

**PRIVATE INTERNATIONAL LAW:
A PARTIAL RESTATEMENT OF MYANMAR LAW**

By Adrian Briggs

General principles

1. The rules set out below represent the private international law of Myanmar law. They are derived from the written laws of Myanmar and from the general principles of the common law. Those which are derived from the written laws of Myanmar are binding on the court according to the letter of the written law. Those which are derived from the general principles of the common law provide the court with guidance, but are not binding on it.

The jurisdiction of a court in Myanmar

2 The international jurisdiction of the courts of Myanmar shall be determined in accordance with the following rules. These rules do not determine the particular court or courts within Myanmar which has or have jurisdiction over the defendant in relation to the suit.

3 The plaintiff, whether a Myanmar citizen or an alien, may call upon the court to exercise jurisdiction over the defendant in accordance with Rules 4 to 8.

4 In the case of suits concerned with immovable property in Myanmar the court has jurisdiction if the suit is for the recovery or partition of the property, or for foreclosure, sale or redemption in the case of a mortgage on the property, or for compensation for a wrong to the property. This jurisdiction does not depend on the nationality, residence, presence, or submission of the defendant.

5. In the case of suits concerned with immovable property outside Myanmar, the court does not have jurisdiction in the suit unless

(a) the suit is for relief respecting, or compensation for wrong to, that property, and

(b) the relief sought can be obtained entirely by the personal obedience of the defendant, and

(c) the defendant has submitted or will submit to the jurisdiction of the court, or resides, carries on business, or works for gain in Myanmar.

6. In cases not concerned with immovable property, and without regard to whether the defendant is present in Myanmar, the court has jurisdiction over the defendant if

(a) the defendant has submitted or submits to the jurisdiction of the court, or

(b) the defendant actually and voluntarily resides, or carries on business, or works for gain in Myanmar, or

(c) the cause of action arose, in whole or in part, in Myanmar, or

(d) the suit is for compensation for a wrong to the person or to moveable property, and the wrong was done in Myanmar.

7. The plaintiff may apply for leave to commence proceedings against a defendant, who is not otherwise subject to the jurisdiction of the court if a co-defendant to the suit actually and voluntarily resides, or carries on business, or works for gain in Myanmar.

8. Apart from Rules 4 to 7, a court also has jurisdiction over a company or corporation:

(a) if it was formed under the laws of Myanmar, or

(b) if it was not formed under the laws of Myanmar but has a place of business in Myanmar.

Service of process on a defendant

9. A defendant who is in Myanmar

(a) may be served with the document which institutes the proceedings in accordance with Order 5 of the Civil Procedure Rules, or

(b) may accept service of process by consent.

10. A defendant who is not in Myanmar

(a) may be served with the document which institutes the proceedings in accordance with Order 5 rule 25 of the Civil Procedure Rules, which is to say, by registered post, with acknowledgment paid, to an address outside Myanmar, or

(b) may accept service of process by consent.

Applications to contest the jurisdiction of the court or its exercise

11. A defendant who has been served with the summons, whether within the territory of Myanmar or in a foreign country may, before he files his defence, apply to the court for an order that the proceedings be dismissed on the ground that the court does not have jurisdiction over him in relation to the claim; and upon the applicant satisfying the court of the grounds on which the application is based, the court shall set aside the summons and return the plaint, and grant such other relief as may be appropriate in the circumstances.

12. A defendant who has been served with the summons, whether within the territory of Myanmar or in a foreign country may, before he files his defence, apply to the court for an order

(a) pursuant to Section 34 of the Arbitration Act 1944, that the proceedings be stayed, on the ground that the parties had agreed that the matter be referred to arbitration, and/or

(b) that the court not proceed further and that the proceedings be stayed, on the ground that the parties agreed that the matter in dispute would be brought before the courts of another country and not before the courts of Myanmar, and/or

(c) that the court not proceed further and that the proceedings be stayed on the ground that the courts of another State are in all the circumstances of the case clearly more appropriate for the trial of the suit and that the interests of justice would be served by a stay of the proceedings, and upon the applicant satisfying the court of the grounds on which the application is based, the court may grant the relief applied for if it considers that it is in the interests of justice to do so.

Restraint of person within jurisdiction from suing outside Myanmar

13. Where proceedings have been or may be brought before the courts of a foreign country contrary to an agreement between the parties, and the court considers that the agreement should be enforced by specific relief, or in any other case, where the court considers the case to be an exceptional one in which the interests of justice require the respondent to be ordered to be restrained, the court, having established jurisdiction over a natural person or a corporation, may order that person to discontinue or, as the case may be, refrain from instituting proceedings before the courts of a foreign country.

Res judicata and foreign judgments

14. No foreign judgment has any effect in Myanmar unless that judgment is recognised as *res judicata* in accordance with Rules 15 to 21. A judgment which is recognised as *res judicata* may, on certain conditions, be enforced by suit in the courts of Myanmar.

15. A foreign judgment which satisfies the requirements of *res judicata* binds the party against whom it was given, and those who claim under or through him, to abide by and accept as conclusive the decision of the foreign court.

16. Subject to Rule 21, a judgment given against a plaintiff is binding on the plaintiff as *res judicata*.

17. (1) Subject to Rule 21, a judgment given against a defendant is binding on a defendant as *res judicata*

(a) if the defendant was present within the jurisdiction of the foreign court when proceedings were instituted, or

(b) if the defendant submitted to the jurisdiction of the foreign court prior to service of the summons, by contract or by the appointment of an agent with authority to accept service of the summons on his behalf, or

(c) if the defendant submitted to the jurisdiction of the foreign court after service of the summons, by voluntary appearance in response to the summons.

(2) But a defendant who appears before the foreign court for the purpose, and only for the purpose, of contending

(a) that the foreign court had no jurisdiction under its own law, or

(b) that the foreign court should exercise a power or discretion to refer the parties to arbitration, or

(c) that the foreign court should not exercise its jurisdiction on the ground that the proceedings should be brought before the courts of another country,

does not thereby submit to the jurisdiction of the foreign court.

18. Subject to Rule 21, a foreign judgment which determines title to property is *res judicata* if the property was within the territorial jurisdiction of the foreign court when the proceedings were commenced.

19. (1) A foreign judgment may be *res judicata* in Myanmar even though the foreign court was in error in considering that it had jurisdiction according to its own law, unless and until the foreign judgment is set aside by the foreign court.

(2) A foreign judgment will not be *res judicata* in Myanmar, even though the foreign court had jurisdiction according to its own rules of jurisdiction, if the judgment does not satisfy Rule 17 above.

(3) A foreign judgment may be *res judicata* in Myanmar even though the foreign court may have made an error of fact or of law or both in giving the judgment.

20. A foreign judgment may be *res judicata* in Myanmar even though it is subject to appeal to or revision by a higher court in the country in which it was given.

21. A foreign judgment is not *res judicata* in Myanmar, in any case in which

(a) the foreign court gave judgment, or allowed judgment to be entered, without any consideration by it of the merits of the case, or

(b) the judgment was obtained by the fraud of the party in whose favour it was given, or as a result of fraud by the court, or

(c) the judgment was given in breach of the rules of natural justice, or

(d) the foreign court refused to apply law of Myanmar when should be been applied by that court, or

(e) the claim was founded on breach of a rule of Myanmar law, or

(f) the judgment purported to determine title to, or the right to possession of, land in Myanmar, or

(g) the foreign judgment was given to enforce a penal liability or a liability to pay foreign taxes or charges of a like nature, or

(h) recognition of the judgment would be contrary to the public policy of Myanmar.

22. (1) A foreign judgment which is *res judicata* in Myanmar, and which orders a party to the proceedings to pay a sum of money which is fixed and has been determined, may to that extent be enforced in Myanmar by suit, and the court may order that the sum adjudged to be payable by the foreign court be paid.

(2) A foreign judgment which is *res judicata* in Myanmar but which does not order a party to the proceedings to pay a sum of money which is fixed and has been determined may be relied on in proceedings brought in Myanmar on the original cause of action.

Application of Myanmar law and foreign law in Myanmar court

23. 'Foreign law' means the rules of law which would be applied by a foreign court in a domestic case, and save where the contrary is expressly stated, shall not include the rules of private international law which would be applicable by a judge in a court in the country whose law is to be applied.

24. Judicial notice shall not be taken of any rule of foreign law. A rule of foreign law which a party asks the court to apply shall be proved by expert testimony unless the parties, with the consent of the court, agree that it may be proved by other means.

25. A court may apply a rule of foreign law if

- (a) one or both of the parties to the suit ask the court to do so, and
- (b) the rules of private international set out herein provide that the issue is one on which the court may apply foreign law, and
- (c) the party who asks the court to apply foreign law satisfies the court as to the meaning and effect of that foreign law.

26. No rule of foreign law shall be applied

- (a) to the determination of any issue which is considered by the court to be one of procedural rather than substantive law, or
- (b) to determine the period of time from the accrual of the cause of action to the date on which proceedings are commenced; provided that a rule of foreign law which provides that the right of the plaintiff is extinguished after a certain period of time may be applied as part of the law which governs the substance of the issue before the court, or
- (c) if, in the opinion of the court, the foreign law is penal in character, or a law which provides for the payment or collection of foreign taxes, duties, or charges of a like nature, or a law whose content is contrary to the public policy of Myanmar, or a law whose application would, in the circumstances of the case, be contrary to the public policy of Myanmar.

27. A rule of Myanmar law shall be applied, and a contradictory rule of foreign law shall not be applied, when on a proper construction, a judge is directed to apply a provision of the written law of Myanmar even though the rules of private international law would otherwise authorise the application by the court of a rule of foreign law.

Contracts and issues which are contractual in nature

28. Rules 29 to 38 apply to claims which are contractual, or which are in the nature of contracts.

29. The parties to a contract may choose the law of any country to govern their contract. They may express their choice of law, but if they do not express it, a court may be satisfied that the contract is governed by the law which the parties actually chose but which they did not express.

30. The parties to a contract may refrain from choosing the law by which their contract is to be governed. The court will identify the law with which the agreement has its closest and most real connection, and that the contract will be governed by that law.

31. The law which governs the contract shall apply, in particular, to

- (a) the construction and interpretation of the terms of the contract,
- (b) the validity of any of the terms of the contract,
- (c) the implication of terms into a contract,
- (d) the steps which are to be taken for the performance of the contract,
- (e) the question whether the contract has been discharged by breach or by other cause, and the consequences of the discharge of the contract;
- (f) the question whether a contract may be avoided or rescinded for fraud, misrepresentation, non-disclosure, duress, undue influence or any other vitiating factor,

(g) the legality of the making of the contract.

32. (1) If the issue is disputed, the law which governs the contract shall determine whether the parties formed a contract or failed to conclude an agreement *ab initio*.

(2) But if one of the parties is resident in a country according to the law of which he would not be held to have entered into a contract, the court may conclude that there is no binding contract if the court considers that it is in the circumstances reasonable to come to that conclusion.

33. (1) If the issue is disputed, the law which governs the contract shall determine whether the contract is valid in respect of form.

(2) But if that law would consider that the contract was invalid in point of form, it may be regarded as valid in point of form if it satisfies the formality requirements, if any, of the law of the place where it was made.

34. (1) If the issue is disputed and the contract is a mercantile one, the law which governs the contract shall determine whether a natural person had personal capacity to conclude it.

(2) But if the contract is not a mercantile one, and if a natural person lacked capacity to contract by his or her personal law, the court may, if it is reasonable to do so, hold that the party in question lacked capacity to contract.

(3) The capacity of a company or corporation to conclude a contract is governed by the law under which the company or corporation is formed.

35. (1) The question whether a natural person has legal authority to act, or to make contracts, on behalf of a company is determined by the law under which the company was formed.

(2) The legal effect of a contract made or purported to be made by a person who did not have authority to make the contract on behalf of the company shall be determined by the law which governs the contract.

36. (1) The law which governs the contract shall determine whether the performance of the contract is illegal, and if it is illegal, the consequences of that illegality.

(2) But though the law which governs the contract would consider the performance of the contract legal, if the law of the place at which performance of the contract is required would consider that performance to be illegal, the performance of the contract shall be regarded as illegal.

37. In any case in which the contract is governed by a foreign law, that law shall not apply, and the law of Myanmar shall apply, to

(a) the quantification of recoverable loss or damage which is recoverable or compensable according to the law which governs the contract,

(b) the determination of other remedies which a court may order or impose,

(c) the limitation of time since the accrual of the cause of action within which the proceedings must be instituted, provided that if the law which governs the contract provides that the right of the plaintiff is extinguished after a certain period of time, that rule of the governing law may be applied as part of the law which governs the substance of the issue before the court.

38. Rules 28 to 37 apply by analogy to identify the law which applies to those relationships which are equivalent to contract.

Torts and issues which are tortious in nature

39. Rules 40 to 47 apply to claims which are, or which are in the nature of, torts. That is to say, they apply to obligations which are not contractual, or equivalent to contractual in nature.

40. The place at which a tort is committed is identified by asking where in substance the cause of action arose. If the act or omission complained of, and the damage said to have resulted from it, are located in the same country, that country is the place at which the tort is committed. If the act or omission complained of, and the damage said to have resulted from it, are located in different

countries, the tort is committed in the country which has the closer connection to the facts of the dispute.

41. (1) If a tort is committed in Myanmar, it is governed by the law of Myanmar to the exclusion of all other laws.

(2) But if the case is an exceptional one which has no substantial connection to Myanmar but has a very close connection to the law of another country, the law of that other country shall, subject to Rule 46, apply in place of the law of Myanmar.

42. If a tort is committed in a country outside Myanmar, the defendant will not be liable unless both

(a) the complaint would give rise to civil liability under the law of the country in which, in substance, the cause of action arose, and

(b) the complaint would give rise to civil liability under the law of Myanmar.

43. If the case of a tort committed outside Myanmar is an exceptional one

(a) if the tort has no real connection to Myanmar but has a very close connection to the law of the place where the tort occurred, the law of that foreign country, but not the law of Myanmar, shall be applied,

(b) if the case is an exceptional one which has no real connection to the place where the tort occurred, but had a very close connection to the law of a third country, the law of that third country, but not the law of the place where the tort was committed, shall be applied.

44. If the claimant and defendant are parties to a contract or to a prior relationship equivalent to a contract, and if the cause of action arises in connection with that contract or prior relationship, the claim in tort shall be governed by the law which governs the contract between them and not by the rules otherwise applicable to claims in tort.

45. The law which applies to a tort (or the laws which apply to a tort, as the case may be) shall apply, in particular, to determine

(a) the basis and extent of liability,

(b) the question whether a person may be liable for acts committed by another,

(c) the grounds for exemption from liability, any limitation of liability and any division of liability,

(d) the heads or types of loss or damage for which a party is liable (but not the quantification of the loss or damage liable to be awarded in respect of those heads of damage),

(e) the identification of the persons entitled to compensation for damage sustained personally.

46. Myanmar law shall always be applied, and foreign law shall not apply, to

(a) the quantification of recoverable loss or damage which is recoverable or compensable according to the law or laws which apply to the tort,

(b) the availability and grant of other remedies which a court may order,

(c) the limitation of time since the accrual of the cause of action within which the proceedings must be instituted, provided that if the law which governs the contract provides that the right of the plaintiff is extinguished after a certain period of time, that rule of the governing law may be applied as part of the law which governs the substance of the issue before the court.

47. Rules 39 to 46 apply to causes of action regarded as founded on tort as this expression is understood in the domestic law of Myanmar, and also to claims arising under foreign laws which create or impose obligations equivalent to liability in tort.

The Law of Property

48. For the purposes of these rules, property is divided into immovable and moveable. Moveable property is divided into tangible and intangible property. Intangible moveable property is divided into debts and other intangibles.

49. (1) In the case of immovable property in Myanmar the court has jurisdiction if the suit is for the recovery or partition of the property, or for foreclosure, sale or redemption in the case of a mortgage on the property, or for compensation for a wrong to the property.

(2) The court shall apply the law of Myanmar to all such claims.

(3) No foreign judgment shall be recognised as *res judicata* insofar as it purports to determine title to, or the right to recovery or partition of, or the foreclosure, sale or redemption in the case of a mortgage of immovable property in Myanmar.

50. (1) In the case of immovable property outside Myanmar, the court has jurisdiction in a claim for personal relief if, but only if

(a) the suit is for relief respecting, or compensation for wrong to, that property, and

(b) the relief sought can be obtained entirely by the personal obedience of the defendant, and

(c) the defendant has submitted or will submit to the jurisdiction of the court, or actually and voluntarily resides, or carries on business, or works for gain in Myanmar.

(2) In dealing with such a claim, the court shall apply

(a) to any question of title, and notwithstanding Rule 23, the law which would be applied by a court sitting at the *situs* of the land,

(b) to any question concerned with the existence or extent of an obligation, the law which governs the right or obligation in question determined in accordance with Rule, 28 to 47.

(c) to the issue of the relief which may be ordered, Myanmar law.

(3) A foreign judgment in respect of such a claim may be recognised as *res judicata* in Myanmar even though the suit related to immovable property in Myanmar.

51. (1) The effect of a finding of, using of, dealing with, disposal of, or other transaction concerning tangible moveable property upon title to that moveable property shall in general, be determined by the law of the *situs* of the property at the time of the event said to have affected its title.

(2) A transfer of or other dealing with a tangible moveable which is effective by the law of the country where the moveable is at the time of the transfer is valid and effective in Myanmar.

(3) A transfer of or other dealing with a tangible moveable which is not effective by the law of the country where the moveable is at the time of transfer is not valid and effective in Myanmar; but if the moveable was in transit and its *situs* was not known, a transfer which is valid and effective by the proper law of the transfer will be effective in Myanmar.

52. The effect of a dealing with a negotiable instrument is governed by the law of the country in which the instrument was when it the dealing took place.

53. (1) The question whether an intangible moveable has been assigned by the person to whom it is owed (the assignor) to another (the assignee) is answered in part by the law under which the moveable was created, and in part the law which governs the assignment, as follows.

(2) The question whether the right to an obligation owed by another (the debtor) is capable of being assigned to another is answered by the law under or by reference to which the debt was created.

(3) The question whether a purported assignment to the assignee of the right to an obligation owed by the debtor to the assignor is valid is answered by the law which governs the agreement between the assignor and the assignee.

54. The priority of competing assignments of a debt is governed by the law under which the debt was created. The question whether a debtor is discharged by making payment to the assignor, or to any assignee, is answered by the law under which the debt was created.

55. However,

(a) the validity and effect of all dealings with registered shares in a company is governed by the law under which the company was created,

(b) all questions concerning the validity of a patent, a copyright, a registered design, or a trade mark are answered by the law under which the right was created or is protected.

56. The effect upon its title of seizure or confiscation of property by judicial authority is determined by the law of *situs* of the property seized or confiscated at the date of the act in question.

57. The effect upon its title of seizure or confiscation of property by the government of a foreign state is, subject in particular to Rule 26, determined by the law of *situs* of the property seized or confiscated at the seizure or confiscation in question.

Companies and winding up

58. A company formed under the laws of a foreign state and having legal personality under the law of that state shall be recognised in Myanmar as an overseas company.

59. An overseas company which enjoys legal personality under the law under which it was created may sue in Myanmar. An overseas company may be sued in Myanmar if the court has jurisdiction over it in respect of the suit.

60. A company which is dissolved in accordance with law of country under which it was created shall be treated as dissolved and without legal personality in Myanmar, save that it may be wound up in Myanmar if it is necessary or convenient to do so.

61. A court may wind up a company

(a) formed under the laws of Myanmar,

(b) formed under the laws of a foreign country which has or had a place of business in Myanmar.

62. (1) The winding up of a company under the law under which it was created shall be recognised as effective.

(2) A liquidator appointed by a court in the state under the law of which the company was created will be recognised as having authority to represent the company in Myanmar.

Personal Insolvency

63. An insolvency petition in respect of a natural person may be presented if the debtor ordinarily resides, or carries on business, or works for gain, in Myanmar, or if he has been arrested or imprisoned, if he is in custody in Myanmar.

64. (1) A foreign adjudication will be recognised if made by a court with which the debtor has a proper and sufficient connection.

(2) If under the foreign adjudication the moveable property of the debtor passes to his representative, moveable property, but no immoveable property, in Myanmar shall vest in the representative.