ELP

Arbitration Weekly Update

September 10, 2018

SC CONDUCTS FACTUAL ENQUIRY IN AN APPLICATION UNDER SECTION 11 OF THE ARBITRATION AND CONCILIATION ACT, 1996

United India Assurance Co. Ltd. & Anr. v. Hyundai Engineering and Construction Co. Ltd. & Ors. [1] ***(August 21, 2018)***

INTRODUCTION

1. In an insurance policy, the arbitration clause stipulated that disputes between the parties shall not be referred to arbitration if the insurance company has disputed or not accepted liability under or in respect of the insurance policy. In an appeal filed by the insurance company against a judgment under Section 11 of the Arbitration and Conciliation Act, 1996 ("**the Act**"), the Supreme Court examined the construction of the arbitration clause, to eventually conclude that the arbitration agreement was incapable of being enforced as the insurer expressly denied its liability.

FACTUAL BACKGROUND

2. Hyundai Engineering and Construction Co. Ltd. & Ors. ("**Respondent"**) was awarded a contract for the design, construction, and maintenance of a bridge. Subsequently, the Respondent obtained a Contractor All Risk Insurance Policy ("**Policy**") from United India Assurance Co. Ltd. & Anr. ("**Appellant**"/ "**Insurer**") for the entire project.

3. During the construction of the bridge, a fatal accident occurred which resulted in significant losses to the contractor. The Respondent submitted a claim for these losses to the Appellant. While the Appellant appointed a surveyor to assess the loss, the Ministry of Road Transport and Highways, Government of India set up a committee of experts ("**Expert Committee**") to enquire into the accident. The surveyor and the Expert Committee both concluded that the accident was caused due to faulty design and improper execution of the project by the contractor.

4. Relying upon the findings of the surveyor and the Expert Committee, the Appellant addressed correspondences to the Respondent and repudiated the claims as the Policy specifically excluded losses/damages caused by faulty design, defective workmanship or material. While the Respondent requested the Appellant to re-assess its decision of repudiation of the claim, the Appellant rejected the Respondent's pleas for a reassessment.

5. Thus, disputes arose between the parties which led to the Respondent invoking the arbitration clause in the Policy. The Respondent nominated a sole arbitrator and called upon the Appellant to confirm the nominee or to nominate its own arbitrator in terms of the arbitration clause. As the Appellant did not accede to the request to appoint an arbitrator, the Respondent filed an application under sections 11(4) and 11(6) of the Act, before the High Court of Madras ("**High Court**") for the appointment of an arbitrator.

6. In the proceedings before the High Court, the Appellant placed reliance on the arbitration clause in the Policy which *inter alia* provided that "*no difference or dispute shall be referable to arbitration as herein before provided, if the Company [Appellant] has disputed or not accepted liability under or in respect of this Policy".*

   The Appellant resisted reference to arbitration and contended that the only remedy which the Respondent can take recourse to is institution of a civil suit. The Appellant also contended that the period of limitation to institute a suit started would start from the date of receipt of the first intimation through which the Appellant denied the claim. However, the High Court observed that an arbitration agreement existed between the parties, and by way of an Order dated 30 November 2017, the High Court nominated an arbitrator on behalf of the Appellant ("**Order**").

7. Aggrieved by the Order, the Appellant filed an appeal before the Supreme Court by way of a Special Leave Petition. The issue which arose for consideration before the Apex Court was whether the disputes were barred from reference to arbitration since such disputes were not covered by the arbitration clause.

OBSERVATIONS & FINDINGS OF THE COURT

8. The Supreme Court relied upon its ruling in *Oriental Insurance*[2], wherein in a similar factual scenario, the Supreme Court observed that the arbitration clause can carve out exceptions to exclude the applicability of the arbitration clause. Strictly construing the arbitration clause, the Supreme Court held that "*If a clause stipulates that under certain circumstances there can be no arbitration, and they are demonstrably clear then the controversy pertaining to the appointment of arbitrator has to be put to rest.*" [3]

9. The Supreme Court concurred that the insurer should unequivocally admit its liability to trigger the arbitration clause, and therefore the dispute between the parties would be limited to the quantum payable under the Policy.

10. Testing the judicial precedents in light of the present facts, the Supreme Court observed that, the Appellant expressly denied its liability and therefore the arbitration clause was *"ineffective and incapable of being enforced, if not non-existent".* The Supreme Court held that the dispute was therefore "*non-arbitrable*".

CONCLUSION

11. In view of the above, the Supreme Court accepted the plea of the Appellant, allowed the appeal and set aside the Order. While the Supreme Court observed that the only remedy the Respondent can take recourse to is to institute a civil suit for mitigation of grievances, it kept the issue of limitation open for determination before the appropriate forum.

12. With the intent of determining whether the Appellant had excluded the applicability of the arbitration clause between the parties, the Supreme Court examined the facts of the case. However, a brewing cause of concern is that the amended Act had sought to limit the scope of the court's intervention specifically to examining the existence of an arbitration agreement. While Section 11 (6-A) of the Act provides that at the time of considering an application for appointment of an arbitrator the court shall confine itself to "the *examination of the existence of an arbitration agreement*", in the present case the Supreme Court has diverged from the very essence of section 11 (6-A).

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[1] CIVIL APPEAL NO. 8146 OF 2018 (Arising out of SLP(C) No.4260/2018)

[2] *Oriental Insurance Company Limited Vs. Narbheram Power and Steel Private Limited*, (2018) 6 SCC 534

[3] Supra 2