



Case Comment

Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd

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I. Introduction

The Supreme Court of India has shown maturity in pragmatically dealing with arbitration issues in the recent past,¹ overcoming its past decisions which had hindered the growth of arbitration in India.² The principle of ‘party autonomy’ is being recognized and enforced with greater resonance by the Court.³ In continuation of the pro-arbitration stance, the grey areas regarding the enforceability of multi-tier arbitration clauses in India were addressed in *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.* (Centrotrade Case).⁴

Multi-tier arbitration clauses are much like multi-tier escalation clauses, which provide for pre-arbitration steps that are necessary for invocation of the arbitration clause. Typically, a multi-tier escalation clause will provide for a mandatory conciliation or mediation clause.⁵ However, a multi-tier arbitration clause is

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¹ *Enercon (India) Ltd. & Ors. v. Enercon GMBH & Anr.*, (2014) 2 SCR 855 (India).

² *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 (India).

³ *Sasan Power Ltd. v. North American Coal Corp. (India) (P) Ltd.*, (2016) 10 SCC 813 (India).

⁴ *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*, (2017) 2 SCC 228 (India).

⁵ *Handbook On Multi-tiered Dispute Resolution Clauses*, INTERNATIONAL BAR ASSOCIATION (Oct. 1, 2015), [https:// www.ibanet.org/ Document/](https://www.ibanet.org/Document/)

slightly different and provides for different levels of arbitrations under the same clause.⁶ The structuring of the multi-tier arbitration clause can be decided mutually by the parties. The parties are free to device a suitable mechanism which is tailor made for their individual needs.⁷ A multi-tier arbitration clause can also involve more than one arbitration tribunal, depending upon the nature of the dispute and the requirements of the parties. The arbitration clause in the contract will provide for distinct stages, involving separate procedures, for dealing with and seeking to resolve disputes. Parties are free to have a summary procedure, or a detailed procedure, depending upon their requirements, which provide them the greatest flexibility.⁸ The reason that many contracts do not provide for multi-tier arbitrations is the complexity involved, as it may result in an intra-arbitrator appeal. But then, pursuant to the principle of party autonomy, the process and procedure can be tweaked to make it cost effective and efficient. Prior to the *Centrotrade Case*⁹, the concept of having a multi-tier arbitration was ambiguous and the Supreme Court has finally settled the uncertainty regarding their enforceability in India.

I. 1 Background

The development of the Indian economy has meant that more and more Indian companies are entering into commercial arrangements with multinational companies. With the growth of trade, there is a corresponding growth in commercial disputes and also the need for effective and timely adjudication. Often multinational companies are uncomfortable in litigating under the Indian legal system and the same has been looked at unfavorably by various players, due to the prolonged legal battles and uncertainty involved.

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⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

Historically, at the time of passing the Arbitration and Conciliation Act, 1996 (“ACA, 1996”), the law on arbitration in India was substantially contained in three enactments, namely, the Arbitration Act, 1940 (“1940 Act”), the Arbitration (Protocol and Convention) Act, 1937 (“1937 Act”) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (“1961 Act”).¹⁰ The aforesaid enactments were replaced by the ACA, 1996, which was based on the United Nations Commission on International Trade Law (“UNCITRAL”), International Commercial Arbitration, 1985 and the UNCITRAL Conciliation Rules, 1980.¹¹

The need for amending the old arbitration law was often felt. The Supreme Court observed in *F.C.I. v. Joginderpal Mohinderpal*¹², that the process of arbitration should be made simple and less technical. The Supreme Court had earlier expressed its anguish at the working of the arbitration law in *Guru Nanak Foundation v. Rattan Singh*¹³, wherein it observed that, ‘the very purpose of arbitration law had been frustrated’ and the manner in which the proceedings under the 1940 Act were conducted had resulted in ‘lawyers laughing and legal philosophers weeping’, as the proceedings under the 1940 Act had become highly technical, accompanied by unending prolixity with a legal trap at every stage.

The ACA, 1996, was drafted to curtail delays in the arbitral process, to comprehensively cover international commercial arbitration and conciliation and also domestic arbitration and conciliation, to minimize the supervisory role of courts in the arbitral process, and to provide that every final arbitral award is enforced in the same manner as if it was a decree of court.¹⁴

The *Centrotrade Case*, a judgment by a bench of three judges, is a welcome change from the previous judgment of the Supreme Court of India in *Centrotrade Minerals & Metals Inc. v. Hindustan Copper*

¹⁰ Arbitration and Conciliation Act, No. 26 of 1996.

¹¹ *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*, (2011) 8 SCC 333 (India).

¹² *F.C.I. v. Joginderpal Mohinderpal*, (1989) 2 SCC 347 (India).

¹³ *Guru Nanak Foundation v. Rattan Singh*, (1981) 4 SCC 634 (India).

¹⁴ *F.C.I. v. Joginderpal Mohinderpal*, (1989) 2 SCC 347 (India).

Ltd. (“Centrotrade 2006”)¹⁵ wherein there was disagreement between the learned Judges and the Indian Supreme Court did not follow the earlier authorities under the existing arbitration law, which had clearly upheld the factum, principle, and rationale behind multi-tier arbitration clauses.¹⁶

II. Brief Facts

The factual matrix of the case can be seen in *Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd.*¹⁷ Centrotrade Minerals and Metals Inc. (“Centrotrade”) and Hindustan Copper Limited (“HCL”) entered into a contract for sale. After the contract had been acted upon, a dispute arose as regards the manner in which the same was done. Centrotrade invoked the arbitration clause. The arbitrator appointed by the Indian Council of Arbitration made an NIL award. Centrotrade, thereupon invoked the second part of the said arbitration agreement. HCL, during pendency of the proceedings before the arbitrator, filed a suit in the court at Khetri, in the State of Rajasthan, questioning the initiation of the second arbitration proceeding before the International Chamber of Commerce (“ICC”). No interim order was passed, whereupon an appeal was preferred by HCL before the District Judge, which was also dismissed. In a revision filed by HCL, the High Court granted an injunction.¹⁸

Meanwhile, the sole arbitrator commenced arbitration proceedings. Centrotrade filed a special leave application before the Supreme Court of India, questioning the order of injunction passed by the Rajasthan High Court and by an order, the interim injunction was vacated. HCL, in a series of letters to the International Court of

¹⁵ *Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd.*, (2006) 11 SCC 245 (India).

¹⁶ *Heeralal Agarwalla & Co. v. Joakim Nahapiet & Co. Ltd.*, 1927 AIR 647 (Cal); *Fazalally Jivaji Raja v. Khimji Poonji and Co.*, 1934 AIR 476 (Bom); *M.A. and Sons v. Madras Oil & Seeds Exchange Ltd.*, 1965 AIR 392 (Mad); *Hanskumar Kishanchand v. Union of India*, (1959) SCR 1177 (India).

¹⁷ *Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd.*, (2006) 11 SCC 245 (India).

¹⁸ *Id.*

Arbitration and to the arbitrator, maintained that the arbitration agreement was void, being opposed to the public policy of India. Submissions by HCL were received by the arbitrator without any supporting evidence or any justification for not complying with the earlier orders passed by him. The arbitrator, however, considered the submissions made by HCL in making the award. The award held, *inter alia*, that, the Arbitration clause contained in the agreement was neither unlawful nor invalid and that, the Arbitrator had jurisdiction to decide his own jurisdiction in terms of the ACA, 1996.¹⁹

HCL filed an application purported to be under §48 of the ACA, 1996, in the Court of the District Judge, Alipore, Calcutta. HCL also filed a suit before the Civil Judge, Senior Division, Alipore praying for a declaration that the ICC award was void and a nullity, as also for permanent injunction and damages. Centrotrade, in the meanwhile, filed an application for enforcement of the original award in the Court of the District Judge, Alipore. Upon an application made in terms of Clause 13 of the Letters Patents of the Calcutta High Court by Centrotrade, the said execution case was transferred to the Calcutta High Court. A learned Single Judge of the said Court by a judgment and order, allowed the said execution petition. Aggrieved by and dissatisfied therewith, HCL preferred an appeal which was allowed and both parties challenged the said judgment of the division bench of the Calcutta High Court before the Indian Supreme Court.²⁰

III. Issue

A bare analysis of the arbitration clause makes it evident that Centrotrade and HCL both intended that the settlement of all their disputes and differences would be resolved by way of arbitration. This would be through a panel appointed by the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and that if either party, i.e. HCL or Centrotrade, was dissatisfied with the result then both had an option to file an appeal. This would be before a second arbitrator in

¹⁹ *Id.*

²⁰ *Id.*

London, in accordance with the rules of conciliation and arbitration of International Chamber of Commerce. It is pertinent to note that only the result of the second arbitration was binding on both the parties. But whether such a clause was valid and enforceable under Indian arbitration law was never conclusively decided before this case and hence was to be considered by the Supreme Court.

IV. Legal Principle: Party Autonomy

In the background of the arbitration clause, the Indian Supreme Court in the *Centrotrade Case*²¹ while dealing with the issue of multi-tier arbitration has rightly leaned towards the principle of party autonomy.

The principle of party autonomy has been held to be one of the foundational stones of ACA, 1996 by the Supreme Court. In *Union of India v. U.P. State Bridge Corpn. Ltd.*,²² the Court held that the following are the foundational pillars of the ACA, 1996:

- a) The first pillar: Three general principles.
- b) The second pillar: The general duty of the Tribunal.
- c) The third pillar: The general duty of the parties.
- d) The fourth pillar: Mandatory and semi-mandatory provisions.

The Court also observed that insofar as the first pillar is concerned, it contains three general principles on which the entire edifice of the ACA, 1996 is structured, which was to encourage and facilitate a reformed and more independent, as well as private and confidential system of consensual dispute resolution, where only limited possibilities of court involvement were necessary in the interests of the public and a fair result.²³ The principle of party autonomy is set forth as one of the three main principles of arbitration law *viz.* (i) speedy, inexpensive and fair trial by an impartial tribunal; (ii) party autonomy; and (iii) minimum court

²¹ *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*, (2017) 2 SCC 228 (India).

²² *Union of India v. U.P. State Bridge Corpn Ltd.*, (2015) 2 SCC 52 (India).

²³ *Id.*

intervention.²⁴ In the words of the Indian Supreme Court, if a particular procedure is prescribed in the arbitration agreement, which the parties have agreed to, that has to be generally resorted to and as a normal practice, the Court will insist the parties to adhere to the procedure to which they have agreed upon.

V. Decision

Applying the celebrated and now oft resorted principle of party autonomy, the Supreme Court of India in the *Centrotrade Case*²⁵ held, parties are not prevented from entering into an agreement providing for non-statutory appeals, so that their disputes and differences could preferably be settled without resort to court processes. The Court reasoned that on a combined reading of §§ 34 and 35 of the ACA, 1996, an arbitral award would be final and binding on the parties unless it was set aside by a competent court on an application made by a party to the arbitral award. However, this does not preclude the autonomy of the parties to an arbitral award to mutually agree to a procedure, whereby the arbitral award might be reconsidered by another arbitrator or panel of arbitrators, by way of an appeal and the result of that appeal was accepted by the parties to be final and binding subject to a challenge provided for by the ACA, 1996. The Indian Supreme Court further held that a multi-tier arbitration clause was also not contrary to the public policy of India, as there was nothing in the ACA, 1996 which restricted the autonomy of the parties to agree to an arbitration clause, with the prearrangement for appellate proceedings, before another arbitral tribunal.

VI. Conclusion

The *Centrotrade Case* enables parties to craft arbitration agreements with greater leeway to include appellate arbitration proceedings, as part of the arbitration process and restores multi-tier arbitrations in the light of the previous authorities of the

²⁴ *Id.*

²⁵ *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*, (2017) 2 SCC 228 (India).

decisions of the High Courts and the Supreme Court of India, under the old arbitration laws.²⁶ The Indian Supreme Court has correctly restored the flexibility and benefits available to parties in a multi-tiered arbitration clause.

With the *Centrotrade Case*, the Supreme Court has continued its approach to promote arbitration law and reduce the interference of courts.²⁷ In fact, the clarity which has been provided, will enable the business community, in India and abroad, greater impunity to resolve disputes in a detailed set-up, with enhanced review from commercial individuals and will avoid the pit falls of having just one shot adjudication by arbitral tribunals. Even though cost may be a factor, for disputes involving high stakes, the enhanced freedom will ensure that errors committed by the first tribunal are guarded against and that the parties get another chance to effectively resolve their disputes. The Supreme Court has sent out a signal which will ensure that parties will be discouraged from not taking the arbitration process seriously enough, and in the long run it will enable the parties seated outside India to be sure of the support of the Indian Courts in enforcing arbitration agreements, awards and processes. Overall the cloud over multi-tier arbitrations in India has been removed and the same is a welcome step in the jurisprudential development of the Indian arbitration law.

²⁶ *Heeralal Agarwalla & Co. v. Joakim Nahapiet & Co. Ltd.*, 1927 AIR 647 (Cal); *Fazalally Jivaji Raja v. Khimji Poonji and Co.*, 1934 AIR 476 (Bom); *M.A. and Sons v. Madras Oil & Seeds Exchange Ltd.*, 1965 AIR 392 (Mad); *Hanskumar Kishanchand v. Union of India*, (1959) SCR 1177 (India).

²⁷ *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 (India); *Enercon (India) Ltd. &Ors. v. Enercon GMBH &Anr.*, (2014) 2 SCR 855 (India); *Sasan Power Ltd. v. North American Coal Corpn. (India) (P) Ltd.*, (2016) 10 SCC 813 (India); *Union of India v. U.P. State Bridge Corpn. Ltd.*, (2015) 2 SCC 52 (India).