

Multi-Tier Arbitrations: Perspectives From India and Abroad in Pursuance of The Centrotrade Minerals Ruling

Subhankar Das and Vasa Jaishanth¹

National Law University, Odisha

Abstract

The Supreme Court of India on 16th of December 2016, passed a landmark judgment in the recent case of *M/S Centrotrade Minerals and Metal Inc. v Hindustan Copper Ltd.* regarding the admissibility of two-tier arbitrations in India, wherein it was held by the apex court that a system of two-tier arbitrations was admissible in India. The case which had earlier been decided in 2006 was referred to a larger bench of the Honorable apex court, and it was ultimately decided that two instances of arbitration could be held to be permissible in the country. In the abovementioned matter there were two options available to the parties i.e. in case they were not satisfied with arbitration laws of India, they could exercise their right to appeal to the International Chamber of Commerce (ICC). Though, this judgment comes as a welcome change in the arbitration regime in India, giving parties a second opportunity to arbitrate the dispute for the second time, before going to a court of law to adjudicate the matter, yet the major question that arises here is whether this actually is a good step, or whether there are possibilities of the proposition laid down in this judgment complicating arbitration proceedings further? The judgment comes at a time of the enactment of the new Arbitration Amendment Act 2015, which is aimed at encouraging more amount of Foreign Direct Investments, through faster adjudication of transnational commercial disputes. Therefore what remains to be seen is whether this judgment will smoothen the ADR process in India or further complicate the process through multiple arbitral tribunals. The authors through this paper will be analyzing the impact of allowing multi-tier arbitrations in the Indian scenario by analysis of the Centrotrade judgment and perspectives from abroad.

Keywords: Arbitrations, ICC, FDI, Two-tier Arbitration, Dispute.

I. Introduction

Humans being social animals, have continuous interactions with someone or the other at every point of time in their life. Such interactions are an integral part of our survival and with these interactions come differences of opinion and conflicts. These conflicts are resolved by us within ourselves mostly through various types of dispute resolution mechanisms such as litigation, arbitration, mediation, negotiation, conciliation, among other mechanisms. The focus of this paper is broadly on arbitration which is one such dispute resolution mechanism. Arbitration is a private process using which two parties reach an agreement before an arbitrator(s), who then makes an arbitral award or decision which is binding in its nature.²

Arbitration has been in use for quite some time now. Arbitration in India is governed by the Arbitration and Conciliation Act, 1996 which was amended in 2015. Arbitration in India is also encouraged through the Constitution.³ For the purposes of this paper, we will be dealing with the two-tier arbitration system in specific.⁴

The world in which we live in, and the transactions we make every day, run almost entirely on contracts. When there is a contract involved between two contracting parties, there is always a chance of there being a conflict. This conflict is then usually resolved in the manner specified in

the contract itself, mentioned in the form of clauses. A two-tier or multi-tier arbitration hence is a very handy tool. The parties are encouraged to resolve their dispute out of Court, and thereby save a lot of time and money. This is one of the main reasons as to why there is a marked increase in the use of multi-tier arbitration clauses in commercial contracts.⁵ In this paper we will discuss the use of such clauses in India and its applicability in Arbitration in India. The focus of this paper is on the Indian position with regard to the two-tier arbitration system, which has been laid down by a three judge bench of the Supreme Court in the Centrotrade Minerals case⁶ which has been elaborated below and in addition to that, the authors would also be analyzing abroad perspectives and impacts of the multi-tier arbitrations.

II. Analysis of The Judgment

2.1 Facts

In this case Centrotrade Minerals (Party A) had entered into a contract with Hindustan Copper Ltd. (Party B) for the sale of Copper Concentrate to Party B. In this contract, in its Clause No. 14, it said that, *“All disputes or differences whatsoever arising between the parties out of, or relating to, the construction, meaning and operation or effect of the contract or the breach thereof shall be settled by arbitration in India through the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration. If either party is in disagreement with the arbitration result in India, either party will have the right to appeal to a second arbitration in London, UK in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce in effect on the date hereof and the result of this second arbitration will be binding on both the parties. Judgment upon the award may be entered in any court in jurisdiction.”*

Party A invoked this clause when a dispute arose between Party A and Party B. In the first arbitration held by an arbitrator before the Indian Council of Arbitration (ICA), the arbitrator gave a NIL award. Thereafter, Party A invoked the second part of Clause No. 14 of their contract, and made an appeal in London for arbitration before the International Chamber of Commerce (ICC). The arbitrator in London made an arbitral award on 29/09/2001 which was in favour of Party A. Thereafter, Party A sought to enforce this award made in accordance with the Rules of Conciliation and Arbitration of the ICC. An application under Section 48⁷ was made by Party A. This application was eventually given a favourable response by a single Judge Bench of the Calcutta High Court, but it was reversed by a Division Bench of the same High Court. Thereafter appeals to the Supreme Court were made, which were initially looked into by a Division Bench and were ultimately decided by a three Judge Bench in this case, as the Division Bench differed in its opinion.

2.2 Main issues that the Court had framed

1. Is the two-tier arbitration system, as provided for in Clause 14 of the contract between the parties, permissible under the laws of India?
2. Assuming that it is permissible under the laws of India, is such a foreign award liable to be enforced under the provisions of Section 48 of the Arbitration and Conciliation Act at the behest of Party A? In case it is possible, what relief will Party A be entitled to?

2.3 Decision

As per the Bench of the Supreme Court, a simple reading of the arbitration clause in the contract showed that the parties wanted to have a provision which allowed for two opportunities

at solving their dispute(s) by way of arbitration.⁸ The Court analysed every argument put forth by the counsels of both parties.

Firstly, the Court opined that the award made by the arbitrator in the first arbitration is to be considered as an arbitral award and not just a decision which cannot be enforced in a Court of law. The Judges discussed at length about this and concluded that the award made in the first arbitration had in it all the elements that are required for it to be called an arbitral award. It was also said that in case it is not considered an arbitral award, it would create a 'legal vacuum' post such an award, as it would have no enforceability.

Secondly, the Court decided on the question whether the second arbitration which was an appeal to the first arbitration, is contradicting the laws of India. The Court looked into the Report of the Working Group on International Contract Practices on the Work of its Third Session⁹ to which India was one of the State members. The Court also looked into some commentaries and also some previous judgments such as *Dedhia Investments Pvt. Ltd. v. JRD Securities Pvt. Ltd.*¹⁰, *Dhansukh K. Sethia v. Rajendra Capital Services Ltd.*¹¹, *Dowell Leasing & Finance Ltd. v. Radheshyam B. Khandelwal*¹², amongst others. After such reference, the Court stated that two-tier arbitration has been historically a valid principle.

The Court also ruled that the right to appeal is a substantive right and isn't only a matter pertaining to procedure, thereby drawing a line between appellate arbitration and statutory appeals. The Court said that appellate arbitration is a substantive right created by mutual agreement at the time of contract. The Court also discussed the question about whether such an appeal is prohibited by the Arbitration and Conciliation Act, 1996.¹³ The Court concluded that even though an arbitral award is "final and binding" it does not by way of compulsion rule out the idea of the existence of an appeal. The Court also dismissed the submission of the counsel from Party B, stating that there was no such aspect in the whole dispute which would lead to something against the public policy of India.¹⁴ The arbitration clause was mutually decided by Party A and Party B, and is in no way violating the Arbitration and Conciliation Act, 1996. The Court also laid down firmly that party autonomy is "virtually the backbone of arbitration"¹⁵ in India and everywhere else also. In the words of the Judges "it is not the intention of the Arbitration and Conciliation Act, 1996 to throttle the autonomy of parties or to preclude them from adopting any other acceptable method of redressal, such as an appellate arbitration."¹⁶

Thereby, the Court finally laid down in the judgment that the laws of India do not prohibit the contracting parties from opting for an appellate arbitration either in India or outside India. A lot of emphasis was laid on party autonomy all through the judgment. So it was left to the discretion of the parties, to decide whether they wanted an appellate arbitration or not. The Court said that the object of having arbitration as an alternate dispute resolution mechanism would be defeated if such a right was curtailed.¹⁷

III. Position Prior to the Judgment

The law relating to two-tier arbitration, or even multi-tier arbitration clauses was pretty much silent till the *Centrotrade Minerals* case¹⁸, which has been discussed at length in this paper. This concept has been recognised pretty recently in India. The arbitration law prior to the 1996 Act was governed by the Arbitration Act, 1940.¹⁹ But, even in the Arbitration Act, 1940 there was a provision that allowed the parties to go for an appeal before a private authority,²⁰ as seen in the judgment given in *M.A. Sons v. Madras Oil and Seeds Exchange Ltd. and Another*²¹. Another such case in which it was held that there was no provision in Indian law which prevented the

parties from agreeing to appeal against an arbitral award is, *Heeralal Agarwalla and Co. v. Joakim Nahapiet and Co. Ltd.*²²

Apart from many High Court judgments, there were no Supreme Court judgments which had any ruling on this matter. A lot many High Court judgments from different High Courts in India had however ruled that two-tier arbitration is a valid system, provided the parties have agreed for the same. There was or is no law which prohibits the same even now.

IV. Overall Analysis and Effect of Judgment

Post the *Centrotrade* case judgment that was delivered in 2016, a lot of thought needs to be put into the concept of having a two-tier or a multi-tier arbitration system in India. The fact that the Supreme Court has decided in favour of allowing an arbitration appeal is a welcome step towards strengthening India's stand regarding arbitration. This judgment will no doubt give more confidence to foreign players involved in international commercial transactions and contracts. This will also lead to parties having more faith and belief in the justice system in India.

The fact that the Apex Court has continued to give party autonomy the highest preference when it comes to arbitration, shows that it is willing to abide by the whole object of having a proper system of arbitration in India, which is as per the international standard, and acceptable worldwide. Also the fact that in case there happens to be some kind of a problem or misrepresentation during the course of the first arbitration, the availability of the option to appeal, will give a sense of confidence and relief to the parties who want to rectify any error they made previously. Knowing the fact that an appeal is not prohibited, will also in a way ensure that the first arbitration gets done soon within a smaller time frame.

Though this judgment has brought in quite some cheer, there are also certain points which need to be looked into. There is no doubt that parties must be allowed to go for an appeal if it suits them both and they have agreed upon the same, but this will also leave open a void. The void here is due to the fact that there is no time limit prescribed for going on an appeal. This will further lead to uncertainty over the enforcement of the first arbitral award. Once enforcement is sought and allowed, the appeal process should technically no longer be valid. Also the fact that an arbitral award is final and binding after enforcement makes it more difficult to implement this idea of a two-tier arbitration system.

Moreover many parties opt for arbitration so as to not lengthen the process of dispute resolution and to get finality over a particular dispute once and for all. By allowing a two-tier system it will not be possible as finality will arise only after the second arbitral award is made. Hence, in theory, it will lengthen the process. When an option of having a two-tier arbitration system is available to the parties, it is indeed very helpful and productive. The existence of such a system will end any hesitation in the minds of foreign investors or contracting parties. They will no longer avoid entering into contracts with Indian parties, thereby helping the country grow. But all of this will not be possible until the holes and lacunae in the implementation of the same, are plugged. It is still very early to fully cheer or fully criticize the system. Only time will tell whether arbitration in India has adapted to this change in a positive way.

V. Cross Jurisdictional Approach on Multi-Tier Arbitrations and Dispute Resolution Mechanisms

The concept of two-tier or multi-tier arbitration clauses is not a new concept, it is one aspect of arbitration which is recognized not only in India, but in other jurisdictions of the world as

well, so as to give parties of choosing different processes of arbitration in the same case or legal proceedings under the same contract.²³ Most of the multi-tier arbitrations not only have more than one dispute resolution clauses with regards to arbitration, but also in addition to that, may have a mediation or negotiation clause at the initial stage, before the commencement of arbitration proceedings among the parties.²⁴

The report of the working group of UNCITRAL in 2015, allows for a two-tier or multitier dispute resolution or arbitration proceedings, wherein parties are at liberty to challenge the arbitral award at the first instance and then go for appeal, if they are not satisfied with the appellate arbitral proceedings, they can seek remedy from a court of law.²⁵ The essential purpose behind the same is to provide parties another opportunity to carry out the resolution of the matter amongst them before proceeding to a court of law to settle down the matter.²⁶ The multi-tier arbitration or dispute resolution clauses come into account, mainly in relation to commercial transactions, wherein a speedy disposal of disputes is solicited.²⁷ Parties are encouraged to either include multi-tier dispute resolution clauses, or multi-tier arbitration clauses in their contracts so as to carry out mutual resolution of the disputes, and avoid the court proceedings which could be tedious and time taking thereby resulting in loss of time, money and energy of both the parties.²⁸

The arbitration laws of India derive its origins from the English laws, wherein though not explicitly mentioned, two-tier arbitration clauses were allowed in commercial contracts for discouraging parties to get into tedious court proceedings with regards to cross border commercial disputes.²⁹ The English laws mention the need for a proper mentioning of the alternative dispute resolution process before proceeding to a court of law having competent jurisdiction.³⁰ In addition to that, it has also been held that when it has been clearly defined that arbitration or negotiation should be done for the purpose of settling the dispute in good faith, the same should be done before availing the judicial process.³¹ The English laws have established the following parameters for encouragement of multi-tier dispute resolutions³², (a) The dispute resolutions should be described in a manner in which no agreement be needed before proceeding with the matters, (b) there needs to a definition with regards to the arbitral process and the person presiding over the proceedings (c) A model of the process should be agreed upon by the parties in details to help them decide over the possible dispute resolution alternatives.

The law with regard to multi-tier arbitrations in Australia, talks about the fact that the parties should be well aware of the obligations and their rights under the dispute resolution or arbitration clause in the contract.³³ Even if the negotiation clause was held unenforceable, it was held that failure of negotiation or first instance of arbitration could lead to a second arbitral proceedings under the laws agreed upon by the parties to the contract.³⁴ In addition to that, Singapore which is the most accessible country for the purpose of doing business, and is considered as an arbitration and dispute resolution hub in Asia, also permits multiple dispute resolution clauses and multiple instances of arbitrations.³⁵ Therefore, it can be seen that two tier arbitrations or multiple dispute resolutions are not only applicable under the Indian laws, but have been traditionally allowed in many countries which are centers of commercial importance outside India.

VI. Possible Effects of Allowing Two-Tier Arbitrations in the Indian Scenario

The judgment delivered by the apex court in the *Centrotrade Minerals Case*, comes at a time when there have been significant changes made in the arbitration laws with regards to the Arbitration Amendment Act of 2015, which came in force in 2016.³⁶ The objective of the central

government is to make India an arbitration hub, so as to encourage Foreign Direct Investment, and encourage foreign investors to settle disputes under the local laws in relation to commercial arbitration proceedings.³⁷

The advantage of having the multiple arbitration and dispute resolution clauses is inevitably the fact that, it provides parties multiple opportunities of out of court settlement to their disputes, and thereby delaying court proceedings as has been already enunciated.³⁸ In commercial disputes, with regards to Indian laws, there is always a fear of companies being embroidered in unwanted legal hassles and unwanted legal hassles which would further delay proceedings, considering the tedious judicial process in India.³⁹ Considering the fact, that Indian judicial system functions in a manner in which the judicial proceedings are delayed unnecessary due to following of the due hierarchy of courts, two-tier arbitrations or multiple dispute resolution mechanisms are considered better for the same.⁴⁰

Though the multi-tier arbitrations or dispute resolution mechanisms provide an effective means of out of court settlement, however, there are problems with regards to enforcement of the particular clause or clauses in relation to contractual disputes.⁴¹ In many of the instances, the major problem which surfaces with regards to multiple provisions of arbitral tribunals, is with regards to which particular instance of arbitration should be enforceable.⁴² There have been many cases wherein parties have challenged a positive arbitral award at the first instance, and then proceeded with arbitration and after that hasn't been to their interest they have gone to the court for the settlement.⁴³ In addition to the same, huge costs are involved in arbitration proceedings, and even a single sitting of arbitration is expensive and multiple arbitration or dispute resolution clauses further escalate the costs, which is cumbersome for both the parties in question.⁴⁴ Suppose, if there are two arbitral awards, which are in favour of both the parties i.e. one award in favor of Party A and the other in favor of Party B, it further complicates the process, as there is confusion as to which tribunal's ruling is to hold good for the purpose of the dispute.⁴⁵ In case there are multiple dispute resolution clauses, and suppose there is no time frame within the clauses of the contract, with regards to the individual dispute resolution processes, it amounts to further delay in the dispute resolution proceedings between the parties to the contract.⁴⁶ Moreover, even if a time frame is present if the individual dispute resolution clauses like negotiation or mediation, and even the multiple arbitration proceedings are not decided within the same, it further escalates the costs and causes unnecessary trouble and inconvenience to the parties to the dispute.⁴⁷

Therefore, though allowing two-tier arbitrations in India is a welcome step for the arbitration regime in India and is aimed at encouraging investors to follow Indian laws while settling the disputes, even though, they belong to foreign countries, only time will tell as to whether the judgment delivered by the apex court will be of any help in encouraging FDI in the country.

VII. Conclusion

After thorough analysis of the *Centrotrade minerals* judgment, the position prior to the passing of the judgment, and the global perspective on the concept of multi-tier arbitrations, it can be affirmatively concluded that it is very much a prevalent practice across the world. The availability of multiple options of dispute resolution is a good way of resolving commercial disputes in the present world, especially the ones in which parties belonging to different jurisdictions and countries are involved. The *Centrotrade Minerals* judgment has brought about a clarity with regards to the applicability of two-tier arbitrations and has clearly laid down its validity in the Indian arbitration regime. However, the judgment itself is no full proof way of establishing that two-tier arbitrations will encourage foreign investment and resolve disputes in a speedy manner.

Therefore, proper implementation of the judgment can only be done by prescribing time frames to the same, thereby carrying out dispute resolution in an effective manner by out of court settlement.

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