

# Dispute Resolution Hotline

December 27, 2016

## APPELLATE ARBITRATION PERMISSIBLE IN INDIA – BUT SHOULD YOU PROVIDE FOR IT?

- Supreme Court permits two-tier i.e. appellate arbitration in India
- Party autonomy is paramount in arbitration under the Indian Arbitration & Conciliation Act, 1996.
- No express and implied prohibition of appellate arbitration is contained in the Arbitration & Conciliation Act, 1996.

A three-judge bench, of the Supreme Court of India (SC), in *Centrotrade Minerals & Metal v. Hindustan Copper* has found that parties may provide for an appeal in their arbitration clause and such a choice would not be contrary to the laws of India. The issue, originally heard in 2006, had been referred to a higher bench due to a difference of opinion between the two judges hearing the case.

### THE DISPUTE RESOLUTION CLAUSE

The question before the SC was whether a settlement of disputes or difference through a two tier arbitration procedure provided for in the contract between the parties was permissible under Indian law. The arbitration agreement contained in Clause 14 of the contract provided:

*14. Arbitration - 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*

It is also relevant to note that the applicable substantive law was also Indian law.

### JUDGMENT

The SC first noted that a plain reading of the arbitration agreement indicated that the intention of the parties was to provide for two opportunities at resolving their disputes or differences. Let's label the decision of the first tribunal as First Award and that of the second tribunal as the Second Award.

The SC addressed several argument raised by counsel in the judgment, of which the significant ones are listed below:

#### A. Is the First Award an “arbitral award”?

The SC noted that the First Award is an arbitral award and not just a decision rendered by a tribunal with no enforceable effect. The reasons for this finding were two fold-

1. The First Award contained all the elements and ingredients of an arbitration award; and
2. If the decision was not considered to be an arbitral award, a legal vacuum would exist post the arbitration result.

While the SC has found that no such vacuum can be read to exist and such an award would be enforceable under the Indian Arbitration & Conciliation Act, 1996 (**A&C Act, 1996**), it has not addressed whether or not the First Award can be enforced while the second tribunal is hearing the matter in appeal.

#### B. Is appellate arbitration contrary to the laws of India?

The SC noted that it was inappropriate to argue that appellate arbitration is contrary to the laws of India because that would indicate that the party knowingly entered into a contract wherein one of the provisions of the contract was contrary to the laws of India. This could amount to serious fraud and would have serious long-term ramifications on international commercial contracts with Indian parties.

The SC then divided the argument raised in appeal into three parts:

1. Whether the A&C Act, 1996 does not sanction appellate arbitration;
2. Whether the A&C Act, 1996 contains an implied prohibition to appellate arbitration; and
3. Whether appellate arbitration is contrary to Indian public policy.

The SC took note of the Report of the **UNCITRAL Working Group**, the Arbitration Act of 1940, referred to some

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commentaries, as well as previous judgments to find that appellate arbitration has historically been considered valid. The SC duly considered this and found that that the legislature would be aware of such a practice at the time of drafting the A&C Act, 1996 and the lack of specific proscription would indicate that appellate arbitration is permissible in India.

The SC took note of the argument that the right of appeal can only be provided by statute. After studying various precedents on the issue, the SC noted that the right of appeal is a substantive right and is not just a mere matter of procedure. On this ground, the SC distinguished appellate arbitration vis a vis statutory appeals before courts and tribunals, to find that an appeal procedure contained in an arbitration agreement was a substantive right created by the parties by mutual consensus.

In regards the implied prohibition contained in the A&C Act, 1996, the court read Section 34-36 in together to find that the availability of recourse to a court for challenging an award, contained in the statute, does not *ipso facto* prohibit the parties from mutually agreeing to a “*second look*”. Furthermore, the idea that an arbitration award is “final and binding” does not necessary rule out the possibility of an appeal. The SC found that an award being “final and binding” indicates that it has legal effect and doesn't preclude appellate arbitration.

As for the public policy argument, the court dismissed the same stating that there is nothing fundamentally objectionable in the parties preferring and accepting a two-tier appellate arbitration mechanism. Such a choice would not violate any mandatory provision of the A&C Act, 1996.

Lastly and most importantly, the SC has placed significant emphasis on party autonomy while arriving at this decision, even noting that it is “*virtually the backbone of arbitration*” and that the intention in the A&C Act, 1996 “*is not to throttle the autonomy of parties or preclude them from adopting any other acceptable method of redressal such as appellate arbitration*”. Therefore, there is nothing in the A&C Act, 1996 that prohibits the parties from explicitly or implicitly agreeing on appellate arbitration.

## ANALYSIS

The present judgment continues the line of pro-arbitration judgments in India. Special mention should be made to the increasing respect being accorded by courts to party autonomy in arbitration.

One cannot ignore that parties may be concerned about the possibility of error in high-stakes disputes and appellate arbitration may safeguard the integrity of the arbitration process and protect parties from such errors. Similarly, the knowledge of the availability of an appeal, may also serve as an encouragement to parties to complete the first proceeding expeditiously. Arbitration can no longer take a standard, one-size-fits-all approach and it must evolve to address the interests of parties in different disputes of varying quantum. These manifold pros of an appeals procedure has also been noted in investor state arbitration and an optional appeals procedure has been made available to give the process greater legitimacy.

While the judgment can be hailed for its party-autonomy oriented approach to the issue which echoes the adoption of appellate mechanisms in arbitration in other jurisdictions, it is pertinent to ask –

### While appellate arbitration has been found to be permissible in India, is it good for your dispute?

The availability of an appeals mechanism also has various cons. A simple example could be that it provides a recalcitrant respondent yet another delaying tactic. However, the larger concern is the lack of clarity on how the availability of an appellate mechanism in arbitration will affect the arbitration system as a whole. Parties choose arbitration over litigation for its final and binding effect at first instance. While the need for an appeal mechanism to protect legitimate interests of parties must be acknowledged, the mechanics will surely implement the structure and spirit of international arbitration.

It is up to arbitral institutions now to draft and provide appellate procedure rules that can cover operational issues that are likely to arise. Some examples are questions regarding which issues can be submitted to an appeal as against the commencement of *de novo* procedures; when would time for the purposes of limitation stop running; or how soon would an appeal need to be filed.

While this judgment is surely an interesting development in Indian arbitration law, its implications remain to be seen.

– Niyati Gandhi & Vyapak Desai

You can direct your queries or comments to the authors

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