



ERGO

Analysing developments impacting business

SUPREME COURT CLARIFIES SECTION 11(6A) DOES NOT BAR 'ANY OTHER ENQUIRY' IN PETITIONS FILED FOR APPOINTMENT OF AN ARBITRATOR

28 August 2018

A full bench of the Hon'ble Supreme Court of India (the Court) in the case of *United India Insurance Co Limited v Hyundai Engineering and Construction Co Ltd & Ors* (Civil Appeal no 8146 of 2018) has clarified that the observation "After Amendment Act 3 of 2016, as per the amended provision of sub-section(6-A) of Section 11, the power of the court is confined only to examine the existence of the arbitration agreement" in *Duro Felguera SA v Gangavaram Port Limited* [(2017) 9 SCC 729] (*Duro Felguera*) is a 'general observation about the effect of the amended provision and not specific to the issue', thus effectively overruled the law laid down in the case of *Duro Felguera*.

Background

The Respondents Nos 1 and 2 (Hyundai Engineering and Construction Co. Limited and Gammon India Limited) constituted a Joint Venture (JV). Respondent No. 3 (National Highway Authority of India) awarded a contract on 29 September 2006 for design, construction and maintenance of a bridge across the River Chambal, which was to be completed within a period of 40 months. After commencement of the work, a Contractor All Risk Insurance Policy (CAR Policy) dated 5 December 2007 was obtained from the appellants covering the entire project. The arbitration clause contained in the policy read as follows:

"7. If any difference shall arise as to the quantum to be paid under this Policy (liability being otherwise admitted) such difference shall independently of all other questions be referred to the decision of an arbitrator..."

... It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as herein before provided, if the Company has disputed or not accepted liability under or in respect of this Policy.

During the construction of the bridge, an accident occurred and in the final report of the Surveyor and Loss Adjuster, a finding was recorded to the effect that the damage was on account of the faulty design and improper execution of the project. Based on the insurance and the above report, the JV made a claim under the insurance and the same was repudiated by the Appellant insurer denying the liability under the insurance policy. This was intimated through two communications to the JV. Consequently, the JV issued a notice invoking arbitration clause to the Appellant and when no response

ERGO | SUPREME COURT CLARIFIES SECTION 11(6A) DOES NOT BAR 'ANY OTHER ENQUIRY' IN PETITIONS FILED FOR APPOINTMENT OF AN ARBITRATOR

was received, filed an application under Section 11 of the Act, before the High Court of Madras (HC).

The Appellant denied its liability under two communications sent to the JV and contended that the arbitration clause in the policy was a conditional *clause*, hence no arbitrator could be appointed under the same. The HC, placing reliance on the law laid down in *Duro Felguera* held that the enquiry under Section 11 is limited to the existence of an arbitration agreement and admission of the same by the parties, and nothing more even where the arbitration clause is conditional.

Supreme Court's Order

The Hon'ble Supreme Court set aside the judgement of HC and held that a conditional arbitration clause will be triggered only if the dispute between the parties is limited to the quantum to be paid under the policy and not a dispute on the liability of the insurer. In the present case the liability should be unequivocally admitted by the insurer as the same is precondition and *sine qua non* for triggering the arbitration clause. Therefore, an arbitration clause would come to life only if the insurer admits or accepts its liability under or in respect of the concerned policy. Further, the Court stated, that an enquiry should have been made by the HC to examine whether the communications sent by the insurer fell in the excepted category of repudiation and denial of liability in toto or has the effect of acceptance of liability by the insurer under or in respect of the policy and limited to disputation of quantum.

Comment

The Court has effectively overruled its judgment in *Duro Felguera* and held that there can be a limited enquiry on facts by the Court under Section 11(4) and (6) of the Act. In the cases of a conditional arbitration clause, unless such condition is strictly complied with, an arbitrator cannot be appointed. The Court should have protected the legislative intent behind inserting Section 11(6A) and maintained a fine balance between the "power to appoint an arbitrator" and the "power of the arbitrator to decide the question of jurisdiction". The present judgement, being a full bench judgment, binds all the courts in India including the Supreme Court itself and resultantly, there may be considerable delay in appointment of an arbitrator.

The present judgment virtually the effect of Section 11(6A) and resultantly reads down the same.

- *Udayarkar Rangarajan and Praveenkumar Hiremath*

For any queries please contact: editors@khaitanco.com

We have updated our [Privacy Policy](#), which provides details of how we process your personal data and apply security measures. We will continue to communicate with you based on the information available with us. You may choose to unsubscribe from our communications at any time by [clicking here](#).

For private circulation only

The contents of this email are for informational purposes only and for the reader's personal non-commercial use. The views expressed are not the professional views of Khaitan & Co and do not constitute legal advice. The contents are intended, but not guaranteed, to be correct, complete, or up to date. Khaitan & Co disclaims all liability to any person for any loss or damage caused by errors or omissions, whether arising from negligence, accident or any other cause.

© 2018 Khaitan & Co. All rights reserved.

Mumbai

One Indiabulls Centre, 13th Floor
Tower 1 841, Senapati Bapat Marg
Mumbai 400 013, India

T: +91 22 6636 5000
E: mumbai@khaitanco.com

New Delhi

Ashoka Estate, 12th Floor
24 Barakhamba Road
New Delhi 110 001, India

T: +91 11 4151 5454
E: delhi@khaitanco.com

Bengaluru

Simal, 2nd Floor
7/1, Ulsoor Road
Bengaluru 560 042, India

T: +91 80 4339 7000
E: bengaluru@khaitanco.com

Kolkata

Emerald House
1 B Old Post Office Street
Kolkata 700 001, India

T: +91 33 2248 7000
E: kolkata@khaitanco.com