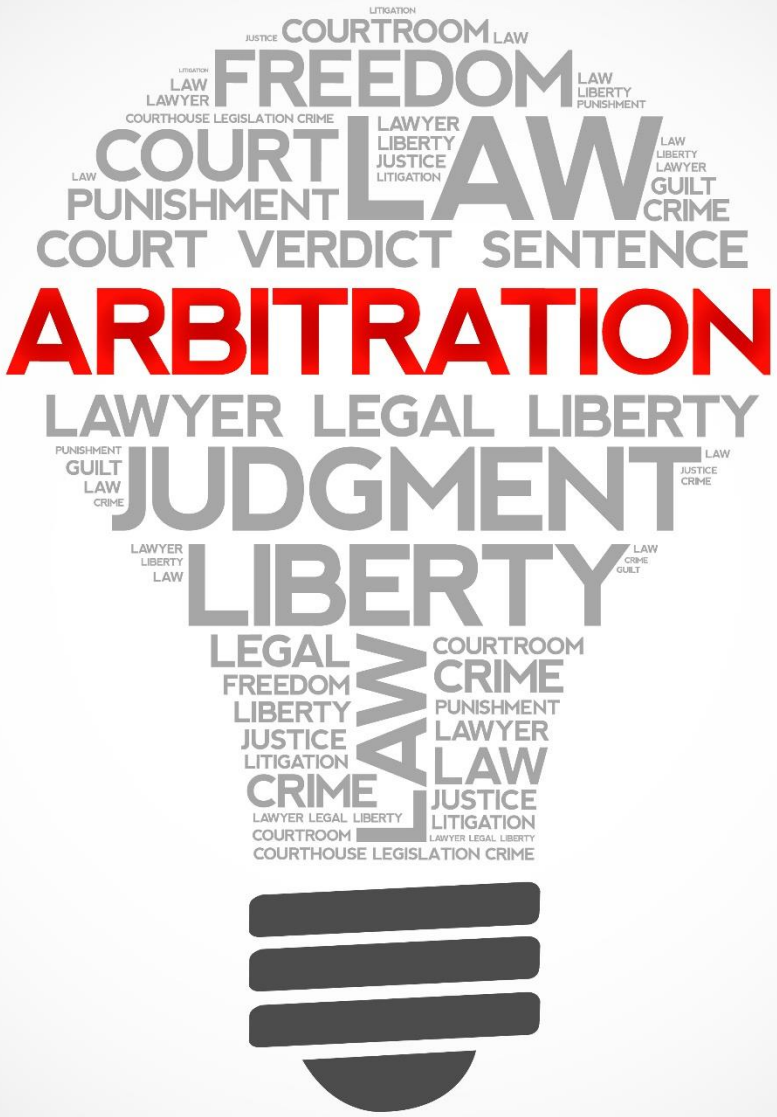

ELP Arbitration Weekly Alert

April 11, 2019

Union of India and Ors. v. *Parmar Construction Company and Ors.*[1] (Supreme Court, 29 March 2019)

Introduction

The Supreme Court of India, in its recent judgment of *Union of India* v. *Parmar Construction Company*, has analysed a multitude of caselaws and reiterated the following important principles of arbitration law:

i. The provisions of the Arbitration and Conciliation (Amendment) Act, 2015 shall only become applicable to proceedings where the notice of arbitration was served after 23 October 2015 (the date when the said amendment came into force), unless otherwise agreed by the parties;

[1] Civil Appeal No. 3306 of 2019.

ii. A no-claim certificate signed by a contractor is not conclusive proof of there being no disputes as to payments, and each case must be analysed based on its facts and circumstances; and
iii. If the arbitration agreement prescribes a specific procedure and criteria for appointment of an arbitrator / arbitral tribunal, courts must seek to adhere to the same and not directly proceed to appoint an independent arbitrator.

Factual Background

The Respondents were all registered contractors with the Railways / Appellants, undertaking various kinds of construction works. Respondent No. 1 had been allotted certain construction works. At the time of submission of the final bill, the Appellant allegedly refused to pay the amount unless the Respondent No. 1 signed a 'no-claim certificate', which it did. Thereafter, in 2013, Respondent No. 1 sent a demand notice to the Appellants, asking them to appoint an arbitrator as per the arbitration agreement under Clause 64(3) of the General Clauses of Contract ("**GCC**") between the parties. Clause 64(3) laid out the procedure to appoint an arbitrator. However, the Appellants refused to appoint an arbitrator, ostensibly on the grounds that since Respondent No. 1 had signed a no-claim certificate, there was no dispute to be referred to arbitration.

Respondent No. 1 (and similarly the other Respondents) approached the Rajasthan High Court ("**HC**") for appointment of an independent arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("**1996 Act**"). The matters were decided by the HC after the promulgation of the Arbitration and Conciliation (Amendment) Act, 2015 ("**Amendment Act**"), and the HC opined that the amended 1996 Act would be applicable to the said matters. In light of the same, the HC found that the arbitration agreement under the GCC – which provided for appointment of a Railways employee as arbitrator – would be violative of Section 12(5) of the amended 1996 Act, and thus exercised its powers under Section 11(6) and passed separate orders appointing independent arbitrators.

Issues and Findings

Aggrieved by the findings of the HC, the Appellants approached the Supreme Court ("**SC**"), which formulated the following issues:

i. Whether the HC was justified in invoking the amended provisions as introduced by the Amendment Act;
ii. Whether the arbitration agreement stood discharged on acceptance of the final amount by the contractor and signing of no-claim certificate;
iii. Whether the HC erred in appointing an independent arbitrator outside the procedure for appointment agreed upon by the parties.

With regard to the first issue, the SC looked at Section 21 of the 1996 Act, read in conjunction with Section 26 of the Amendment Act.

In light of the fact that the requests for arbitration had been received much prior to the commencement of the Amendment Act on 23 October 2015, the SC adverted to its earlier judgment in *M/s Aravali Power Company Private Limited* v. *Era Infra Engineering Limited*[2]. Following the principles of the said judgment, the SC held that the arbitral proceedings had to be governed by the 1996 Act. It would be immaterial that the Amendment Act had come into effect while applications under Section 11(6) were still pending. The SC ruled that the HC ought to have decided the matters under the 1996 Act.

The second issue for the SC's consideration was the effect of the no-claim certificate having been signed by the Respondents, who alleged that they had done so under economic coercion and duress. The SC categorised the precedents relied upon by the parties in two categories. The first category was where the court upon analysing the facts of the case found that there was indeed full and final settlement and the allegations of coercion by contractors were baseless. The second category was where the court did find some substance in allegations of coercion, as the

[2] 2017 (15) SCC 32 ["***Aravali Power***"].

no-claim / no-dues certificates would be taken as a condition precedent for release of even admitted amounts, and small contractors would have no choice but to comply. While the SC referred to the principles for such determination as laid down in *National Insurance Company Limited* v. *Boghara Polyfab Private Limited*[3], it recognised that such principles are not exhaustive, and a determination would have to be made on a case-to-case basis.

In the present case, the SC, considering the imbalance of bargaining power, the fact that no-claim certificates were being furnished along with the final bill (and not after its payment), and found that it fell squarely within one of the principles laid down in *Boghara Polyfab*. Thus, the no-claim certificate was *prima facie* not found to have been submitted voluntarily.

For the purpose of deciding the third issue, the SC *inter alia* discussed the judgment of *Union of India & Another* v. *M.P. Gupta*, to demonstrate the settled law that where the arbitration agreement contained express terms regarding the appointment of arbitrator(s), the High Court would not be justified in acting beyond the provision and appointing an independent arbitrator.

The Respondent sought to place reliance on various judgments including *Datar Switchgears Ltd.* v. *Tata Finance Ltd. And Another*[4], to contend that by failing to appoint an arbitrator, the Appellants had forfeited their right to do so. The SC distinguished these judgments on the basis that those judgments had laid down that the right of appointment would continue until institution of a Section 11 application, while in the present case the court was concerned with whether the Court could, in exercise of its power under Section 11(6) of the 1996 Act, directly appoint an independent arbitrator without first exhausting the remedies under the arbitration agreement.

Therefore, the SC quashed and set aside the orders of the HC and directed the Appellant to appoint the arbitrators in terms of Clause 64(3) of the GCC.

ELP Comment

The applicability of the Amendment Act has been a highly contentious issue since its very introduction. Therefore, any judicial analysis – such as through the present judgment – lending some clarity to that issue is a welcome development.

While the effect of submission of no-claim certificates by contractors on the existence of disputes must necessarily be examined on a case-to-case basis, it is significant that the courts are clearly aware of the ground reality that is the imbalance of bargaining power between government and private companies.

Lastly, this judgment also goes on to reinforce the concept of party autonomy as being one of the cornerstones of arbitration. This is exemplified through the finding that a court is expected to honour the procedure for appointment of an arbitrator as agreed between the parties, even though the alternative would be the court appointing an independent arbitrator. Needless to say, if the arbitrator appointed by the parties does not act in an independent and impartial manner, there are consequent remedies available to the aggrieved party.

[3] 2009 (1) SCC 267 ["***Boghara Polyfab***"].
[4] 2000 (8) SCC 151 ["***Datar Switchgears***"].