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Settlement of commercial disputes

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I. Introduction

1. At its forty-seventh session, in 2014, the Commission agreed that the Working Group should consider at its sixty-second session the issue of enforcement of settlement agreements resulting from international commercial conciliation and should report to the Commission at its forty-eighth session, in 2015, on the feasibility and possible form of work in that area. The Commission invited delegations to provide information to the Secretariat in respect of that subject matter.[1] For the preparation of possible future work on the matter, and to facilitate the collection of information by delegations, the Secretariat circulated to States a questionnaire, reproduced in section II of document A/CN.9/846. The replies received by the Secretariat before the commencement of the forty-eighth session of the Commission have been reproduced in document A/CN.9/846 and its addenda. A reply received after that date is reproduced below.

II. Compilation of comments

1. India

[Original: English]
[Date: 14 July 2015]

Question 1: Information regarding the legislative framework

As per Indian domestic law, the terms "mediation" and "conciliation" are not used as synonym to each other. Both terms are having their own meaning. The Supreme Court of India in *Salem Advocate Bar Assn. (II) v. Union of India, (2005) 6 SCC 344*, while considering the Report submitted by a Committee under the chairmanship of the then Chairman Law Commission appointed by the Supreme Court so as to ensure that amendments made in the Code of Civil Procedure, 1908 in 1999 and 2002 related to Alternative Disputes Resolution method become effective and quicker dispensation of justice, observed as under:

> "61. It seems clear from the Report that while drafting the model rules, after examining the Mediation Rules in various countries, a fine distinction is tried to be maintained between conciliation and mediation, accepting the views expressed by the British author Mr. Brown in his work on India that in 'conciliation' there is a little more latitude and a conciliator can suggest some terms of settlements too."

The said Committee defined the term mediation and conciliation in the following words:

Settlement by "conciliation" means the process by which a conciliator who is appointed by parties or by the Court, as the case may be, conciliates the disputes between the parties to the suit by the application of the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) insofar as they relate to conciliation, and in particular, in exercise of his powers under Sections 67 and 73 of that Act, by making

[1] *Official Records of the General Assembly, Sixty-ninth session, Supplement No. 17* (A/69/17), para. 129.

proposals for a settlement of the dispute and by formulating or reformulating the terms of a possible settlement; and has a greater role than a mediator.

Settlement by “mediation” means the process by which a mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2003 in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties’ own responsibility for making decisions which affect them.

There is no specific law dealing with “mediation” except it has been referred to in Section 89 of the Code of Civil Procedure, 1908. On the other hand, “conciliation” is a non-adjudicatory alternative dispute resolution process, which is governed by the provisions of the Arbitration and Conciliation Act, 1996. There can be a valid reference to conciliation only if both parties to the dispute agree to have negotiations with the help of a third party or third parties either by an agreement or by the process of invitation and acceptance provided in Section 62 of the Arbitration and Conciliation Act, 1996 followed by appointment of conciliator(s) as provided in Section 64 of the said Act. Section 73 of the Act provides for settlement agreement. If the parties to a dispute reach a settlement, they may draw up and sign a written agreement. The signed agreement is final and binding on the parties and persons claiming under them respectively. As provided in Section 74, the settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under Section 30 of the Arbitration and Conciliation Act, 1996.

Further, when a dispute is already referred to the Arbitral Tribunal, it may with the agreement of the parties use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement. If, during arbitral proceedings, the parties settle the dispute, the Arbitral Tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the Arbitral Tribunal, record the settlement in the form of an arbitral award on agreed terms. An arbitral award on agreed terms shall be made in accordance with Section 31 of the Arbitration and Conciliation Act, 1996 and shall state that it is an arbitral award. Such an arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.

Further, when a dispute is already filed in the Civil court, and if it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the said court is required to formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for alternative disputes resolutions mechanism such as arbitration, conciliation or mediation. Where a dispute had been referred to arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply for mediation, the court can effect a compromise between the parties and shall follow such procedure as may be prescribed.

The enforcement of "international commercial settlement agreement" arising out of mediation/conciliation depends upon the seat/place of such settlement agreement.

(i) If the place of settlement is outside India — Part II of the Arbitration and Conciliation Act, 1996 deals with enforcement of foreign awards. The definition of the term "foreign award" is provided in Section 44, in respect of New York Convention awards and in Section 53 in respect of Geneva Convention awards. If any international commercial settlement agreement arising out of conciliation proceeding falls within the definition of "foreign award" as provided in Sections 44 or 53, such an agreement is enforceable in India as provided in Sections 49 and 58 of the Arbitration and Conciliation Act, 1996;

(ii) If the place of settlement is India — If such settlement agreement has been arrived and signed in India, the same is binding on the parties in terms of Section 74 of the Arbitration and Conciliation Act, 1996.

As per Section 74 of the Arbitration and Conciliation Act, 1996, the status of the written settlement agreement signed by the parties arising out of the conciliation proceedings shall have same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under Section 30.

There are no procedures for expedited enforcement of international commercial settlement agreements.

If a settlement agreement comes into existence under Section 73 of the Arbitration and Conciliation Act, 1996 satisfying the requirements stated therein, it gets the status and effect of an arbitral award on agreed terms on the substance of the dispute rendered by an Arbitral Tribunal under Section 30 of the Act and it is enforceable in terms of Section 36.

(2) A settlement agreement should result from conciliation proceedings as envisaged in Part III of the Arbitration and Conciliation Act, 1996. It should be in writing and signed by the parties and should be authenticate by the conciliator.

(3) If an award on agreed terms falls within the definition of foreign awards contemplated in Section 44 of the Arbitration and Conciliation Act, 1996, courts consider such awards enforceable under the New York Convention.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

If the settlement agreement comes into existence under Section 73 of the Arbitration and Conciliation Act, 1996 satisfying the requirements stated therein, it gets the status and effect of an arbitral award on agreed terms on the substance of the dispute rendered by an Arbitral Tribunal under Section 30 of the Act and it is enforceable in terms of Section 36 of the Act.

Question 3: Validity of international commercial settlement agreements

There are no specific criteria that international commercial settlement agreements need to meet to be deemed valid.