

# Indian Supreme Court upholds parties' choice to refer disputes to appellate arbitration

The Indian Supreme Court in *Centrotrade Minerals & Metal Inc v Hindustan Copper Ltd* ("Centrotrade Minerals") has again reinforced its pro-arbitration stance by upholding the validity of an arbitration clause that provided for recourse to an appellate arbitral tribunal. In doing so, the Court has accorded primacy to the principles of party autonomy and procedural flexibility which form the bedrock of international arbitration. This briefing analyses the ruling in *Centrotrade Minerals* and the implications for parties which may consider incorporating appellate arbitration clauses into their dispute resolution provisions.

## Background

The dispute resolution clause in question provided for a slightly unusual appellate or "two-tier" arbitration clause, whereby disputes would be referred: (i) in the first instance, to arbitration in India under the Rules of Arbitration of the Indian Council of Arbitration; and (ii) if either party disagrees with the decision of that tribunal, to a second arbitration in London under the ICC Rules. The clause stated as follows:

*"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.*** (emphasis added)

A dispute arose between the parties under a contract for sale of copper concentrate. Centrotrade invoked the arbitration clause. The award made by the arbitrator appointed by the Indian Council of Arbitration was a "nil" award with no order for damages. Centrotrade appealed this award to a sole arbitrator in London. The ICC

arbitrator upheld the validity of the arbitration clause, and granted damages in favour of Centrotrade.

Centrotrade brought enforcement proceedings in the Calcutta courts, with the matter eventually reaching the Supreme Court by way of cross-appeals filed by both parties against the judgment of Calcutta High Court. The matter was eventually referred to a Constitution Bench of three judges who issued their decision on 15 December, 2016.

## Judgment of the Supreme Court

The Supreme Court held that there is nothing either explicit or implicit in the Arbitration & Conciliation Act, 1996 (the "Act") that prohibits the parties from agreeing to appellate arbitration. The provisions dealing with setting aside (section 34) and finality of arbitral awards (section 35) under the

Act do not exclude parties' autonomy to agree for reconsideration of the award by another arbitration panel in the form of an appeal. In such circumstances, it is the result of the appellate award which will be final and binding on the parties subject to the right of challenge provided under the Act. The Court relied on the principle of party autonomy to uphold the parties' agreement that the first arbitration award could be "appealed" to a second tribunal. Importantly, the Court categorically held that the parties' choice of an appellate arbitration clause is not contrary to the public policy of India.

Unfortunately, the court left the intrinsically related question of whether the award rendered by a foreign seated appellate tribunal is enforceable under the Act to a later date.

### Implications

*Centrotrade Minerals* is an encouraging decision in that it places considerable emphasis on the principle of party autonomy. The

Court also relied on a number of leading international treaties and the Report of the UNCITRAL Working Group to reach its findings, highlighting that the Indian courts are willing to adopt international best practices when considering the principles underlying the Act.

Appellate arbitration clauses of the type considered in this decision are uncommon, as they depart from the "finality" of decision which is typically seen as a virtue of the arbitral process. A second set of arbitration proceedings means a consequent increase in the time and costs which may be necessary to obtain a final award that can be enforced directly. However, it is conceivable that parties may, in certain circumstances, wish to provide for a safeguard in the form of an appellate procedure to review the decision of an arbitral tribunal. Such appellate mechanisms are common in commodity trading disputes where the first arbitration is held swiftly and the award can then be appealed to a board of appeal of the relevant association. While the issue of enforcement of an award rendered by

the appellate tribunal has yet to be heard, the Supreme Court's decision appears to indicate that the Indian courts will generally respect dispute resolution provisions which have been specifically tailored by agreement of the parties.

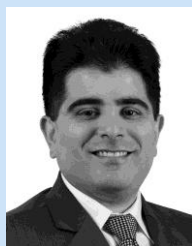
Parties who may be inclined to provide for a form of appeal against arbitral awards should take care to ensure that such clauses are clearly drafted. For example, they should try to specify as precisely as possible the exact scope of the appeal process to avoid uncertainty and to keep costs and delay at a minimum. This might include specifying whether an appellate tribunal may only rely on the evidence before the first tribunal below or is permitted to consider fresh evidence or whether a review by an appellate tribunal should be restricted to only points of law. It would also be advisable to include a specific time frame within which an appeal can be filed (which was lacking in *Centrotrade Minerals*). Parties should take specialist advice when drafting bespoke dispute resolution provisions of this nature.

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