

# ‘Two Tiers or Three Tier’ a Never-Ending Saga of Dispute Settlement– A Delaying Mechanism Arbitration

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## Abstract

Two Tier Arbitration or Appellate Arbitration is recognised by Court through its various judicial pronouncements. Even though Party Autonomy and fair mechanism are the stand points by which court gives importance or validity to Two Tier mechanism, it has unnecessarily opened the gates for delayed mechanism. The famous *Centro trade Minerals and Metal Inc. v. Hindustan Copper Ltd.* decision has further strengthened the principle that there is less chance of court intervention. All these shows the positive impact the particular mechanism will bring but the main question here is: Whether Arbitration mechanism is going far beyond speedy redressal of disputes? Or Whether the processes right now the Court’s rely on party autonomy is relatable to unnecessary court proceedings which we are tired off.

In this Article the author’s try to analyse the repercussions that will create if Court starts supporting various appellate, revisions or review mechanisms in Arbitration proceedings. The Author’s surmises the Article by providing suggestions on appropriate implementation of Arbitration regime in India by comparing with other countries.

**Keywords:** Arbitration, Appellate, Judiciary, Delay, Autonomy

## Introduction to Two Tier Arbitration in India

There is a recent trend in the judicial society not to drag disputes to courtrooms, but to settle them through discourse, mutual agreements, and sometimes the appointment of a third party who is not acting in a judicial capacity to preside over the dispute. Arbitration is a procedure wherein by consensual agreement between parties a dispute is submitted to one or more arbitrators who make a decision that is binding on the parties<sup>1</sup>. It is the result of efforts to find more effective and efficient alternatives to litigation. The parties are free to choose their own arbitrators, sometimes the central government can recommend or appoint arbitrators from its wide roster of potential candidates. Arbitration processes are less formal than judicial processes, they are more flexible due to the non-mandatory nature of formal pleadings, written documentaries, and stringent rules of evidence<sup>2</sup>.

<sup>1</sup> Guide to WIPO ADR Arbitration and Mediation Center, 2020.

<sup>2</sup> Dr. S.C Tripathi, Arbitration and Conciliation Act, 1996, Central Law Publications, 7<sup>th</sup> Edition, 2015.

Two-tier arbitration is a concept wherein the award given by the arbitrator is challenged by one of the parties to the dispute before an appellate tribunal<sup>3</sup>. The aggrieved party must file an appeal within 30 days from the date of receipt of the award before the appellate tribunal of arbitrators. The tribunal may uphold or set aside the award passed. It is a relatively new concept in India its legal validity was upheld by the supreme court in the case *Centro trade Minerals and Metals Inc. v. Hindustan Copper Limited*<sup>4</sup>.

Two-tier arbitration or appellate arbitration or second-instance arbitration reflects party autonomy where they choose to retain the choice to go for appeal, however, this defeats the initial purpose of introducing the concept of arbitration to reduce the cost of litigation and prevent wastage of time and resources. These conflicting schools of thought paired with the lack of proper substantiation in the arbitration Act lead to further confusion.

In a country like India with diverse cultural and linguistic differences and the plethora of cases filed each day in the country, there needs to be some sort of an alternative system to reduce the burden of the courts. Arbitration is a type of alternate dispute resolution that involves solving a dispute without entering the intricacies of court. The Arbitration and Conciliation Act of 1996 was passed to consolidate and amend the laws dealing with domestic and international commercial arbitration. The purpose of this Act is to minimize the role of courts and to put forth a procedure that is fair efficient and capable of meeting the needs of society. It also deals with the enforcement of foreign awards, stipulating the jurisdiction of the tribunals, and defines the law relating to conciliation.

### Two-Tier Arbitration in India

Handbook of Arbitration Practise defines TwoTier Arbitration as "Second Instance Arbitration" as, *"Fundamental and ancient feature of commodity trade arbitration is the two-tier system whereby the first arbitration is held speedily and relatively informally and results in the issuance of an award, which, subject to time limits, can be appealed by a dissatisfied party to a board of appeal of the relevant association. This gives a party two bites at the cherry and the arbitral process is not deemed to be concluded until the board of appeal has issued its final award.....In two tier systems, the awards of the tribunal, sole arbitrator or umpire are usually called awards of arbitration, to distinguish them from appeal awards issued by boards of appeal."*

The UNCITRAL Model Law, the mother of modern jurisprudence underlying the International Arbitration Regime, gives us sufficient assurance that the two-tiered arbitration process is viable and legal.

*"However, a party is not precluded from appealing to an arbitral tribunal of the second instance if the parties have agreed on such a possibility"*

The concept of two-tier arbitration while providing means for a more flexible justice system in debating the validity of awards by an appellate tribunal, this concept upends the original purpose for which arbitration was recognized- a speedier justice system. Arbitration can be statutorily recognized in India through the Arbitration and Conciliation Act of 1996.

The supremacy that the arbitration act gives to party autonomy paves way for the concept of two-tier arbitration. While the act failed to incorporate provisions of appellate legislation it does not deny the parties to the dispute the opportunity to opt for it.<sup>5</sup> Over the years the judiciary has had a divided opinion

<sup>3</sup> Govindarajan, Two Tier Arbitration, TaxManagementIndia.Com (2020) – Referred in [https://www.taxmanagementindia.com/visitor/detail\\_article.asp?ArticleID=9592](https://www.taxmanagementindia.com/visitor/detail_article.asp?ArticleID=9592)

<sup>4</sup> Dr. S.C Tripathi, Arbitration and Conciliation Act, 1996, Central Law Publications, 7<sup>th</sup> Edition, 2015.

<sup>5</sup> Gaurav Jairaj, Two-tier Arbitration in India: An Unclear Path, Referred in <https://indiacorplaw.in/2020/07/two-tier-arbitration-in-india-an-unclear-path.html>

on the interpretation of Sec 35 of the Act which deals with the finality of the arbitral awards. This debate found a conclusion in the Centrotrade case where the court held that the clause “final and binding” in Sec 35 does not mean final and binding for all intents and purposes. This case overruled the earlier system that once an arbitral tribunal passes an award, no further action can be taken based on the original subject matter of the initial claim. Thus, the Indian courts have conclusively held that sec 35 is no bar to appellate arbitration, this power is only limited to the extent of party intention. Though two-tier arbitral clauses are not statutorily recognized they form the core of the Indian arbitral system. The courts are of the opinion that the right to appeal is not a matter of procedure but a substantive right.

The underlying principle is not only party autonomy but also due regard for a fair trial. It provides the courts the opportunity to revisit any dispute for revision with consent from the parties. To lessen the disputes in arbitration it becomes impertinent for the parties to the dispute to draft the clauses unambiguously. When parties fail to do so it leads to the wastage of lots of time, money, and resources, therefore it is essential to lay down precise and clear mechanisms and provisions especially relating to the limitation period and finality of previous awards.

### **Case Study of *Centrotrade Minerals and Metals Inc. V. Hindustan Copper Limited***

This hallmark case paved the way for the legal recognition of two-tier arbitration. Centrotrade an American company entered into a contract with Hindustan copper limited to supply 15500 DMT of copper concentrate. The Centrotrade saga as it has now come to be known in India the dispute between centrotrade and Hindustan copper limited regarding the sale of copper concentrates. When a conflict arose due to the weight of silver ingots a case was filed by centrotrade minerals and co before an arbitrator appointed by the Indian Council for arbitration<sup>6</sup>. The arbitration agreement provided for 2 stages of arbitration. Both parties will be heard by an arbitrator in India, if either of the parties is dissatisfied with the result then they can appeal for a second arbitration to be conducted by ICC in London. When a nil award was passed on the invocation of the agreement in 1999, Centrotrade appealed to ICC. Subsequent to this, Hindustan copper limited filed a suit in Rajasthan challenging the arbitral clause and requesting the court to grant an anti-arbitration injunction. The Rajasthan High Court granted an ex-parte stay order in Hindustan Copper Limited’s favor against the London arbitration. This ex-parte stay was vacated by the Supreme Court in February 2001.

The ICC arbitration passed a monetary award in favor of Centrotrade and suit for the enforcement of the award was filed before the Calcutta high court. The matter then went before the supreme court where the bench was of a divided opinion. One view was that a clause in the agreement which provided for two-tier arbitration was violative of public policy and hence void under Sec 23 of Indian Contract Act<sup>7</sup> and the arbitration act 1999 did not envisage the concept of two-tier arbitration and hence the monetary award should be deemed invalid. The contrary opinion was that the two-tier arbitration clause was valid and enforceable and the award passed by ICC is a valid and a foreign award but it will not be enforceable since Hindustan copper limited was not given an opportunity to properly present its case before ICC.

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<sup>6</sup> Shaneen Parikh & CAM Corporate Team, The Centrotrade Enforcement Saga Ends on a High Note, Referred in - <https://corporate.cyrilamarchandblogs.com/2020/08/the-centrotrade-enforcement-saga-ends-on-a-high-note/>

<sup>7</sup> Section 23: What considerations and objects are lawful, and what not. - The consideration or object of an agreement is lawful, unless—it is forbidden by law; or is of such a nature that if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

Since the judges were divided in their opinion the matter was referred to a 3 judge bench of the Supreme Court which ruled that parties were free to enter into agreements that provide for alternate forms of dispute resolutions which do not require approaching the court and though the act does not contain any provisions for appellate arbitration it does not expressly prohibit a two-tier system or the autonomy of the parties to approach another arbitrator to reconsider any previously given award.

This case laid the groundwork for the acceptance of appellate arbitration by courts in India. It also brought light to the problem of the enforcement of awards in the country. The award received by Centrotrade in 2001 was only enforced in 2020.

### **Nuances of Judgment**

The court looked into two issues in the judgment

The court found two-tier arbitration lawful and not against Indian public policy on the first concern. On the second issue—whether the appellate arbitration award is a "foreign award" liable to be enforced under Section 48—the court stated that "appeals should be listed again for consideration of the second question which relates to the enforcement of the appellate award"<sup>8</sup>. The verdict is excellent and supports party autonomy, but the Supreme Court must answer some key concerns on the second problem. This Article focusses on the implementation of the two tier arbitration system in India.

The Apex Court's persistent emphasis on party autonomy in arbitration shows that it is committed to establishing a proper arbitration system in India that meets international standards and is accepted worldwide. The possibility to appeal if there is a fault or misrepresentation at the initial arbitration will provide parties confidence and relief if they want to correct their mistakes. Knowing that an appeal is allowed will speed up the initial arbitration.

Arbitration enables people to choose any dispute resolution mechanism that is suitable for their needs, and resolves disputes in a manner that avoids adversity, it is very important in long-term contracts as it prevents the damage of relationship between the parties. One of the main reasons for its adoption is due to the convenience it brings with regard to time and cost related issues. Two-tier arbitration provides an independent forum for party autonomy where it is left to them to decide whether they will go for an appeal. This acts as a counter principle to the logic behind the enabling of the arbitral mechanisms- reducing the burden of courts, time, and cost management. In commercial disputes especially in India, there is a fear of unwanted legal hassle which often ends with long-drawn battles. The tedious judicial situation in India where the judicial proceedings are delayed due to the archaic hierarchy of courts throws a better light on alternate dispute mechanisms including 2 tier arbitration. However, despite being a valid method of dispute resolution 2 tier arbitration brings forth confusion as to which instance of arbitration to be enforced, and the delay in enforcement of arbitral awards. There have been instances where parties after being dissatisfied with both tiers of arbitration approach the court for settlement which is a tiresome process in itself. In case there are multiple dispute resolution clauses in the agreement and no time frame within the clauses it leads to further delay.

### **Submissions and Concluding Remarks**

The advantage provided by the developing technology and science should be made use of to provide a faster resolution to the problems arising due to the time delay in the two-tier arbitral process. The ICJ (International Court of Justice) and ICC (International Court of Arbitration) must create a better platform

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<sup>8</sup> *Enercon (India) Limited v. Enercon GMBH* [(2014) 5 SCC 1].

on the international stage for the proper development and application of two-tier arbitration, as it will bring a sense of safety and trust to the business environment in this globalized era<sup>9</sup>. Interim relief other than 50% of the award should be given to the affected party during the two-tier arbitral proceedings. There should also be immediate enforcement of such partial relief to prevent harm to the interest of the aggrieved party in the unnecessary dragging of the proceedings. The courts should concentrate not only on the speedier resolution of the dispute but also on the proper enforcement of the awards given to ensure proper justice.

Two-tier arbitration is a valid form of arbitration and is an important aspect of the Indian judicial system. It garners support from public policy and forms the driving force of the principle of party autonomy. The decision of the supreme court in the Centrotrade case brought about a tidal wave of changes regarding the amendment of arbitration laws of the country. The Central Government has also taken a keen interest in this matter with an aim to develop India into an arbitration hub so as to encourage foreign direct investment, to encourage foreign investors to settle disputes according to local laws in relation to arbitration. While it has its advantages as well as disadvantages it has now become a part of the judicial structure of the country. After an analysis of the Centrotrade case judgment and the international view on two-tier arbitration has brought clarity with regard to the acceptance, statutory force, and enforceability of arbitration awards, agreements, and proceedings in India. However the judgement itself will not serve as proof of two tier arbitration in attracting foreign investment and speedy dispute resolution, only time will tell.

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<sup>9</sup> <https://iccwbo.org/dispute-resolution/dispute-resolution-services/icc-international-court-of-arbitration/>