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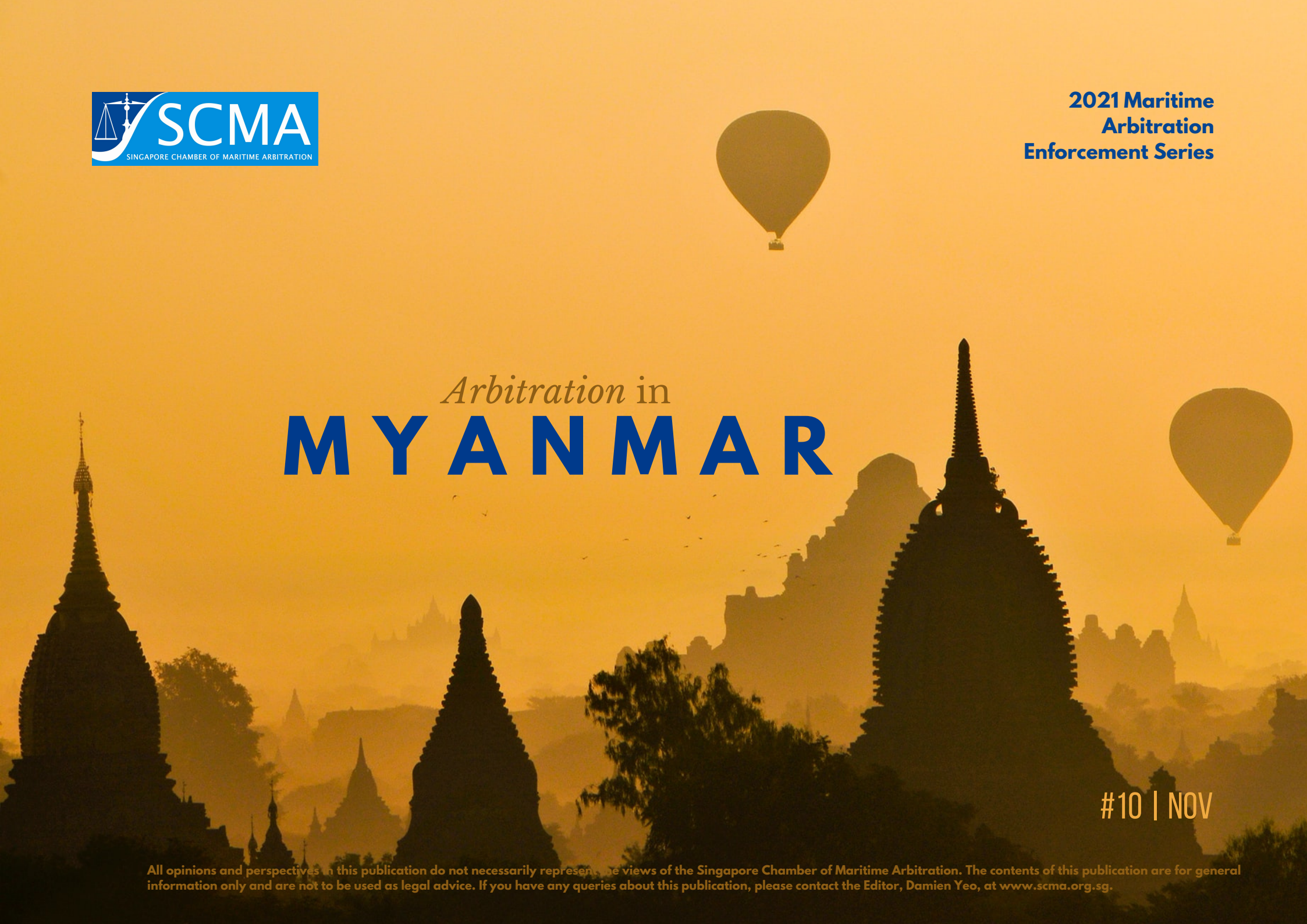

Arbitration in MYANMAR

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Arbitration of Maritime Disputes – a Myanmar Perspective

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Introduction

Since Myanmar's economy opened up a decade ago in 2011, there has been an increase in the flow of Foreign Direct Investment ("**FDI**") into the country. With the opening up, there have also been legal reforms to ensure that there is a strong legal framework to attract and protect foreign investment, as well as provide a better environment for all investors to do business. Consequently, various new laws have been enacted such as the Companies Law, the Arbitration Law and the Investment Law.

In Myanmar, arbitration has always been a mechanism that was used in settling disputes, particularly in contracts involving foreign parties, although the arbitration regime was outdated and not well developed under the 1944 Arbitration Act. Fortunately, it has now been updated with the enactment of the 2016 Arbitration Law. It has also gained in popularity as more local companies have become aware of arbitration, and remains the dispute resolution mechanism of choice in cross-border transactions.

This article discusses arbitration and maritime law in Myanmar to provide insights to investors interested in Myanmar.

Overview of Myanmar Law on Arbitration

On 5 January 2016, the Union Parliament of Myanmar enacted the Arbitration Law 2016 ("**Arbitration Law**") which is based on the UNCITRAL Model Law on International Commercial Arbitration (1985) ("**Model Law**"). The new Arbitration Law also gives effect to Myanmar's ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and replaces the Myanmar Arbitration Act of 1944.

The Arbitration Law is the main procedural law on domestic and international arbitration.

The Arbitration Law respects the principle of party autonomy. The parties are free to choose the law governing the arbitration and the seat of the arbitration. If the seat of arbitration is Myanmar, the Arbitration Law will govern the arbitration. If the seat of arbitration is in any country other than Myanmar or if the seat of arbitration has not been designated or determined upon, sections 10, 11, 30, 31 and Chapter 10 of the Arbitration Law shall be relevant. These set out the Myanmar Court's power to order a stay of proceedings in favour of arbitration, to intervene in arbitral proceedings, to provide assistance in the taking of evidence, to enforce the interim awards made by the arbitral tribunal, and to recognise and enforce foreign arbitral awards.

The significant departures from or amendments to the Model Law are as follows:

(1) The Arbitration Law sets out specific instances where a party must state its objection without undue delay, failing which, it will be deemed to have waived such an objection (compare Article 4 of the Model Law). These include pleas that the arbitral tribunal has no jurisdiction; that the arbitral proceedings were not conducted properly; that any provision of the arbitration agreement or the arbitration law was not complied with; and that the arbitral tribunal or the arbitral proceedings were affected in some manner leading to the proceedings not being conducted properly. If a party proceeds with the arbitration without stating any such objections, he shall be deemed to have waived his right to object.

(2) The Arbitration Law makes clear that where an action is brought before a court, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue of whether the court proceedings should be stayed in favour of arbitration is pending.

(3) Contrary to the Model Law, if the parties have not agreed on a number of arbitrators in the arbitration agreement, the default position is that a sole arbitrator is to be appointed.

(4) The Arbitration Law adds to the Model Law by stating that in the event of any dispute concerning whether any of the grounds for the termination of the mandate of the arbitrator is triggered, a party may request the court to decide the issue. However, no appeal lies from a decision of the court on the issue.

(5) The Arbitration Law, going beyond the Model Law, appears to have adopted the position under the Singapore International Arbitration Act ("**Singapore IAA**") in granting a right of appeal against both positive and negative determinations of jurisdiction by an arbitral tribunal. Therefore, the Arbitration Law provides that a party may appeal against a jurisdictional decision of the arbitral tribunal within 30 days of such decision.

(6) The Arbitration Law also confers specific powers on an arbitral tribunal to grant interim measures of protection and orders, although the formulation of the powers of the tribunal does not follow the text of the Model Law, but is instead modelled closely on Section 12 of the Singapore IAA (the version at the material time). Therefore, Myanmar did not adopt the 2006 version of the Model Law on measures and orders by the tribunal.

(7) The Arbitration Law specifically provides that orders, decisions and directions issued by an arbitral tribunal may be enforced with the permission of the court as if they were court orders. This is an important adoption of the principle of Article 17H Model Law but not its text.

(8) The Arbitration Law expands on Articles 9 and 17J of the Model Law and sets out in some detail the nature of interim measures of protection that may be ordered by a court in aid of arbitration. Further, an order made by the court granting any such interim measures of protection will cease to have effect if the arbitral tribunal makes an order on the same issues.

(9) When the parties fail to make a choice of law, the Arbitration Law does not adopt the indirect approach of Article 28(2) Model Law which require reference to rules of conflicts of law (that is, "the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable") but rather the direct approach which does not require reference to any rules of conflicts of law (that is, "the arbitral tribunal shall apply the rules of law which it considers applicable"). It should also be noted that whereas the Model Law allows the parties to

choose “rules of law”, the Arbitration Law only allows the tribunal to choose “the law” thus limiting the tribunal to a choice of a national law rather than some other rules such as the UNIDROIT Principles of International Commercial Contracts.

(10) When both parties are from Myanmar (that is, in a domestic arbitration), the tribunal shall decide the dispute in accordance with the prevailing substantive law of Myanmar. There is no equivalent provision in the Model Law.

(11) The Arbitration Law additionally confers on the arbitral tribunal the power to determine, in the award, the costs of arbitration and its apportionment among the parties.

(12) Unlike the Model Law, under the Arbitration Law, any party may, unless agreed otherwise by the parties and with notice to the arbitral tribunal and other parties, apply to the court for a ruling on an issue of law arising from the arbitral proceedings even before the award is issued. The court may rule on such an issue of law if it is convinced that the rights of parties are materially prejudiced. This recourse is only available to domestic arbitrations and not international arbitrations. The court will however not consider such an application if it is convinced that such an application was not made in accordance with the agreement of the parties, or was made without notice to the arbitral tribunal, or that the consideration of such an application will increase costs or delay the proceedings. An arbitral tribunal may continue with the arbitral proceedings notwithstanding that such an application is pending before the court.

(13) Unlike the Model Law, a party may also appeal on an issue of law arising from a domestic award. However, parties may agree to exclude such a right. The court shall allow the appeal if it is convinced that its ruling upon the issue materially prejudices the rights of a party or the award of the arbitral tribunal in respect of the dispute submitted for its decision is completely wrong. Consequently, the court may confirm the award, vary the award, return the award to the arbitral tribunal for reconsideration of the whole or any part of the award, or set aside the whole or part of the award.

Both domestic and foreign arbitral awards can be enforced under the Arbitration Law as a decree rendered by the Myanmar court under the Code of Civil Procedure (the “**CPC**”).

In terms of seeking the court’s assistance under the Arbitration Law, any application made under the Arbitration Law shall be classified as a Civil Miscellaneous Case and will be conducted in accordance with the CPC.

While still in its nascent stages of development, arbitration in Myanmar is growing as a preferred mode of dispute resolution. As the market develops, specialised arbitration institutes such as SCMA will also become better known and utilised.

Overview of Maritime Law in Myanmar

Myanmar Maritime Law mainly consists of:

(1) Legislation, which includes:

a. the Merchant Shipping Act,
b. the Carriage of Goods by Sea Act,
c. the Bills of Lading Act, and
d. the Territorial Sea and Maritime Zones Law;

(2) Rules issued under the laws, and directives and orders issued by the Myanmar Port Authority (“**MPA**”) and the Department of Marine Administration (“**DMA**”); and

(3) International treaties, including the Maritime Labour Convention and the United Nations Convention on the Law of the Sea.

The Merchant Shipping Act, Carriage of Goods by Sea Act and Bills of Lading Act are respectively based on the India Merchant Shipping Act 1923, India Carriage of Goods by Sea Act 1925 and the India Bills of Lading Act 1856. The Territorial Sea and Maritime Zones Law was re-enacted in 2017.

The MPA is responsible for amongst other things, exercising regulatory functions with respect of marine and port services and facilities, facilitating port operators and port users in order to promote smooth flow of trade, initiating port development plans and implementing projects in collaboration with the private sector and conducting fruitful cooperation with regional/international organisations and business institutions.

The DMA is responsible for amongst other things, maritime legislation, accident investigations, safety, environmental protection, security, ship survey, ship registration, and seafarers' certification and verification.

Myanmar Courts have jurisdiction over any civil claims including maritime disputes. However, parties can agree to settle maritime disputes through arbitration by including an arbitration clause in the contract or by entering a separate written arbitration agreement. We are not aware of any reported cases related to maritime arbitration in Myanmar to date.

Enforceability of Foreign Arbitral Awards in Myanmar

Since Myanmar is a party to a New York Convention, Myanmar Courts can recognize and enforce foreign arbitral awards rendered in the contracting states of the New York Convention and awards rendered in Myanmar can similarly be enforced in other contracting states of the New York Convention.

Section 46(b) of the Arbitration Law provides that the court may refuse to recognise and enforce a foreign award, if any of the following in submission for recognition and enforcement of foreign award can be proved by the respondent:

(1) a party to the arbitration agreement was, under the law applicable to them, under some incapacity;
(2) the arbitration agreement is not valid under the law to which the parties have subjected it, or in the absence of any indication in that respect, under the law of the country where the award was made;
(3) the party was not given proper notice of the appointment of the arbitrator, or the arbitration proceedings were not carried out properly or the respondent was otherwise unable to present its case in the arbitration proceedings;
(4) the award deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration or it contains a decision on the matter beyond the scope of the submission to arbitration;
(5) the composition of the arbitral tribunal 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
(6) 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.

Section 46(c) of the Arbitration Law further provides that the court may refuse to enforce the award if it finds that:

(1) the subject-matter of the dispute is not capable of settlement by arbitration under the law of the State; or
(2) the enforcement of the award would be contrary to the public policy of the State.

Section 46(d) of the Arbitration Law provides that where the court is satisfied that an application for the setting aside or for the suspension of the award has been made to a competent authority referred to in subsection (b) of section 46, the court may, if it considers proper to do so, postpone the order to enforce the award and may also order the respondent to provide appropriate security on the application of the party claiming enforcement of the award.

As a matter of procedure, Section 45 of the Arbitration Law provides that the party seeking to enforce a foreign award must produce to the court:

(1) the original award or a copy thereof duly authenticated in the manner required by the law of the country in which it was made;
(2) the original arbitration agreement or an authorised copy thereof; and
(3) such evidence as may be necessary to prove that the award is a foreign award.

Further, where the award or arbitration agreement required to be produced is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in the Union of Myanmar.

In general, every court in Myanmar has jurisdiction to enforce foreign arbitral awards subject to certain pecuniary limit of its jurisdiction. The pecuniary limit of the Myanmar Courts are as follow: Township Court up to MMK 10 million, District Court up to MMK 1,000 million and no limits apply to the High Courts. In addition to such pecuniary limits, the Courts have territorial limits. Suits must therefore be instituted in a Court which has territorial jurisdiction based on the location in which the defendant resides, carries on business or personally works for gain, or where the cause of action arises.

After the foreign arbitral award is recognised, the judgement creditor shall apply to execute the foreign arbitral award in a Myanmar Court against the judgement debtor, based on its relevant jurisdiction.

The usual methods of execution applicable to a judgment issued by the Myanmar court will apply:

(a) attachment and sale of any property;
(b) examination of the judgment debtor on his property;
(c) application for garnishee orders requiring third parties, such as banks, who are indebted to the judgment debtor to pay the judgment creditor the amount of any debt due or accruing due to the judgment creditor in satisfaction of the judgment;
(d) arrest and detention in prison; and
(e) commencement of insolvency (against individuals) or winding up (against companies) proceedings, where applicable.

Application for execution of the decree may be either oral or written pursuant to Order 21, Rule 11 of the CPC.

Institutional vs ad hoc Arbitration – Myanmar Perspective

Myanmar Courts, in general, have jurisdiction to enforce both institutional and ad hoc arbitral awards under the Arbitration Law.

As mentioned above, arbitration is well accepted in Myanmar and is the preferred mode of dispute resolution in commercial contracts, particularly in cross-border transactions or where a foreign party is involved. Parties in such transactions would also generally prefer to have an international arbitral institution and its rules to administer their disputes. SCMA, as a specialised international arbitral institution, is well placed to be one of such institutions.

The Union of Myanmar Federation of Chambers of Commerce and Industry established the Myanmar Arbitration Centre in 2019. As it is a relatively new establishment, it has not been widely adopted as the arbitral institution of choice in arbitration agreements of Myanmar-related transactions. Further, it does not yet have an established panel of international arbitrators and its procedures and rules are not publicly or easily accessible. Nevertheless, it has taken on a small handful of ad hoc cases but there is no publicly available information on the outcome of these cases.

Status of SCMA Awards in Myanmar

Currently, we are not aware of any reported SCMA awards that have been enforced in Myanmar. However, given that SCMA is a specialised maritime arbitration centre with rules tailored for maritime disputes, we expect that usage of SCMA in shipping disputes connected to Myanmar will rise as trade grows for Myanmar and shipping volumes increase.

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