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RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN MYANMAR AND COMPARATIVE ANALYSIS WITH ASEAN'S EMERGING ARBITRATION VENUES: MALAYSIA AND THE PHILIPPINES

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ABSTRACT

This thesis would mainly address the domestic procedures of recognition and enforcement of foreign arbitral awards and critically analyze the legal reforms and their effects mainly in my home jurisdiction Myanmar, (formerly known as "***Burma***"). Arbitration development in Myanmar left behind because of political instabilities although the initial legislations were strong enough to develop the practice as a British colony. Along with democratic transition of the country in 2010, accession to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**" or "**NYC**"), 1958, in 2013 and the new arbitration law enacted in 2016 are initial steps to reactivate arbitrations in Myanmar. Despite the legal reforms, there is still dearth of literature on Myanmar to clearly understand the arbitration-related proceedings under the current system. Accordingly, this thesis aims to access any procedural gaps and complexities particularly at the enforcement stage of foreign arbitral awards before Myanmar courts.

Enforcement of foreign arbitral awards is the final step of an arbitration to enjoy what legally allows for injustice suffered by the award-creditor. After time-consuming costly arbitration procedures, no award-creditors may want to encounter denial of recognition and enforcement of their awards by a national court of a country where the assets of the award-debtor exist. The NYC is the international initiative to reduce the risk of unenforceability of a foreign arbitral award. However, discretion given to the Contracting States to define the enforcement proceedings under its maximum threshold requirements occasionally deviate from the uniform application of NYC. This thesis aims to highlight variations in enforcement proceedings in Myanmar and two selected jurisdictions: Malaysia and the Philippines and to determine whether their practices comply by NYC's mandate.

Being at nascent stage, Myanmar do yet to tackle every aspect of enforcement proceedings of foreign arbitral awards. To understand the procedural imperfections and possible solutions to them, I will comparatively assess it with the Philippines and Malaysia's enforcement proceedings which are better developed than Myanmar. Comparative analysis on court decisions of grounds for refusal to enforce foreign arbitral award aims to filter good practices out of the Philippines and Malaysia and particularly, to suggest Myanmar to adopt them to become an arbitration-friendly jurisdiction.

LIST OF ABBREVIATIONS

§	Book Section
ADR	Alternative Dispute Resolution
Art.	Article
ASEAN	Association of Southeast Asian Nations
NYC	New York Convention
para.	paragraph
paras.	paragraphs
S	Section
SIAC	Singapore International Arbitration Center
SS	Sections
UNCITRAL	United Nations Commission on International Trade Law

INTRODUCTION

Procedure on recognition and enforcement (*hereinafter will be described occasionally as merely* "**enforcement**") of foreign arbitral awards serves to transform a non-court decision to a court-made judgement which will officially grant an award-creditor to realize reliefs granted by the arbitral tribunal. The New York Convention mandates the enforceability and non-discrimination of foreign arbitral awards as if courts' judgments in its Contracting States. However, it allows the national courts of Contracting States certain authority under which a court can deny attempt to recognize and enforce a foreign arbitral award in its jurisdiction.

The unenforceability issue may arise because of the incomplete or incompliance with domestic regulations for enforcement proceeding by the award-creditor; lack of jurisprudence to handle certain dispute by court; inconsistent *stare decisis* of domestic courts; or judicial corruption. Each jurisdiction has its own formal and substantive requirements to be met by the applicant award-creditor under the Arbitration Law, Civil Procedure Code, and Court Practice Rules. Those requirements may be basically similar such as requisite of original award, date, and place where award is made; they may, however, be different in the interpretation of grounds for refusal to enforce the award expressly provided under NYC. Although disputed parties enjoy the advantage of NYC which allows the award-creditor to apply for enforcement of award at every Contracting State where the assets of the award-debtor exist, no award-creditor may like delays by several proceedings in seeking reliefs. This thesis aims to pinpoint pro-arbitration practices of selected jurisdictions which reassures the enforceability of foreign arbitral awards before their national courts.

This thesis will mainly focus on enforcement proceeding of Myanmar and comparatively analyze with those proceedings of the Philippines and Malaysia. Myanmar is chosen as being my home jurisdiction which has scarce of academic commentaries on its arbitration and enforcement system after legal reforms. The two jurisdictions are selected based on similarity of practicing common law tradition within ASEAN and all being promoting arbitration practices. Philippines is said to be practising hybrid of common law and civil law system, but common law principle of judicial precedents is highly recognized in arbitration regime. Thus, I chose to add it in my research. I exclude Singapore (despite being common-law country within ASEAN) because Singapore is already recognized as Asia hub of arbitration, and I would rather compare between emerging countries of arbitration practice.

Regarding methodology, I will refer to the international convention, domestic laws and rules, judicial precedents, commentaries, and scholarly articles to elaborate the enforcement system of each jurisdiction. I will start by descriptive approach relying on legislations and *stare decisis*, and critically examine the essential features of statues and judicial rulings in each jurisdiction. Then, I will comparatively analyze on courts' interpretations on substantive grounds of NYC to challenge enforcement of foreign arbitral awards among the three selected jurisdictions.

Chapter I will discuss the gradual development of arbitration practice in Myanmar throughout different eras. The chronological assessment portrays the background legal system of Myanmar and history of arbitration laws. Comparison between the repealed law and the new law sparks the significance of legal reforms and their effects in arbitration development in Myanmar. **Chapter II** will consult the recognition and enforcement proceedings of foreign arbitral awards in three selected jurisdictions: Myanmar, the Philippines and Malaysia. The full picture of enforcement proceeding of each jurisdiction not only under arbitration law but also under other relevant procedural laws such as Civil Procedure Code, Limitation Act, and Rules of Court will be described. The essential features of each jurisdiction will be emphasized and critically analyzed. **Chapter III** will analyze on similarities and differences between the provisions relating to the grounds for refusal to enforcement in each jurisdiction. Comparative analysis will result in comprehensive understanding of differences in interpretation of substantive grounds for refusal by national courts. Finally, this thesis will conclude by highlighting the good practices and loopholes in the enforcement mechanism in Myanmar and proposing suggestions to them by referring to good practices from the Philippines and Malaysia

CHAPTER I: GRADUAL DEVELOPMENT OF ARBITRATION PRACTICES FROM COLONIAL ERA TO TODAY IN MYANMAR

Myanmar has an overwhelming history on peaceful settlement of dispute. Dispute settlement outside the court has been long existed in Myanmar although the format is different from modern practices. Chapter I will describe the traditional arbitration practice in Myanmar and will differentiate between the old legal framework and the new one and highlight the significances.

1. Legal history on arbitration in Myanmar

Myanmar judiciary system can be traced by reliable records from 12th Century A.D.[1] *Yazathat* (Royal Edicts), *Dhammathats* (Legal Texts), *Phyatthons* (Judicial Rulings) and traditional customs were sources of laws during the era of Myanmar Kings.[2] During monarchical era, parties settled disputes amicably, either face to face or through a mediator, and once they reached settlement, they ate a snack called "*Laphet*" (pickled tea leaves) together as a sign of satisfaction of the agreement/decision.[3]

During the "*Konbaung*" (the Last Dynasty of Myanmar Kings) period (1753-1885), there were two kinds of arbitrators: arbitrator appointed voluntarily by parties and arbitrator appointed by royal authority who could sit at the "*Khon*" (Tribunal).[4] Above the tribunals were district officer court, chief civil court and finally the King.[5] Dispute settlement outside the court has been long existed in Myanmar although the format is different from modern practices. Mediation and arbitration were widely used in the villages for family disputes as well as general social problems of the village in the past.

[1] Ei Ei Khin, "An Overview of Arbitration in Myanmar," 現代社会文化研究 38 (2007): 293.
[2] Ibid.
[3] Ibid.
[4] Ibid, 294.
[5] Dr. Maung Maung, *Law and Custom in Burma and the Burmese Family*, The Hague: Martinus Nijhoff, (1963), 15.

Myanmar legal system predominantly belongs to the common law legal family[6] as Myanmar had been colonized by British for more than 100 years. English common law principles and statutes, *stare decisis*, customary law and recent Myanmar legislation are the backbone of Myanmar legal system.[7] The early references to arbitration can be found in the Codes of Civil Procedures, and later in 1944, the first Arbitration Act ("**1944 Act**") [Burma Act IV, 1944] was enacted which repealed the relevant provisions under the Civil Procedure Code and Indian Arbitration Act of 1899.[8] Moreover, as a British colonial country, Myanmar became the signatory of Geneva Protocol of 1923 on Arbitration Clauses and Geneva Convention of 1927 on the Execution of Foreign Arbitral Awards, and enacted Arbitration (Protocol and Convention) Act of 1939 ("**Protocol and Convention Act"**) [India Act VI, 1937] for recognition and enforcement of foreign arbitral awards. Myanmar had feasible legislations for arbitration development and there had been reported cases of domestic arbitrations before 1962 when Revolutionary Government declared to exercise socialist policies. However, enforcement of foreign arbitral awards had never been sought under the Protocol and Convention Act.

In 2013, Myanmar acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("**New York Convention" or "NYC"**) as a first step to reactivate the arbitration practice in the country. Consequently, "*Pyidaungsu Hluttaw*" (Myanmar Parliament) enacted a new Arbitration Law[9] in 2016 (**"Arbitration Law"**) which adopts the UNCITRAL Model Law (2006) ("**Model Law**") with certain adjustments. The old 1944 Act was repealed whereas the Protocol and Convention Act remains dormant.

The currently applicable arbitration legislations in Myanmar are Arbitration Law, Arbitration Procedures (2018)[10] and procedural rules governing domestic arbitration[11] issued by the Union Supreme Court of Myanmar, and Code of Civil Procedure of 1909 ("**Civil Procedure Code**"),[12] for court proceedings. Due to the impact of military coup and political crisis started

[6] Myanmar legal system is also said as a hybrid of Civil Law and Common Law legal traditions because of practice of codification. See also John Southalan, "Burma and the Common Law? An Uncommon Question," *Thailand Law Journal* 10 (January 2006).
[7] Alec Christie, "A Guide to Arbitration in Myanmar.," *International Arbitration Law Review*, G27-32, 1, no. 5 (1998), 1.
[8] Thida Aye and James Finch, "Part L:Myanmar," in *Arbitration in Asia*, 2nd ed. Michael J. Moser and Christopher W. To, Release 13 (Juris, 2021).§1.
[9] Myanmar Arbitration Law, Pyidaungsu Hluttaw Law No. 5/2016, 2016, https://www.mlis.gov.mm/mLsView.do;jsessionid=8A2E6B90F83F1199F7453B49FBB58EDB?lawordSn=9668 .
[10] Notification 634/2018 of Union Supreme Court, 2018.
[11] Notifications 42/2021, 43/2021 of Union Supreme Court, 2021.
[12] India Act No. 5 of 1908.

since 2021, economy of Myanmar is at the downward trend, however, arbitration development within the country seems not to be affected. Reported cases about arbitration are increasing and stay of proceedings suits are the most among them.[13] Court decisions are inconsistent on stay of proceeding suits.[14] However, in the reported two enforcement cases, West Yangon District Court ordered to recognize and enforce the foreign arbitral awards which reinstates pro-arbitration policy in the country.

2. Significances of legal reforms and practical development in arbitration regime

A significant ruling under the 1944 Act was the invalidity of arbitration agreement that restricted judiciary proceedings. Despite Section 28 of Contract Act 1872 exempts arbitration agreements from being void as restricting legal proceedings, the Supreme Court in V.I.E Ismolansa Kajar v. Ebrahim Ram Co. Ltd,[15] decided the arbitration agreement as void. The court emphasized on the wording of arbitration clause "*without any recourse to legal proceedings*" and ruled that the "*such offending language was not protected by the exceptions under the Contract Act*".[16] This precedent is not attractive to today's current pro-arbitration practice. A similarly arbitration clause may rarely be occurred at present because of jurisprudence in this field and abundance of model arbitration clauses. To avoid any negative impacts in any case, if any business wants to choose Myanmar as the seat of arbitration, they should carefully draft their arbitration. agreement not to include words that amount to arbitration as the sole remedy.

The main advantage of Myanmar legal reforms is obviously compliance with international arbitration practices as well as stipulation of more clear guidance for arbitration in Myanmar. The problem of 1944 Act and Protocol and Convention Act was that whereas the former provided only for domestic arbitration, the latter provided merely for enforcement of foreign arbitral awards but neither for the procedures of arbitration.[17] The peculiarities of 1944 Act are

[13] Judgements of Commercial Cases, Union Supreme Court of Myanmar, https://cjs.usc.gov.mm.
[14] Sebastian Pawlita and Nyein Chan Zaw, "Primer-on-Arbitration-in-Myanmar," *Lincoln Legal Services (Myanmar) Limited*, July 9, 2023, 2–4, https://www.lincolnmyanmar.com/wp-content/uploads/2023/06/Primer-on-Arbitration-in-Myanmar.pdf.
[15] 1962, B.L.R. (C.C.), 152.
[16] James Finch and Saw Soe Phone Myint, "Arbitration in Myanmar," *Journal of International Arbitration* 14, no. 4 (1997): 91–92.
[17] Aye and Finch (n 8) §2.1.

as follows. First, the even number of arbitrators may theoretically be feasible to make awards, and only in case of tied votes, the umpire will be appointed and make decision.[18] Second, challenge to arbitrators had to be applied to the court, instead of to the arbitral tribunal.[19] Third, the principle of *kompetenz-kompetenz* was not accepted because the question of existence and validity of an arbitration agreement or an award had to be challenged before the court.[20] Objection to an award conducted without filing with a court had to be considered as a failure by the court.[21] The new Arbitration Law supersedes all those provisions in line with international practice.

Although 1944 Act dealt with only domestic arbitration, considering the lack of caselaw on enforcement of foreign arbitral awards in the past, the judicial rulings under 1944 Act are important to analyze the legal customs of Myanmar in enforcement proceedings. In several cases, it is found that Myanmar courts narrowly exercised court power to interfere with the decisions of the arbitral tribunals.[22] In Burma-Indo Ceylon Rice Corporation Limited v. the State Agricultural Marketing Board,[23] the high court decided that courts did not have the jurisdiction of an appellate court to review decisions of the tribunal and should not interfere with an arbitrator's conclusion of fact. In Ramanand v. U.N. Menon,[24] the court ruled that the fact that a court failed to provide proper notice of filing of an arbitral award was not a ground to set aside the award by another court. The grounds for setting aside of award was limited to the following under Section 30 of 1944 Act:

- "*An arbitrator or umpire has misconducted in the proceedings;*
- *The award has been made after the issue of an order by the court superseding the arbitration or after arbitration proceedings have become invalid under Section 35;*
- *The award has been improperly procured or is otherwise invalid*."

In the case of U Sein Win and Co. Ltd. v. the State Agricultural Marketing Board[25], the court ruled that misconduct of arbitrator was sufficient ground to set aside an arbitral award. In the case of U Aye and one v. U Ko Gyi and Two Others,[26] the court set aside the award because

[18] SS-9 and 10(3) of 1944 Act.
[19] S-5 of 1944 Act.
[20] SS-31(2), 32 and 33 of 1944 Act.
[21] U Aye Maung v. Daw Aye Khin [1965] B.L.R. (C.C.) 75; U Hla Myint v. Daw Khin Myint [1982] B.L.R. 92.
[22] SS-17-19 of 1944 Act.
[23] 1958, B.L.R. (H.C.), 68.
[24] 1951, B.L.R. (H.C.), 192.
[25] 1954, B.L.R. (H.C.), 200.
[26] 1959, B.L.R. (H.C.), 152.

the award was made by arbitrators not properly appointed. In the case of Daw Mi (Deceased) her Representatives, Ma Pu and Five others v. Muti, [27] the court held the award was invalid under the ground of 'improperly procured or invalid award' because the arbitrator had decided on rights of succession by which arbitrator exceeded its power as it was not arbitrable under the laws of Myanmar. These rulings can be related to the grounds under Section 46(b) and (c) of Arbitration Law which deal with foreign arbitral awards by analogy. Despite the defects of 1944 Act, the outcomes of the said cases implied that Myanmar courts were not absolutely departed from international arbitration practices in the past.

On the other hand, the main feature of the dormant Protocol and Convention Act is its applicability only to "commercial" contracts under the laws of Myanmar. [28] According to Section 2(b) of Protocol and Convention Act, a foreign arbitral award made within the jurisdiction of a Contracting State, with which reciprocal provisions have been made and declared by notification in the Gazette, [29] shall be enforced by the competent courts in Myanmar. The requirements designated to apply for an enforcement proceeding are the same as those provided in the Geneva Convention 1927.[30] In addition, the Protocol and Convention Act also provides three grounds for challenge of enforcement if the court finds that:

- the award has been annulled under the law of the country in which it was made;
- procedural irregularities in enforcement proceedings and incapacity or inability to present his case by any party;
- the award does not deal with all questions referred or contains decisions on matters beyond the scope of arbitration.[31]

The Act provides very limited grounds for denial of enforcement of foreign arbitral awards. The grounds set under 1944 Act would not be considered by the courts.[32] One can fairly remark that Myanmar already had quite systematic legal framework for enforcement of foreign arbitral award even before reforms. It is quite surprising why there was not at least one case on that matter.

[27] 1966 B.L.R. (C.C.) 878.
[28] Preamble and S-2 of Protocol and Convention Act.
[29] Notification No. 180, 2 December 1938, Myanmar Gazette, 1938, p.1089.
[30] S-7(1) of Protocol and Convention Act.
[31] S-7(2) of Protocol and Convention Act.
[32] Finch and Myint (n 16) 101.

A significant reform regarding enforcement procedure is that the new Arbitration Law reduced the two-step procedure into a single procedure. Under Section 6 of Protocol and Convention Act, the award-creditor shall apply to the competent court and shall register as a civil suit between the award-creditor as plaintiff and the award-debtor as defendant. Only when the court is satisfied with enforceability, the court shall order the award to be filed and pronounce judgment according to the award. Then, as a second step, execution of the decree shall be proceeded. In contrast, new Arbitration Law revokes the first step and Myanmar courts shall enforce foreign arbitral awards made within the jurisdictions of the NYC Contracting States in the same manner as execution of a decree under the Civil Procedure Code of Myanmar.[33] This change effectively eases the enforcement procedures and shortens the length of court proceedings.

Despite optimistic reforms increasing the chance of enforceability of foreign arbitral awards among NYC's Contracting States, a major defect of the new Law is non-restriction upon appeal(s) on the decision of the court either for or against the enforcement of foreign arbitral awards. In this respect, the Protocol and Convention Act looks more compelling because it expressly restricts the right to appeal upon the decree made by the court for enforcement of foreign awards under its Section 6(2). The new Law is silent on appeal relating to the foreign arbitral awards, from which one may assume that any aggrieved party may appeal to the higher courts like the appellate proceedings of civil suits. The old approach looks more efficient by avoiding several appeals to the higher courts and shortening the proceedings than the new one. Nevertheless, the advantages of legal reforms outweigh this single defect.

[33] S-46(a) of Arbitration Law.

CHAPTER II: LEGAL FRAMEWORK ON RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN SELECTED JURISDICTIONS

Arbitration laws of all three selected jurisdictions: Myanmar, the Philippines and Malaysia are found to be drafted based on UNCITRAL Model Law. Thus, the formal requirements to initiate an enforcement proceeding are basically similar but the additional procedural rules such as Rules of Court, Civil Procedure Code cause slightly different the proceeding from each other. This Chapter II will describe the whole enforcement proceedings of foreign arbitral awards in each jurisdiction under existing laws of each jurisdiction.

1. Recognition and enforcement of foreign arbitral awards in Myanmar

Myanmar Arbitration law 2016 stipulates, subject to its NYC's obligations, that "*the court shall presume and enforce a foreign arbitral award as if it were a decree of the court*" under Section 46(a). The competent courts for this purpose are the District Courts where the **award-debtor** resides or conducts business activities or owns property.[34] Since a foreign arbitral award shall be treated as if the decree of a District Court, a civil execution suit shall be filed by the party seeking enforcement ("**award-creditor**" (or) "**applicant**") subject to Order 21 of Civil Procedure Code.[35]

The party seeking recognition and enforcement of a foreign arbitral award shall submit the following documents to the court as *prima facie* evidence of holding an entitlement:

- *the original award or duly certified copy of thereof,*
- *the original arbitration agreement or duly certified copy thereof,*
- *the evidence to prove as may be necessary to prove that the arbitral award is a foreign arbitral award*.[36]

It is not clear of the third requirement, especially when the existence of a foreign arbitration and an award resulting from it can be fulfilled by the first and second requirements. When the required documents are written in other languages, a certified translation into English shall be

[34] Para. 45 of Arbitration Procedures.
[35] Order XXI, The First Schedule, Civil Procedure Code, 1909.
[36] S-45(a) of Arbitration Law.

submitted.[37] English translation only is sufficient under the law, however, applications before Myanmar courts normally require translations from English into Myanmar.[38] Evidence of finality of award in the country where the award is made, as required under the Protocol and Convention Act, is revoked subject to NYC mandate.

In addition, the application needs to be formalized under Order 21, Rule 11(2) of Civil Procedure Code as it governs civil execution suits in Myanmar. It shall be in writing, signed and verified by the award-creditor or his representative with satisfactory proof and accompanied with the designated form under the Code. [39] In practice, the following additional documents may also be demanded:

- Board of directors' resolution that appointed a person/director to represent the company in the enforcement proceedings (if the award-debtor is a company),
- An application under Section 160 of Myanmar's Companies Law and Order 29, Rule 1 of the Civil Procedure Code that are also related to the representative appointment,
- Service of summons for both the award-creditor and the award-debtor,
- Court fees of 200 MMK to serve the District Court (which is stamped on the recognition and enforcement application forms),
- Any other that may require based on the claim.

In Ignesis Technologie Co. Ltd. v. Pinnacle Asia Company Limited, ("**Ignesis Technologie case**")[40] the lack of application form under Order 29, Rule 1 of Civil Procedure Code was relied on, by the award-debtor, to challenge the enforcement of the award under the ground of procedural deficiency in the application for which enforcement should be denied. The court ruled that Order 29, Rule 1 was not applicable since Myanmar company law overruled the Civil Procedure Code and the board of directors' resolution was sufficient evidence for appointment to represent in the proceeding. Accordingly, it is not clear if the form under Order 29, Rule 1 is still required to be attached. Since the case was decision of West Yangon District Court, it is important to note that a different District Court may render a different outcome. Nevertheless, this case shows that a Myanmar court may not deny enforcement of a foreign award merely

[37] S-45(b) of Arbitration Law.
[38] Yoshiaki Muto et. al., "Landmark Recognition and Enforcement of a Foreign Arbitral Award in Myanmar", *Baker McKenzie Blog*, September 2, 2020, https://www.globalarbitrationnews.com/2020/09/02/landmark-recognition-and-enforcement-of-a-foreign-arbitral-award-in-myanmar/.
[39] Appendix E, Form 6: Application for Execution of Decree, Order 21, Rule 11 of Civil Procedure Code.
[40] Ignesis Technologie case, Civil Execution Suit No. 122/2022 (District Court).

because of incomplete documentary requirements. The court seems to limit determination on meeting formal requirements to the documents required under Section 45 of Arbitration Law and under Order 29, Rule 11 of Civil Procedure Code.

Arbitration Law does not stipulate the limitation period for enforcement of foreign arbitral awards, but it refers to the Limitation Act, 1908 as applicable.[41] A contradictory in the Limitation Act is whether the filing with the court shall be done within 90 days from the date of service of notice of award[42], or within 3 years (6 years, if the award is registered at the Office of Registration of Deeds (ORD) in Myanmar) from the date of the arbitral award[43]. Since the 90-day limit was descended from the 1944 Act and remains unchanged, one can argue that it is relevant only for domestic arbitration. There is no dispute on this provision. Nevertheless, current practice seems to follow 3-year period (6 years if registered) because in the case of ARV Offshore Co. Ltd v. Myanmar Offshore Co. Ltd. and MOL Offshore Pte Ltd., ("**ARV Offshore case**")[44] the application for enforcement of foreign award dated 1 August 2016 was filed nearly 3 years later, in 2019. No argument regarding limitation period was raised and the court ordered to enforce the award. Thus, generally, it can be assumed that limitation period for enforcement mechanism at Myanmar court is three years from date of award.

Section 46(b) and (c) of Arbitration Law stipulate a list of substantive grounds for refusals which closely resemble the grounds for challenge under the Model Law and NYC with two notable differences. First, Myanmar substituted the word "*public policy*" with "*national interests*" under Section 46(c)(ii) which can be argued as totally different from the concept of public policy. Second, Myanmar excludes the second sentence of Art.V(1)(c) of NYC that allows the severability and partial enforcement of awards in Section 46(b)(iv) of Arbitration Law. Although domestic awards can be separated from matters not submitted to arbitration for enforcement,[45] Myanmar stipulates more stringent rule for foreign arbitral awards. The detailed analysis will be discussed in Chapter III.

As mentioned above, right to appeal in the enforcement proceedings of foreign arbitral awards is not expressly provided. One may assume that the appellate proceedings should be similar to those for civil suits whereas one may argue that lack of express provision in Arbitration Law

[41] S-56 of Arbitration Law.
[42] Art. 178 of First Schedule of Limitation Act.
[43] Art. 182 of First Schedule of Limitation Act.
[44] ARV Offshore case, Civil Execution Suit No. 132/2019 (District Court).
[45] S-41(a)(iv) of Arbitration Law.

prohibits appeal under the Civil Procedure Code.[46] Assuming that appeal is allowed, there may be three levels: (1) appeal to a High Court of Region/State,[47] (2) appeal to the Union Supreme Court,[48] and (3) a further special appeal may be allowed to an Appellate Bench before Union Supreme Court (Special Division).[49] Myanmar has a complex system of appellate and revision proceedings and on the basis of type of suit, whether the aggrieved party can appeal or can merely apply for civil revision suit can be determined. Assuming that an appeal is not allowed on the order of the District Court, the aggrieved may be able to apply for a revision suit to the Supreme Court.[50] Therefore, it is very controversial because of lack of an express guidance under Arbitration law. Surprisingly, since the two decided cases did not proceed to further proceedings, it is difficult to know whether appeal is allowed or not in Myanmar.

Although there are many untouched questions in the enforcement proceedings especially regarding the interpretation of grounds for refusal, it is compelling that Myanmar has now constructed the fundamental infrastructure to conduct arbitration proceedings. Because of shortage of enforcement proceedings in Myanmar, courts have yet to determine on varieties of arguments that are commonly raised in enforcement proceedings.

2. Recognition and enforcement of foreign arbitral awards in the Philippines

The legal system of Philippines can fairly be assumed to be a mixture of common law legal tradition being influenced by US legal system and civil law system as being colonized by Spain.[51] The doctrine of judicial precedents is recognized in the Philippines subject to Art.8 of the Civil Code.[52] In 1953, the Congress of the Philippines enacted the first Arbitration Act called Republic Act No. 876 ("**RA 876**") which regulates for domestic arbitration. Then, the Philippines ratified NYC in 1967 with two reservations: reciprocity reservation and commercial reservation.[53]

[46] S-104 of Civil Procedure Code
[47] S-39 of Union Judiciary Law
[48] Ibid, S-12.
[49] Ibid, S-19.
[50] Ibid, S-13.
[51] Tetsuo Kurita and Jennebeth Kae Cainday, "Dispute Resolution and Arbitraiton System in the Philippines," *One Asia Lawyers*, July 2021, §2.1, https://oneasia.legal/en/4015.
[52] Philippine Civil Code, Republic Act No. 386, 1949.
[53] The Philippines: Declaration and Reservation to the New York Convention, https://www.newyorkconvention.org/contracting-states.

Only nearly 40 years later of ratification in 2004, the Philippines Congress enacted Alternative Dispute Resolution Act of 2004 ("**ADR Act**")[54] as a single governing law for various types of ADR methods including arbitration, mediation, and others such as evaluation of neutral third party, mini-trial, and multi-tiered dispute resolution. It refers to UNCITAL Model Law 1985 as the law governing international arbitrations,[55] and to NYC for recognition and enforcement of foreign arbitral awards.[56] UNCITRAL Model Law 2006 version has not yet been updated under the ADR Act to date ("*UNCITRAL Model Law" hereinafter, regarding the Philippines' context, refers to 1985 version*).

The recognition and enforcement of foreign arbitral awards is governed principally by ADR Act, Rule 13 of Special Rules of Court on Alternative Dispute Resolution ("**ADR Rules**") 2009,[57] and NYC. Foreign arbitral awards are distinguished into two categories: Convention Award made in a Contracting State[58] and Non-Convention Award made in a third country[59]. Convention awards shall be enforced pursuant to NYC,[60] whereas non-convention awards may be either enforced as if it were a convention award,[61] or as a foreign judgment.[62] Nevertheless, the distinguishment is relatively immaterial because over 190 countries in the world are already the Contracting States of NYC.

A regional trial court is authorized to determine on enforcement applications and the appropriate one can be decided by the applicant based on factual circumstances pursuant to Rule 13.3 of ADR Rules. The limitation period for filing for enforcement is not clearly expressed in the laws. Under Rule 13.2 of ADR Rules, it is mentioned as "*at any time after receipt of a foreign arbitral award*" upon which one can argue that no limitation period applies to such enforcement. However, one commentator argued that the limitation period should be 10 years as applicable to civil suits under Art. 1144 of the Civil Code, by analogy.[63]

[54] Alternative Dispute Resolution Act, Republic Act No. 9285, 2004.
[55] S-19 of ADR Act.
[56] S-42 of ADR Act.
[57] Special Rules of Court on Alternative Dispute Resolution, Supreme Court of the Republic of the Philippines, A.M. No. 07-11-08-SC, 2009.
[58] S-3(i) of ADR Act.
[59] S-3(x) of ADR Act.
[60] S-42 of ADR Act; Rule 13.4 of ADR Rules.
[61] S-43 of ADR Act; Rule 13.4 of ADR Rules.
[62] Rule 39, S-48 of the Rules of Court of 1997; Rule 13.12 of ADR Rules.
[63] Custodio Parlade, "Philippines", in *Arbitration in Asia*, 2nd ed. Michael J. Moser, (Juris, 2010), §2.2.

Once the applicant filed for enforcement of foreign awards, the defendant is prohibited from fling motion to dismiss in the Philippines.[64] The aggrieved party can only submit objections during the proceedings. The formal requirements to file a petition for recognition and enforcement of foreign arbitral awards are listed under Rule 13.5 of ADR Rule where an authentic copy of the arbitration agreement and an authentic copy of the arbitral award are required to be attached. If they are written in other language, certified translations into English will be required. [65] In addition, a certification against forum shopping,[66] an affidavit[67] and minimal filing *"fee payable in all other actions not involving property"* [68] may also be required.

The Philippines does not prohibit appeal upon the decision of the regional trial court and three levels of appeal/recourse are available. First, the aggrieved party may file a motion for reconsideration of the decision to the regional trial court within 15 days from the date of receipt of the decision.[69] At the second level, the aggrieved party is given two options and recourse to one remedy shall preclude recourse to the other.[70] They are an appeal to the Court of Appeals within 15 days from the notice of final decision of regional trial court after reconsideration,[71] or alternatively, a special civil action for *certiorari* to the Court of Appeals.[72] However, the *certiorari* proceeding is allowed only on the decision of the regional trial court "*allowing to enforce a foreign arbitral award pending appeal*", and on the conditions that the regional trial court gravely abused its discretion and there is no appeal or any plain, speedy and adequate remedy in the ordinary course of law.[73] Third, the aggrieved party can appeal by *certiorari* to the Supreme Court, not as a right of appeal entitled by the parties but as sound judicial discretion exercised by the Supreme Court if it found serious reasons resulting in grave

[64] Rule 1.6(a) of ADR Rules.
[65] Ibid, Rule 13.5.
[66] Ibid, Rule 1.5.
[67] Ibid, Rule 1.4.
[68] Ibid, Rule 20.1.
[69] Ibid, Rule 19.1(o) and 19.2.
[70] Ibid, Rule 19.9.
[71] Ibid, Rule 19.12(j) & (k) and 19.14.
[72] Ibid, Rule 19.26.
[73] Ibid, Rule 19.26(k).

prejudice to the aggrieved party. [74] Nevertheless, in practice, it is said that the Supreme court hears greater number of such petitions for *certiorari*.[75]

One compelling feature of Philippines' system is the immediate executory effect of the foreign arbitral award[76] and the incentive that an appeal shall not stay the award unless the Court of Appeals ordered otherwise.[77] This ensures that the enforcement is not defeated during the pending appeal by the aggrieved party to frustrate the enforcement process. In practice, it is unrealistic if the Court of Appeals does not order to adjourn the execution process while pending appeal because it may reverse the regional trial court's decision. The provision looks itself attractive, but it seems to be difficult to enjoy it. Moreover, one should note that monetary claims against the government department must be approved by the Commission on Audit (COA) in the Philippines in addition to the enforcement order by the court.[78]

The grounds to deny enforcement of foreign arbitral awards are strictly limited to those mentioned under Section 45 of ADR Act and 13.4 of ADR Rules which resembles Art.V of NYC without any changes. Power of enforcing court is explicitly delineated to determine only whether the foreign arbitral awards shall be recognized and enforced or denied them, and lack of authority to set aside or vacate foreign arbitral awards.[79] Judicial review on foreign arbitral awards, disturbing the tribunal's determination of facts and/or interpretation of law is prohibited.[80] As a hybrid nature of civil law and common law legal tradition, Philippines' approach of codification of the essential rules of enforcement proceedings in the ADR Rules seems to be able to largely assist the courts in decision-making of the firstly-tried case before the court.

[74] Ibid, Rule 19.36.
[75] Jun Bautista and Cesar P. Manalaysay, "Philippines Chapter," in *ICC Guide to National Procedures for Recognition and Enforcement of Awards under the New York Convention*, Third Edition, (JusMundi, 2019), §D, Q.10, https://jusmundi.com/fr/document/publication/pdf/en-philippines-1.
[76] Rule 13.11 of ADR Rules.
[77] Ibid, Rule 19.22.
[78] Ricardo MA. Ongkiko and John Christian Regalado, "The Philippines", in *Guide to Arbitration Places (GAP)*, 2nd Edition (Delos Dispute Resolution, 2024), 5, https://delosdr.org/wp-content/uploads/2018/06/Delos-GAP-2nd-edn-Philippines.pdf.
[79] Ibid, Rule 13.4.
[80] Ibid, Rule 13.11.

3. Recognition and enforcement of foreign arbitral awards in Malaysia

Malaysia's legal system is based on common law legal tradition of British. According to the Pangkor treaty between the Sultans of the Malay States and the British in 1874, Malaysia was under the regime of British till 1957 and British legal system was introduced to Malaysia.[81] The first arbitration legislation was the Arbitration Ordinance XIII of 1809 and the law developed throughout different eras with enactments and repeals.[82] In 2005, Arbitration Act 2005 ("**Arbitration Act**") was enacted on the basis of UNCITRAL Model Law 1985 and the New Zealand Arbitration Act 1996. The legislation has been amended once in 2011 and twice in 2018 and the latest version[83] is as of November 1, 2018. The Arbitration Act applies to both domestic and international arbitrations seated in Malaysia and the recognition and enforcement of foreign arbitral awards is governed by its Sections 38 and 39. Those provisions affiliate the provisions of NYC as a signatory since 1986. Moreover, Rules of Court, 2012 ("**ROC 2012**")[84] is applicable as supplementary procedural rules to conduct effective proceedings before the courts.

At the time of accession to NYC, Malaysia, similarly to the Philippines, made reciprocity reservation and commercial reservation.[85] Accordingly, Section 38(4) of Arbitration Act limits the enforceability of foreign arbitral awards expressly to awards made in a Contracting State. It clarifies that Malaysia has not accepted the principle of recognizing and enforcing all foreign awards made outside Malaysia.[86] However, it does not mean that gazette notification is a prior condition to the enforcement of foreign arbitral awards made under NYC (Convention awards).[87] Alternative option to enforce foreign arbitral awards in Malaysia is the proceeding under Reciprocal Enforcement of Judgments Act 1958 ("**REJA**"). This REJA enforcement proceeding is applicable to awards made in a non-Contracting State of NYC but limited to only

[81] "Malaysia, British, 1874–1957," *Encyclopedia of Western Colonialism since 1450*, *Encyclopedia.com.*, May 15, 2024. https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/malaysia-british-1874-1957.
[82] Thayananthan Baskaran, "Part N: Malaysia", in *Arbitration in Asia*, 2nd ed. Michael J. Moser and Christopher W. To, Release 13 (Juris, 2021), §1.1.
[83] Arbitration Act 2005, Act 646, as amended on 1 November, 2018, https://admin.aiac.world/uploads/ckupload/ckupload_20210909045828_63.pdf.
[84] Rules of Court, Federal Government Gazette, 2 July 2012, https://www.malaysianbar.org.my/cms/upload_files/document/Rules%20of%20Court%202012.01.07.2012.pdf
[85] Malaysia: Declaration and Reservation to the New York Convention, https://www.newyorkconvention.org/contracting-states.
[86] Baskaran (n 82) §24.
[87] Ibid; Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd, [2010] 2 MLJ 23, Federal Court.

countries within Commonwealth jurisdiction.[88] Considering the high number of Contracting States in NYC and more flexible requirement for enforcement proceeding, REJA proceeding seems to be dormant.

High Court in Malaya or High court in Sabah and Sarawak are competent courts for enforcement proceedings.[89] Malaysia procedural requirement for enforcement of Convention awards is quite significant. It sets two-step procedures: registration as a court judgment in terms of the award and execution proceedings.[90] The first registration as a court judgment proceeding also include two-stage proceedings: Section 38 proceeding (*ex parte*) and Section 39 proceeding (*inter partes*).[91] As confirmed in CTI Group Inc. V. International Bulk Carriers SpA case, the aggrieved party challenging the enforcement of foreign arbitral award must make separate application under Section 39 of Arbitration Act, different from application for enforcement by the other party under Section 38.[92] First, the award-creditor may apply *ex parte* to the High Court by way of an originating summons to enforce the award[93] accompanied by affidavit which includes:

- the duly authenticated original award or a duly certified copy of the award; and
- the original arbitration agreement or a duly certified copy of the agreement.[94]

Whereas the said agreement and/or award are written in languages other than national language or English, the applicant shall supply a duly certified translation of them in English language.[95] Then, the award-debtor must be served on by a copy of application and order permitting to enforce the award and is entitled to apply to set aside the order within 14 days of service of such order.[96] Upon such counter-application, the High Court will conduct *inter partes* hearing and determine to permit enforcement of foreign arbitral award or dismiss it. Unless the award-debtor applies to challenge the enforcement of award within 14 days, the court will grant the award-creditor to proceed to enforcement and execution of the arbitral award. Therefore, it can generally be assumed that enforcement of foreign awards in Malaysia must encounter two-fold

[88] S-2 of Reciprocal Enforcement of Judgments Act 1958 (REJA)
[89] S-2 and 38(1) of Arbitration Act.
[90] S-38(1) of Arbitration Act.
[91] Thayananthan Baskaran, "Recognition and Enforcement of Awards", in *Arbitration in Malaysia: A Commentary on the Malaysian Arbitration Act,* (Kluwer Law International, 2019), §38.06(B).
[92] CTI Group Inc v. International Bulk Carriers SPA, Civil Appeal No. 02(f)-61-09-2015(S), Federal Court, Excerpt Decision (10 August 2017), paras.60-63. In *ICCA Yearbook Commercial Arbitration,* Stephan W. Schill ed., Vol. 43, (ICCA & Kluwer Law International, 2018), 514-518.
[93] Order 69, Rule 8(1) of ROC 2012.
[94] S-38(2) of Arbitration Act, Order 69, Rule 8(3) of ROC 2012.
[95] S-38(3) of Arbitration Act.
[96] Order 69, Rule 8(7) of ROC 2012.

process, *ex parte* and *inter partes* proceedings, to successfully convert the award in the form of judgement first. Only after the award has affirmed as judgment by enforcement permit, the award-creditor may proceed to execution stage like court judgments by way of garnishee proceedings, judgment-debtor summons, writ of seizure and sale, winding-up or bankruptcy.[97] If the enforcement proceeding is against the government of Malaysia, the award-creditor must apply for a certificate under Section 33 of Government Proceedings Act 1956 in addition to the application for enforcement under Section 38 of Arbitration Act.[98]

Moreover, in the case of Siemens Industry v. Jacob and Toralf Consulting,[99] the Federal Court ruled that the enforceable scope of an arbitral award to only the dispositive part of the award, not to the entire award which included the testimonies of witnesses, the submissions, the summary of findings, etc. The court agreed that enforcement of the entire award would undermine the confidentiality of the arbitral proceedings. This ruling not only deters attempt to rely on the tribunal's findings at the separate suit between the same parties but also maintain confidentiality principle of arbitration. Malaysia applies the formalistic approach of compliance with Section 38 as a *prima facie* evidence upon submission of arbitral award and arbitration agreement by the applicant regardless of arguments by the aggrieved party challenging jurisdiction of arbitral tribunal. This formalistic approach seems to be pro-enforcement practice; however, it is immaterial in reality since the award-debtor may mostly proceed to the Section 39 proceeding to oppose the enforcement.

There is no limitation period provided under the Arbitration Act for recognition and enforcement of foreign arbitral awards. However, under Section 6(1)(c) and 6(3) of Limitation Act 1953, which was affirmed by the Federal Court in Christopher Martin Boyd v. Deb Brata Das Gupta case,[100] stipulates six years to bring an action to enforce an award and the judgement entered in terms of the award may be executed within twelve years. Right to appeal is not expressly mentioned in the Arbitration Act, like Myanmar's situations. However, the developed case law proves that appeal is allowed in Malaysia.

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[97] Baskaran (n 91) §38.05.
[98] Dato' Sunil Abraham et al., "Arbitral Awards in Malaysia: Recognition and Enforcement," *Lexology*, May 12, 2022, https://www.lexology.com/library/detail.aspx?g=51c09905-8a91-4fe2-ac43-a3b7f6f5ac71#1.
[99] Siemens Industry Software GmbH & Co Kg v. Jacob and Toralf Consulting Sdn Bhd & Ors, Civil Appeal No. 02(f)-115-12/2018(W), Federal Court, Excerpt Decision (27 March 2020), paras.25-52. In *ICCA Yearbook Commercial Arbitration,* Stephan W. Schill ed., Vol. 45, (ICCA & Kluwer Law International, 2020), 339-342.
[100] [2014] 9 CLJ 887, Federal Court, paras. 24-25.

Some provisions under Section 39 of Arbitration Act regarding grounds for refusal have defects which will be discussed in detail in the Chapter III. However, it is surprising that a Malaysian court has never encountered it despite development on case laws compared to the Philippines and Myanmar. Nevertheless, one cannot deny that Malaysia has been promoting pro-enforcement policy through judicial proceedings.

CHAPTER III: COMPARATIVE ANALYSIS ON ENFORCEABILITY OF FOREIGN ARBITRAL AWARDS UNDER THE NEW YORK CONVENTION BETWEEN MYANMAR AND SELECTED JURISDCITIONS OF THE PHILIPPINES AND MALAYSIA

New York Convention imposes pro-enforcement obligation on its Contracting States to recognize and enforce a foreign arbitral award made in a Contracting State in another Contracting State. Accordingly, grounds for refusal to enforcement are limited to circumstances under Art.V of NYC. National courts accept the exhaustive nature of the grounds and tend to interpret it narrowly to comply by their pro-enforcement obligation.[101] Grounds for refusal under Art.V(1) and (2) of NYC are generally as follows:

Art.V(1)

- The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

[101] New York Convention Guide: Art.V, https://newyorkconvention1958.org/ .

Art.V(2)

- The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- The recognition or enforcement of the award would be contrary to the public policy of that country.

The burden of proof is on the party opposing recognition and enforcement regarding the grounds under Art.V(1) whereas the court *ex officio* can obverse the grounds under Art.V(2) that parties need not be pleaded in theory.[102] However, the prevailing practice is that the opposing party has the ultimate burden of proving grounds under Art.V(2) as well.[103] Since the three selected jurisdictions in this thesis are Contracting States, they have promulgated those substantive grounds in their national laws with some adjustments.[104] The essential features of each jurisdiction are as follows.

1. Incapacity of parties or invalidity of arbitration agreement

Art.V(1)(a) of NYC consults two situations: (1) incapacity of parties to conclude arbitration agreement under the law applicable to them; or (2) invalidity of the arbitration agreement under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made. Except the Philippines,[105] both Myanmar and Malaysia separated Art.V(1)(a) into two sub-sections in their respective arbitration laws.[106]

Regarding the first situation, whereas Malaysia and the Philippines stipulates as "*a party to the arbitration agreement was under some incapacity*" excluding the "*under the law applicable to them*", Myanmar does not make any exclusion. It seems that Malaysia and the Philippines would like to avoid any potential misleading interpretation by that phrase to conflict-of-law rule and take the path of UNCITRAL Model Law approach deleting such phrase.[107] This is merely minor difference that does not impact a court's interpretation. Myanmar court could

[102] Ibid, paras. 13-16.
[103] Ibid, para. 16.
[104] S-46(b)&(c) of Myanmar Arbitration Law, Rule 13.4 of ADR Rules in connection with S-42 of Philippines' ADR Act, S-39(1) of Malaysian Arbitration Act.
[105] Rule 13.4(a)(i) of Philippines' ADR Rules
[106] S-46(b)(i) and (ii) of Myanmar Arbitration Law; S-39(1)(a)(i) and (ii) of Malaysian Arbitration Act.
[107] NYC Guide: Art.V(1)(a), para.19, footnote 623.

correctly decide in the ARV Offshore case[108] pursuant to the law governing a party's personal status,[109] and the relevancy of time to determine the capacity of a party [110]. The court denied the argument that the board of directors was incapable of representing the company after having obtained "absolute receivership order" under Bankruptcy Act of Thailand reasoning that the situation arose only after the award was rendered and not at the time of conclusion of the arbitration agreement.

Second situation of invalidity of arbitration agreement has also been confronted by the Myanmar court. In Ignesis Technologie case,[111] the award-debtor argued that lack of express governing law in the arbitration agreement should result in denial of enforcement of the award under Section 46(b)(ii) of Myanmar Arbitration Law. District Court emphasized on the chosen SIAC arbitration rules in their agreement and decided that the governing law could be deemed to be Singapore Law. Thus, the court decided that the award-debtor's argument was without merit.

In Malaysia, Section 39(1)(a)(ii) of Arbitration Act which stipulates second part of Art.V(1)(a) is amended in 2011 from "*[t]he laws of Malaysia*" to "*[t]he law of the country where the award was made*" to correct inconsistency with NYC's mandate. The application of Art.V(1)(a) in cases is not seen in the Philippines and Malaysia to my knowledge. From the two decided cases in Myanmar, one may agree that Myanmar's interpretation on Art.V(1)(a) is accurate with practices in most jurisdictions.

2. Violation of due process and inability to present case.

Due process under Art. V(1)(b) of NYC refers to the proper notice of appointment of arbitrator and arbitral proceedings as well as opportunity to present one case in the proceeding. All three jurisdictions respectively stipulate the same as the wordings of NYC.[112] However, there is no jurisprudence on this matter in the selected jurisdictions in this thesis.

[108] ARV Offshore case (n 44).
[109] NYC Guide: Art.V(1)(a), para.20; Gary B. Born, "Chapter 26:Recognition and Enforcement of International Arbitral Awards," in *International Commercial Arbitration*, 3rd Edition (Kluwer Law International, 2021), (Updated September, 2022). §26.05(C)(2)(a).
[110] NYC Guide: Art.V(1)(a), paras.24-25.
[111] Ignesis Technologie case (n 40).
[112] S-46(b)(iii) of Myanmar Arbitration Law; S-39(1)(a)(iii) of Malaysian Arbitration Act; Rule 13.4(a)(ii) of Philippines' ADR Rules

3. Manifest excess of power by arbitral tribunal and severability of awards

Art.V(1)(c) of NYC tackles two aspects: whether the arbitral tribunal exceeds its power authorized by the parties' arbitration agreement in making awards; and whether such awards can be separated from those not submitted to arbitration and be partially enforced by the enforcing court. Despite the critic about the severability of foreign arbitral awards that partial enforcement may unavoidably require review on merit of the award courts tend to recognize the principle of severability of award pursuant to their pro-enforcement obligation.[113]

In Myanmar, the severability of the award is not accepted under Section 46(b)(iv) of Arbitration Law. When the tribunal's excess of power relates merely to minor or incidental respects, the prevailing perspective is that the award should not be denied enforcing, and such denial would be contrary to NYC's pro-enforcement bias.[114] Myanmar's approach is completely out of international practices. Besides, severability principle under Art.V(1)(c) is recognized to extend to both *infra petitia* (an incomplete award which does not include all matters submitted to arbitration) and *ultra petita* (an award which contains matters beyond submission to arbitration).[115] Although NYC does not regulate on incomplete awards, since the grounds for challenge to enforcement is limited to Art.V, incompleteness is not a ground for refusal of enforcement per se.[116] Accordingly, since Myanmar does not recognize severability principle, it is interesting to see how court will decide if any case arose out of incomplete award. Myanmar courts may probably deny partial enforcement for both *infra petitia* awards and *ultra petita* awards for consistency purpose. In contrast, one can argue that *infra petitia* awards should be enforced as it can be assumed as an interim award where the definition of award includes interim awards under Section 3(e) of Arbitration Law. Moreover, denial of enforcement of *infra petitia* awards will be contrary to pro-enforcement bias because incomplete award is outside the list of Art.V grounds for refusal.

On the other hand, both the Philippines and Malaysia recognize severability of award and courts may order partial enforcement of such award.[117] Malaysia affirmed its position in the

[113] NYC Guide: Art.V(1)(c), paras.29-33, https://newyorkconvention1958.org/
[114] Born (n 109) §26.05(C)(4)(j).
[115] Albert Van Den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation, 1981, 318-322.
[116] Ibid.
[117] Rule 13.4(a)(iii) of ADR Rules of Philippines; S-39(1)(a)(iv) & (v), and S-39(3) of Malaysian Arbitration Act.

case of Kejuruteraan Bintai Kindenko Sdn Bhd v. Serdang Baru Properties Sdn Bhd & Another.[118] According to Section 39(3) of Arbitration Act, High Court decided to excise the part relating to the pre-award interest for which arbitral tribunal had no jurisdiction, from the whole award which integrity had not been compromised by the pre-award interest element. Unlike to Myanmar's position, Malaysia and the Philippines do not need to consider the difference between *infra petitia* awards and *ultra petita* awards since they recognized partial enforcement of separated award.

Supreme court of the Philippines, in the case of Mabuhay Holdings,[119] confronted that the tribunal decided the matter not falling within the scope of arbitration agreement. The jurisdictional question whether the dispute was intra-corporate controversy that was excluded from the parties' arbitration agreement was raised. The court denied the argument without any review with reference to the *kompetenz-kompetenz* principle and finality of tribunal's findings on facts or interpretation of law. The ruling is that *"[i]n the absence of sufficient evidence that Sembcorp acquired the shares of IDHI, the Court finds no cogent reason to disturb the arbitral tribunal's ruling in favor of the latter's jurisdiction over the dispute."* The court's interpretation of *kompetenz-kompetenz* principle confutes the genuine meaning of the principle to be the first to rule on its own jurisdiction.[120] The ruling wrongfully restricts the national courts to review the tribunal's findings. Although NYC is silent on the standard of review by an enforcing court, many courts have affirmed their power to conduct *de novo* review on the contention that the tribunal exceeded power by making decision on matters beyond the scope of arbitration agreement.[121] Thus, this ruling has been criticized as going too far for pro-enforcement policy by the Philippines.[122]

It is notable from the Philippines that in the case argued that tribunal exceeded power in making decision, national court is entitled to conduct de novo review on the decision of the tribunal. Non-acceptance of severability of award principle by Myanmar is arguably inconsistent with pro-enforcement obligation of Myanmar. Moreover, it raises complexity distinguishing

[118] [2018] 1 CLJ 369, High Court.
[119] Mabuhay Holdings Corporation (Philippines) v. Sembcorp Logistics Limited (Singapore), G.R. No. 212734, Supreme Court (First Division), Excerpt decision (5 December 2018), paras.52-58. In *ICCA Yearbook Commercial Arbitration*, Stephan W. Schill ed., Vol. 45, (ICCA & Kluwer Law International, 2020), 359-364.
[120] Jay Patrick Santiago and Nusaybah Muti, "The Philippines' Pro-Arbitration Policy: A Step Forward Gone Too Far?," *Kluwer Arbitration Blog*, April 9, 2019, https://arbitrationblog.kluwerarbitration.com/2019/04/09/the-philippines-pro-arbitration-policy-a-step-forward-gone-too-far/.
[121] NYC Guide: Art.V(1)(c), paras. 41-45.
[122] Santiago and Muti (n 120).

between *infra petitia* awards and *ultra petita* awards to permit enforcement or not. Myanmar should consider amendment of this provision.

4. Procedural Irregularities

Procedural irregularities stipulated under Art.V(1)(d) of NYC enable national courts to refuse to enforce foreign arbitral awards where the constitution of the arbitral tribunal or the arbitral procedure was in accordance with the parties' agreement or, in the absence of such agreement, with the law of the seat of arbitration. Party autonomy is highly prioritized and the laws of seat of arbitration merely serves as subsidiary role in the absence of parties' agreement under this provision.[123] This provision is exactly adopted in Myanmar[124] and the Philippines[125] whereas Malaysia's provision is quite unusual in terms of two phrases.

Section 39(1)(a)(vi) of the Malaysian Arbitration Act imposes additional element "*[t]he composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties,* ***unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate****, or, failing such agreement, was not* ***in accordance with this Act***". The former phrase is criticized as non-compliance with its pro-enforcement obligation under NYC[126] because it adds additional burden on the parties to be complied by the mandatory rules under Arbitration Act that may harden the enforcement of the foreign awards. The latter phrase is arguably erred by referring to its own Arbitration Act instead of the law of seat of arbitration. This is incompatible with the nature of foreign arbitration held outside Malaysia. Despite several amendments to Arbitration Act, this Section has never been observed. No argument to that regard has been raised. However, in the case of Open Type Joint Stock Company Efirnoye – EFKO v. Alfa Trading Ltd ("**EFKO v. Alfa Trading**"), [127] the award-debtor argued procedural irregularities regarding two unusual arbitral proceedings.

This case related to two arbitrations: one in Ukraine initiated by Alfa Trading for late delivery of goods, and another in Russia initiated by EFKO for delay in paying for deliveries under the same contract. The court denied the contention of Alfa Trading that commencement of

[123] NYC Guide: Art.V(1)(d), para. 3.
[124] S-46(b)(v) of Arbitration Law.
[125] Rule 13.4(a)(iv) of Philippines' ADR Rules.
[126] Baskaran (n 91) §39.06(E).
[127] Open Type Joint Stock Company Efirnoye – EFKO v. Alfa Trading Ltd, D-24NCC-221-2010, High Court of Kuala Lumpur, Excerpt decision (10 October 2011), paras. 29-35. In *ICCA Yearbook Commercial Arbitration*, Albert Jan van den Berg ed., Vol.37, (ICCA & Kluwer Law International, 2012), 264-267.

arbitration in Russia was not according to their agreement because arbitration in Ukraine prohibited a subsequent arbitration in Russia under the same contract. The court observed that the subject matter of the dispute in two arbitrations were different, and that Alfa Trading failed to effectively argue the similarity of the two disputes in arbitral proceedings. The court concluded that Alfa Trading failed to prove the failure to adhere to the proceedings under parties' agreement and thus, procedural irregularities argument must be failed. The ruling is significant that Malaysian court may not deny enforcement merely because of unusual procedure agreed between the parties.

In the case of the Philippines, Supreme Court dismissed argument under Art.V(1)(d) in the case of Mabuhay Holdings[128] that the appointment of arbitrator had not been subject to the parties' agreement under which "*the arbitrator must have expertise in the matter at issue*". The court ruled that appointment of Thai national as the sole arbitrator by the ICC was not in contravention with party autonomy because parties chose ICC Rules in their agreement and did not expressly derogate its Rule that arbitrators must be different nationalities from the parties'. Court reasoning is criticized because of reference to Rule 7.2 of ADR Rules which implicated the Philippines' court having jurisdiction to decide on challenge to arbitrator. Since Singapore was the seat, only Singapore courts would have authority to deal with the challenge. Although the outcome was not different, reference to its own Philippines' rule is criticized as error in reasoning. Besides, reference to Rule 7.2 adversely restricts the power of enforcing court to conduct *de novo* review on the constitution of the tribunal because under the rule, the court have jurisdiction to decide it only when the arbitral tribunal refuse to determine the challenge.[129]

Myanmar courts are yet to determine on the procedural irregularities ground. The Philippines' example reminds the risk that the wrongful application of legal provision may result in unenforceable award. Malaysian ruling in EFKO v. Alfa Trading case is also notable for the application of principle of estoppel that Malaysian court tends not to entertain argument that did not effectively raise during the arbitral proceedings at the enforcement stage.[130] Myanmar court should consider the principle of estoppel in enforcement proceedings once brought before them.

[128] Mabuhay Holdings case (n 119) paras.46-51.
[129] Santiago and Muti (n 120).
[130] EFKO v. Alfa Trading (n 127) paras.45-46.

5. Award non-binding, set aside or suspended by the supervising court.

Art.V(1)(e) of NYC permits courts to deny recognition and enforcement of a foreign arbitral award where the party opposing enforcement proves that the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made. All three jurisdictions have similar provisions in respective arbitration laws.[131] One significance of the Philippines is the exclusion of "*under the law of which*" in the provision. Philippines' approach seems to avoid any potential wrongful application of the substantive law of the underlying contract that may arise from the situation when the award is governed by an arbitration law different from the seat of arbitration.[132]

Since Art.V(1)(e) relates to Art.VI of NYC which enables courts to adjourn the enforcement proceedings as it considers appropriate and to order payment of security to the party opposing enforcement, all three jurisdictions have similar provisions in their arbitration law.[133] Malaysian provision is a bit unusual as it states as "*If an application for setting aside or suspension of an award has been made to* ***the High Court*** *[..]*". This might probably be drafting error, otherwise it will be incompatible with the nature of foreign arbitration conducted outside Malaysia since only the court of the seat of arbitration has power to determine on applications to set aside or suspend the award.

Although NYC does not obligate courts to enforce non-binding, suspended or set aside awards at the seat of arbitration, some courts tend to order enforcement relying on the wording of "**may**" at the chapeau of Art.V whereas some denied enforcement of such awards.[134] Which practice the courts of three jurisdictions will be followed is unpredictable. Nevertheless, they should be cautious that the binding nature of the award does not depend on whether the award is enforceable in the country where the award is made.[135] Otherwise it amounts to the *double exequatur* requirement. In dealing with the argument of set-aside award, the effective set aside rather than the mere application to set aside award should be sufficient to deny enforcement.[136]

[131] Rule 13.4(a)(v) of Philippines' ADR Rules; S-39(1)(a)(vii) of Malaysian Arbitration Act; S-46(a)(vi) of Myanmar Arbitration Law
[132] Van Den Berg (n 115) 350.
[133] Rule 13.10 of Philippines' ADR Rules; S-39(2) of Malaysian Arbitration Act; S-46(d) of Myanmar Arbitration Law
[134] NYC Guide: Art.V(1)(e), para. 27-31.
[135] Born (n 109) §26.05(C)(7)(b)&(e).
[136] Van Den Berg (n 115) 350; New York Convention Guide: Art. V(1)(e), para.30.

In the case of suspended award, the mere commencement of a set aside proceeding should not have automatic suspension effect on the award.[137] These are the prevailing practices by most jurisdictions that the courts of the three jurisdictions should take into account once arguments under this Art.V(1)(e) bring before them.

6. Arbitrability

Art. V(2)(a) of NYC enables courts of Contracting States to deny enforcement of foreign arbitral awards where the court *ex officio* found that the subject matter of the dispute is not capable of settlement by arbitration under their national laws. What composed of non-arbitrable disputes depend on each jurisdiction.

Myanmar does not expressly define non-arbitrable dispute in the Arbitration Law.[138] Like most jurisdictions, criminal matters, insolvency proceedings,[139] corporate disputes,[140] family matters, labour and employment disputes,[141] land disputes[142] are considered to be non-arbitrable in Myanmar. Because of shortages of case law, it is still unclear how Myanmar court would delineate the arbitrability of the subject matter of the dispute.

Two recent cases addressed non-arbitrability arguments raised by the award-debtors and the court answered negative to such argument in both cases. In ARV Offshore case,[143] the award-debtors wrongfully alleged that the dispute was not capable of settlement by arbitration under Myanmar Law since the parties' choice of law was the law of Singapore. The court ruled that the argument was unreasonable, and contravened with the non-arbitrability principle of whether the subject matter of the dispute is barred from settlement by arbitration in Myanmar. Since the dispute was failure of payment due relating to the sale of natural gas, and consequent engineering activities, the court held that there was no law in Myanmar designating the said dispute to be non-arbitrable. Furthermore, in Ignesis Technologies case,[144] the award-debtor argued non-arbitrability of subject matter of the dispute in connection with contrary to national

[137] Van Den Berg (n 115) 352.
[138] S-46(c)(i) of Arbitration Law.
[139] S-401 of Insolvency Law, Pyidaungsu Hluttaw Law No. 01/2020, 2020.
[140] S-432 of Myanmar Company Law, Pyidaungsu Hluttaw Law No. 29/2017, 2017.
[141] Settlement of Labor Dispute Law, Pyidaungsu Hluttaw Law No. 05/2012, 2012.
[142] "Guide to Arbitration Rules and Procedures in Myanmar", *Rajah & Tann Asia*, accessed on 12 June, 2024, §5.4, https://arbitrationasia.rajahtannasia.com/country/myanmar-2/.
[143] ARV Offshore case (n 44).
[144] Ignesis Technologie case (n 40).

interest ground. The court reached similar decision of denial of non-arbitrability argument because the dispute arose out of the agreement for construction of communication towers which was not prohibited as non-arbitrable.

From these two cases, the parties opposing enforcement are found to apply non-arbitrability principle on procedural matters. The concept of non-arbitrability of the subject matter of the dispute rather relates to substantive part and one can say that Myanmar courts could have correctly interpreted in the cases.

Unlike to Myanmar, the Philippines expressly stipulates non-arbitrable disputes under Section 6 of Philippines' ADR Act which include labor disputes, the civil status of persons, the validity of a marriage, any ground for legal separation, the jurisdiction of courts, future legitime (e.g., inheritance), criminal liability, and those which by law cannot be compromised. Philippines' court tend to narrowly interpret non-arbitrable disputes limited to those under Section 6. In a domestic arbitration, the court ruled that the dispute on adjustment of water and sewage service fees was arbitrable as it fell outside the list under Section 6 of ADR Act, although enforcement of award was denied finally.[145] Moreover, the Philippines allows intra-corporate disputes to settle by domestic arbitration seated in the Philippines under the Securities and Exchange Commission (SEC) Memorandum Circular No. 8. In Myanmar, they seem to be non-arbitrable.

Like Myanmar, Malaysia does not define non-arbitrable disputes in Arbitration Act.[146] Malaysia connects the arbitrability of the disputes with the concept of public policy under Section 4(1) of Arbitration Act, which is criticized as superfluous.[147] The drafters of NYC were also aimed to analyze non-arbitrability and public policy separately considering not all non-arbitrable disputes are contrary to international public policy.[148] Section 24A of Courts of Judicature Act 1964 suggests that all, except criminal proceedings, are arbitrable. Due to precedents, criminal matters, judicial review matters, matters under statutory tribunal (e.g. Labor court, Competition Appeal Tribunal), land charge matters, insolvency or corporate disputes (some decided as arbitrable though) are considered to be non-arbitrable.[149] In the case

[145] Maynilad Water Services Inc. v. National Water and Resources Board, et al., G.R. No. 181764, Supreme Court, 2023. *In* Angela Ray T. Abala, "Arbitrability and Enforcement in the Philippines: The Maynilad Case," *Kluwer Arbitration Blog*, October 23, 2023, https://arbitrationblog.kluwerarbitration.com/2023/10/23/arbitrability-and-enforcement-in-the-philippines-the-maynilad-case/.
[146] S-39(1)(b)(i) of Arbitration Act
[147] Baskaran (n 91) §39.06(G).
[148] NYC Guide: Art.V(2)(a), paras. 9-10.
[149] Teh Eng Lay et. al., "Malaysia Chapter," in *International Arbitration Laws and Regulations* (International Comparative Legal Guides, 2023), §3.1, https://iclg.com/practice-areas/international-arbitration-laws-and-

of Arch Reinsurance Ltd v. Akay Holdings Sdn Bhd ("**Arch Reinsurance case**"),[150] Malaysian Federal Court determined on the dispute relating to the right to foreclose the security under the National Land Code (NLC). The Court concluded that the dispute was non-arbitrable under Section 4(1) of Arbitration Act reasoning that NLC was a statutory law and any attempt to contact out of rights and remedies provided by NLC would be contrary to public policy. This case informs that land rights issues are non-arbitrable in Malaysia. If similar dispute arose in Myanmar, Myanmar court may render the same ruling as Malaysia.

Section 4(2) of Malaysian Arbitration Act is significant for clarification that the mere reference to the jurisdiction of the court in the law does not indicate that a dispute relevant to it is not arbitrable. It mitigates any potential contention that may raise by the award-debtor to oppose the enforcement based on the expression of the court jurisdiction in a statute. Moreover, Malaysia and the Philippines may strictly delineate commercial and non-commercial disputes than Myanmar because of their reservations to only "commercial matters" at the accession time to NYC. This may occasionally create complexity in interpretation.[151] In this sense, since Myanmar made no reservation, Myanmar courts can *ex officio* exercise broad discretion to determine the arbitrability of the subject matter of the dispute on a case-by-case basis.

7. Public Policy

The prevailing concept of public policy under Art.V(2)(b) of NYC is that the court of enforcement jurisdiction may deny enforcement of a foreign arbitral award when such enforcement would jeopardize the State's fundamental norms of morality and justice.[152] Although the standards of morality and justice are different from State to State, courts uniformly recognize that public policy ground should be narrowly interpreted subject to NYC's pro-enforcement policy.[153]

regulations/malaysia#:~:text=It%20is%20provided%20in%20section,through%20arbitration%20under%20Malaysian%20laws.

[150] Arch Reinsurance Ltd v. Akay Holdings Sdn Bhd, Civil Appeal No. 02(F)-9-03 of 2016(W), Federal Court, Excerpt Decision (29 January 2018), paras.51-67. In "*ICCA Yearbook Commercial Arbitration*," Stephan W. Schill ed., Vol.44, (ICCA & Kluwer Law International, 2019), 590-594.

[151] Nigel KC Blackaby, et. al., "Recognition and Enforcement of Arbitral Awards," in *Redfurn and Hunter on International Arbitration*, 7th Edition, (Kluwer Law International; Oxford University Press, 2023), paras.11.45-11.49.

[152] NYC Guide: Art.V(2)(b), paras. 5-9.

[153] Born (n 109) §26.05(C)(9)(d).

In Myanmar, public policy is replaced as "national interest", the so-called "*A Myo Thar A Kyoe Se Pwar*" under Section 46(c)(ii) of Arbitration Law. It is not unusual to refer to "national interest" as one aspect of public policy like in a few jurisdictions.[154] However, one can argue that Myanmar's provision is beyond merely an aspect of public policy, but rather a broader concept that may intertwin with politics. The genuine meaning of the term "national interest" is never defined by the government. However, "contrary to national interest" is interpreted under para. 2(e) of Arbitration Procedures 2018 by the Union Supreme Court as "*impacts such as environmental damage to the nation's land, water and air, damage to the interests of all citizens, and damage to the national culture and heritage*". One can even assume that it is a non-exhaustive list as it refers to "*impacts such as*". The plain meaning of the interpretation leads to the broader concept beyond the widely accepted notion of public policy in the field of arbitration, measured by the basic norms of morality and justice of a State.

In ARV Offshore case,[155] the foreign arbitral award contained decision on bribery to minister and Myanmar Oil and Gas Enterprise for which the award-debtor failed to rebut during arbitral proceedings. The court denied the argument of contrary to national interest ruling that the parties' agreement was not found to be affected by such bribery because it was committed by the award-debtor only after the parties' main contract had been concluded. This case implies that bribery is considered as a ground for refusal of enforcement within the scope of national interest in Myanmar.

Moreover, in Ignesis Technologie case,[156] the party opposing the enforcement contended that enforcement would be contrary to national interest based on contentions as procedural errors and the interest rate of 5.35% for security for costs. The court denied all arguments reasoning that the party failed to prove its allegations, and that no argument fell under the definition of "contrary to national interest" in Arbitration Procedures. This ruling suggests that Myanmar court interprets "contrary to national interest" in a narrower sense which is consistent with the prevailing approach practiced in most jurisdictions.

Unlike to Myanmar, the Philippines and Malaysia refers simply as 'contrary to public policy' without express definition in their arbitration law. [157] In the Philippines, the court in some cases defined broadly as "*that principle of the law which holds that no subject or citizen can lawfully*

[154] Born (n 109) §26.05(C)(9)(i)(xv).
[155] ARV Offshore case (n 44).
[156] Ignesis Technologie case (n 40).
[157] Rule 13.4(b)(ii) of Philippines' ADR Rules; S-39(1)(b)(ii) of Malaysian Arbitration Act

do that which has a tendency to be injurious to the public or against the public good."[158] Philippines' court seems to differentiate public policy standard in the context of foreign arbitral awards from those in domestic awards. In Tuna Processing, Inc. v. Philippine Kingford Inc.[159] Philippines' Supreme Court ordered to enforce the award although the award-creditor did not have business license, which caused it lack of capacity to sue before the court for such enforcement proceeding. From this case, one can assume that Philippines determines the argument pursuant to international public policy rather than domestic public policy.

Lack of clear guidance on interpretation of public policy provided inconsistent judicial decisions in the Philippines. Philippines' Supreme Court, for the first time, in Mabuhay Holdings case[160] provides clear guidance on public policy ground to challenge enforcement of foreign arbitral awards. The court ruled that the illegality or immorality of the award must reach a certain threshold and mere errors in the interpretation of law or factual findings would not be sufficient to deny enforcement under public policy. Although this case was criticized by scholars as overly pro-enforcement approach with regards to arguments under Art.V(1)(c) and V(1)(d) of NYC as discussed above, the ruling under public policy ground is widely recognized as good practice.[161] One should note that Philippines' court extends public policy ground to apply in domestic arbitration although contrary to public policy is not a ground to challenge domestic awards under Arbitration Act (R.A. 876).[162]

In Malaysia context, the contention of contrary to public policy by enforcement of award in caselaw is found to be raised either in connection with non-arbitrability argument or in accordance with procedural matters. As discussed above in non-arbitrability part, in Arch Reinsurance case,[163] Federal Court decided that the contracting out of the rights and charge under a statutory law, National Land Code, would be contrary to public policy of Malaysia. Again, in EFKO v. Alfa Trading,[164] the High Court recognized the principle of *res judicata* that determining the matters already decided during arbitral proceedings at enforcement stage would be contravention of public policy. However, since the party opposing enforcement did

[158] Donemarkj L Calimon and Felicisimo F Agas, "Taming the Unruly Horse: Philippine Public Policy and the New York Convention," *Ateneo Law Journal* 61, no. 2 (November 2016): 647.
[159] Tuna Processing, Inc. v. Philippine Kingford, Inc., G.R. 185582, 29, Supreme Court (Second Division), Excerpt Decision (29 February 2012), paras.20-28. In *ICCA Yearbook Commercial Arbitration*, Albert Jan van den Berg ed., Vol.42, (ICCA & Kluwer Law International, 2017), 481-483.
[160] Mabuhay Holdings case (n 119) para.64.
[161] Santiago and Muti (n 120).
[162] S-24 of Arbitration Act (R.A. 876); Maynilad Water case (n 145).
[163] Arch Reinsurance case (n 150), paras.66-67.
[164] EFKO v. Alfa Trading (n 127) paras.36-47.

not effectively raise this argument during the two arbitral proceedings and considering the tribunals' decisions that they determined on different disputes, the court concluded that there would be no violation of public policy by enforcement of the award. Moreover, in Tanjung Langsat Port Sdn Bhd v. Trafigura Pte Ltd & Another case,[165] High Court denied the contention that absence of reasons in the award would not amount to contravention of public policy unless the parties required it in agreement since the rules of natural justice did not obligate reasons to be given in the award.

The caselaw implies that Malaysia's standard on the public policy defense seems to be international public policy that must concern with the most basic notion of morality.[166] Malaysia recognizes the requirement of high thresholds to invoke on public policy ground. It is clear from the developed caselaw in the Philippines and Malaysia about their approach of narrow interpretation of the provision and the distinction between international and domestic public policy. However, the rulings of Myanmar court do not clarify the standard on national interest defense. Rather it adhered to the interpretation in Arbitration Procedures and reached conclusion that no argument fell under the scope of interpretation. However, one may assume that Myanmar would like to apply domestic public policy because of the broad interpretation of "contrary to national interest" under Arbitration Procedures. Nevertheless, Myanmar should try to provide clear guidance on how to tackle national interest defence.

[165] [2016] 4 CLJ 927, High Court, paras.78, 87-89
[166] Baskaran (n 91) §39.06(H).

CONCLUSION

Jurisprudence needs to be developed not merely in recognition and enforcement proceedings of foreign arbitral awards but also in all other arbitration-related proceedings in Myanmar to critically determine how much arbitration-friendly jurisdiction Myanmar is. Nevertheless, it is very compelling to see the pro-enforcement decisions of the court in very first two cases of the country. The dearth of literature on Myanmar arbitration system is found to cause misapplications of grounds for refusal under Section 46(b) and (c) of the Arbitration Law by the parties in decided cases. However, the court could have correctly analyzed the parties' arguments and made fair decisions to enforce the awards. From comparative analysis with Malaysia and the Philippines, the findings suggest no outrageous practice/ruling in Myanmar but merely some procedural gaps which can be improved.

First, a clear guidance on appellate proceedings with respect to foreign arbitral awards should be provided in Myanmar. Although the dormant Protocol and Convention expressly prohibits the appeal, I believe right to appeal should not be absolutely banned. It should rather be limited because absolute prohibition on appeal may prejudice the right of the award-debtor in the situations under Art.V(1)(e) of NYC, especially where the award has been ordered to enforce pending the set aside proceeding and the court of the seat of arbitration ordered to set aside the award. Myanmar should adopt limited one level of appeal to the Union Supreme Court on the decisions of the District Court whether to enforce the award or to refuse the enforcement.

Second, lack of clear definition about non-arbitrable disputes may occasionally result in complexities. Myanmar should consider of providing clear guidance on it as the Philippines do. Section 6 of Philippines' ADR Act provides a list of non-arbitrable disputes which helps the court to determine the enforcement in a narrow sense adhering to the list. **Third**, the substitution of the word "public policy" with "national interest" still looks very controversial although Arbitration Procedures provides interpretation for "contrary to national interest". Myanmar should try to provide clarification on whether the notion of "national interest" is similar to the widely accepted concept of "public policy" in arbitration regime. The court in the decided cases also did not effectively tackle with the technical concept of public policy defense. Like the Philippines and Malaysia, Myanmar should clearly declare its standard whether Myanmar will access the argument under domestic public policy or under international public policy.

Fourth, despite partial enforcement of foreign arbitral awards may raise complexities for the enforcement court to separate matters not submitted to arbitration and those submitted arbitration while ensuring the integrity of the award not undervalued. Myanmar's approach is straightforward by denying the whole award to be enforced if the award-debtor can prove components beyond submission to arbitration in the award. However, this is contrary to its pro-enforcement obligation. Malaysia added partial enforcement provision under Section 39(3) at the time of 2011 amendments to Arbitration Act to elevate their compliance with pro-enforcement obligation. Myanmar should consider of amendment because this partial enforcement incentive may make Myanmar more attractive as an arbitration-friendly venue.

According to the two enforcement applications, Myanmar court seems to mainly emphasize on Section 46(a) of the Arbitration Law to determine on meeting formal requirements for enforcement proceedings and ruled that the mere defects in application for enforcement proceedings is not a ground for refusal of enforcement. This is a fresh ruling after legal reforms. Court decisions on domestic arbitration under the old 1944 Act as discussed in Chapter I, Sub-section 2 should occasionally be relied on because they were decided in accordance with prevailing practice in many jurisdictions. Malaysia and the Philippines have such remarkable pro-enforcement rulings that should be adopted in Myanmar under similar situations. In Malaysia, prohibition on new claim at enforcement stage is very compelling. Case law in Malaysia, namely, EFKO v. Alfa Trading discussed in Chapter III, Sub-sections 4 and 7, affirmed that Malaysian courts tend to respect principle of estoppel and principle of *res judicata* effectively. The party must be estopped from raising such argument before the enforcing court if the argument had not been raised at prior arbitral proceedings. Moreover, determining the matters already decided during arbitral proceedings by the enforcing court would be contravention of public policy in Malaysia. In the Philippines, although the referred Rule was wrong in the Mabuhay Holdings case discussed in Chapter III, Sub-section 4, the Philippines court also recognized the *res judicata* principle. Moreover, the case further ruled that argument under public policy defence requires high level of thresholds and the mere error in interpretation of law and facts should not be sufficient to deny enforcement. Since Myanmar has yet to deal with arguments under various grounds for refusal, Myanmar should take into account the rulings of Malaysia and the Philippines as abovementioned to render a decision in line with prevailing international practice and with pro-enforcement obligation to NYC.

In short, the findings of this thesis suggest that Myanmar is developing arbitration practice on the right track. A very unusual approach of Myanmar must be shown as the "national interest" defense. Although more cases need to be brought before the court to correctly access the pro-enforcement policy of Myanmar, the current two caselaw shows optimistic improvements. To have better enforcement proceedings, Myanmar should consider of construction of limited appeal system for matters concerned with foreign arbitral awards, of providing clear guidance on dealing with "national interest" defense, of allowing partial enforcement of awards, and of reference to international good practices in determining on arguments for which the court has never confronted before.

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