



## Supreme Court upholds a foreign award given through a two-tier arbitration procedure<sup>1</sup>

### Brief Facts

Centrotrade Minerals and Metal Inc. (“**Appellant**”) and Hindustan Copper Ltd. (“**Respondent**”) entered into a contract for sale of 15,500 DMT of copper concentrate by the Appellant to the Respondent. The dispute resolution clause of the contract provided, in relevant part, as follows:

“14. All disputes and difference whatsoever arising between the parties...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 arbitrator in London, U.K. 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 of Jurisdiction”.*

A dispute arose between the parties regarding the quantity of dry concentrate delivered to the Respondent, which led the Appellant to commence arbitration seated in India, under the rules of the Indian Council of Arbitration (“**ICA**”).

The Appellant was unsuccessful in the ICA arbitration. Thereafter, it invoked the second tier of Clause 14 of the contract, which allowed parties to appeal the result from the ICA arbitration to another arbitrator in London in accordance with the rules of the International Chambers of Commerce (“**ICC**”).

The Respondent filed an application in the Rajasthan High Court to obtain an injunction against this second arbitration. The order of the Rajasthan High Court, granting such ad-interim *ex-parte* injunction, was challenged by the Appellant in the Supreme Court of India (“**Supreme Court**”). By an order dated 8 February 2001, the Supreme Court vacated the injunction issued by the Rajasthan High Court, thereby allowing the parties to continue the ICC proceedings.

The arbitrator appointed in the ICC arbitration, by an award dated 29 September 2001, decided in favour of the Appellant (“**ICC Award**”).

An action was brought before the Calcutta High Court by the Respondent challenging the execution of the ICC Award by the Appellant under Section 48 read with Section 49 of the Arbitration and Conciliation Act, 1996 (“**Act**”). The single judge dismissed the Respondent’s petition. However, on appeal, a division bench of the Calcutta High Court overturned the decision of the single judge on the basis that there was a “contrary

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*Indian award making it to no effect*". Further, it held that the ICC award was not a foreign award since no seat of arbitration was mentioned in Clause 14 and the "*proper law of the contract*" was Indian.

The matter eventually reached the Supreme Court. Two separate judgments were given by the judges of the division bench. The judgment by S.B. Sinha, J. merely dealt with the validity of the two-tier process of dispute resolution in Clause 14 of the contract and held such a contractual provision to be "*void for being opposed to public policy*" under Section 23 of the Indian Contract Act, 1872.

On the other hand, the judgment by Tarun Chatterjee, J. held that Clause 14 was enforceable and not opposed to public policy since similar clauses have been regularly upheld and are not considered as defeating the object of the Act. Further, he held that the ICC Award was a foreign award because even though Indian law was the governing law of the contract, the parties cannot be said to have "*deemed*" India as the seat of the second arbitration. However, he held that the ICC Award was not executable in India since the Respondent was not given a "*fair hearing*" by the arbitrator who did not consider the Respondent's delayed submissions even when the delay was "*not attributable to HCL's conduct*".

This matter was eventually referred to a three judge bench of the Supreme Court in 2017. The three judge bench held that the two-tier process in Clause 14 of the contract was valid. However, the Supreme Court deferred ruling on the enforceability of the ICC Award as a foreign award to a later date.

## Issues

**Issue (i):** Whether a larger bench could consider the issue of enforceability of the ICC Award in India?

**Issue (ii):** Whether the ICC Award was enforceable as a foreign award in India?

## Judgment

**Issue (i):** The Supreme Court held that a larger bench could decide on this issue since the entire matter, and not merely the question of the validity of Clause 14 of the contract, was referred to it owing to lack of consensus between the judges of the division bench of the Supreme Court.

**Issue (ii):** The Supreme Court held the ICC Award was enforceable in India. It rejected the Respondent's contention that it was not given adequate opportunity to present its case in the ICC proceedings on the basis that:

*First*, the ICC Award was not void on the ground that the arbitrator continued the proceedings in spite of the injunction issued by the Rajasthan High Court. The Supreme Court held that even though the injunction is only binding on the parties, and not the arbitrator, the arbitrator asked the parties to make their submissions only after receiving a green signal of the ICC and after the Supreme Court had vacated the injunction issued by the Rajasthan High Court on 8 February 2001. *Second*, the arbitrator had given multiple extensions to the Respondent to make its submissions and even considered lengthy submissions that were submitted by the Respondent after the deadline.

Relying on the judgments given in **Vijay Karia v. Prysmain Cavi E Sistemi SRK<sup>2</sup>** and **Minmetals Germany GmbH v. Ferco Steel Limited<sup>3</sup>**, the Supreme Court held that the Respondent cannot claim that it was not given adequate opportunity to present its case since it was never outside its control to present its submissions to the ICC arbitrator.

## Analysis

The Supreme Court's final decision has brought much needed clarity on the scope of enforcement of foreign awards given in two-tier arbitrations.

Also, this decision has imposed a high burden on parties challenging foreign awards on the grounds of natural justice to prove that they

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were unable to present their submissions due to factors outside their control.

Further, the Supreme Court's active reinforcement of the approach adopted in the recently passed **Vijay Karia** (*supra*) judgment, to restrict the grounds of challenge to enforcement of foreign awards,

is certainly welcome. An outcome of the Supreme Court's reliance on this judgment is that Indian courts may require parties to challenge foreign awards in the seat of arbitration before challenging their execution in India.

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### Endnotes

- 1 Authored by Rishabh Gupta, Partner, Rishabh Jogani, Senior Associate and Ritika Bansal, Associate; *M/S Centrotrade Minerals and Metals Inc. v. Hindustan Copper*, Supreme Court of India, 2020 SCC OnLine SC 479, judgment dated 2 June 2020.  
**Coram:** R.F. Nariman, S. Ravindra Bhat and V. Ramasubramanian, JJ.
- 2 2020 SCC OnLine SC 177.
- 3 [1999] CLC 647.

## PRACTICE AREA EXPERTS

### Pallavi Shroff

Managing Partner and  
National Practice Head Dispute Resolution  
+91 98100 99911  
E: pallavi.shroff@AMSShardul.com

### Rishabh Gupta

Partner  
+91 98217 80313  
E: rishabh.gupta@AMSShardul.com

### Binsy Susan

Partner  
+91 96500 80397  
E: binsy.susan@AMSShardul.com

### Smarika Singh

Partner  
+91 97170 98075  
E: smarika.singh@AMSShardul.com

### Tejas Karia

Partner and Head, Arbitration Practice sub-group  
+91 98107 98570  
E: tejas.karia@AMSShardul.com

### Siddhartha Datta

Partner  
+91 90070 68488  
E: siddhartha.datta@AMSShardul.com

### Nitesh Jain

Partner  
+91 96507 00833  
E: nitesh.jain@AMSShardul.com

### Anirudh Das

Partner  
+91 98100 98329  
E: anirudh.das@AMSShardul.com

### Ila Kapoor

Partner  
+91 98717 92737  
E: ila.kapoor@AMSShardul.com

### Aashish Gupta

Partner  
+91 98189 19857  
E: aashish.gupta@AMSShardul.com

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