

Supplier Liability Under Civil Liability for Nuclear Damage Act, 2010



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Background

Article 10 of the Convention on Supplementary Compensation for Nuclear Damage ("CSC") (which India ratified in 2016) allows ratifying states, through domestic legislation, to provide that in the event of a nuclear incident, the operator shall have a right of recourse against the supplier only if: (a) it is expressly provided for by a written contract; or (b) if the nuclear incident results from an act or omission done with intent to cause damage, against the individual who has acted or omitted to act with such intent. The intention underlying the CSC was categorical. It limits liability of suppliers of nuclear technology to two narrow circumstances – i.e., if the contract between the operator and supplier explicitly provides for recourse to the supplier, or if the supplier intentionally causes harm.

India's Civil Liability for Nuclear Damage Act, 2010 ("CLNDA") largely replicates the aforesaid risk allocation in the CSC. However, Section 17 (b) of the Civil Liability for Nuclear Damage Act, 2010 ("CLNDA") extends recourse against the supplier to situations where the nuclear incident has resulted from an act of the supplier or his employee, which includes supply of equipment or material with patent or latent defects or sub-standard services.

Issues

- A. Whether Section 17(b) of the CLNDA goes beyond the provisions of the CSC?
- B. Whether Section 17 establishes a mandatory statutory right of recourse to the supplier (overriding, for instance, a contrary position in a supply contract)?

Analysis

Issue A

The Ministry of External Affairs, Government of India *vide* FAQs issued by way of a press release dated February 8, 2015¹ stated the following on this issue:

"...the situations identified in Section 17(b) relate to actions and matters such as product liability stipulations/conditions or service contracts..... Thus, this provision is to be read along with/in the context of the relevant clause in the contract between the operator and supplier on product liability..."

Article 10(a) of the CSC Annex does not restrict in any manner the contents of the contract between the operator and the supplier including the basis for recourse agreed by the operator and supplier. Therefore, in view of the above, in so far as the reference to the supplier in Section 17(b) is concerned, it would be in conformity with and not in contradiction of Article 10(a) of the CSC Annex....."

By stating that Section 17(b) is to be read along with / in the context of the relevant clause in the contract between the operator and supplier on product liability, the Government has in effect suggested that Section 17(a) and 17(b) are connected with the word "and" which is not the case. In fact, a proposal to so connect Section 17(a) and 17(b) was made in the Report of the Parliamentary Standing Committee² but the said suggestion was not upheld by the Parliament in the final version of CLNDA. It is a well settled principle of Indian law that a provision that was expressly excluded from the statute cannot be read into the statute by interpretation and that every statute is to be interpreted in accordance with the intention of the legislature³. It is evident that Section 17(b) exists independently of the contract which may be entered into between the operator and supplier. In our view, even if the operator and supplier were to provide for exclusion of the liability of the supplier in their agreement, such a provision would be void as being violative of Section 17(b).

Issue B

The aforesaid FAQs also state that Section 17 permits but does not require an operator to include in the contract or exercise a right of recourse. This response also suffers from the same fallacy as the previous one. As stated above, the right of recourse against the supplier under Section 17(b) is independent of the contract and therefore, even if such a right is not included in the contract, the operator would still be entitled to the same. With respect to the option with the operator to not exercise a right of recourse, it is pertinent to mention that as per the Indian law⁴, only the Central Government, an authority or corporation established by the Central Government, or a Government Company can operate a nuclear power plant in India.

¹https://www.mea.gov.in/press-releases.htm?dtl/24766/Frequently_Asked_Questions_and_Answers_on_Civil_Liability_for_Nuclear_Damage_Act_2010_and_related_issues

²Parliamentary Standing Committee report available at: https://www.prsindia.org/sites/default/files/bill_files/SCR_Nuclear_Liability_Bill_2010.pdf

³M/s. Trutuf Safety Glass Industries vs. Commissioner of Sales Tax U.P., 2007 (9) SCALE 610

⁴Section 2(m) of CLNDA

Therefore, while it may be theoretically possible for the operator to not exercise the right of recourse, the propriety of such a waiver could be challenged before the Indian courts. The ground for such challenge being that the waiver / non-recourse / limited recourse against a negligent supplier is contrary to public interest as it entails a burden on the Indian taxpayer on account of the operator being a Government undertaking.

Conclusion

The Government of India (GoI) has provided encouraging clarifications in the FAQs. Considering that only the GoI or authorities, corporations, and companies under GoI's control can operate nuclear power plants in India, American suppliers could introduce language in their contracts restricting supplier's liability to the grounds set out in the CSC. As the

FAQs have indirectly endorsed this position (albeit without direct legislative support), this may be an opportunity for global suppliers to reopen discussions in an important sector for Indo-US collaboration. In fact, India has attempted to further allay the concerns of suppliers by limiting their liability under the Civil Liability for Nuclear Damages Rules, 2011 and creating a nuclear insurance pool. Some of these additional policy measures adopted may serve to re-invigorate participation from US suppliers of components, technology, and know how in civilian nuclear technology in India.

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