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In conjunction with our Myanmar qualified litigation partners, we have launched an exclusively dedicated disputes team comprising trial lawyers, litigators and consultants.

We represent clients in a wide range of disputes, from complex cross border insolvency and enforcement of foreign arbitration awards to collection of debts and labour cases.

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LABOR DISPUTES IN MYANMAR: A REVIEW OF SOME INTERESTING LABOR ARBITRATION COUNCIL DECISIONS

As foreign enterprises continue flock to Myanmar, lured by a robust investment landscape and the recent easing of US sanctions, they must also contend with a new reality – more labor protection and a special labor disputes arbitration system. Understanding Myanmar’s three-tier labor dispute resolution system — which consists of the Township Conciliation Body (“Conciliation Body”), the Arbitration Body and the Labor Dispute Arbitration Council (“Council”) — and managing employer-employee conflicts remain key to both foreign and local enterprises.

VDB Loi organized a client briefing session in Yangon on February 28 2017 on the latest developments and highlights in Myanmar’s labor dispute cases. In this memo, we provide key observations from this briefing and analyze some of the cases and practical pointers with respect to labor dispute settlements.

Terminate after three warnings

One of the things highlighted under Myanmar’s labor laws is the need to provide three formal warnings before an employer dismisses an employee. Of the three warnings, the first warning must be verbal, followed by two written warnings. In addition, warnings must be formal in nature, i.e. a sit down meeting between the employee, the employee’s manager who raised the need for warning, and the human resource manager to represent the employer so that no prejudice to the employee occurs during the meeting. Meetings must be documented and it should permit all parties to voice their concerns on why the warning is

Highlights of this note

- ▶ Terminate after three warnings
- ▶ Profanity at workplace - is it a reason for immediate termination?
- ▶ Social justice and equity considerations
- ▶ Can you fire employees for economic reasons?
- ▶ Thou shall not steal

required or not.

In one case before the Council in 2016, an employee was given written warnings and later dismissed for creating disorder at work and disrespecting his supervisor. Following his dismissal, the employee filed a case at the Conciliation Body. The case was transferred to the Arbitration Body, which found the dismissal to be ‘void’ and ordered reinstatement of the employee as it was proven that the employer had not given him the first verbal warning. The employer appealed against this judgment at the Council, which confirmed the Arbitration Body’s decision, highlighting the importance of both verbal and written warnings.

Profanity at workplace - is it a reason for immediate termination?

Conventional wisdom may have us believe that use of profane or obscene language at workplace could directly lead to dismissal, but some of the recent labor dispute cases in Myanmar prove otherwise. Under Myanmar labor laws, swearing at work is not considered to be a serious breach of contract, unless otherwise stated in the employment contract. In other words, employers may find it difficult to dismiss an employee for the sole reason that he or she used obscene language at workplace.

In a case before the Council, an employee was dismissed after he accused his supervisor of stealing missing items from work and used profane language at workplace. Following this termination, he filed a case against the employer at the Conciliation Body, which failed to mediate the case. He then appealed to the Arbitration Body, which ordered his reinstatement, given there was no proof for use of profane language. The employer filed an appeal against this judgment at the Council, which confirmed the Arbitration Body's decision, but with a promise of the employer to stop swearing.

Social justice and equity considerations

Courts in Myanmar uphold principles of social justice and equity when adjudicating on employer-employee disputes, and this often leads to judgments deviating from the law. This is primarily done with the intention of offering fairness and equal opportunity to all parties involved in the case, while protecting and expanding civil and

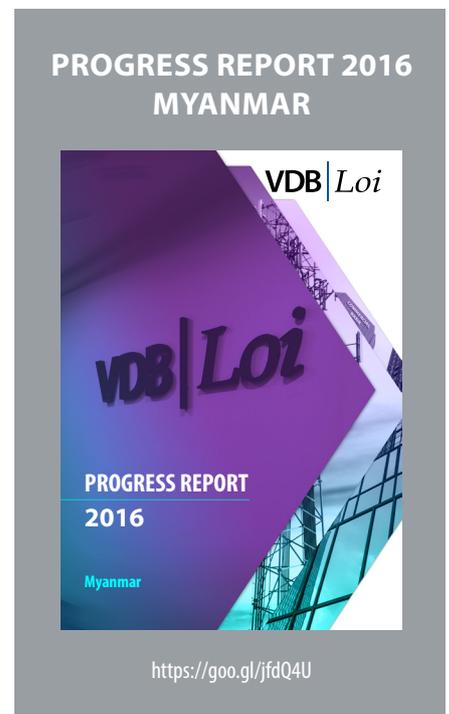
human rights, regardless of a person's position, gender or ethnicity. According to section 21(a) of the Settlement of Labor Dispute Law, duties of the Arbitration Council includes "standing and carrying out as the organization which is independent and impartial based on social justice, decent work and principles of equity in making decisions."

To illustrate, one Council case involved a disagreement between employees that later turned into a physical fight. The employer found this to be a serious breach and dismissed one of the employees. The employee filed a case at the Conciliation Body, which failed to mediate. He then moved to the Arbitration Body, which ruled in favor of the employer and rejected his request for reinstatement, highlighting that physical fights are a serious breach of labor rules in Myanmar. In his third and final attempt, the employee moved to the Labor Dispute Arbitration Council, which confirmed the Arbitration Body's decision on not having to reinstate the employee, but ordered the employer to pay severance based on principles of social justice and equity.

Can you fire employees for economic reasons?

A slowdown in business activity may force employers to lay off some of their workforce, however, employers in Myanmar must be careful when taking such an action. As seen in some of the recent cases, dismissal without notice or severance pay solely on economic grounds is mostly deemed unfair, regardless of the reality of the employer's financial realities.

In a recent Council case, four employees



who worked at a construction site of a foreign employer were dismissed without notice or severance pay for allegedly stealing construction materials. According to employees, they were dismissed because the employer wanted to save on manpower and wage-related costs. Although the lost construction materials were recovered a few days later, the employer refused to reinstate dismissed employees. The conciliation body, where the employees filed a case against the employer, ordered the employer to pay both notice and severance to employees. The employer appealed to the Council, which confirmed the lower court's judgment.

Thou shall not steal

Cases involving embezzlement and theft are taken seriously by Myanmar courts, and they are often considered





to be acceptable reasons for dismissal without notice or severance. This is in contrast to cases involving profanity, defamation or vague descriptions of being disrespectful, which are not considered acceptable reasons for termination under Myanmar labor laws.

Another case before the Council involves the dismissal of an employee without notice or severance for embezzling company funds. According to the employer, this was a serious case of theft as the employee was supposed to

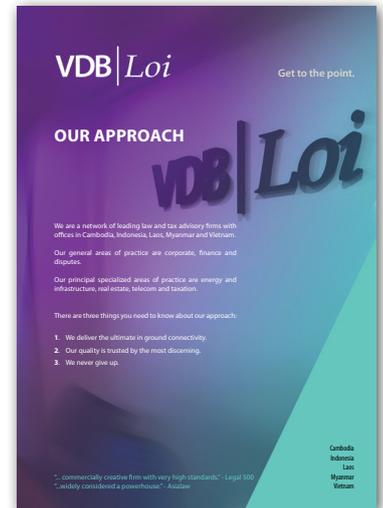
transfer the amount to one of the security guards. The employee filed a plaint seeking severance at the Conciliation Body, from where the case was transferred to the Arbitration Body.

The Arbitration body ruled in favor of the employer and accepted termination without notice or severance as embezzlement is a serious breach of the employment contract under Myanmar labor laws. The employee appealed to the Labor Dispute Arbitration Council, which confirmed this decision.

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Edwin is a prominent foreign legal advisor living and working in Myanmar since 2012. He frequently advises the Government on privatizations and transactions in the energy, transport and telecommunications areas. He and our Banking team act for international financial institutions and DFIs, including on their largest ever Myanmar financing, and had a role on virtually every completed project financing transaction. In 2016, Edwin and his team obtained MIC permits for an astounding 25% to 33% of approved FDI in Myanmar, and helped establish a foreign bank. With our firm's Energy team, Edwin worked on 5 out of 7 power projects signed in 2016, and advised 4 of the "supermajors". Supported by an exclusively dedicated telecom team, he helped clients obtain and negotiate Myanmar's first new spectrum and IGW licenses this year.

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U Aye Kyaw is a Myanmar qualified lawyer and the principal of U Aye Kyaw & Associates VDB Loi, a specialized litigation firm which joined VDB Loi in 2014. He is a former judge, magistrate and law lecturer with nearly 25 year experience in civil and commercial litigation and arbitration. He and his team of litigators have served clients in a broad range of industries with services since 1990.

VDB Loi's Disputes team comprises Myanmar qualified trial lawyers, litigators and foreign arbitration specialists (resident in Myanmar) who exclusively work on litigation and arbitration matters. We focus on a broad range of commercial disputes, labour cases, construction disputes, insolvency and debt enforcement. In 2016, the disputes team booked a significant win when it was able to secure the release and clear the employee of a foreign state agency from criminal charges in connection with a fatal accident.

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