



A PRIMER ON LITIGATION ABROAD

11th April 2020

The COVID-19 pandemic has left many factories and other businesses in Myanmar in a bind: First, they faced a shortage of raw materials from China. Now, China's economy is recovering - but customers from the United States and the European Union are cancelling orders. Often, these cancellations will be a breach of contract, entitling the Myanmar business to sue for performance and/or damages. However, economic considerations ("Will they ever buy from me again if I sue them?"), reluctance to try the unknown ("I want to go after them, but have no idea how to go about it!") and fear of throwing good money after bad ("I will never win, plus I will be saddled with the costs!") often prevent Myanmar businesses from taking what may, in fact, be an avenue with good prospects of recouping at least some of the loss.

In this primer, we have summarised some important aspects - in no particular order - of litigating a claim abroad. We hope that this primer will provide valuable information to Myanmar businesses that have to decide whether it makes sense to sue a foreign business partner. This information is general in nature, and businesses should consult with their lawyer about their specific case before taking action.

1. **If I take legal action against a business partner, that will surely be the end of the business relationship, right?**

Very often, this will be indeed the end of the business relationship. Nevertheless, depending on the circumstances, it may still make sense to sue, as is shown in the examples below.

- If the business relationship only consisted in a one-off transaction without the prospect of follow-up contracts, breaking the business relationship usually does no harm.
- The loss is so big that an attempt to recoup it has to be made at all costs.
- The customer is not an important customer.
- So much frustration has built up over time that it is a relief to lose the customer.
- There are signs that the customer will change its supplier anyway.

2. **Isn't this all tremendously expensive?**

Possibly, but not always.

Let's assume that Myanmar business A (the "**creditor**") is being owed USD 100,000 by business B (the "**debtor**") from Singapore. In this case, A might go to a Myanmar lawyer with contacts to



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Singapore and agree on a success fee of, say, 12%. The Myanmar lawyer might then internally agree with his Singapore lawyer friend to split the success fee among them. For his part of the success fee, the Singapore lawyer would send a demand letter to the Singapore debtor and contact him by phone and through personal visits (always within the limits of the law), trying to persuade the debtor to pay. These out-of-court efforts are often referred to as “amicable collection”.

If the Singapore lawyer is unsuccessful in his amicable collection efforts, the Myanmar client will not have to pay anything. If, on the other hand, the Singapore debtor is sufficiently impressed by the demand letter and pays the debt in full or in part, 12% of such payment will go to the lawyers and the Myanmar client will only get 88%.

If we assume that amicable collection failed in our case and the contract between the Myanmar creditor and the Singapore debtor contains no clauses that would prevent litigation in Singapore, the Myanmar creditor would have to decide whether to sue the debtor in a Singapore court of law.

The client may decide to deal with the Singapore lawyer directly or, alternatively, to use the Myanmar lawyer as his point of contact. In any case, the lawyer(s) should provide the client with an estimate of the costs involved and the timeline (and an estimate of the chances of winning and recouping the debt). As success fees in litigation are prohibited in Singapore (and in many other jurisdictions), the Singapore lawyer may not act on the basis of a success fee anymore.

Depending on the case, the Singapore lawyer may also advise the client to file a complaint with the police in Singapore (if, e.g., there is reason to believe that the debtor perpetrated a fraud).

3. We don't want to be involved in litigation abroad; we want to sue the foreign former business partner in Myanmar. This should be possible, shouldn't it?

Before looking at whether it is possible to sue a foreign business partner in Myanmar, one first has to look at whether it would actually make sense.

Often, a foreign party has no assets in Myanmar. If the Myanmar party wins the Myanmar lawsuit, but the foreign party still refuses to pay, the Myanmar party cannot enforce the judgment (more precisely, the “decree”) in Myanmar as there are no assets to enforce it against. Rather, the Myanmar party has to take the Myanmar judgment abroad to the country in which the foreign party's assets are located and try to enforce it there. Unfortunately, chances of this enforcement being successful are rather slim.

The background is that countries tend to enforce foreign judgments only if there is reciprocity, i.e. the country from which the judgment originates (“country A”) also enforces judgments from



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the country in which enforcement is sought (“country B”). If country A is Myanmar, country B is likely to deny enforcement as Myanmar is not party to any international treaty on the enforcement of foreign judgments and does not seem to have enforced foreign judgments in decades.

Before suing a foreign (former) business partner in Myanmar, it is therefore vital to check whether the foreign business partner has assets in the country and, if he does not, whether the country in which the assets are located would be prepared to enforce a Myanmar judgment.

4. **Our contract says, “all disputes shall be decided by the competent courts in Myanmar”. In light of your explanation above in paragraph 3, this may not be such a clever clause to have after all, right?**

Indeed, if your foreign (former) business partner has no assets in Myanmar, it will often not make much sense to sue him here. You would want to sue him in the country where his assets are located. Unfortunately, your contractual clause would usually prevent this as it establishes exclusive jurisdiction of the courts of Myanmar.

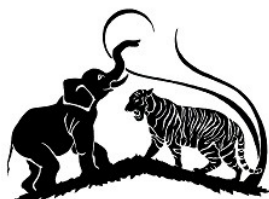
5. **Our contract says, “all disputes shall be resolved by arbitration in Yangon according to the Myanmar Arbitration Law 2016”. Can we have arbitration in Myanmar and enforce the arbitral award abroad?**

In principle, this is possible. Myanmar acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“**New York Convention**”) on 15th July 2013. The New York Convention covers most jurisdictions of this planet and each of these jurisdictions should enforce a Myanmar arbitral award. In practice, enforcement is easier in some jurisdictions and more difficult in others.

6. **We are being owed USD 100,000 and our contract says, “all disputes shall be resolved by arbitration administered by the Singapore International Arbitration Centre (‘SIAC’). Can we afford arbitration in Singapore?**

The biggest chunk of the arbitration costs are the lawyer fees. This website (<https://www.international-arbitration-attorney.com/siac-arbitration-cost-calculator/>) attempts to estimate the SIAC arbitration costs inclusive of the lawyer fees. According to this website:

- Lawyer fees at the low end are USD 110 per hour (SGD 1 = USD 0.73);
- the average SIAC arbitration requires between 1,000 and 5,000 (!) hours of legal work (this seems to be an awful lot to us as arbitration is usually touted as being superior to court litigation for, among others, taking less time); and



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- in low-complexity cases (fewer than 2,000 hours of legal work required) and where there are small amounts in dispute (less than - converted - USD 1,466,667), it is assumed that no quantum or legal experts will be required.

On the assumption that the dispute will be resolved by a sole arbitrator, the lawyers only charge USD 110 per hour and will “only” require 1,000 hours, the website calculates the “Estimated Total Cost of SIAC Arbitration per Party” to amount to (converted) **USD 137,544**.

As sadly, your entire claim is only worth USD 100,000, arbitration in Singapore does not appear to make much sense. It is unfortunately also not possible to pursue your case for less money in the ordinary courts as this avenue is blocked by the arbitration clause.

Generally speaking, arbitration abroad in our opinion only makes sense if a contract is worth millions. Agreeing to arbitration abroad in smaller contracts is, we think, usually a mistake, unless you have decided from the outset to break the contract and want to dissuade the other side from trying to recover damages. (Although, admittedly, there is one more situation in which arbitration for small amounts in Singapore, Hong Kong or elsewhere may make sense for want of a better option, and this is the situation in which both party A and party B are from jurisdictions with an unreliable court system.)

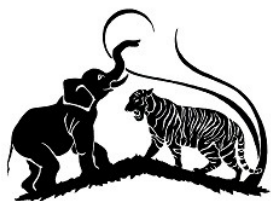
(The sponsors of the arbitration cost calculation website are trying to make the case here <https://www.acerislaw.com/should-an-international-arbitration-for-a-small-claim-even-be-commenced/> for why it may make sense to commence arbitration for a small claim, but we think it would usually be better in this case not to have an arbitration clause in the contract to begin with.)

7. If I lose, will I have to bear the costs (in particular, the lawyer fees) of the winning party?

(a) Lawsuit

In a lawsuit, this depends on the jurisdiction and what is agreed in the contract. Generally speaking, the following main models exist:

- In some jurisdictions (e.g., Germany), the losing party has to pay all court fees and the winning party’s lawyer fees which are, however, often capped by statute.
- In other jurisdictions (e.g., Japan), the losing party has to pay all court fees, but each party (usually) bears the fees of their own lawyers.
- Many jurisdictions allow the parties to agree to a cost split in their contract.



(b) Arbitration

Parties may agree to a cost split in the arbitration clause. If there is no such agreement, the winning party can usually recover the arbitration costs from the losing party, including reasonable lawyer fees.

8. Do I have to travel abroad in order to initiate legal proceedings abroad against a foreign party?

Most jurisdictions do not require the plaintiff to be present when initiating legal proceedings; the plaintiff may authorise a lawyer admitted in the foreign jurisdiction to submit the plaint on his behalf.

The plaintiff or his personnel may, however, be required to appear in person as a witness (if, e.g., the merit of the plaintiff's claim is not apparent from documentary evidence such as the contract, invoices, shipping documents and correspondence) which currently is obviously a problem in light of the present travel restrictions.

9. If I decide to sue a foreign party abroad, is it necessary to pay a deposit? If yes, how can I transfer the deposit out of the country?

It is often necessary to put down a deposit. The foreign lawyer will often request a deposit for his fees. Furthermore, the foreign court will often request a non-resident plaintiff to provide security for (i) court costs and (ii) expenses which the defendant may recoup from the non-resident plaintiff if the defendant wins.

The transfer of foreign currency to a destination abroad is regulated by the Foreign Exchange Management Regulation (Central Bank Notification 7/2014). According to Regulation 22, a bank may transfer foreign currency as an "advance payment for services". It may stretch the wording a bit, but it should be possible to transfer money from Myanmar to cover litigation costs abroad, although this may require some negotiations with the bank.

10. We are being owed USD 100,000, but the foreign party says that the COVID-19 pandemic is a force majeure event and they won't pay us. Is this legal?

One would have to look at the specific case, but generally speaking, not having money is not a force majeure event.

However, the COVID-19 pandemic - or other reasons - may have pushed the foreign party to (or over) the brink of insolvency. Obviously, winning against an insolvent party is without much merit as the winning party will realistically not be able to recoup his money, at least not much of it.



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Some jurisdictions have online insolvency registers which can be sighted. There may be other public registers (such as land registers), organisations (such as credit rating agencies) and other sources of information (such as online news portals and social media) that can be consulted in order to find out whether a debtor is still likely to have assets.

One should be clear, though: It is often not possible to determine the financial situation of a debtor, and a creditor always runs the risk of going home empty-handed in spite of having spent much money and effort on obtaining a winning judgment. If there are serious indications that a debtor will not be able to pay, it may be better to write off the debt and walk away.

That said - many governments are currently implementing absolutely massive rescue packages to keep businesses alive. The situation of a foreign debtor may therefore not be as bad as he may make it sound. One has to bear in mind that many jurisdictions keep winning judgments alive for a very long time, meaning that they can still be enforced when the debtor has recovered after years, although it would not be easy to monitor recovery from far-away Myanmar.

11. We are being owed USD 20,000. This is a lot of money for us, but is it worth the effort of trying to recoup it abroad?

This obviously depends on the case, the jurisdiction in which the debtor is located and also on personal opinion. As a rule of thumb, however, we tend to say that a debt should amount to at least USD 30,000 to merit efforts of recouping it abroad.

12. I have lots of documentary evidence. Is it necessary to get it all notarised and legalised? This would cost a lot.

Notarisation and legalisation is a process by which documents which are to be submitted to a foreign authority are officially authenticated. If they are not officially authenticated, the foreign authority may suspect that they are forged and reject them.

In order to notarise and legalise documentary evidence from Myanmar, one would make a copy and ask a Myanmar notary to certify that the copy is a true copy of the original. One would then ask the Myanmar Ministry of Foreign Affairs to certify that the notary's seal is genuine and, in a last step, ask the embassy of the country in which the document is to be submitted to certify that the signature of the Ministry of Foreign Affairs officer is genuine.

However, it is usually not necessary to notarise and legalise documentary evidence for submission in a foreign court as judges tend to have the discretion to decide themselves whether they consider a document to be genuine and/or there is a system by which the



genuineness of a document submitted by one party would have to be successfully challenged by the other party in order for it to be inadmissible as evidence.

There may, however, be formal requirements with regard to the power of attorney by which the Myanmar plaintiff authorises a foreign lawyer to bring a lawsuit in a foreign court. Often, the best way to proceed is for the plaintiff to sign the power of attorney in front of an authorised officer of the embassy of the country in which the power of attorney is to be used.

13. Our contract is not revenue-stamped. Can it be submitted as evidence in a foreign court?

Most jurisdictions have more or less abolished stamp duty (a notable exception, apart from Myanmar, is India). Usually, documentary evidence can therefore be submitted in a foreign court without stamp duty being an issue.

14. The most important question last: How can I know whether a lawsuit abroad will be successful?

If we had a way of reliably predicting whether a lawsuit will be won or lost, we would long be rich and in blissful retirement, enjoying life in a villa in a beautiful seaside resort.

However, we - and other law firms and lawyers in Myanmar - can make an educated guess by looking at the contract, the correspondence with the debtor, invoices, shipping documents, etc. The rule of thumb is that prospects improve the more complete the documentary evidence is and the less excuses (such as, "We won't pay because the delivery was late and faulty") the debtor has made so far.

After having made an initial assessment, we contact a lawyer in the debtor's jurisdiction, ask him for his assessment, a cost estimate and an estimate of the timeline and whether it is possible to find out information about the debtor's financial situation. Based on all this information, the client is then asked to decide whether to proceed.



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About Lincoln Legal Services (Myanmar) Limited

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