTICAL INFORMATION* 147-48 (De La More Press ed., 3d ed. 1921).

<sup>6</sup> *Id.* at 148.

<sup>7</sup> *Id.*

Governor General of British India.<sup>8</sup> In addition to local legislation, all of the Indian Statutes enacted during this period applied to the "province of Burma."<sup>9</sup>

In 1935, Burma separated from British India but did not gain much independent sovereignty. Burma remained a British colony but gained the power to make laws in the Burma Legislature.<sup>10</sup> The Government of Burma Act, however, specifically declared that the Indian Statutes would continue in force until altered, repealed or amended by the Legislature.<sup>11</sup> During the Japanese occupation of Burma from 1942 to 1945, the existing laws of Burma, including the Indian Acts applicable to Burma, continued in force.<sup>12</sup> In May 1945, Britain re-occupied Burma and revived all laws and regulations in force prior to the Japanese occupation.<sup>13</sup>

### *B. Governments Since Independence*

Even after Burma became an independent sovereign state on January 4, 1948, Burma kept in place the prior law enacted during the colonial times. Specific legislation mandated that all laws passed prior to January 4, 1948 were to continue in force until amended or repealed by the new Union Parliament.<sup>14</sup> Similarly, the law as it existed in Myanmar immediately prior to the assumption of power by the Revolutionary Council on March 2, 1962, continued in force until specifically repealed or amended.<sup>15</sup> The 1974 Constitution also continued the pre-1974 laws to the extent that they did not conflict with the Constitution itself or unless they were expressly repealed or amended.<sup>16</sup> Furthermore, after the State Law and Order Restoration Council ("SLORC") took power in September 1988 and abandoned the socialist economic system by reintroducing a market-oriented economy, all existing laws remained in force until specifically repealed or amended, including laws passed during the socialist period.<sup>17</sup> Similarly, on the assumption of

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<sup>8</sup> *Id.*

<sup>9</sup> To date, the India statutes applied in Myanmar still carry a reference to the "India Act" reference number.

<sup>10</sup> Government of Burma Act (1935) (Myan.).

<sup>11</sup> *Id.* § 148; see A. EGGAR, DIGEST OF THE GOVERNMENT OF BURMA ACT 15 (Government Printers 1962).

<sup>12</sup> The Law Regulating the Administration of Burma (1305 M.E.) (Myan.) § 23.

<sup>13</sup> The Burma Indemnity and Validating Act (1945) (Myan.).

<sup>14</sup> BURMA CONST. (1947) ch. XIV § 226 (1); The Union of Burma (Adaptation of Laws) Order (1948) (Myan.).

<sup>15</sup> Kyaw Sein, *supra* note 4.

<sup>16</sup> BURMA CONST. (1974) art. 202(b).

<sup>17</sup> Kyaw Sein, *supra* note 4; Notification of the State Law and Order Restoration Council (No. 6/88, Sep. 24, 1988)(Myan.)

power by the State Peace and Development Council ("SPDC"), all laws then in force continued until specifically repealed or amended.<sup>18</sup>

### III. OVERVIEW OF THE CURRENT LEGAL SYSTEM

Today, the legal system of the Union of Myanmar is a unique combination of the customary law of the family, codified English common law, local case law, and recent Myanmar legislation.<sup>19</sup> Prior to Myanmar's independence, Britain implanted the principles of English statutory and common law in Myanmar through the Indian Statutes.<sup>20</sup> These codes, based on English statutory and common law, include the Arbitration Act, the Companies Act, the Contract Act, the Negotiable Instruments Act, the Registration Act, the Sale of Goods Act, the Transfer of Property Act, the Trusts Act, and the Civil and Criminal Procedure Codes.<sup>21</sup>

Myanmar courts interpret these codes by looking to Indian and English authorities. Indian decisions interpreting these codes and English decisions interpreting equivalent English laws remain extremely persuasive authority in Myanmar courts. Similarly, Indian legal texts on the laws shared by India and the former Burma are also persuasive.<sup>22</sup> Where no statute addresses a particular matter, courts apply Myanmar's general law, which is based on English common law as adopted and interpreted by Myanmar courts.<sup>23</sup> Where there is no relevant statutory or general law on point, the Myanmar Courts are obliged to decide the matter according to justice, equity, and good conscience.<sup>24</sup>

#### A. *Re-Emphasis on Pre-Independence Law*

Under the SLORC and the SPDC, the corporate, commercial, and economic laws of pre-independence Myanmar have been re-emphasized as

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<sup>18</sup> The Adoption of Expressions Law (1997) (Myan.).

<sup>19</sup> See U MAUNG MAUNG KYI, *supra* note 2, ch. VI; MAUNG MAUNG, LAW AND CUSTOM IN BURMA AND THE BURMESE FAMILY vi., ch. III (Martinus Nijhoff 1963).

<sup>20</sup> As to the adoption and use of common law and equity in Myanmar, see U Tin Eng v. U Ba Yoke [1957] B.L.R. (H.C.) 341 (Myan.); U MAUNG MAUNG KYI, *supra* note 2, ch. III.

<sup>21</sup> For a discussion of the legal system and the laws before colonisation, see MR. JUSTICE E. MAUNG, THE EXPANSION OF BURMESE LAW (1951).

<sup>22</sup> For example, His Honour U Thaung Sein J cites a number of India and English legal texts in *Indo Burma Petroleum Company Limited v. The Union of Burma*, [1961] B.L.R. (H.C.) 145 (Myan.).

<sup>23</sup> See *Dr. Daw Mya Swe v. The Union of Burma Airways* [1964] B.L.R. (C.C.) 279 (Myan.).

<sup>24</sup> *U Sein v. Daw Mya Aung* [1984] B.L.R. 224 (Myan.); The Judiciary Law 2000 § 2 (No. 5/00) (Myan.) [hereinafter Judiciary Law].

the pillars of Myanmar's push towards a market economy.<sup>25</sup> In 1998, the Office of the Attorney General published a comprehensive and authoritative listing of the statutes in force in Myanmar as of December 31, 1997, including pre- and post-independence legislation.<sup>26</sup> Myanmar's commercial laws have historically been based on concepts similar to those of the commercial laws of Australia, England, Hong Kong, Malaysia, Singapore, and other former British colonies of the region. These laws, however, are subject to the interpretation of the Myanmar courts.<sup>27</sup>

As a result of the socialist economic system in place between 1962 and 1988, there is little case law interpreting Myanmar statutes. However, as expected, recent decisions confirmed that pre-1962 case law will be followed by the courts of post-1988 Myanmar.<sup>28</sup>

### B. *New Laws*

Since 1988, Myanmar has promulgated numerous new laws to encourage foreign and local investment and develop the market economy. Perhaps the most important of these new laws, especially for larger foreign investors, is the Myanmar Foreign Investment Law of 1988. The purpose of this law is to offer tax incentives and exemptions to attract the larger foreign investments.<sup>29</sup>

### C. *The Administration of Justice*

Myanmar courts base the administration of justice upon the following principles:<sup>30</sup>

- (1) Independence of the judiciary;
- (2) Protecting and safeguarding the interests of the people;

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<sup>25</sup> Dr. Tun Shin, *The Legal Framework of Myanmar*, Address before the Europe/East Asia Economic Summit in Singapore (Sept. 20-22, 1995) in *GOLDEN MYANMAR*, vol. 3 No. 1 1996, at 3; *THE EAST ASIA ANALYTICAL UNIT OF DEPARTMENT OF FOREIGN AFFAIRS AND TRADE OF AUSTRALIA, THE NEW ASEANS: VIETNAM, BURMA, CAMBODIA AND LAOS* 104 (1997).

<sup>26</sup> OFFICE OF THE ATTORNEY GENERAL, *THE INDEX OF LAWS* (1998).

<sup>27</sup> See *H. Oppenheimer v. M. E. Moola Sons, Ltd.* [1929] 7 Ran. 514 (Myan.).

<sup>28</sup> *U MAUNG MAUNG KYI*, *supra* note 2, at 62-63; For an example of *star decisis* in Myanmar, see the reasoning of the Full Bench of the High Court in *In Re Ma Mya v. Ma Thein*, I.L.R. 4 Ran. 313 (Myan.).

<sup>29</sup> See generally Alec Christie & Suzanne Smith, *FOREIGN DIRECT INVESTMENT IN MYANMAR* (1997).

<sup>30</sup> *The Judiciary Law*, *supra* note 24, § 2.

- (3) Educating the people to understand and abide by the law and cultivating the habit of abiding by the law;
- (4) Working within the framework of law for the settlement of cases;<sup>31</sup>
- (5) Dispensing justice in open court, unless otherwise prohibited by law; and
- (6) Guaranteeing, in all cases, the right of defense and the right of appeal under the law.

The judicial system in Myanmar is hierarchical. In order of importance, the following are the various courts of Myanmar:<sup>32</sup>

- (1) The Supreme Court;
- (2) Divisional Courts or State Courts (of which there are fourteen);
- (3) District Courts (of which there are sixty-three); and
- (4) Township Courts (of which there are 323).

#### *D. The Supreme Court*

The Judiciary Law of 1988 re-established the Supreme Court as the highest court in Myanmar, and this was confirmed by the Judiciary Law 2000. The Myanmar Supreme Court consists of the Chief Justice, two Deputy-Chief Justices and between seven to twelve judges.<sup>33</sup> The Supreme Court Justices are assisted by judicial officers who undertake research and provide other assistance. In addition, law officers, appointed by the Attorney General's office, act as public prosecutors in all Myanmar courts.

The Supreme Court is responsible for the supervision of all other courts in Myanmar and has jurisdiction to adjudicate the following:<sup>34</sup>

- (1) Civil and criminal matters within its original jurisdiction;
- (2) Appeal hearings from a decision of a Divisional or State Court;
- (3) Any order or decision relating to the legal rights of a citizen, and if necessary, amending or quashing such order;
- (4) Cases against the judgment, order, or decision of any court;

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<sup>31</sup> See also *Jiwanram & Rampartap v. Comm'r of Income Tax, Burma* [1958] B.L.R. (H.C.) 95 (Myan.).

<sup>32</sup> Judiciary Law, *supra* note 24, § 12.

<sup>33</sup> *Id.* § 3.

<sup>34</sup> *Id.* §§ 5, 6.

- (5) Any judgment, order, or decision of any court that is not in accordance with the law;
- (6) Admiralty cases; and
- (7) Cases for which it is given jurisdiction under any law.

The full bench of the Supreme Court, at the discretion of the Chief Justice may review any decision by a single Supreme Court judge or a decision made by a less than full bench.<sup>35</sup>

#### *E. Additional Myanmar Courts*

The Divisional or State Courts have original jurisdiction in criminal and civil proceedings, as well as being the court of first appeal for decisions made in Township Courts.<sup>36</sup> The Township and District Courts deal mainly with petty criminal matters and civil matters of low monetary value. In accordance with the directions of the Supreme Court, each Divisional, State, District, and Township Court may decide cases with a single judge or by a bench.<sup>37</sup>

#### *F. Jurisdiction*

In general, Myanmar courts have jurisdiction to try all civil suits against all persons within Myanmar, local or foreign, other than foreign sovereigns.<sup>38</sup> The appropriate court in which to commence proceedings depends on the type and value of the claim and the location of the parties or the location of the act in question.<sup>39</sup> Myanmar courts will uphold choice of jurisdiction clauses between parties specifying that a particular Myanmar court will hear a given dispute.<sup>40</sup> Such agreements, in which a court outside of Myanmar is chosen, will be enforced if they are not contrary to public

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<sup>35</sup> *Id.* § 9.

<sup>36</sup> *Id.* §§ 14, 15.

<sup>37</sup> *Id.* §§ 17, 20, 21.

<sup>38</sup> BURMA CODE OF CIVIL PROCEDURE [C. CIV. P.] § 86. Regarding actions against foreign sovereigns, see *U Zeya v. The Secretary of State of His Britannic Majesty For War Represented By Headquarters, Burma Command* [1949] B.L.R. (H.C.) 402 (Myan.).

<sup>39</sup> C. CIV. P. §§ 15-20; see *Daw Kyin Hlaing v. U Win Maung* [1958] B.L.R. (H.C.) 87 (Myan.); *U Sein Hlaing v. U Chan Ba Lone* [1987] B.L.R. 13 (Myan.). Regarding choice of jurisdiction, see *Am. Int'l Underwriters (Myan.) Ltd. v. U Maung San* [1961] B.L.R. (H.C.) 41 (Myan.).

<sup>40</sup> See *U Maung San v. Am. Int'l Underwriters (Myanmar) Ltd. Rangoon* [1962] B.L.R. (C.C.) 191 (Myan.); *Steel Brothers & Co. Ltd. v. Y. A. Ganny Sons* [1965] (C.C.) 449 (Myan.).

policy. However, a clause that excludes the jurisdiction of the courts altogether is illegal and void in Myanmar under the Contract Act.<sup>41</sup>

#### IV. BRIEF OUTLINE OF CIVIL PROCEDURE IN MYANMAR

Myanmar's legal system is adversarial. Matters are heard before a judge or bench of judges and argued by advocates or pleaders. The Code of Civil Procedure provides the main source of Myanmar's procedural rules regarding civil litigation. Advocates and pleaders also refer to the Courts Manual of 1960 and the Evidence Act of 1872. Despite its separate existence, the practices and procedures of Myanmar courts were significantly influenced by English practices and procedures.

Currently, Myanmar does not have a developed dispute resolution mechanism, apart from arbitration.<sup>42</sup> In particular, unlike the North American court system, "mini trials," "private courts," and compulsory settlement conferences do not exist in Myanmar.

##### A. *Parties to a Suit*

##### 1. *Contract Actions*

In a breach of contract action the proper plaintiff is the person with whom or on whose behalf the contract was made or in whom the rights under the contract were vested.<sup>43</sup> If an action is to be brought by several co-contractors upon a promise made to them jointly, all the parties should be joined.

The proper defendant in a contract action is any of the following: (1) the person who made the promise, the breach of which has led to the action being brought; (2) the party who is liable under the contract; or (3) the party to whom the liability under the contract has passed.<sup>44</sup> When two or more persons are jointly and severally liable under a contract, all parties must be joined as co-defendants.<sup>45</sup> If only one of the appropriate parties is sued, that party may, on application to the court, have the action stayed until all other relevant persons are joined as co-defendants.

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<sup>41</sup> The Contract Act § 28 (Myan.).

<sup>42</sup> For a discussion of arbitration, see Alec Christie, *Arbitration in Myanmar*, INT'L. ARB. L. REV. (1998).

<sup>43</sup> C. CIV. P., ORD. I, R. 1.

<sup>44</sup> C. CIV. P., ORD. I, R. 3.

<sup>45</sup> See *Daw Aye Myaing v. Daw Hla Kyi* [1987] B.L.R. 116 (Myan.).



All objections on the ground of non-joinder or misjoinder of parties must be made at the earliest possible opportunity. These objections cannot be made later than the settlement of issues, unless the grounds for the objection have arisen out of or subsequent to the settlement of issues.<sup>46</sup>

## 2. *Tort Actions*

In a tort action the proper plaintiff is the person injured by the wrongdoer or, in case of death, the person with a vested right to sue.<sup>47</sup> Where several persons are injured by a tort, any one of them may sue without joining the other injured parties. Where there is more than one plaintiff, one or more of them may be authorized by the others to appear, plead, or act for them in any proceeding.<sup>48</sup> This authority must be conferred in writing, signed by the party or parties giving it, and filed in court.<sup>49</sup> The same principle also applies to multiple defendants.<sup>50</sup>

The proper defendant in a tort action is the wrongdoer or the person who is liable for the acts of the wrongdoer, such as a vicariously liable employer.<sup>51</sup> If several persons jointly commit a tort, the plaintiff may sue any individual tortfeasor and is not obligated to join any other defendants.

## B. *Instituting Proceedings and Service*

Typically, a plaintiff commences a civil action by filing a plaint<sup>52</sup> that sets out the claim against the defendant.<sup>53</sup> Courts will reject plaints that do not state a cause of action, undervalue the relief claimed, are barred by law, or are incorrectly stamped.<sup>54</sup> When a plaint has been filed, a summons is served upon the defendant requesting the defendant to appear and answer the claim.<sup>55</sup>

In civil matters, a summons to commence proceedings must meet certain requirements. The summons must be signed by a judge, or the

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<sup>46</sup> C. CIV. P., ORD. I, R. 13; *see also* S.S. Mohideen et al. v. U.P. Narayana Swamy [1967] B.L.R. (C.C.) 188 (Myan.).

<sup>47</sup> C. CIV. P., ORD. I, R. 1.

<sup>48</sup> *See* Phu Kyaw Wai v. Ah Sein [1958] B.L.R. (H.C.) 353 (Myan.).

<sup>49</sup> CIV. P., ORD. I, R. 12.

<sup>50</sup> *Id.*

<sup>51</sup> C. CIV. P., ORD. I, R. 3.

<sup>52</sup> "Plaint" is the term used in Myanmar for a complaint in the United States.

<sup>53</sup> C. CIV. P. § 26; *see* C. CIV. P., ORD. IV, R. 1.

<sup>54</sup> C. CIV. P., ORD. VII, R. 11.; *see* Daw Thin Hlaing v. G. Gordhandus [1965] B.L.R. (C.C.) 594 (Myan.).

<sup>55</sup> C. CIV. P. § 27.

judge's representative, and sealed by the court prior to service upon the defendant.<sup>56</sup> The summons should also attach a copy of the plaint or, if unavailable, a concise statement of the claim against the defendant.<sup>57</sup>

Service of the summons in Myanmar may be either personal, upon an agent, or, in certain circumstances, by registered mail.<sup>58</sup> In matters against a company, service is considered complete if the summons is served upon a representative of the company at its registered office or any place of business established by the company in Myanmar. However, if the company has its registered office outside of the jurisdiction, service upon a manager or agent who works for the company in Myanmar will suffice.<sup>59</sup> For the purpose of this rule, the master of a ship is considered the agent of the owner or charterer.<sup>60</sup> A summons may also be served on the defendant's lawyer if the lawyer is authorized to accept service and appear for the defendant.<sup>61</sup>

Where the court is satisfied that the defendant is avoiding service or that the summons cannot be served in the ordinary way, the court may order substituted service.<sup>62</sup> Substituted service is accomplished by either affixing a copy of the summons conspicuously in a court in the jurisdiction where the defendant last resided or conducted business. Substituted service can also take place by serving the summons in any other manner the court finds reasonable. Where substituted service is appropriate, the court will set the time for the defendant's appearance in accordance with the circumstances of each case.<sup>63</sup>

If a defendant resides outside the jurisdiction of the Myanmar courts and there is no agent in Myanmar authorized to accept service, the summons may be served via registered mail to the defendant's residence.<sup>64</sup>

### *C. Stay of Proceedings*

No case will be permitted to proceed in a Myanmar court if another matter that is substantially the same and between the same parties is already

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<sup>56</sup> C. CIV. P., ORD. V, R. 10.

<sup>57</sup> C. CIV. P., ORD. V, R. 2.

<sup>58</sup> C. CIV. P., ORD. V; *see* U Shaung Ti v. U Sein Maung [1978] B.L.R. 106 (Myan.).

<sup>59</sup> C. CIV. P., ORD. V, R. 13(1).

<sup>60</sup> C. CIV. P., ORD. V, R. 13(2).

<sup>61</sup> *See* Daw Tin Tin Yee v. Maung Khin Maung Aye [1980] B.L.R. 16 (Myan.); Daw Yin Yin May v. U Min Din [1982] B.L.R. 82 (Myan.).

<sup>62</sup> C. CIV. P., ORD. V, R. 20.

<sup>63</sup> C. CIV. P., ORD. V, R. 20(3).

<sup>64</sup> C. CIV. P., ORD. V, R. 25.

before another Myanmar court.<sup>65</sup> Similarly, no case can proceed if the matter has been decided in a former suit between the same parties in a court of competent jurisdiction.<sup>66</sup> However, the pendency of a suit in a foreign court does not preclude a Myanmar court from trying a suit founded on the same cause of action.<sup>67</sup>

A foreign judgment on the same matter, between the same parties will act to stay a Myanmar action where the following criteria are met:<sup>68</sup>

- (1) A court of competent jurisdiction has pronounced the judgment;
- (2) Such a court based the judgment on the merits of the case;
- (3) On the face of the proceedings, the judgment does not appear to be founded on an incorrect view of international law or a refusal to recognize the laws of Myanmar where such law is applicable;
- (4) The proceedings in which the judgment was obtained are not opposed to natural justice;
- (5) The judgment has not been obtained by fraud;<sup>69</sup> and
- (6) The judgment does not sustain a claim founded on the breach of any law in force in Myanmar.

The court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction, unless the document indicates otherwise.<sup>70</sup> However, the presumption may be rebutted by proof of lack of jurisdiction.<sup>71</sup>

A Myanmar court also has the power to stay legal proceedings where the parties are bound by an arbitration agreement that applies to the issues before the court. Stays can be requested any time after appearance and before the delivery of any pleadings or any other significant occurrence in

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<sup>65</sup> C. Civ. P. § 10; see *Manmull Khemka v. Murlidhar Bogla* [1919] 10 L.B.R. 154 (Myan.).

<sup>66</sup> C. Civ. P. § 11; see *U Maung Gale v. Madam Gopal Bagla* [1964] B.L.R. (C.C) 834 (Myan.); *Daw Kyin Nu v. U Mohamed Usoof (a) U Khin Maung*, [1989] B.L.R. 4 (Myan.).

<sup>67</sup> See C. Civ. P. § 10, explanation; *R.M.K.A.R. Arunachallam Chettyar v. R.M.K.A.R.U. Valliappa Chettyar* [1938] R.L.R. 176 F.B (Myan.).

<sup>68</sup> *BURMA C. Civ. P. § 13*; see *V.A.S. Arogya Odeyar v. V.R.R.M.N.S. Sathappa Chettiar* [1951] B.L.R. 211 (Myan.); *A.S.R.M. Samy Nathan Chettyar v. E.M. Chulakingum Chettyar* [1963] B.L.R. (C.C.) 131 (Myan.).

<sup>69</sup> The fraud must not merely be constructive, it must be actual fraud consisting of representations designed and intended to mislead: a mere concealment of facts is not sufficient to avoid a foreign judgment. See generally *Syed Abdulla Rahman Hady v. Seyd Akabi Bin Hamid Momafer* [1924] 3 I.L.R. Ran. 65 (Myan.).

<sup>70</sup> C. Civ. P. § 14; see *S.P.S.N. Kasivisvanathan Chettyar v. S.S. Krishnappa Chettyar* [1951] B.L.R. (H.C.) 399 (Myan.).

<sup>71</sup> C. Civ. P. § 14.

the proceedings.<sup>72</sup> A request to stay will be refused where, after an application has been made to revoke the arbitrator's authority, the circumstances indicate that the court would have granted leave to revoke it. Stay requests will also be denied when 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.

In dealing with "foreign" arbitration agreements, the court is obliged to order a stay under certain circumstances. If a foreign arbitration agreement is in place, the court will stay legal proceedings unless it is satisfied that the arbitration agreement is inoperative or that the current dispute lies outside the scope of the issues that were arbitrated.<sup>73</sup>

#### *D. Discontinuance and Dismissal*

A plaintiff may completely discontinue an action against the defendant or withdraw part of the plaint by giving written notice prior to receipt of the defendant's written statement.<sup>74</sup> However, after the defendant files a written statement, the plaintiff can only withdraw from the case with the leave of the court.<sup>75</sup>

The court may at any stage of the proceedings strike or amend any matter in any pleading which it finds unnecessary, scandalous, or likely to prejudice, embarrass, or delay the fair trial of the suit.<sup>76</sup> In particular, an action may be struck out for any of the following reasons:

- (1) The action is an abuse of process;
- (2) A party fails to deliver a plaint or describe the particulars of the claims within the plaint;
- (3) A party fails to deliver a reply;
- (4) An action is frivolous or vexatious;
- (5) A party defaults in taking out a summons for directions;
- (6) A party defaults in giving discovery;

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<sup>72</sup> The Arbitration Act § 34 (Myan.). A "step" may be taken in proceedings by a party notwithstanding his/her ignorance at the time of the existence of an arbitration agreement. Any application whatsoever to the Court, even though it be merely an application for time, is considered as a "step" in the proceedings. See *Union of Burma v. P. James* [1958] B.L.R. (H.C.) 691 (Myan.).

<sup>73</sup> See A. Christie, *Enforcement of Foreign Arbitral Awards and Arbitration Agreements in Myanmar*, INT'L ARB. L. REV. 194-97 (1998); The Arbitration (Protocol and Convention) Act (1939) (Myan.).

<sup>74</sup> *U Sein Ya v. U Sein* [1980] B.L.R. 36 (Myan.).

<sup>75</sup> C. CIV. P., ORD. XXIII, R. 1-2.

<sup>76</sup> C. CIV. P., ORD. VI, R. 16; see *Ghanhamdas Bilasroy v. Madanlal Saraf* [1966] B.L.R. (C.C.) 1128 (Myan.).

- (7) A party defaults in giving security for costs;
- (8) A party defaults in setting a cause or matter down for trial; and
- (9) A party fails to appear at the trial.<sup>77</sup>

#### *E. Defending Proceedings*

The defendant's key procedural step is the submission of a written statement answering the specific claims made in the plaint.<sup>78</sup> Both the plaint and written statement must be concise, and must exclude all matters not strictly relevant to the question in dispute.<sup>79</sup> The reason for requiring that the claim and answer to such claim be set out in writing in the complaint and in the written statement, respectively, is to ensure that clearly defined issues emerge to be answered during the hearing.<sup>80</sup>

#### *F. Discovery and Interrogatories*

If either the plaint or written statement does not sufficiently disclose a party's case, the other party may ask for further information through interrogatories and discovery of documents, in order to be familiar with the issues for the hearing.<sup>81</sup> Certain interrogatories are not allowed and need not be answered. Interrogatories that seek to obtain the following information are not allowed:

- (1) Discovery of facts that exclusively constitute the evidence of the other party's case or title;
- (2) Disclosure of information that is legally privileged; and
- (3) Disclosure of information injurious to the public interest.

If a party objects to an interrogatory, that party may state the reasons for the objection in its answers to the interrogatories.<sup>82</sup>

A party to a suit may, by application to the court, also seek discovery of documents relating to the matters in question that are in the opposing

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<sup>77</sup> C. CIV. P., ORD. VI, VII, IX, XI, XXV.

<sup>78</sup> See BURMA C. CIV. P., ORD. VIII, R. 1; *Daw Budi v. U Maung Tin* [1980] B.L.R. 36; see also *Daw Saw Nyan v. Ma Hla Kyin* [1966] B.L.R. (C.C.) 760 (Myan.) (regarding the defendant's obligation to file a written statement).

<sup>79</sup> C. CIV. P., ORD. V, R. 17; CTS. MANUAL (Myan.) para. 153; see *Bank of Communications v. Khin Co.* [1966] B.L.R. (C.C.) 811 (Myan.).

<sup>80</sup> See *U Nyunt Aung v. Daw Htay Htay Myint* [1979] B.L.R. 40 (Myan.).

<sup>81</sup> C. CIV. P. § 30; BURMA C. CIV. P., ORD. XI.

<sup>82</sup> See *A.P. Pennel v. D. Wilson* [1906] B. L. R. 24 (Myan.).

party's possession or power.<sup>83</sup> Upon order of the court, the opposing party must provide an affidavit of documents. The affidavit must state what relevant documents are in the party's possession or power and produce the documents for inspection.<sup>84</sup>

Parties have a duty to make wide disclosure of relevant documents, whether helpful or harmful. This includes confidential documents, documents generated after the event, and internal documents relating to the case. However, the duty to disclose does not encompass legally privileged documents.<sup>85</sup>

### G. *Evidentiary Issues*

The Evidence Act of 1872 sets out the rules of evidence in Myanmar. The Evidence Act establishes rules similar in form and content to those in other former British colonies in the region and in Britain today.<sup>86</sup> The Evidence Act is applicable to all judicial proceedings before any court<sup>87</sup> and to all judges or other persons legally authorized to hear evidence.<sup>88</sup> However, the Evidence Act does not apply to arbitrations.<sup>89</sup>

The facts of a case may be proven by oral evidence or written documents. In general, facts may be proved by oral evidence, namely statements made under oath by witnesses in court.<sup>90</sup> The existence or content of documents must be proved by the documents themselves and produced for the inspection of the court.<sup>91</sup> The exception to this is when secondary evidence is admissible or when the document is only remotely relevant.<sup>92</sup> The court may require any material document to be produced for inspection and may view the place of occurrence of the alleged event in question.<sup>93</sup>

<sup>83</sup> C. CIV. P., ORD. XI, R. 12.

<sup>84</sup> C. CIV. P., ORD. XI, R. 13. A party's affidavit of documents is normally conclusive, unless the other party can show from the list itself and the documents in it or from the pleadings, that further documents are relevant.

<sup>85</sup> See *Ma Hla Mra Khine v. Ma Hla Kra Pru* [1938] R.L.R. 243 (Myan.).

<sup>86</sup> *The King v. Nga Myo* [1938] R.L.R. 190 (Myan.).

<sup>87</sup> The Evidence Act (1872) (Myan.) § 1. Broadly speaking, a "court" may be defined as an authority which exercises judicial as distinguished from executive or administrative functions. See *D. D. Grover v. A. C. Koonda & One* [1955] B.L.R. 54 (S.C.) (Myan.).

<sup>88</sup> The Evidence Act, *supra* note 87, § 3.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at § 59.

<sup>91</sup> *Id.* at §§ 59, 63, 64; see *Maung Maung Thauung v. U Hla Gyi and Daw Aye Kyi* [1963] B.L.R. (C.C.) 208 (Myan.); *Chip Bee Trading Co. v. Overseas Chinese Match Factory* [1964] B.L.R. (C.C.) 375 (Myan.).

<sup>92</sup> The Evidence Act, *supra* note 87, §§ 65, 144.

<sup>93</sup> *Id.* at § 60; C. CIV. P., ORD. XIII, R. 11.

## *H. Remedies*

The remedies available in other former British colonies of the region and England are also generally available in Myanmar. Remedies in Myanmar include damages, injunctions, and costs.

### *1. Damages*

Myanmar damage awards tend to be extremely conservative by North American standards. Unlike countries such as the United States of America, Myanmar does not have significant punitive damages or statutory "multiple damage" awards. Monetary judgments normally bear simple interest from the date the cause of action arose. However, there is some judicial discretion as to the interest rate. Damages in contract and tort actions are covered by rules of reasonable foreseeability and causation.

### *2. Injunctions*

Both temporary<sup>94</sup> and permanent<sup>95</sup> injunctions may be granted by a court. A permanent injunction may only be granted by a final decree made at the hearing and upon the merits of a suit. A temporary or interim injunction, however, may be granted on an interlocutory application at any stage of the suit.

Injunctions are difficult to obtain from Myanmar courts. When exercising its discretion to grant a temporary injunction, the court must be satisfied that all of the following exist:<sup>96</sup>

- (1) The applicant has a *prima facie* and *bona fide* case to go to trial;
- (2) Protection is necessary to avoid "irreparable injury";
- (3) Mischief or inconvenience is likely to arise if the court withholds the injunction; and
- (4) The need for relief is immediate.

Myanmar courts define "irreparable injury" as substantial injury that can never be adequately remedied by damages.<sup>97</sup>

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<sup>94</sup> C. CIV. P., ORD. XXXIX, R. 1-2.

<sup>95</sup> The Specific Relief Act §§ 54-57 (1877) (Myan.).

<sup>96</sup> *Jogal Ahir v. Babu Samarath Sin* (a) *Sambrathy Sin* [1962] B.L.R. (H.C.) 70 (Myan.); *U Tin Myint v. U Soe Tin*, [1979] B.L.R. 40 (Myan.).

<sup>97</sup> *Jogal Ahir*, B.L.R. (H.C.) 70.

### 3. *Costs*

Subject to conditions and limitations set forth in a particular law, the court has discretion to award costs.<sup>98</sup> The court determines the amount of the costs and the party responsible for paying it. Interest on costs cannot be charged at more than six percent and is added to the principle cost award to determine the total sum payable. However, costs awards in Myanmar courts are usually based on a "scale" of fees over thirty years old, which bears little relevance to today's costs and is thus wholly inadequate.

## V. FOREIGN JUDGMENTS

### A. *Enforcement*

A conclusive and final foreign judgment<sup>99</sup> can be enforced in Myanmar by an action on a debt to enforce the judgment. The rationale is that where a court of competent jurisdiction has already entered a judgment, Myanmar courts will enforce the legal obligation to pay the sum awarded in the judgment as a debt.<sup>100</sup>

To constitute a valid cause of action for debt, the foreign judgment must be final in the foreign court. In order to establish a final foreign judgment, plaintiffs must show that the foreign court made a final conclusion that established the existence of legal liability. The judgment is then considered *res judicata* between the parties.<sup>101</sup> However, a foreign judgment will not operate as *res judicata* on any matter not directly decided in the judgment or if it offends any of the criteria for a stay of proceedings.<sup>102</sup>

Generally, in suits on a foreign judgment, courts cannot inquire into the merits of the original claim or the propriety of the decision.<sup>103</sup> In other words, Myanmar courts cannot sit in appeal over a foreign judgment because it proceeded on grounds that would not be adequate in Myanmar.<sup>104</sup>

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<sup>98</sup> C. Civ. P. § 35; see *Moolidhar Kandoi v. Lakha Singh* [1962] B.L.R. (H.C.) 112 (Myan.).

<sup>99</sup> "Foreign judgment," for the purposes of the Code of Civil Procedure, means the decree or order of a foreign Court, not the Judge's reasons for the decision.

<sup>100</sup> *K.B. Walker v. Gladys P. Walker* [1935] A.I.R. (Ran.) 284 (Myan.).

<sup>101</sup> *The Bank of Chettinad v. The Chettyar Firm of S.P.K.P.V.R.* [1935] I.L.R. 14 (Ran.) 94 (Myan.); *K.B. Walker v. Gladys P. Walker* [1935] A.I.R. (Ran.) 284 (Myan.).

<sup>102</sup> See *supra* note 50 and accompanying text.

<sup>103</sup> As distinct from determining whether or not the case was decided on its merits as a matter of principle, which is one of the Criteria for enforcement of a foreign judgment. See *S.P.S.N. Kasivisanathan Chettiar v. S.S. Krishnappa Chettiar* [1951] B.L.R. 399 (Myan.).

<sup>104</sup> *The Bank of Chettinad*, I.L.R. 14 (Ran.) 94; *K.B. Walker*, A.I.R. (Ran.) 284.



Myanmar courts can, however, examine the pleadings and the reasoning in the foreign opinion to understand what issues are actually disposed of in the judgment.

Three of the criteria that most often arise when challenging the enforcement of a foreign judgment in Myanmar are whether (i) the foreign court had jurisdiction, (ii) the case was decided on the merits, or (iii) the proceedings were in accordance with natural justice.

### *B. Jurisdiction*

A judgment of a foreign court will not be conclusive unless that court had competent jurisdiction to pronounce it. It is a fundamental principle of law, accepted and practiced in Myanmar, that where a court has no jurisdiction, its judgments and orders are null and void.<sup>105</sup> Whether a foreign court is has competent jurisdiction is determined in accordance with the principles of international law and the law of the country in which the foreign court is situated.

When the property in dispute is situated within the foreign territory, territorial jurisdiction always exists, except in the case of actions of a personal nature against the defendant. Myanmar courts recognize foreign courts to be of competent jurisdiction in suits of a personal nature against the defendant in the following situations:<sup>106</sup>

- (1) The defendant is a citizen of the foreign country in which the judgment has been obtained;
- (2) The defendant was a resident in the foreign country when the action began;
- (3) The defendant has selected the forum in which the defendant is afterwards sued;
- (4) The defendant has voluntarily appeared; and
- (5) The defendant has contracted to submit to the forum in which the judgment was obtained.

### *C. Decided on the Merits*

A foreign judgment must have been decided on the merits of the case for it to be enforceable in Myanmar. Courts in Myanmar have the power to

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<sup>105</sup> S.A. Nathan v. S.R. Samson [1931] I.L.R. 9 (Ran.) 480 (Myan.).

<sup>106</sup> See Rousillon v. Rousillon 14 Ch. D. 351 (Ch. 1880).

examine the judgment to determine whether it was decided on the merits.<sup>107</sup> In making this determination, courts consider whether the judgment was (1) rendered as a penalty for the defendant's or (2) given after consideration of the truth of the plaintiff's case.<sup>108</sup> For example, a judgment is not a judgment "on the merits" if it is given in a case where the defendant does not appear, no evidence is called or considered, and the judgment is entered by default in a summary procedure.<sup>109</sup> However, notwithstanding the non-appearance of a duly served defendant, when evidence is taken on behalf of the plaintiff and judgment is given on such evidence, the case will be considered to have been decided on the merits.<sup>110</sup>

#### D. *Natural Justice*

One of the fundamental principles of natural justice is that a person must be given an opportunity to be heard before the judgment is made against him.<sup>111</sup> Thus, a judgment obtained without notice of the suit to the defendant is considered contrary to natural justice. Courts in Myanmar insist on strict proof of service of process used in foreign courts before giving them effect.<sup>112</sup> When a foreign court has held a particular notice to be sufficient, a Myanmar court must, in the absence of any evidence to the contrary, consider the notice to be correct. The fact that the foreign court followed its own rules of procedure, and not the procedural and evidentiary rules of Myanmar, is not grounds for finding that the foreign proceedings were opposed to natural justice.

### VI. ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Myanmar has adopted the Geneva Protocol of 1923 on Arbitration Clauses and the Geneva Convention of 1927 on the Execution of Foreign Arbitral Awards (collectively referred to as "the Protocol").<sup>113</sup> The Protocol provides for Myanmar's recognition and enforcement of foreign arbitral

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<sup>107</sup> As distinct from an evaluation of the merits of the decision.

<sup>108</sup> A.N. Abdul Rahiman v. J.M. Mahomed Ali Rowther [1928] 6 (Ran.) 552 (Myanmar).

<sup>109</sup> *Id.*

<sup>110</sup> C. Burn v. D.T. Keymer [1913] 7 L.B.R. 56 (Myan.).

<sup>111</sup> V. V. CHITALEY & S. APPU RAO, AIR COMMENTARIES: THE CODE OF CIVIL PROCEDURE 377 (5th ed. 1950).

<sup>112</sup> *Edulji Burjorji v. Manekiji Sorabji Patel* [1886] I.L.R X1 (Bombay) 241 (India).

<sup>113</sup> The Arbitration (Protocol and Convention) Act (1939) (Myan.).

awards made in signatory countries and grants reciprocal rights for enforcement of Myanmar arbitral awards.<sup>114</sup>

The Protocol has been superseded, in some respects, by the United Nations Conference on International Commercial Arbitration and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (collectively the "New York Convention").<sup>115</sup> However, the New York Convention legally supersedes and replaces the Protocol only where both the country in which the award was made and in which it is to be enforced are contracting states and only to the extent such countries are bound by the New York Convention.<sup>116</sup>

## VII. CONCLUSION

With ASEAN membership and increasing levels of foreign investment in Myanmar, use of its legal system by foreign investors and their counsel has grown. Despite a widespread belief to the contrary, Myanmar has a well developed legal system that is a significant advantage to foreign investors.<sup>117</sup> In addition, Myanmar's Court structure and civil procedure has a structure familiar to commercial lawyers and business people from the United States and other "common law" based jurisdictions. After nearly thirty years of self imposed isolation, Myanmar has re-emerged as a significant and convenient destination for foreign investment.

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<sup>114</sup> See Christie, *supra* note 73, at 194-97; The Arbitration (Protocol and Convention) Act (1939) (Myan.).

<sup>115</sup> Myanmar is not yet a signatory to the New York Convention. It has been reported that the Government is considering acceding to the New York Convention, which would make enforcement of foreign arbitral in Myanmar much easier and Myanmar awards could similarly be more widely enforced in foreign jurisdictions.

<sup>116</sup> New York Convention, art. VII.2.

<sup>117</sup> For a full analysis of the laws applicable to foreign direct investment in Myanmar, see A. CHRISTIE & S. SMITH, *FOREIGN DIRECT INVESTMENT IN MYANMAR* (Sweet & Maxwell Asia 1997).

