



October 2022

## **Delhi High Court has held that the period of limitation for referring the disputes to arbitration would commence only once the parties exhaust the pre-arbitration steps set out in the agreement**

In a recent judgment dated October 10, 2022 titled *Welspun Enterprises Ltd. vs NCC Ltd*<sup>1</sup>, a Division Bench of the Delhi High Court (“**Delhi HC**”) has held that if the contract between the parties contemplates pre-arbitration steps (such as negotiation, mediation etc.) before commencing arbitration, then the period of limitation for initiating arbitration would start only after the parties exhaust such steps.

### **Facts**

The contract between the parties required that in the event of a dispute arising between the parties:

1. The parties would resolve the dispute by mutual negotiation;
2. If the dispute is not resolved within 1 (one) month from when it arose, it would be referred to the chief executives of the parties; and
3. If the chief executives also fail to reach an agreement then the dispute would be referred to arbitration.

Welspun Enterprises Ltd. (“**Welspun**”) completed the works under the contract between the parties. In a meeting held on August 3, 2010, NCC Ltd. (“**NCC**”) agreed to pay various amounts due to Welspun for the works executed by it under the contract. Thereafter, on October 30, 2010, Welspun submitted its final bill to NCC towards the work executed by it and on November 30, 2010, NCC issued the completion certificate, certifying that Welspun had completed the works under the contract. Dispute arose between the parties in relation to payment of the final bill and other claims raised by Welspun under the contract (for executing extra works, towards escalation etc.).

Welspun referred the dispute to the chief executives of NCC and Welspun. However, on December 21, 2012, the attempt to resolve the disputes between the parties failed. Welspun invoked arbitration by its notice dated January 27, 2014.

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<sup>1</sup> 2022 SCC OnLine Del 3296

## Award & finding of Single Judge

1. The Arbitral Tribunal (majority) passed an award holding that the cause of action for invoking the arbitration had arisen on August 3, 2010 (when NCC made the promise to pay Welspun) and then on October 30, 2010 (when the final bill was issued/certified). Since the notice of arbitration was issued on January 27, 2014, it held that the invocation of arbitration was beyond the period of 3 (three) years and the claims raised were therefore, barred by limitation.
2. In a petition filed by Welspun challenging the award under Section 34 of the Indian Arbitration and Conciliation Act, 1996, the Single Judge upheld the award and held that:
  - (a) The claim raised by Welspun was on the basis of certification of the final bill and therefore, the cause of action arose on the date the final bill was certified.
  - (b) Under the contract, the parties were required to explore the possibility of settlement through reference of disputes to their respective chief executives. However, Welspun had not considered the reference to chief executive as a pre-condition to invocation of the arbitration but instead only as an attempt to amicably resolve the disputes.
  - (c) The court rejected the contention that limitation would commence from December 21, 2012, i.e., on the failure of the dispute resolution process and held that the letter dated November 26, 2012 invoking the dispute resolution mechanism (by referring the dispute to the chief executives) did not stop the period of limitation.
3. The judgment of the Single Judge was challenged before the Division Bench. The issue before the Delhi HC was whether the period of limitation would commence prior to the parties exhausting the agreed pre-reference procedure/remedies.

## Finding of the Division Bench

1. The Division Bench held that:
  - (a) Several dispute resolution clauses provide for a multi-tier or water fall dispute resolution mechanism and the entire purpose of such clauses is to provide the parties an opportunity to resolve the disputes amicably before resorting to adversarial proceedings.
  - (b) The period of limitation would run when a party acquires a right to refer the disputes to arbitration. If the arbitration agreement requires the parties to exhaust the dispute resolution process as a pre-condition for invoking arbitration, the right to refer the dispute to arbitration would arise only after the parties have exhausted the said procedure.
  - (c) The time spent for complying with the pre-reference procedure is not to be excluded while calculating the period of limitation for referring the disputes to arbitration. Instead, the period of limitation would commence only after the said procedure has been exhausted.
  - (d) In the present case, the attempt to resolve the disputes by the Chief Executives failed on December 21, 2012. It is on the said date that the right to refer the disputes arose in favour of Welspun and therefore, the notice of arbitration issued on January 27, 2014 was within the period of limitation (i.e. 3 (three) years).
2. The Division Bench also referred to Indian Commercial Courts Act, 2015 and the law in other countries (such as Singapore, UK, Canada, Austria etc.) to support its finding that the judicial policy is to promote mediation and encourage the parties to make a serious endeavour for an amicable resolution of the disputes before commencing any adversarial proceedings.
3. Pertinently, in respect of one claim raised by Welspun, the Division Bench observed that Welspun had not taken any steps for escalating the dispute to the Chief Executives of the parties within three years from the date when the cause of action in respect of that dispute arose, and therefore, that claim would be barred by limitation.

## JSA Comment

The outcome of the Division Bench judgment would be that in cases where the agreement provides for the parties to follow a mandatory dispute resolution mechanism (such as negotiation or mediation) before commencing arbitration then:

1. A party asserting a claim should invoke the dispute resolution mechanism within the limitation period (usually 3 (three) years from the date when the cause of action arose);
2. If the dispute resolution mechanism fails, then the party asserting the claim will have another 3 (three) years to commence arbitration from the date of such failure.

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