TWO-TIER ARBITRATION PROCESS: IS IT OPPOSED TO THE DOCTRINE OF PUBLIC POLICY IN INDIA?

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"International Arbitration may be defined as the substitution of many burning questions for a smoldering one" – Ambrose Bierce (United States)"

An Arbitration Agreement with a *'two-tier arbitration clause'* provides for an appellate review of an arbitral award by a subsequent arbitration. It empowers the parties with flexibility and autonomy to resolve a dispute by going into an appeal against the original arbitral award. In India, this two-tier arbitration system was not explicitly recognized under the Arbitration Act previously.

The Hon'ble Supreme Court in its recent decision of *Centrotrade Minerals and Metals Inc. v. Hindustan Copper Ltd.*[3] by stating that "*party autonomy is virtually the backbone of arbitrations*" has however upheld the validity of the two-tier arbitration process in India. The Court further observed that a foreign arbitral award can now be executed in India under a two-tier arbitration process, thereby taking a step forward towards making India a pro-arbitration nation.

In this article, I assisted by my researcher, Surbhi, propose to do a comparative analysis of the Indian Legal System and the acceptability of the awards passed in Foreign Shores following a two-tier arbitration process and whether the same is not opposed to the doctrine of public policy.

Doctrine of Public Policy vis-à-vis Arbitration and Conciliation Act, 1996

The Indian arbitration law follows the United Nations Commission on International Trade Law (UNCITRAL) Model Law. On June 2nd 2020, the Hon'ble Supreme Court in its landmark decision in *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd*. has recently upheld a two-tier arbitration clause that provides for an appellate review of the original arbitral award by a subsequent arbitration, which is not explicitly prohibited in India.

Section 48 of Arbitration and Conciliation Act, 1996 lays down the circumstances under which a foreign arbitral award can be prevented from being enforced by the Indian Courts. One such ground for refusal to execute such an award was that "its enforcement would be against public policy". In the landmark case of *Renusagar*[4], by the virtue of Section 7(1)(b)(ii) of Foreign Awards (Recognition & Enforcement) Act, 1961, the term 'public policy' was interpreted by the Supreme Court in a much narrower sense in order to maintain a balance between the broadly worded provision and the legislative intent of minimal judicial interference.[5] The Supreme Court further held that the term 'public policy' is confined to:

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[3] 2020 SCC OnLine SC 479.
[4] Renusagar Power Co. Ltd. v. General Electric Co. 1994 Supp (1) SCC 644.
[5] https://www.lexology.com/library/detail.aspx?g=ee1fbf07-288e-4c74-8fa1-88e4c2f7d679.

i) The fundamental policy of Indian law,

ii) Justice or morality,

iii) National interests.

The Apex Court later on firmed this stance of 'minimal judicial interference' in an arbitral award while interpreting Section 48(2)(b) of Arbitration and Conciliation Act, 1996 in the case of *Shri Mahal Ltd. v. Progetto Grano Spa*[6] and by overruling the previous judgment of *Phulchand Exports v. Ooo Patriot*[7] in which it was held that the term 'public policy' holds the same meaning under both Section 34 and Section 48 of Arbitration and Conciliation Act, 1996.

The need for an amendment in Arbitration and Conciliation Act, 1996 arose in order to resolve the dilemma surrounding Section 48 that whether it will be governed by the *Renusagar* judgment or by the *ONGC* judgment. The Apex Court in the case of *ONGC Ltd. v. Western Geco International Ltd.*[8] observed that for the purpose of the Section 34, the term 'public policy' is to be widely interpreted and also "patent illegality" to be a ground for an arbitral award to be set aside by the Indian courts. Hence, Wednesbury principles of reasonableness were included within the term "fundamental policy of Indian Law" while interpreting the term public policy as u/s 34.

Inspired by the *Renusagar* judgment, the Parliament while enacting the 2015 Amendment to the Arbitration and Conciliation Act, 1996, followed a proactive approach, and amended Section 48 of the Arbitration and Conciliation Act, 1996 in order to define the scope of 'public policy' exception. By adding an explanation to Section 48(2), the 2015 Amendment Act explicitly stated that a foreign award will be treated against the 'public policy' only if:

i) It was induced by fraud or corruption;

ii) It's against the national interests;

iii) It's against the principles of morality and justice.

Analysis of Centrotrade Judgment vis-à-vis law on the doctrine of Public Policy

On June 2nd 2020, the Supreme Court upheld the enforceability of a 'foreign arbitral award' rendered in accordance with a two-tier arbitration agreement.[9] The Court held that a two-tier arbitration process would not be against the principle of public policy in India. The decision is notable as it demands a clarification on the interpretation of the public policy exception post Arbitration and Conciliation (Amendment) Act, 2015.[10]

Briefly, the facts of the instant case are that HCL and Centrotrade entered into a contract of sale of which clause 14 mentioned a two-tier arbitration clause in case of dispute. The first tier mentioned the dispute to be settled in India. Under second tier, the aggrieved party could appeal before the International Chamber of Commerce (ICC) in London. When dispute arose, Centrotrade commenced arbitration against HCL invoking the arbitration clause 14. As a result, the Indian

[6] (2014) 2 SCC 433.
[7] (2011) 10 SCC 300.
[8] (2014) 9 SCC 263.
[9] Centrotrade Minerals & Metals, Inc. v. Hindustan Copper Limited Ltd., *Civil Appeal No. 2562 of 2006 (Sup. Ct. India).*
[10] https://www.law.ox.ac.uk/business-law-blog/blog/2017/03/centrotrade-decision-two-edged-sword.

Council of Arbitration (ICA) passed a NIL award in the matter. Centrotrade being aggrieved from the decision of ICA invoked the second tier of the arbitration agreement before the ICC London, which delivered an award in favor of Centrotrade. At the same time, HCL approached the Supreme Court of India (ISC) claiming that the two-tier arbitration process is in violation with the Indian public policy.

The Apex Court by adapting a pro-arbitration approach, rejected the HCL's defense of two-tier arbitration clause being in violation with Indian public policy. Hence, the same does not contravene the fundamental principles of Indian laws as the court denied to 'misconstrue' the arbitration act in such a way that it makes two-tier arbitration system against its 'fundamental principles'. The three-judge bench further held that HCL had first hand knowledge and intentionally did not participate in arbitration proceedings at ICC London, thereby rejecting its contentions flavored with being violative of Indian policy and natural law. In this welcoming judgment, the court further while defining the 'scope of public policy' chose to ignore the words of the statute by stating that the primary intention behind the statute is not to "throttle the autonomy of the parties or preclude them from adopting an appellate arbitration". Therefore, the finality of the first award as protected by the statue does not prevent an aggrieved party from claiming a second award by going into an appeal. Hence, the Supreme Court also took a proactive approach and affirmed the two-tier arbitration process and broadened the meaning of Public Policy under the Arbitration and Conciliation Act, 1996, as not doing so would have rendered the entire process undertaken by Centrotrade infructuous.

Conclusion

In our opinion, after analysing the law and the judgment of the Supreme Court in Centrotrade matter, it can be said that, by choosing to ignore the words of the statute while defining the scope of the doctrine of public policy and putting party autonomy at a greater pedestal, the Supreme Court has rightly affirmed the validity of two-tier arbitration system in India.

Moreover, by adapting the minimal judicial intervention approach, the very basic purpose of the Arbitration and Conciliation Act has been fulfilled. Overall, this judgment has plugged the loopholes that previously existed which will allow India to become an arbitration-friendly nation in future, whereby foreign companies would feel more secured and confident for protecting their rights under Arbitration Law as practiced and enforced in India.

Rightly, the Supreme Court has upheld and applied the law in a proactive manner which will ultimately benefit the Indian Legal Fraternity as well as the Courts while interpreting foreign arbitral awards which follows the two-tier process in foreign shores. India is currently looking forward to be the global arbitration hub and genuinely such interpretations and judgments by the Supreme Court of the biggest democracy in the world shall not only help but shall pave the way for the future of India by coming a global leader and investment friendly nation with robust and friendly arbitration process abreast with the laws in foreign jurisdictions.