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Use of the word 'may' in an arbitration clause does not amount to parties agreeing to mandatory arbitration clause under which the courts would exercise jurisdiction under the Arbitration Act

A single bench of the Bombay High Court ("**Bombay HC**") in its recent judgment ***GTL Infrastructure Ltd. v. Vodafone Idea Ltd. (VIL)***[1] *inter alia* held that an arbitration agreement which postulates a fresh consensus between the parties before referring the disputes to arbitration is not a mandatory/valid arbitration agreement. While deciding applications under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") for appointment of an arbitrator, the Bombay HC held that in arbitration agreements where the word 'may' has been used, there is no mandatory agreement to initiate arbitral proceedings.

Brief Facts

GTL Infrastructure Limited ("**Applicant**") and the predecessor of Vodafone India Limited ("**Respondent**") executed a master service agreement ("**MSA**") *inter alia* for the supply of telecom infrastructure by the Applicant to the Respondent. On termination of the MSA, disputes arose between the parties and the Applicant issued a notice of invocation of arbitration in terms of the MSA.

The arbitration clause provided for mandatory mediation as a pre-arbitral step for resolution of any dispute which when *"not resolved within 30 days, ...may, if mutually agreed upon by the parties, be submitted for arbitration in accordance with the Arbitration and Conciliation Act, 1996 before an arbitral panel comprising three arbitrators…."* [*emphasis added*].

The Respondent replied to the notice *inter alia* stating that the mandatory pre-arbitral steps specified under the MSA were not followed by the Applicant before issuing the notice of invocation. However, the existence of a valid or mandatory arbitration agreement under the MSA was not disputed by the Respondent. Considering the above, the Applicant filed applications under Section 11(6) of the Arbitration Act seeking appointment of a sole arbitrator in terms of the MSA provision.

The Applicant *inter alia* submitted that the conduct of the Respondent in not disputing the existence of an arbitration clause while replying to the invocation notice evidenced the parties' understanding that the arbitration clause under the MSA was mandatory and not optional despite the use of the word 'may'.. On the other hand, the Respondent argued that arbitration was merely an optional mode of dispute settlement for the parties under the MSA. It was also argued

[1] 2023 SCC OnLine Bom 39.

that the arbitration clause was an enabling provision for parties to opt for arbitration, with fresh mutual consent upon failure of the pre-arbitral steps required as specified under the dispute resolution clause in the MSA.

Issue

Whether the use of the word 'may' in an arbitration agreement makes reference of dispute to the arbitrator(s) imperative.

Analysis and Findings

After considering the submissions and arguments advanced by the parties, the Bombay HC *inter alia* made the following observations:

1. The courts have a limited scope of inquiry under Section 11 (6) of the Arbitration Act, which is confined to ascertaining whether there exists an arbitration agreement warranting reference to the arbitrator.
2. Whilst the Arbitration Act does not contemplate a particular form for an arbitration agreement, the existence of a valid arbitration agreement is *inter alia* determined based on the facts and circumstances of the case as well as the intention and conduct of the parties.
3. Reference to arbitration would be necessitated if the wordings of the arbitration agreement unambiguously indicate the intention of the parties to refer disputes to arbitration. A mandatory arbitration clause should leave no scope to depart from the agreement to enter into arbitration.
4. If the terms of the arbitration clause clearly indicate intention of the parties contentions raised before the court and the correspondence exchanged between the parties after the dispute has arisen would be immaterial.
5. Interpreting the clause, the Bombay HC held that use of the word 'may' merely contemplated a choice or a discretion, an option for the parties to refer their dispute to arbitration. The use of the word 'may' removed the element of compulsion to refer the dispute to arbitration, and merely contemplated future mutual consent of the parties for making reference to arbitration.
6. In the absence of any specific and direct expression of intent to have disputes adjudicated by way of arbitration, there can be no valid and binding arbitration agreement.

In light of the foregoing, the Bombay HC dismissed the applications seeking appointment of an arbitrator. Considering that the arbitration agreement contemplated a fresh consensus between parties by virtue of the word 'may' and the following rider 'if mutually agreed upon the parties' used in the arbitration agreement, the Bombay HC concluded that the arbitration agreement was not mandatory in nature.

JSA Comment

This judgment reiterates the importance of an unambiguous and mandatory arbitration agreement between parties for reference to arbitration. The judgment emphasises the importance of clear drafting and sounds a word of caution for parties entering into arbitration agreements as well as the individual drafting such agreements to ensure that words like 'may' and qualifiers such as 'if mutually agreed upon by the parties' ought not to be used if parties are *ad idem* to adopt arbitration as the means of dispute resolution. Such qualifiers are most likely to be interpreted as the wilful intention of parties to not *simplicitor* agree to bind themselves to mandatory arbitration under the contract.

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