



AN UNSTAMPED AGREEMENT DOES NOT BAR THE CONSTITUTION OF AN ARBITRATION PANEL

In a recent judgment in the matter of *Coastal Marine Construction and Engineering Limited v. Garware-Wall Ropes Limited*, the Bombay High Court (the “**Bombay HC**”) has examined whether Indian courts can act upon an unstamped arbitration agreement to constitute an arbitration panel. This judgment is important in the backdrop of the amendment to Section 11 of the Arbitration and Conciliation Act, 1996 (the “**Arbitration Act**”) effective from October 23, 2015, which regulates THE appointment of arbitrators.

Background

Coastal Marine Construction and Engineering Limited (“**CMC**”) and Garware-Wall Ropes Limited (“**GRL**”) were parties to a sub-contract dated June 14, 2013 (the “**Agreement**”). In 2016, a dispute arose between CMC and GRL under the Agreement, and CMC issued a letter notifying its intention to commence arbitration to resolve the dispute. CMC and GRL were unable to agree upon the arbitrator, and GRL also protested against invocation of the arbitration provision. As a result, CMC invoked Section 11 of the Arbitration Act.

Section 11 of the Arbitration Act deals with the appointment of arbitrators and, among other things, permits the parties to approach a court in case they fail to appoint an arbitrator. More specifically, Section 11(6A), inserted by the Arbitration and Conciliation (Amendment) Act, 2015, provides that notwithstanding any judgment of any Indian court, while considering an application for the appointment of arbitrators, the Supreme Court or the High Court will only confine themselves to the existence of an arbitration agreement.

Contentions

GRL’s primary objection to CMC’s invocation of the arbitration provision and appointment of an arbitrator was that no stamp duty had been paid on the Agreement as a “works contract” under the Maharashtra Stamp Act, 1958. GRL highlighted that, Indian courts have regularly ruled that an arbitration agreement on which adequate stamp duty has not been paid cannot be acted upon even for the constitution of the arbitration panel or appointment of a sole arbitrator.

CMC argued that the recently introduced Section 11(6A) changed this position, and Indian courts were now required only to verify the existence of the arbitration agreement prior to appointing an arbitrator. CMC insisted that the judgments delivered by Indian courts prior to 2015 were no longer applicable as the Indian legislature had made a conscious decision to take away the power of courts to examine all other aspects, except the existence of the arbitration agreement under Section 11. Moreover, as GRL had not denied that a valid arbitration agreement existed in the Agreement, the Bombay HC must go ahead and appoint an arbitrator to resolve the dispute.

Ruling of the Bombay HC

The Bombay HC ruled in favour of CMC and distinguished the current position under Section 11 from the erstwhile position. The Bombay HC relied on the Supreme Court’s decision in *Duro Felguera, S. A. v.*



Gangavaram Port Limited ((2017) 9 SCC 729), which distinguished the pre-2015 and post-2015 law on appointment of arbitrators by Indian courts albeit on a different issue. The Bombay HC also emphasized that the arbitrator is free to impound the Agreement for failure to pay the stamp duty and direct the parties to pay the stamp duty and penalty in accordance with the procedure prescribed under the Maharashtra Stamp Act, 1958. Accordingly, the Bombay HC appointed an arbitrator to hear the dispute between CMC and GRL.

Pro-arbitration decision

Stamp duty is a tax levied on certain instruments and documents in India. The rate of stamp duty payable on an instrument depends on the nature of the instrument and varies from state to state. Typically, government authorities do not *suo moto* take action against parties who have insufficiently stamped documents. However, insufficiently stamped documents are inadmissible as evidence before an authority or an Indian court, and if the document has to be admitted as evidence, it has to be stamped with the requisite duty and penalty (as applicable). Furthermore, courts in India have held that failure to pay stamp duty does not take away a party's right to litigate, as stamp duty is a revenue generating source for the Indian government.

In light of the above, and given the shift in the post-2015 law on appointment of arbitrators, the Bombay HC's decision is welcome. The Bombay HC has rightfully noted that, the 2015 amendment to the Arbitration Act was to increase the "ease of doing business in India" and to make India an attractive arbitration destination. Given India's low global ranking on contract enforcement, it is imperative that the Arbitration Act be implemented in a manner so as to facilitate the enforcement of claims and resolution of disputes. Moreover, as Section 11(13) casts an obligation on Indian courts to appoint an arbitrator within sixty (60) days of an application, it is not intended that courts look into substantive issues relating to the arbitration. Therefore, in our view, the Bombay HC is a very progressive decision and will pave the way in making arbitration in India a preferred mode of dispute resolution.