

5th November, 2020

ANALYSIS OF “LEIGHTON INDIA CONTRACTORS PRIVATE LTD. VS. DLF LTD.”: NO UNILATERAL BG ENCASHMENT

A Introduction:

- 1 Section 9 of the Arbitration and Conciliation Act, 1996 (for short “**the said Act**”) grants the power to courts for granting interim measures of protection.
- 2 It can be said that Section 9 is one of the most crucial and widely invoked provision of the said Act.
- 3 The reason for the filing of the Section 9 Application under the said Act is to prevent damage to or loss of, the subject matter of the dispute in the interim period, i.e. before the final adjudication of the dispute by an arbitral tribunal.

B Scope of Section 9 under the said Act:

- 1 Section 9 of the said Act, is very wide in scope and it would extend even to third parties in whom the properties or goods are vested, even though such parties may not be a party to the arbitration clause in an agreement.
- 2 The power conferred under Section 9 of the said Act is to be exercised only in exceptional circumstances.
- 3 The power contemplated under Section 9 is not intended to frustrate the Arbitration Proceedings.
- 4 In “*Leighton India Contractors Private Ltd. vs. DLF Ltd.*” decided on May 13, 2020, the Hon’ble Delhi High Court has reiterated that the scope of Section 9 of the Act is very broad and that it is an expansive provision which does not curtail the powers of the court

C Analysis of “Leighton India Contractors Private Limited –Vs- DLF Limited” - Brief Facts:

- 1 The Respondent i.e. DLF Limited (for short “**DLF**”) issued Letter of Intent (for short “**LOI**”) on 11.07.2013 for developing a residential project “The Camellias” at DLF City, Phase V, Gurugram to the Petitioner, Leighton India Contractors Private Limited (for short “**LIC**”).
- 2 On 19.09.2013, The contract was signed between LIC and DLF.
- The value of the contract was approximately Rs. 1438 Crores.

- Date of completion of the contract was 03.09.2017.
 - After the initial contract, several variation orders were placed and the date of completion was revised.
 - The last extension was granted till 30th June 2018.
- 3 Total 6 Bank Guarantees (for short “**BGs**”) furnished by LIC having validity till 31.05.2020.
 - 2 BG’s –in lieu of retention money.
 - 4 BG’s –to secure the performance of the contract.
- 4 As per LIC, substantial part of the work was completed by September, 2017. However, due to various amendments/variation orders that were placed, some part of the work continued till date.
 - 5 Completion Certificate refused by DLF.
 - 6 A letter was issued by DLF to LIC on 07.04.2020, raising defects in work. LIC replied on 04.05.2020.
 - 7 On the basis on the letter dated 07.04.2020, DLF invoked BGs.
 - 8 According to LIC, defects were minor and total cost of rectifying would not be more than Rs. 50 lakhs. The invocation of BGs of more than Rs. 200 crores was totally unjustified.
 - 9 Invocation of BGs were not intimated to the LIC either by DLF or by the Bank.
 - 10 That on 04.05.2020, an e-mail was issued by Bank to LIC, stating that the BG’s stood invoked.
 - 11 No termination of Contract has taken place.
 - 12 Thereafter, Section 9 application under the said Act has been filed by LIC, inter alia, praying for following:
 - a “*Restraining Respondent No.1, its agents, officers, employees etc. from invoking and/or encashing Bank Guarantee(s) as detailed Paragraph No. [73] herein above issued by Respondent No.2 during pendency of the present Petition till conclusion of arbitration proceeding; and/or;*



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b *Restraining Respondent No.2, its agents, officers, employees etc. from making any payment to Respondent No.1 under Bank Guarantee(s) as detailed Paragraph No. [73] herein above during pendency of the present Petition till conclusion of arbitration proceeding; and/or; Or*

In alternative, if amount is already released by the Respondent no.2 in favour of the Respondent no.1 under Bank Guarantee(s) as detailed Paragraph No. [73],

c *Direct the Respondent No.1, its agents, officers, employees etc. to pay to and deposit the complete amount received under Bank Guarantee(s) as detailed Paragraph No. [73] with the Petitioner during pendency of the present Petition as well as during arbitration proceeding; and/or;*

d *Direct the Respondent No.1, its agents, officers, employees etc. to pay to furnish appropriate security to the Petitioner or to this Hon'ble Court to secure the complete amount received by the Respondent No.1 under Bank Guarantee(s) as detailed Paragraph No. [73] during pendency of the present Petition as well as during arbitration proceeding; and/or;*

e *ad-interim reliefs in terms of prayer (a) to (d) above.*

f *for costs:*

Pass any such other or further orders as may be deemed fit by this Hon'ble Court in facts and circumstances of the present case;"

D Issue:

1 Whether DLF ought to be directed to refund the amount or to secure the amount in any manner until the section 9 petition is heard or the disputes are adjudicated by the arbitral tribunal.

E Decision of the Court:

1 The scope of Section 9 of the Act is very broad.

2 The Court is empowered to grant various 'interim measures of protection', including,

a Securing the amount in dispute

b Preservation of property

c Interim injunctions

d Appointment of receivers.

3 That the defects do not disclose non-performance.

4 That issue of defect in work are arbitrable disputes.

5 Presence of defects can not lead to invocation of BGs, especially during the COVID-19 lockdown.

6 That the manner in which the BGs, especially the performance BG's, invoked i.e. during the lockdown period is not completely bona fide and therefore, special equities exist to protect the interest of the Petitioner and secure the amount of the performance BG's.

7 The Hon'ble Court directed that out of the amount credited by the Bank to DLF, DLF shall create a fixed deposit for a sum of Rs. 143,87,22,708/- and place the same in an interest-bearing FD with auto renewal. FD in name of the Registrar General of the High Court of Delhi. Original FD Receipt to be filed in the Court + Bank's undertaking not to encash until further orders of the Court.

F Conclusion:

1 Powers under Section 9 of the said Act are broad and interim measures of protection can be granted.

2 Section 9 relief is often considered critical to get a head start, and very often, half the fight is won with such a relief being granted by the court.

3 Section 9 also empowers the Court to grant such other interim measure of protection 'as may appear to the court to be just and convenient'.

4 That the BG cannot be encashed unlawfully and fraudulently and if the same is done than the Courts are having the broad power to secure the encashed BG amount.

5 Thus, it is an expansive provision and does not curtail the powers of the court.