ELP Arbitration: Update

THE CENTROTRADE SAGA - SC REITERATES THAT A NARROW MEANING SHALL BE ATTRIBUTED TO SECTION 48(1)(B) OF THE ARBITRATION AND CONCILIATION ACT, 1996.

***M/s Centrotrade Minerals and Metals Inc. v. Hindustan Copper Ltd.*[1]**

FACTUAL BACKGROUND

- M/s Centrotrade Minerals and Metals Inc. (**Centrotrade**), a U.S. Corporation, entered into a contract (**Agreement**) for the sale of 15,500 DMT of copper concentrate to Hindustan Copper Ltd. (**HCL**).
- Subsequently, disputes arose between the parties with respect to the delivered quantity of dry weight of copper concentrate. Pursuant to the same, Centrotrade invoked the arbitration clause in the Agreement.
- Clause 14 of the Agreement contained a two-tier arbitration clause as per which, the disputes were to be first settled by arbitration in India. However, if either party disagreed with the result of such arbitration, an appeal could be made vide another arbitration to be held by the ICC in London.
- On June 15, 1999, the learned arbitrator appointed by the Indian Council of Arbitration made a Nil award (**Award I**).
- Aggrieved by the same, Centrotrade invoked the second part of Clause 14 of the Agreement (**London Arbitration**). On September 29, 2001, the learned arbitrator in the London Arbitration allowed Centrotrade's claims along with interest (**Award II**).
- During the pendency of the London Arbitration, HCL filed a suit before the courts at Khetri, Rajasthan challenging the arbitration clause. In a revision petition filed against the orders of the Khetri court, on April 27, 2000, the High Court of Rajasthan restrained the appellant from taking further steps in London Arbitration (**Rajasthan HC Order**). This *ad interim ex parte* stay granted vide the Rajasthan HC Order was subsequently vacated by the Supreme Court (**SC**) on February 8, 2001.

[1] Order dated June 2, 2020 in Civil Appeal No. 22562 of 2006 with Civil Appeal No. 2564 of 2006.

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- In the proceedings for enforcement of Award II, a single judge of the Calcutta High Court dismissed the petition filed by HCL under Section 48 of the Arbitration and Conciliation Act 1996 (**the Act**), as a result of which the Award II became executable in India.
- However, vide its judgement dated July 28, 2004, the order of the single judge of the Calcutta High Court was set aside by the Division Bench of the Calcutta High Court on the ground that though a two-tier arbitration clause is valid under law, since the learned arbitrators in Award I and Award II had concurrent jurisdictions which were mutually destructive of each other, neither could be enforced. For this reason, Award II was held to be unenforceable (**Calcutta HC Order**).
- Both Centrotrade and HCL appealed against the Calcutta HC Order and the matters came up before a Division Bench of the SC. While S.B. Sinha, J. held Award II to be unenforceable since two tier arbitration clauses would be invalid by virtue of Section 23 of the Indian Contract Act 1872, Tarun Chatterjee J. *inter alia* while holding two-tier arbitration clauses to be valid also held that HCL had not been given a proper opportunity to present its case in the London Arbitration (**Centrotrade I**).[2] Hence, HCL's appeals were allowed.
- Due to such disagreement between the Division Bench, the matter was then referred to a three judge bench of the SC. The questions before the SC were (i) whether the settlement of disputes through a two-tier arbitration procedure was permissible under the laws of India and (ii) if the answer to (i) was in the affirmative, whether Award II being a "foreign award" was liable to be enforced under the provisions of Section 48 of the Act.
- The three judge bench of the SC ultimately held two-tier arbitration clauses to be permissible under the laws of India (**Centrotrade II**).[3]
- Thereafter, the SC directed that the appeals be listed again for determining the question relating to the enforcement of Award II.

ARGUMENTS ADVANCED BY THE PARTIES

- On behalf of Centrotrade, it was argued that:
  - It was incorrect to state that a fair opportunity had not been given to HCL to present its case since the learned arbitrator in London Arbitration had afforded as many as six opportunities to HCL to present its case. Even the time allotted to HCL for filing of submissions and documents was extended on several occasions.
  - In this regard, reliance was placed by Centrotrade on the recent SC judgement in *Vijay Karia v. Prysmian Cavi E Sistemi SRL*[4], which held that a foreign award under Section 48 of the Act may be rejected on the ground that a party was prevented from presenting its case, only if such party was prevented to present its case by matters outside its control. To further elucidate on the same, reliance was also placed upon the English judgements in *Cuckurova Holding A.S. v. Sonera Holding B.V.*[5], *Eastern European Engineering v. Vijay Consulting*[6]*;* United States District Court's judgements in *Consorcio Rive v. Briggs of Cancun*[7], *Four Seasons Hotels v. Consorcio Barr*[8] S.A.; Supreme Court of Hong Kong's decision in *Nanjing Cereals v. Luckmate Commodities*[9]; and Supreme Court of Italy's decision in *De Maio Giuseppe v. Interskins.*[10]
- HCL, on the other hand, argued that:
  - The only point of difference between S.B. Sinha J. and Tarun Chatterjee J. was whether a two-tier arbitration clause was valid in law. Since that point had already been answered in Centrotrade II, the

[2] Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd, (2006) 11 SCC 245.
[3] Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd. (2017) 2 SCC 228.
[4] 2020 (3) SCALE 494. Paragraph 76.
[5] (2014) UKPC 15. Paragraphs 31, 34 and 53.
[6] (2019) 1 LLR 1 (QBD). Paragraphs 89, 98 and 99.
[7] 134 F. Supp 2d 789, the US District Court, E.D. Louisiana. Paragraphs 26-30 and 33.
[8] 613 Supp2d 1362 (S.D. Fla. 2009)
[9] XXI Y.B. Com. Arb. 542 (1996). Paragraphs 5, 7-9.
[10] Y.B. Comm. Arb. XXVII (2002) 492. Paragraphs 5-9.

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question of being unable to present one's case was not referred to the larger bench. Therefore, this aspect cannot now be adjudicated upon.

- In any case, once the learned arbitrator had extended time, the last extension being 12 September 2001, he ought to have allowed further time to HCL to submit documents they wished to rely upon. Due consideration must also be given to the terrorist attacks of September 11, 2001 that restrained HCL from sending important documents to the learned arbitrator.
- The word 'otherwise' occurring in Section 48(1)(b) of the Act cannot be read *ejusdem generis* with the words that precede it. In this regard, reliance was placed on the SC judgement in *Kavalappara Kottarathil Kochuni v. States of Madras.*[11] HCL thus argued that an expansive interpretation must be attributed to the provision.
- Issue of jurisdiction was to be taken as a preliminary question before the learned arbitrator, after which further proceedings were to take place.
- The London Arbitration had proceeded despite there being an ex parte ad-interim stay on it vide the Rajasthan HC Order.

FINDINGS OF THE COURT

- Rejecting HCL's contentions, the SC held as follows:
  - The law in relation to Section 48(1)(b) of the Act has been laid down in *Vijay Karia.* It also noted that in *Vijay Karia*, no challenge was made to the award under the English arbitration law, though available, just like the facts of the present case.
  - As set out in *Vijay Karia,* the expression "was otherwise unable to present his case" occurring in Section 48(1)(b) of the Act, cannot be given an expansive meaning. The SC reiterated that a narrower meaning of the phrase has been preferred due to a pro-arbitration and enforcement approach in line with the New York Convention. It also noted that since the *Kochuni's* decision dealt with an entirely different act viz. Madras Marumakkathayam (Removal of Doubts) Act, 1955 with a different object, it cannot therefore, possibly apply to construe the word "otherwise" in the Act.
  - The SC also examined three of its earlier judgments under Section 30 of the 1940 Act which dealt with the issue of the arbitrator misconducting himself or the proceedings - *Ganges Waterproof Works (P) Ltd. v. Union of India*[12], *Sohan Lal Gupta v. Asha Devi Gupta*[13] and *Hari Om Maheshwari v. Vinitkumar Parikh.*[14]
  - Both Centrotrade I and Centrotrade II, make it clear that Centrotrade I was referred to a larger bench due to difference of opinion on the entire matter and not just the issue of validity of two-tier arbitration clauses.
  - HCL's contention that the learned arbitrator in London Arbitration ought to have determined the question of jurisdiction is belated and unfounded. The said argument had never been raised previously and in any case, there was nothing on the record to clearly show that the learned arbitrator sought to take up the plea as to jurisdiction as a preliminary objection.
  - HCL's contention that the learned arbitrator proceeded with the London Arbitration despite the Rajasthan HC Order was rejected. The stay order of the Rajasthan High Court was not directed against the learned arbitrator; it was only directed against the parties to the proceedings. Though the learned arbitrator had initially begun the proceedings by directing the parties to serve submissions along with supporting evidence, the said direction was reiterated to the parties only after the Rajasthan HC Order

[11] (1960) 3 SCR 887.
[12] (1999) 4 SCC 33. Paragraphs 2 and 6.
[13] (2003) 7 SCC 492. Paragraphs 27 and 43.
[14] (2005) 1 SCC 379. Paragraphs 7, 12 and 16.

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was vacated pursuant to SC's order dated February 8, 2001. Also, the said plea by HCL again having been taken for the first time, is untenable.

- No fault could be found with the conduct of the arbitration proceedings. HCL was clearly trying to stall the arbitration proceedings. Despite being informed time and again to appear before the Tribunal and submit their response and evidence in support thereof, it was only after the learned arbitrator indicated that he was going to pass an award that HCL's attorneys started responding. Repeated time extensions were granted by the learned arbitrator to HCL. Finally, when the legal submissions of 75 pages were sent beyond the time that was granted, the learned arbitrator took this into account and then passed Award II.

- Further, with regards to Chatterjee J.'s judgement, the SC found that it contained inter alia, several factual inconsistencies and failed to advert to the *Minmetals Test,* which is that HCL was never unable to present its case as it was at no time outside its control to furnish documents and legal submissions within the time given by the learned arbitrator. The SC further found that that the said judgement sought to remand the matter to the ICC arbitrator for a fresh award, which was outside the jurisdiction of an enforcing court under Section 48 of the Act. Hence, his judgement was set aside by the SC.
- As a result, Centrotrade's appeal, being Civil Appeal No. 2562 of 2006 was allowed and HCL's appeal, being Civil Appeal No. 2564 of 2006, was dismissed. The SC further directed Award II to be enforced.

CONCLUSION AND ANALYSIS

- With its present judgement, the SC has finally brought the long-drawn Centrotrade saga to a close.
- In the present case, by following the principles laid out in the *Vijay Karia* decision, the SC has rightly re-iterated the necessity of minimal interference with foreign awards. It is imperative that the awards made under the aegis of New York Convention are attributed due sanctity since in most cases, such awards have gone through a challenge procedure in the country of their origin. Hence, undue intervention of the courts in the enforcement of such foreign awards is against the very spirit of New York Convention. The SC through its recent decisions, including the present one, seems to have struck the right balance between a protectionist and a pro-arbitration approach.

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