NEWS FROM ACICA

INDIA

India has recently joined the growing list of countries to incorporate the UNCITRAL Model Law in its legislation dealing with international commercial arbitration. The Model Law was developed by the United Nations Commission on International Trade Law (or UNCITRAL as it is usually known) and promulgated for adoption by members of the United Nations in 1985. UNCITRAL developed the Model Law to assist countries in implementing legislation which would provide a legal regime suited to international commercial arbitration. Experience indicated to UNCITRAL that often domestic legislation was not suited to the special requirements of international disputes and also that domestic legislation did not adequately deal with many issues that could later raise difficulty in enforcement of awards under the New York Convention on the Recognition and Enforcement of Foreign Arbital Awards of 1958 (New York Convention). Thus the Model Law was developed.

The Indian legislation which adopted the Model Law was part of a comprehensive enactment of law dealing with both conciliation and arbitration. An Arbitration and Conciliation Ordinance was promulgated by the Prime Minister on January 16, 1996 and subsequently was passed by the Indian Parliament on August 2, 1996. The legislation was effective from January 25, 1996 (hereafter referred to as the new Law). The new Law also replaces three existing pieces of Indian legislation, the Arbitration Act 1940, the Arbitration (Protocol and Convention) Act and the Foreign Awards (Recognition and Enforcement) Act 1960. The Arbitration Act provided the framework within which domestic arbitration was dealt with and the other two Acts dealt with foreign awards.

The new Law incorporates India's pre-existing adoption of the New York Convention. However, it does effect an improvement in the procedure for enforcement. Under the earlier 1961 legislation it was necessary to obtain a decree from an Indian Court to enforce a foreign award. Under the new Law there is no need to obtain a decree from an Indian Court. Foreign arbitral awards automatically are treated as court decrees and are made effective by separate notification.

The new Law embodies the Model Law provisions and applies them in the main to both domestic and foreign arbitration proceedings. Those provisions support the freedom of the parties to agree on the terms for arbitration. Only if the parties fail to agree on many matters does the new Law make alternative provision. The arbitral tribunal may also use procedures such as conciliation and mediation to endeavour to assist the parties to reach settlement of the dispute.

The new Law adopts key principles which are regarded as important to the efficacy of international commercial arbitration and demonstrate that

India wishes to support its rapid economic development with appropriate laws and procedures. The most notable feature of the new Law is the reduction of judicial intervention in the process and product of arbitration. In the face of an arbitration agreement the judicial authority is required to direct the parties to arbitration. The grounds upon which an award may be challenged have been reduced. The powers of the arbitrator have been increased.

Conciliation

A part of the new Law is concerned with conciliation. A major thrust of the new Law is to provide an alternative to the resolution of commercial disputes by court procedure. In India there is an enormous backlog in the lists of cases awaiting trial in the courts. The new Law is aimed at providing a useful and ready alternative to disposition of such disputes in the courts. These provisions are the first of their kind to appear in Indian legislation. They are of interest here in Australia because apart from court sponsored mediation there is no corresponding legislation in Australia in respect of commercial disputes.

Conciliation may be resorted to in relation to disputes arising out of a legal relationship, whether contractual or not. A conciliation is initiated when one party sends to the other party an invitation to conciliation and commences when the other party accepts in writing such invitation. The process rests in agreement so that if the invitation to conciliate is not accepted then there can be no conciliation. The new Law contains provisions as to appointment of conciliators, usually there will only be one conciliator unless otherwise agreed by the parties. The parties may enlist the assistance of an appropriate institution or person regarding the appointment of a conciliator.

The procedure of conciliation is spelt out in the new Law. Upon appointment the conciliator may request the parties to submit a written statement about the dispute and the points in issue. The parties may be asked to submit further statements and evidence. The conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement. He is to be guided by principles of objectivity, fairness and justice and give consideration to the rights and obligations of the parties, trade usages and the circumstances surrounding the dispute. The conciliator may propose a settlement at any stage. He may invite the parties to discuss matters jointly or separately. The parties are required to cooperate with the conciliator in responding to requests for information and attendance at meetings. If the conciliator finds that the elements of a settlement are present and are acceptable to the parties he may formulate the terms of a settlement and submit same to the parties for their consideration. Ultimately if a settlement is reached a written settlement agreement is drawn up and signed, this is done by the parties with or without the assistance of the conciliator.

The new Law contains provisions about disclosure and confidentiality in conciliation proceedings. Factual information disclosed to the conciliator by one party should be disclosed to the other party unless it is provided on condition of confidentiality. There is also a general requirement that the conciliator and a party shall keep confidential all matters relating to the conciliation proceedings. This obligation extends to the settlement agreement except where disclosure is necessary for its implementation and enforcement.

The new Law contains interesting provisions about the effect of settlement agreements. A settlement agreement is binding upon the parties. It is to be authenticated by the conciliator. The settlement agreement has the same status and effect as if it were an arbitral award rendered by an arbitral tribunal on agreed terms. A settlement agreement can therefore be enforced as if it was a decree of a court.

These comprehensive developments in India are of great interest to the international commercial community and their operation in practice will be of continuing interest.

INDONESIA

At the recent joint Ministerial forum between Australia and Indonesia the Australian Deputy Prime Minister and Minister for Trade, the Hon. Tim Fischer launched a handbook on Australia-Indonesia Contract Management, Dispute Avoidance and Resolution. The handbook was the product of a joint research project initiated by the International Legal Services Advisory Council in Australia and corresponding bodies in Indonesia including the Attorney-General's Department. It contains sections dealing with various means of non-curial dispute resolution in the two countries including arbitration, conciliation and mediation. The position of both countries in respect of adherence to various international treaties dealing with dispute resolution is reviewed. There is a section dealing with drafting dispute resolution clauses and an appendix of model clauses. There is also a section providing detail of dispute resolution institutions in both countries. Further information about the Handbook can be obtained from Mr. John Tucker, Director, ILSAC, Attorney General's Department, Robert Garran Offices, Barton, A.C.T. 2600, fax 6 250 5952. The price of the Handbook is $ 29.95.

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