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Supreme Court of India Upholds Validity of Appellate Arbitration Clauses

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Appellate arbitration clauses provide for an appellate mechanism against an award rendered between the concerned parties by subjecting the dispute through another arbitration to eliminate all potential errors and obtain correction of the same. Not all arbitration disputes are suitable for an appellate review. But in cases where parties place higher importance on the correctness of an award rather than on time and cost of arbitration, appellate arbitration clauses serve this purpose. The purpose served by such clauses can also be understood by appreciating how arbitral awards cannot be judicially reviewed on merits (Gary Born, *International Arbitration*: *Law and Practice* at 8, Kluwer Law Int'l 2012). Since the grounds on which an award may be challenged before a court remain limited, as can be seen from the UNCITRAL Model Law and the Indian Arbitration and Conciliation Act, 1996 ("1996 Act"), appellate arbitration clauses provide greater freedom of review of arbitral awards to parties resorting to them.

Recognizing the importance of such clauses, a three-judge bench of the Supreme Court of India ("Supreme Court"), delivered a judgment on December 15, 2016 upholding the legal validity of appellate arbitration clauses under the 1996 Act in the case of ***M/s Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd., Civil Appeal No. 2562 of 2006*** ("Centrotrade"). In *Centrotrade*, the arbitration agreement contained a two-tiered arbitration procedure providing for a first instance institutional arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration ("ICA Rules") to be held in India. In the event of disagreement between the parties in respect of the correctness of the first award, the arbitration agreement granted either party a right to appeal against the first award before an appellate tribunal to be constituted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("ICC Rules"), to be held in London. The law of the main contract was Indian law.

Centrotrade initiated arbitration against Hindustan Copper Ltd. The tribunal of the first instance delivered a "nil" award, which prompted Centrotrade to appeal, as permitted by the arbitration agreement. The appellate tribunal delivered an award in favour of Centrotrade, who thereafter commenced Indian enforcement proceedings against Hindustan Copper Ltd. The determination of the Supreme Court on the enforcement proceedings is still pending. Hindustan Copper Ltd. thereafter moved to challenge the legal validity of the appellate tribunal award before a division

bench of the Supreme Court. The judgment of the Supreme Court is important for two reasons: first, the 1996 Act is modelled on the UNCITRAL Model Law and, hence, the present judgment could add to the developing jurisprudence on how national courts should assess appellate arbitration clauses. Second, since Part I of the 1996 Act is also applicable to international commercial arbitrations seated in India, the judgment could increase India's prospects as an arbitration friendly destination.

The Supreme Court affirmed that the intention of the parties to reserve a right to an appellate review of the first award is unambiguously clear from the wording of the two tiered arbitration agreement. Notably, the apex court also observed that the 1996 Act, neither explicitly nor implicitly, bars parties to resort to appellate arbitration clauses. Second, the Supreme Court drew the distinction between legal and statutory right to appeal. In *Centrotrade,* the election of an arbitration appellate mechanism qualified as a legal right premised on an agreement between the parties. Thereafter, the Supreme Court held that UNCITRAL Model Law—and hence the 1996 Act—allows parties to an arbitration agreement to reserve their right to appeal against an award.

Although the said case is a strong reflection of a pro-arbitration approach, the following questions of importance remain unaddressed. First, whether Indian courts would entertain annulment or enforcement proceedings in respect of the first arbitral award pending its review by an appellate arbitral tribunal. In the interest of judicial economy and efficiency, this should not be allowed. A bar on initiation of annulment or enforcement proceedings as regards the first award would also ensure certainty regarding the fate of the appellate arbitral award, and the recourse available to parties thereafter. The said proposition finds approval under the JAMS Optional Arbitration Appeal Procedure, 2003 ("JAMS Appeal Procedure"); the Arbitration Appeal Procedure of International Institute of Conflict Prevention and Resolution, 2007 ("CPR Appeal Procedure"); and the Optional Appellate Rules of American Arbitral Association, 2013 ("AAA Optional Rules"). Rule (c) of the JAMS Appeal Procedure, Rule 2.3 of the CPR Appeal Procedure and Rule A-2(a) of the AAA Optional Rules provide for the same.

Second, it is important to determine the stage at which the limitation period for seeking an annulment or enforcement of an award would commence, i.e., whether the limitation period would commence from the date of the first award or from the date of the appellate award. Since it would be proper to allow annulment or enforcement proceedings to commence only against the appellate award, it follows that the limitation period should also commence from the date of the appellate award. While Rule (c) of the JAMS Appeal Procedure and Rule 2.3 of the CPR Appeal Procedure imply that the limitation period for initiating annulment/enforcement proceedings shall commence from the date of the appellate award, Rule A-2(a) of the AAA Optional Rules makes the said case expressly clear while reading – "*…and the time period for commencement of judicial enforcement proceedings shall be tolled during the pendency of the appeal.*"

Third, the Indian judiciary may need to address whether the 1996 Act permits remanding the dispute to the prior tribunal, owing to the principle of party autonomy. Strictly speaking, a tribunal

rendering its final award is *functus officio*. The said aspect requires consideration as the JAMS Appeal Procedure, the CPR Appeal Procedure and the AAA Optional Rules forbid the appellate tribunal to remand the matter back to the prior tribunal. The issue has two sides to it, assuming the arbitration agreement is silent on the availability of remand. The probable benefit of remanding may entail the familiarity of the said tribunal with the dispute, thereby avoiding a scenario wherein an appellate tribunal would be required to consider the issues *de novo*. However, a potential drawback to parties arising from a remand would be that of losing out on an opportunity to have the dispute re-examined by a set of arbitrators with specified qualifications. Rule A-5(d) of the AAA Optional Rules provides for the latter.

Fourth, in cases where a two-tiered arbitration agreement resorts to an *ad hoc* arbitration, it would be interesting to explore the manner in which an appellate tribunal would be appointed where no express procedure for the same is provided in an agreement. Since the arbitration agreement in the *Centrotrade* case did not provide for any appointment procedure, the default procedures under the ICA and ICC Rules applied respectively. Two eventualities may arise out of such a situation. Either the Indian courts may require the parties to resort to the same procedure of appointment as agreed upon for the constitution of the first arbitral tribunal or they may require the party invoking the appellate procedure to proceed under Section 11 of the 1996 Act to seek a court assisted appointment of the appellate arbitral tribunal. Although a situation as contemplated above (appellate arbitration clauses providing for *ad hoc* arbitration without a procedure for appointment) would be peculiar, as parties resorting to such clauses can reasonably be expected to seek appellate arbitrators possessing expertise over the concerned subject matter of the dispute, it can never be entirely ruled out.

With the abovementioned issues remaining unsettled in the Indian legal sphere of arbitration, it would be apt to say that although the Indian judiciary has put its best foot forward while upholding the legal validity of appellate arbitration clauses, a testing journey of a thousand miles remains yet to be covered and successfully completed.

This entry was posted on Thursday, February 16th, 2017 at 12:30 pm and is filed under Appeal, Appellate Body, Arbitration, Arbitration Agreements, Arbitration Awards, Arbitration Institutions and Rules, Arbitration Proceedings, India
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