

Dispute Resolution Hotline

July 10, 2006

TWO-TIER ARBITRATION - THE CONTROVERSIAL CLAUSE!

The Judges of a division bench of the Supreme Court of India, in pronouncing their ruling on May 9, 2006 in the matter of *Centrotrade Minerals and Metals Inc. v. Hindustan Copper Limited*, differed in their views in respect of the validity of the two-tier arbitration mechanism.

The issue was with regard to a contract for sale of 15,500 DMT of Copper Concentrate, wherein the parties agreed to settle the disputes by arbitration in India before the Indian Council of Arbitration ("ICA") in accordance with the Rules of Arbitration of ICA and in the event of disagreement with this arbitration, either party had a right to appeal to a second arbitration in London, UK in accordance with the rules of the International Chamber of Commerce ("ICC").

Centrotrade Minerals and Metals Inc. ("Centrotrade") invoked the arbitration clause before the arbitrator appointed by the Indian Council of Arbitration who, passed a 'Nil' award. Disagreeing, Centrotrade subsequently approached the ICC and the arbitrator so appointed by the ICC passed an award in favour of Centrotrade. Consequently, Hindustan Copper Limited ("HCL") filed an application in the Court of the District Judge Alipore, Calcutta seeking declaration of the award passed by the ICC as void and unenforceable. Simultaneously, Centrotrade filed an application before the Civil Judge, Senior Division, Alipore for execution of the ICC award. Both these cases were transferred to the Calcutta High Court. A Single Judge of the Calcutta High Court passed an order in favour of Centrotrade while the Division Bench of the same court reversed the decision of the Single Judge. Nevertheless, it may be noted that both, the Single Judge as well as the Division Bench of the Calcutta High Court were of the view that two-tier arbitration provision constituted a valid agreement.

To complicate issues further, on both parties appealing to the Supreme Court, the division bench, differed in their judgments in dealing with issues, *inter-alia*, as follows:

- i. whether a two-tier arbitration is valid and permissible in India under the Arbitration and Conciliation Act, 1996 ("1996 Act")?

One of the judges held that two-tier arbitration was valid and recognized only under the erstwhile Arbitration Act of 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961 and not under the 1996 Act while the other judge held that such two-tier arbitration was applicable under the 1996 Act;

- ii. whether the ICC arbitrator sat in appeal against the award of the Indian arbitrator?

One judge held that a challenge to the domestic award can be made only before a national court designated by the 1996 Act itself and on the grounds specified in Section 34 of the 1996 Act and hence, the validity of a domestic award cannot be questioned before any other forum including the forum chosen by the parties while the other judge held since it was the intention of the parties to the agreement that if the parties are dissatisfied with the first award and if approach was made to the ICC arbitrator in view of the second part of that clause, then the first arbitration award would not be binding on the parties nor would there be any existence of the same after the ICC award was made;

- iii. whether the ICC award is enforceable as a 'foreign award'?

One judge held that an award made in terms of one arbitration agreement can either be a domestic award or a foreign award and that it is inconceivable that one part of the arbitration agreement shall be enforceable as a domestic award but the other part would be enforceable as a foreign award and that hence the foreign award was not valid while the other judge held that the award of the ICC arbitrator was not a domestic award but a foreign award and hence enforceable under the 1996 Act.

In light of this difference of opinion, these issues are now being referred to a larger Bench of the Supreme Court as they are of tremendous importance and complexity. With India becoming the center of global commercial and economic activity, we are going to be faced with numerous dispute resolution issues, which may conflict with laws, be ambiguous or raise issues of enforceability. We will have to wait and see how the Supreme Court deals with these rather interesting issues.

-Vyapak Desai & Vivek Kathpalia

Source: *Centrotrade Minerals and Metals Inc. v. Hindustan Copper Limited*

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