FOREIGN LAW

Asia-Pacific Law

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Japan*

A. TRADE MATTERS

Despite at least twenty trade deals cinched with Tokyo over the past several years, the United States has continued to press Japan for greater access to its markets. In January 1996, the U.S. Trade Representative announced that a permanent unit was being established in his department to monitor and enforce trade agreements. Presumably trade agreements with Japan played a role in this decision, although the strong yen and other structural changes in the Japanese economy have (together with the trade agreements) contributed to a steadily decreasing trade surplus on the part of Japan vis-à-vis the United States. (The trade surplus with the United States declined in July 1996 for the seventeenth straight month.) Progress was considered to be especially slow last year in at least two areas where trade deals have been made, telecommunications and insurance. This led the U.S. Commerce Department to announce that it would conduct an investigation regarding telecommunications. The 1990 semiconductor agreement, scheduled to expire at the end of June 1996, was also the topic of some high-level discussions during the summer.

B. U.S.-JAPAN AIR TREATY

In late February 1996 talks on the 44-year-old air treaty between the two countries began. With the Asia-Pacific region being the world's fastest growing air market, and with Japan playing an important role in that market, the U.S.-Japan negotiations will likely determine the shape of the market for the next several decades. Japan views the existing treaty as unfair, with U.S. airlines offering twenty-three routes linking Japan to the rest of Asia, whereas Japanese airlines have only one such route in the West (Los Angeles to Sao Paulo).

An agreement concluding the air cargo portion of the talks, providing for expanded freight

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services in both countries, was signed April 16, 1996 (air cargo constituting approximately twenty percent of the U.S.-Japan aviation market). In June, talks on passenger services ended in failure. In July, the U.S. Government proposed sanctions against Japan Airlines (JAL) cargo services in reaction to Tokyo's refusal to allow Federal Express to operate five new routes beyond Japan. Tokyo threatened to retaliate if sanctions were imposed on JAL.

C. Mortgage Company Bailout

In early 1996, the Japanese Prime Minister proposed a bailout of seven mortgage finance companies (known as *jusen*). The *jusen* had been set up by Japanese banks originally to lend to home buyers, but also ended up lending to land speculators during the height of the bubble economy which burst in approximately 1990. The seven *jusen* hold an estimated ¥7.6 trillion ($66 billion at ¥115 to the dollar) in bad loans, which constitutes more than half of their assets. The proposed bailout would provide for a gigantic liquidation scheme involving at least ¥685 billion ($6 billion) of public money, and has been the focus of robust protest in Japan. The bailout, together with the huge write-off of bad loans by Japanese banks in June (amounting to over ¥6 trillion (or over $52 billion) may make it easier for Japanese banks and other companies to address their troubled real estate investments in the United States.

D. Nippon Telegraph & Telephone (NTT)

Five years ago, the Ministry of Posts and Telecommunications issued a report concluding that a breakup of NTT was needed to free up competition. The report was scrapped, and a final decision deferred for five years. A new report was endorsed by the Ministry this spring, which again proposed to divide NTT into three parts: one company providing domestic phone services in western Japan, another serving eastern Japan, and a third company to provide services internationally. NTT is resisting the breakup plan. As mentioned above, telecommunications in Japan remains a market in which access by foreign companies lags, in large part because of the near monopoly of NTT. This near monopoly is also blamed for lack of innovation and change in the telecommunications field (for instance, it has been blamed for the low penetration of cable TV, which only five percent of the households in Japan have as compared to about seventy percent in the United States). ***Business Week*** magazine recently ranked NTT as the third largest corporation in the world by market capitalization, at $115.7 billion.

E. Senkaku-Diaoyu Islands

The year has seen an increasingly volatile succession of incidents and rhetoric regarding the Senkaku-Diaoyu Islands, involving China, Taiwan, and Japan. The small group of islands, located between Okinawa and Taiwan, has been under Japanese control since it took Okinawa in 1879. Only during the post-war administration of Okinawa by the United States, which ended in 1972, was control of the islands outside Japan. The islands are uninhabited, but are located near potentially rich oil fields. Although a treaty signed with China after a naval encounter in 1895 ceded the islands to Japan, neither China nor Taiwan recognizes this treaty.

F. Revised Civil Procedure Code

In June a revised Civil Procedure Code was proposed, which is to take effect in two years. The revised Code is viewed as making substantial changes. Among other things, it will make it easier to obtain discovery in Japan (although still not to the extent discovery is allowed in U.S. litigation), and will make review of civil cases by the Supreme Court discretionary.

G. Expansion of Bar

The number of licensed lawyers in Japan is very small on a per capita basis, as compared to the United States (in the rough neighborhood of only 15,000 or so lawyers compared to some 700,000 in the United States, but with a population half the size of the United States). All lawyers in Japan must go through a two-year training institute after receiving an undergraduate law degree and passing a bar exam. The number of trainees admitted to the training institute each year has been gradually expanded over the last few years from around 500 to 700. This year, over fierce opposition from the Bar, the number of trainees each year has been raised to 1,500.

Korea*

During 1995 the Korean financial markets were substantially liberalized. By the end of 1995, fourteen foreign securities companies established Korean branches, and two joint ventures had also been established. In addition, the Ministry of Finance and Economy opened the investment trust business and investment advisory services to foreigners.

Unfortunately, the bright future that existed at the beginning of 1996 paled by year-end. The Korean Stock market, which had seen the Korean Stock Price Index (KOPSI) rise to over 1,100 in early 1995, saw the KOPSI fall to less than 700 during the last quarter of 1996. On October 11, 1996, Korea was invited to join the Organization of Economically Developed Countries and, after an extensive discussion in the National Assembly, Korea voted to join this impressive organization. However, unlike Japan, which has a positive trade surplus, the Koreans developed a large trade deficit during the latter half of 1996. Overall, the economy slowed in the second half of 1996 and is not expected to pick up until late in 1997.

The effect of the economic developments has slowed Korean overseas expansion, although the drumbeat of positive publicity has not stopped. Companies continue to tout their plans to expand, but in reality many new projects are on hold until financing can be assured and many other projects have been quietly dropped for lack of financial capability.

A. Legal Developments

The major legal development in Korea during the year has been the trial and convictions of two former presidents of the country on charges of corruption and murder as well as the trials and convictions of a series of highly placed Korean businessmen and economic officials on charges of bribery and corruption. Former President Roh was found to have collected over $500 million, no small sum in a country of slightly over 40 million people.

Korea, like Japan, is a society where economic transparency gives way all too often to conflicts of interest and opaque explanations. At least the trials in Korea have caused many senior businessmen in the ranks of Chaebols and government-owned businesses to avoid the appearance of favoritism. Many such officials are asking for the first time how certain practices and situations would look to a government prosecutor. That attitude is a welcome change of pace in Korea, although it is hardly widely held yet.

Ultimately, if this development continues, it could substantially assist the long-term development and opening of the Korean financial markets. Those markets are open, but the financial

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information available from many companies does not comply with what U.S. officials would view as close to full disclosure.

B. The Korean Peninsula Energy Development Organization (KEDO)

Another important development during the year was the expansion of the Korean Peninsula Energy Development Organization (KEDO). KEDO, supported by an odd series of foreign countries lead by the United States and Japan, is charged with constructing new power plants in North Korea in return for North Korea's promise to close down its existing plutonium power generators. While it appears that North Korea may already have produced at least one or more nuclear devices, KEDO is pushing forward with plans to develop its projects in North Korea. Progress has been slow. Many months were spent simply on protocol agreements to ensure that those working in the North would have diplomatic-like immunity from the unpredictable and often aggressive North Koreans.

KEDO is headquartered in New York City for political reasons, where it represents an expanding organization with more than 100 employees. If KEDO is successful, it will be a model for efforts to bring down the walls between North Korea and the rest of the world, perhaps even South Korea.

C. Korean Presidential Election

This year, 1997, is a presidential election year in Korea and that development will put great pressure on the country politically, as well as economically and legally. The corruption from the past which has now been exposed will presumably lead to a series of other money-raising devices necessary to run for political office. Those activities promise to be a stress test for the fabric of Korean society.

Southeast Asia*

Several major developments in the Southeast Asia region have made 1996 an eventful year for the East Asian international legal and business communities. This brief report will summarize some of the regional highlights.

A. Indonesia

Indonesia initiated a new trade deregulation package aimed at reducing administrative burdens and creating greater opportunities for certain foreign trading companies. Specific measures included: an overhaul of the regulations relating to quota requirements in the textile industry; import tariff reductions on capital goods and raw materials; the removal of tariffs on certain goods, such as, cotton and crude palm oil; and an agreement that allows foreign trading companies to engage in the promotion of export-related services.

Indonesia also enacted new customs laws that confer authority on the government to impose sanctions and penalties on imported goods to protect local industries from "unfair competition." In addition, the new laws converted the old regulatory system for the assessment of tariffs and taxes into a new self-assessment model. Traders must now submit their own valuation reports to the customs office describing not only the goods but also the applicable tariffs. In effect,

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traders are responsible for their own assessment and payment of any tariffs. The customs office polices this new self-compliance method through random inspections and information audits.[1]

B. Malaysia

Malaysia unveiled its Seventh Five-Year Plan in May of 1996. The plan consisted of a combined private and public investment package totaling US$88 billion, of which a substantial amount was expected from foreign investors. Targeted industries under the plan included: telecommunications, energy, and airport development. The plan was designed to bolster Malaysian companies to a globally competitive level by alleviating many substantial constraints, which include production inefficiencies and shortages in skilled labor. A major component of the plan was greater investment in education and training.[2]

C. Philippines

In late March, the Philippines liberalized inbound investment opportunities by amending its Foreign Investment Act. Some of the specific changes included: repeal of "Negative List C," a restrictive list of prohibited investment areas for foreigners, such as insurance and trading; the removal of a three-year waiting requirement for a domestic market enterprise seeking to change its status to an export enterprise; and reduction of the equity requirement for foreign investors from US$500,000 to US$200,000.[3] Although the Philippines retained many of its foreign investment restrictions, the recent liberalization efforts indicate a significant step towards creating greater access to the Philippines market. The amendment to the Foreign Investment Act adds to a series of past policy reforms in the Philippines that have contributed to higher economic growth rates and increased levels of foreign investments.

D. Taiwan

Taiwan continued to move toward bringing its trade and intellectual property laws in line with international standards in an ongoing effort to apply for membership to the World Trade Organization. Taiwan also enacted significant changes in investment policies relating to telecommunications and real estate.

Prior to July 24, 1996, Taiwan had completely banned foreign investment in domestic real estate development. Under recent liberalization measures, Taiwan lifted this ban, removing any equity restrictions on such foreign investments. Despite these measures, real estate investment projects by foreigners now require prior approval from the Foreign Investment Commission.

Direct foreign investment in Taiwan's state-run telecommunications industry was also restricted until the early part of the year. Recent reforms, however, created greater investment opportunities by allowing competition and by liberalizing foreign equity participation in the industry. Foreign investors may now own more than fifty percent of certain companies through the use of joint venture enterprises. In addition to telecommunications services, foreigners may also provide related services that utilize common carrier networks.[4]

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1. Ann Phelan, *Indonesia Announces Trade Deregulation Package and New Customs Law*, East Asian Executive Reports, January 1996, at 6.
2. *Malaysia's New Five-Year Plan*, East Asian Executive Reports, June 1996, at 6.
3. Anne Phelan, *Philippines: New Amendment to Foreign Investment Law Passed*, East Asian Executive Reports, March 1996, at 6.
4. Alice Hung, *Taiwan Widens Foreign Access to Telecom Sector*, The Reuter Asia-Pacific Business Report, July 1996.

On the intellectual property rights front, Taiwan signed a Memorandum of Understanding (MOU) with the United States on patent and trademark protection. The MOU provided reciprocity for U.S. patent and trademark applications in Taiwan in certain areas, such as priority of claims. Additionally, the MOU enabled U.S. patent-holders to seek extensions for patents relating to pharmaceutical and/or agri-chemical products.[5]

Finally, Taiwan recently enacted the Trade Secrets Act (TSA), which governs trade secrets, know-how, and other proprietary information in the context of commercial transactions. Specifically, the TSA sets forth the parameters of protection and defines the types of information eligible for protection. The TSA also provide remedies and guidance on the calculation of damages.[6] To enforce many of these changes, Taiwan created new courts specifically designed to adjudicate intellectual property rights issues and cases. The designation of these special courts is part of a regional trend in East Asia to bolster enforcement efforts in the area of intellectual property rights protection. The adequacy of such protection will likely continue to raise issues in Taiwan and other nations in the region as well; however, the latest reforms reflect a substantial step in a promising direction.

E. Vietnam

Vietnam's first Civil Code, adopted by the eighth session of the National Assembly (legislature IX) on October 28, 1995, took effect on July 1, 1996. The Civil Code clarified an array of issues relating to foreign investors in areas such as intellectual property rights, mortgage rights, and choice of law rules in the context of international contracts. Existing laws inconsistent with the new Civil Code have been and continue to be repealed or amended. However, under certain circumstances, old laws may continue to apply if the transaction in question occurred prior to July 1, 1996, and/or the transaction itself is not contrary to any existing prohibitions or "social morality."[7]

The Civil Code is expected to serve as the foundation for the development of Vietnam's modern legal system. The continued development of this system should not only facilitate foreign investment efforts in Vietnam, but also substantially increase the level of foreign investment activity on the whole. Although the Civil Code took over ten years to produce, its recent adoption will provide a boon to Vietnam's already bright prospects.

India*

A. New Arbitration and Conciliation Law

1. *Introduction*

Recently India promulgated the *Arbitration and Conciliation Ordinance, 1996* (New Law).[8] The New Law is based on the United Nations Commission on International Trade Law

5. C.V. Chen and Daisy Wang, *Taiwan-U.S. MOU on Protection of Patents and Trademarks*, East Asian Executive Reports, July 1996, at 8.

6. Anne Phelan, *Taiwan Issues Trade Secrets Act*, East Asian Executive Reports, February 1996, at 7.

7. Fred Burke, Frank Meier, and Hoang Kim Ngyuen, *Vietnam's First Civil Code*, East Asian Executive Reports, May 1996, at 9.

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8. The Arbitration and Conciliation Ordinance [hereinafter New Law] was promulgated on January 16, 1996, and came into force on January 25, 1996. The ordinance was repromulgated and is expected to be adopted by the Parliament of India when it will become the Arbitration and Conciliation Act. An ordinance is issued by the president of India when the Parliament is not in session and the government considers it necessary to enact a law.

(UNCITRAL) Model Law on International Commercial Arbitration (Model Law).[9] Among other countries, Australia, Bahrain, Bermuda, Bulgaria, Canada,[10] Cyprus, Egypt, Finland, Hong Kong, Mexico, Nigeria, Peru, Russian Federation, Scotland, Tunisia, and Ukraine have adopted the Model Law. Moreover, some states of the United States, like California,[11] Connecticut,[12] Florida,[13] Georgia, Maryland,[14] Oregon, and Texas,[15] have also adopted the Model Law.

Among others, the objectives of the New Law are to harmonize the Indian arbitration law with the Model Law and establish an internationally recognized legal framework for arbitration, consolidate the laws on domestic and international arbitration and conciliation, and on enforcement of foreign awards. Another important purpose of the New Law is to encourage arbitration as an alternate dispute resolution process and avoid prolonged judicial process.

2. *Main Provisions*

a. Applicability

The New Law is divided into four parts. Part I applies to arbitration: domestic and international, if the place of arbitration is in India.[16] Part II covers the enforcement of foreign awards under the New York Convention and the Geneva Convention. Part III covers conciliation and is based on the UNCITRAL Conciliation Rules. Part IV covers the supplementary provisions, like repealing the prior arbitration laws and rule-making powers.

The New Law repeals the *Arbitration Act of 1940* (hereinafter called the 1940 Act), the *Arbitration (Protocol & Convention) Act of 1937*, and the *Foreign Awards (Recognition and Enforcement) Act of 1961*.[17] However, any rule or notification issued under the repealed Acts will continue to be in force, unless it is repugnant to the New Law.[18]

The New Law is not applicable retroactively. All pending arbitration proceedings will be governed by the prior laws, unless the parties agree to apply the New Law. In practice, unless all parties agree, the New Law cannot be applied to a pending arbitration.

b. International Commercial Arbitration

The New Law is applicable to both domestic and international arbitration, if the place of arbitration is in India. The New Law defines an international commercial arbitration as one in which at least one of the parties is a foreign national or resident individual, a foreign corporate

9. United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law on International Commercial Arbitration [hereinafter Model Law] in its eighth session in Vienna, on June 21, 1985. UN DOC A/40/17, at 81-93 (1985).

10. By the federal Parliament and by the legislatures of all provinces and territories.

11. California International Arbitration and Conciliation Code (CIACC), Title 9.3 was added to the Cal. Civ. Proc. Code § 1297.11, by Stats. 1988, c. 23, § 1, eff. March 7, 1988.

12. 1989 Conn. Acts 89-179 (Reg. Sess.).

13. 39 Fla. Stat. Ann. § 684.01 (West 1986).

14. Maryland International Commercial Arbitration Act, Md. Code Ann. Cts. & Jud. Proc., § 3-2B-01 (1990), which adopted some parts of the Model Law.

15. The Act amends title 10 by adding part 3 to Tex. Rev. Civ. Stat. Ann., arts. 249-1 to -43 (West 1996).

16. New Law, Sec. 2(2). This provision seeks to alter the Supreme Court of India ruling in the case of National Thermal Power Corporation v. The Singer Corporation, (1992) 3 S.C. c.198. In this case, the court held that the Indian Arbitration Act of 1940 was applicable to an arbitration outside India if the contract was governed by Indian law. The Singer judgment has been criticized by international arbitration institutes for extending the Indian arbitration laws beyond the territories of India.

17. The *Foreign Awards (Recognition and Enforcement) Act of 1961* is the implementing legislation for the New York Convention of 1958.

18. New Law, *supra* note 8, § 85(1)(b).

body, a foreign controlled business entity, or a foreign government.[19] This definition is different from the Model Law definition, where an arbitration is considered international if one of the parties has their places of business in different countries; the subject matter or performance of the contract is overseas; the place of arbitration is in a country other than that in which the parties have their places of business; or where the parties have agreed in that the subject matter of their agreement relates to commercial interests in more than one country.

(i) *Arbitration Agreement.* The New Law, like the 1940 Act, does not prescribe any specific form of arbitration agreement. However, the agreement should be in writing. It may be a document signed by the parties, a letter, telex, telegram, or fax exchanged between the parties, or nondenial of arbitration in a statement of claim or defense.[20] The naming of the arbitrator or the word "arbitration" is not necessary in the arbitration agreement.

(ii) *Appointment of Arbitrators.* The new law further allows the parties to determine their own procedures for selecting their arbitrator(s).[21] Where the parties fail to agree or the agreement is not comprehensive on a particular matter, the New Law governs. A party can approach the Chief Justice of appropriate jurisdiction or any person or institution designated by him for the appointment of the arbitrator(s).[22] The arbitrator may be of any nationality, unless otherwise agreed to by the parties. The New Law requires that the number of arbitrators should not be even.[23] If the parties fail to determine the number of arbitrators, the arbitral tribunal will consist of a sole arbitrator.[24] This mandatory provision of having an odd number of arbitrators is intended to avoid a deadlock in reaching a decision by the tribunal. However, it may create a deadlock in the appointment of arbitrators if the arbitration agreement provides for an even number of arbitrators. Nonetheless, such deadlock can be resolved by approaching the Chief Justice, as mentioned above.

(iii) *Arbitration Procedure.* The New Law guarantees the freedom and autonomy of the parties to select the arbitration procedures that best suit their circumstances;[25] provides comprehensive and internationally accepted procedures to guide the arbitration where the arbitration agreement is silent; guarantees the fairness of the arbitral process to the parties; provides judicial assistance, where required; and expressly limits judicial intervention, except where internationally accepted, such as for interim relief.[26] If the parties fail to agree on a procedure, the arbitral tribunal can set its own procedures, including admissibility of evidence, relevance, materiality, and weight of any evidence. The arbitral tribunal is not bound by the 1980 Code of Civil Procedure, or the Indian Evidence Act of 1872. The Model Law's overriding of local procedural laws introduces uniformity internationally, thereby making arbitration in India more predictable for foreign parties and legal professionals.

(iv) *Equality and Hearings.* The New Law provides that the parties are to be treated equally and each given a full opportunity to present their case.[27] The parties may submit any relevant documents with their statements and may amend or supplement their statements during

19. *Id.* § 2(2)(f).
20. *Id.* § 7(3) & (4).
21. *Id.* § 11(2).
22. *Id.* § 11(5).
23. *Id.* § 10(1).
24. *Id.* § 10(2).
25. *Id.* § 19.
26. *Id.* §§ 9 & 17(1).
27. *Id.* § 18.

the course of the proceedings.[28] The New Law requires that the parties be given sufficient advance notice of any hearing or other meeting of the arbitral tribunal for inspection of evidence.[29] Like the Model Law, the term "sufficient" is not defined in the New Law. All information supplied to the arbitral tribunal by one party must be communicated to the other party, along with any expert report or other evidentiary document on which the tribunal may rely.[30] Upon request, the parties may present expert witnesses to testify on the points at issue.[31] Since the arbitral tribunal may conduct the proceedings in any manner it considers appropriate, the arbitral tribunal also decides whether to hold oral hearings or whether to conduct the proceedings on the basis of documentary evidence alone.[32]

(v) *Challenging the Arbitrator.* Under the New Law only independent and impartial persons can be arbitrators. The arbitrators are required to disclose any circumstances that raise doubts about their impartiality.[33] The New Law provides freedom to parties to select the procedure for challenging an arbitrator.[34] If the parties fail to select the procedure, the New Law provides that an arbitrator can be challenged only for bias or lack of required qualifications.

The challenge should be presented to the arbitral tribunal who will decide on the challenge.[35] If the challenge is unsuccessful, the arbitral tribunal can continue its proceedings. The affected party challenging the arbitrator cannot approach a court until the award is rendered. Once the award is rendered, it can be challenged in the court on the ground of bias.[36] This provision is different from the Model Law, where if the arbitral tribunal rejects the challenge, the challenging party can request the court to decide on the challenge within thirty days.[37] Under the New Law, there are more restrictions on court interference with the arbitration than under the Model Law. These provisions will reduce the delays in arbitration proceedings caused by court interference, which is often a prolonged process.

A party may request the court to decide on the termination of an arbitrator's mandate if the arbitrator becomes unable to perform the specified functions or fails to act without undue delay. A court decision would be needed only if the arbitrator does not voluntarily withdraw from office or if the parties do not agree on the termination.[38]

(vi) *Staying the Judicial Proceedings.* The New Law also provides that any party to an international or domestic arbitration agreement may apply to the court for an order to stay any judicial proceedings that seek relief with respect to matters covered by the agreement to arbitrate and may move to compel arbitration.[39] The party seeking arbitration must move the court on or before the submission of his first statement on the substance of the dispute. This is a substantial improvement over the 1940 Act, where the right to compel arbitration and stay judicial proceedings was interpreted as terminated if a party took any step in the judicial

28. *Id.* § 23.
29. *Id.* § 24(2).
30. *Id.* § 24(3).
31. *Id.* § 26(2).
32. *Id.* § 24(1).
33. *Id.* § 12(1) & (2).
34. *Id.* § 13(1).
35. *Id.* § 13(3).
36. *Id.* § 13(5).
37. Model Law, *supra* note 9, § 13(3).
38. New Law, *supra* note 8, § 15.
39. *Id.* § 8(1).

proceedings.[40] This provision caused undue hardship on defendants who often lost the opportunity to claim arbitration even before filing the first statement on the substance of the dispute.

(vii) *Limits Court Interference.* A momentous provision of the New Law is that it prohibits court intervention unless expressly provided in Part I of the New Law.[41] This means that the courts cannot stay the arbitration proceedings from the time they commence until making of the arbitral award, except in specified matters.

Under the 1940 Act, the courts had inherent power to stay arbitration proceedings. Under the New Law, the arbitration can also commence or continue during the pendency of the dispute before a judicial authority. This express restriction on the power of courts will discourage frivolous claims before courts that are filled to delay arbitration proceedings.

(viii) *Court Assistance to the Arbitral Tribunal.* The New Law provides for court assistance to the arbitral tribunal. The arbitral tribunal can request a court for orders to compel a witness to appear before it and provide evidence before the tribunal.[42] The request can be made by the arbitral tribunal itself or by a party, on behalf of the arbitral tribunal. Any violation of such court order would result in penalties and punishments similar to a violation of any other court order. This provision will provide teeth and authority of law to arbitration proceedings.

(ix) *Interim Measures.* • Judicial—A request to a court of competent jurisdiction for an interim measure of protection is not deemed incompatible with the arbitration agreement.[43] A party may before, during, and after the arbitration proceedings apply to a court for preserving the subject matter of the dispute or evidence, the appointment of guardian, receiver, or custodian, or any other just and convenient interim measure.

• Arbitral—The New Law provides that an arbitral tribunal itself may order interim measures of protection, unless agreed to the contrary by the parties.[44] The arbitral tribunal can also require a party to provide security in connection with the interim measure of protection. Any order granting or refusing an interim measure is appealable in a court.[45]

(x) *Jurisdiction of the Arbitral Tribunal.* The New Law also provides that an arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.[46] A plea that the arbitral tribunal does not have jurisdiction must not be raised later than the submission of the statement of defense; a plea that the arbitrators are exceeding the scope of their authority must be raised as soon as the matter alleged to be beyond the scope of their authority is raised during the arbitration proceedings.[47] If the arbitral tribunal rules as a preliminary matter that it has jurisdiction, it can continue with arbitration and render the award. The aggrieved party can challenge the award on the ground of lack of jurisdiction.

(xi) *Choice of Law.* • Domestic Arbitration—An arbitration in India under the New Law which is not an international commercial arbitration will apply the substantive law of

40. The 1940 Act, § 34 provided that a party can apply for a stay of judicial proceedings at any time before filing a written statement or "taking any other steps" in the proceedings. This provision of "taking any other steps" was interpreted by courts to mean any appearance before the court without conveying any intention to arbitrate will terminate the right to compel arbitration and stay judicial proceedings. Rachappa Gurudappa v. Gurudiddappa Nurandappa, A.I.R. 1989 S.C. 653.

41. New Law, *supra* note 8, § 5.

42. *Id.* § 27.

43. *Id.* § 9.

44. *Id.* § 17(1).

45. *Id.* § 37(2).

46. *Id.* § 16(1).

47. *Id.* § 16(2) & (3).

India. If no party is a foreign national or resident, foreign corporate body, foreign controlled business entity, or a foreign government, the arbitration will be considered domestic, and therefore subject to the substantive laws of India.

• International Commercial Arbitration—In international commercial arbitration in India the parties are free to designate any rules of law that the arbitral tribunal will apply in its proceedings.[48] This allows the parties to choose the substantive law of any country, but not that countries' conflict of law rules.[49] Where the parties have not designated any law, the arbitral tribunal is free to apply the rules of law that it considers appropriate, given the circumstances surrounding the case.

In both cases, the terms of the contract and usage of trade must be applied by the tribunal.[50] The arbitral tribunal cannot decide *ex aequo et bono*[51] or as *amiable compositeur,*[52] unless expressly authorized by the parties.[53]

(xii) *Award.* The New Law also provides that unless the parties agree to the contrary or the award is based on a settlement, the arbitral tribunal shall give a reasoned award.[54] The award should be in writing and must be signed by at least a majority of arbitrators. The award must also state the date of an award and the place of arbitration. The arbitral tribunal can award the costs, including legal fees and expenses.[55] The New Law also provides procedures for requesting a correction to or an interpretation of an arbitral award, or an additional award as to claims presented but omitted from the award.[56]

(xiii) *Interest.* The New Law authorizes the arbitral tribunal to award interest at reasonable rates from the date on which cause of action arose until the date of entering of the award, if the award is for the payment of money, unless otherwise agreed by the parties.[57] Unless otherwise directed by the arbitral tribunal, the sum owed under the award will carry an interest at the rate of eighteen percent from the date of the award to the date of payment.[58] This mandatory provision seeks to avoid delay in payment after the award.

(xiv) *Enforcement of the Award.* • Domestic Awards—An arbitration award is deemed final and binding upon the parties under the New Law. There is no requirement to file the award in court for confirmation. If no application is made to set it aside within the prescribed time, or the application is refused, the award is enforceable as a decree of a court. The 1940 Act required an award to be filed in a court for confirmation to make it a decree of the court. In many other countries the confirmation of the award is required in order to enforce it. Under the New Law, an award may be challenged on limited grounds, like lack of notice of arbitration, lack of jurisdiction, lack of capacity of a party, agreement not valid under the law selected by the parties, dispute beyond the scope of the arbitration agreement, composition and procedures of the arbitral tribunal not according to the agreement, or violation of the public policy of

48. *Id.* § 28(b).
49. *Id.* § 28(1)(b)(iii).
50. *Id.* § 28(3).
51. *Ex aequo et bono* means according to equity and conscience, or justice and fairness, BLACK'S LAW DICTIONARY 500 (5th ed. 1979).
52. Under *amiable compositeur* rule, the arbitrators are authorized to abate the strictness of the law in favor of natural equity. Some states like Louisiana in the United States allow *amiable compositeur.*
53. New Law, *supra* note 8, § 28(2).
54. *Id.* § 31(3).
55. *Id.* § 31(8).
56. *Id.* § 33.
57. *Id.* § 7(a).
58. *Id.* § 7(b). This interest rate is the prevalent commercial rate in India.

India.[59] An award is against the public policy if it is induced by fraud or corruption. The burden of proof, in most of the cases, is on the challenging party.

• Foreign Awards—Part II of the New Law covers the enforcement of foreign awards. It covers the enforcement under the New York Convention and the Geneva Convention. If the award is rendered in one of the countries which is party to the New York Convention, it is recognized as binding and enforceable. The recognition and enforcement of an arbitral award may be denied only on limited grounds mentioned in the New York Convention.

(xv) *Conciliation.* Part II of the New Law provides for conciliation. It is based on the UNCITRAL Conciliation Rules. The parties can enter into conciliation agreement before a dispute arises. In the alternative, one of the parties can initiate conciliation proceedings when a dispute arises. If the other party does not reject the notice for conciliation within the stipulated time, the conciliation proceedings continue. Conciliation is a nonbinding process unless the parties reach a settlement agreement. A written and signed settlement agreement between the parties is treated as if it were an arbitral award.

3. *Conclusion*

The New Law is intended to avoid excessive judicial intervention and judicial delays. An award rendered in India is enforceable as a decree of court which eliminates the confirmation proceedings before a court. As a result the New Law is expected to facilitate international arbitration in India where the legal system is based on the common law and is considered highly developed and impartial.

B. ADVANCE RULINGS ON INVESTMENT IN INDIA VIA MAURITIUS

Many U.S. corporations and individuals have used a Mauritius holding company for investing in India to avail the tax benefits under the Indo-Mauritius tax treaty. The Mauritius holding company reduces withholding tax on dividends in India and eliminates withholding tax on capital gains in India. Two advance rulings by the Indian Authority for Advance Rulings (AAR) in National Westminister Bank (National) matter (December 1995) and American Insurance Group (AIG) matter (August 14, 1996) have highlighted the need for careful corporate planning while structuring a Mauritius holding company. Under Section 245N of the Indian Income Tax Act, the AAR is authorized to issue a ruling on existing or proposed transactions by the nonresidents. It must be noted that a ruling of AAR is binding only on a particular applicant with respect to the particular transactions involved and is not a judicial precedent. Moreover, in the absence of a favorable ruling, an applicant may still avail the normal assessment procedures and may successfully claim treaty benefits at that stage.

The withholding tax rates in India on dividends and capital gains arising out of India are more favorable under the Indo-Mauritius tax treaty than those under the Indo-U.S. tax treaty and the nontreaty rates. Under the Indo-Mauritius tax treaty, the withholding tax in India on dividends paid from an Indian company to a Mauritian company is five percent when the recipient company owns ten percent or more of the voting stock of the Indian company paying the dividends.[60] Moreover, the Indo-Mauritius tax treaty provides that gains derived by a company resident in Mauritius from the disposition of shares of an Indian company will be exempt from withholding tax in India.[61] Under the Indo-U.S. tax treaty, the withholding tax

59. *Id.* § 34(2).
60. Indo-Mauritius Tax Treaty, Article 10(2).
61. *Id.* at Article 13(4).

in India on dividends paid from an Indian company to a U.S. company is fifteen percent when the recipient company owns ten percent or more of the voting stock of the Indian company paying the dividends. The nontreaty withholding tax rate is twenty percent. There is no provision for withholding tax rates in India on capital gains under the Indo-U.S. tax treaty. The regular withholding tax in India on capital gains for a foreign company is twenty percent.

In the National matter, the parent U.K. company owned two wholly owned subsidiaries resident in Mauritius. These companies, in turn, each acquired a one hundred percent share interest in an Indian company. The AAR concluded that the Mauritius companies are entitled to the benefit of the treaty article exempting them from withholding tax on capital gains realized on share dispositions in India. However, AAR held that National was not entitled to gain the reduced treaty rate of the withholding tax on dividends received from India, on the ground that the Mauritian company that received the dividends was not the "beneficial owner" as required under the Indo-Mauritius tax treaty. AAR reasoned that since the Mauritian company was wholly owned and wholly funded by National Westminister Bank, it was the parent company rather than the Mauritian subsidiaries that was the beneficial owner of any dividend income that the subsidiary might receive. However, the AAR conceded that both the subsidiaries in Mauritius were residents of Mauritius under that country's domestic laws because their place of effective management was in Mauritius and not in India.

The ruling cleared the apprehensions of the foreign investors in India. Under the AIG ruling a company incorporated and resident in Mauritius qualifies for exempting withholding tax on capital gains realized on share dispositions in India and is entitled to the reduced treaty rate of the withholding tax on dividends received from India, provided there are independent reasons apart from tax benefits for using a Mauritius holding company.

It means that in order to qualify for special tax rates the corporate structuring has to be done more carefully. The corporate documents for the Mauritius holding company and the Indian company as well as the share holders' agreement all count for reviewing the nontax reasons for using a Mauritius holding company.