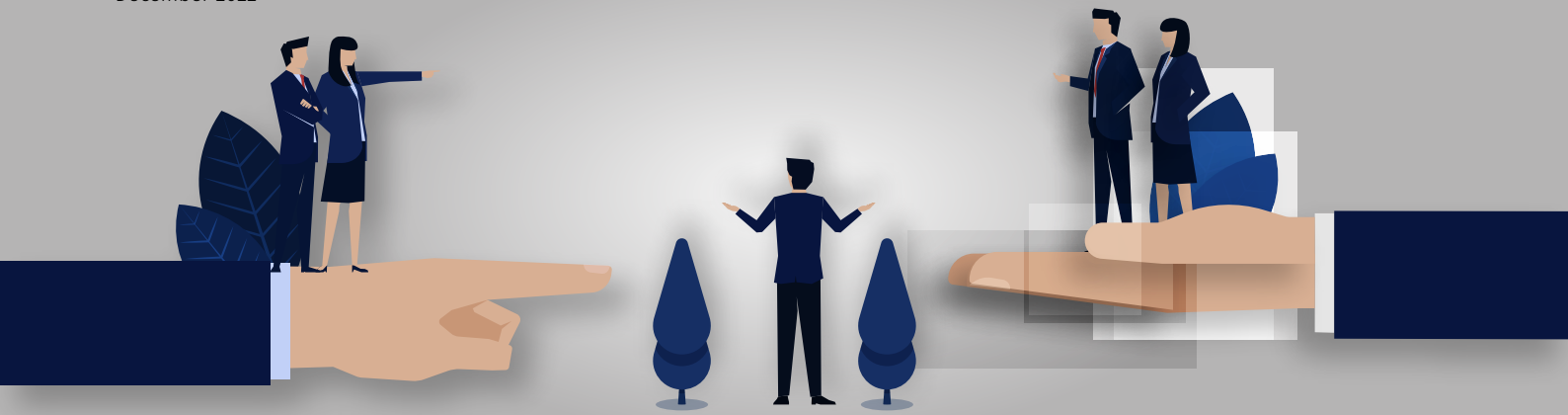


December 2022



High Court of Delhi clarifies the limitation period applicable to a counterclaim vis-à-vis Sections 8 and 21 of the Arbitration and Conciliation Act, 1996¹

Brief Facts

Web Overseas Limited (“**Appellant**”) filed an appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”) challenging an order of the Commercial Court dismissing a challenge to an interim award of the arbitral tribunal, which had rejected the Appellant’s application seeking dismissal of the counterclaim of Universal Industrial Plants Manufacturing Company Pvt. Ltd. (“**Respondent**”) as barred by limitation.

The Appellant filed a suit in 2014 seeking recovery of monies before the jurisdictional District Court. In response, on 28 August 2014, the Respondent filed an application under Section 8 of the Arbitration Act (“**Application**”), which came to be allowed on 27 January 2017. The cause of action admittedly arose on 30 July 2013. However, the Respondent filed its counterclaim before the arbitral tribunal only on 7 July 2018. The Appellant filed an application for dismissal of the counterclaim as being barred by limitation. The Respondent contended that its counterclaim was not barred by limitation because: (i) it was entitled to the benefit of Section 14 of the Limitation Act, 1963 (“**Limitation Act**”) in respect of its Application; and (ii) it had issued notices dated 18 October 2013 and 5 February 2014 to the Appellant, which were to be construed as notices under Section 21 of the Arbitration Act. Therefore, the period of limitation would stop running on the dates when the said notices were received, and not on 7 July 2018, which was the date of filing the counterclaim.

The tribunal held that: (i) the Respondent’s counterclaim was within limitation as the time spent in pursuing its Application was to be excluded under Section 14 of the Limitation Act; and (ii) the Respondent had not issued notices within the meaning of Section 21 of the Arbitration Act (“**Interim Award**”).

In the Appellant’s challenge to the Interim Award under Section 34 of the Arbitration Act, the Commercial Court disagreed with the tribunal to the extent that the notices issued by the Respondent were held to be notices under Section 21 of the Arbitration Act, thereby saving limitation (“**Impugned Order**”). The counterclaim was therefore, within limitation.

Aggrieved by the Impugned Order, the Appellant preferred an appeal before the High Court of Delhi (“**Court**”).

Issues

Issue (i): Whether the Respondent was entitled to exclude the time it spent in pursuing the Application by operation of Section 14 of the Limitation Act?

In this Issue

Brief Facts

Issues

Judgment

Analysis





Issue (ii): Whether the notices issued by the Respondent could be considered notices under Section 21 of the Arbitration Act?

Judgment

Issue (i): The Court distinguished Sections 14(1) and (2) of the Limitation Act to the extent that Section 14(2) applied to an ‘applicant’ pursuing its remedy, whereas Section 14(1) applied to a plaintiff. In effect, the Court was of the view that a counterclaim being in the nature of an original action, it could not be construed to be an application under Section 14(2). Thus, the Respondent could claim exclusion only under Section 14(1) of the Limitation Act, if applicable.

The Court, referring to **Consolidated Engineering Enterprises v. Irrigation Department**,² held that under Section 14(1), both prior and subsequent proceedings ought to be civil proceedings initiated by the same party, and that the prior proceeding has to be prosecuted with due diligence and in good faith. The Court, referring to **Ramadhhar Shrivastava v. Bhagwandas**,³ held that for the application of Section 14(1), the ‘matter in issue’ in both proceedings must be identical and that such ‘matter in issue’ must be a matter which is strictly and substantially in issue.

The Court thereafter observed that applications under Section 8 of the Arbitration Act are made only to refer parties to arbitration, and to terminate the action instituted by a plaintiff in a suit or other proceeding. Counterclaims being not strictly or substantially in issue in these applications, the application of Section 14(1) is precluded.

In the present case, the Court perused the Application and observed that the Respondent had not made any averments in relation to its counterclaim. On a reading of Section 8(3) of the Arbitration Act, the Court was also of the view that the filing of its Application did not preclude the Respondent from initiating arbitration in respect of its counterclaim. The Respondent had therefore, not been diligent in pursuing its remedy for the purposes of Section 14 of the Limitation Act.

The Respondent, relying on **Five Square Agro Gold Pvt. Ltd. v. Mayank Mohan Agarwal**,⁴ sought to contend that the filing of its Application itself was to be construed as commencing arbitration under Section 21 of the Arbitration Act.

Disapproving of such an approach, the Court observed that an application under Section 8 does not commence arbitral proceedings and is not a substitute for a notice under Section 21 of the Arbitration Act. Sections 8 and 21 operate in different areas. The commencement of arbitration within the meaning of Section 21 means the date on which a request to refer a dispute to arbitration is received. Section 21 is limited to arbitral proceedings in respect of the ‘particular dispute’. The Court thus, drew a distinction between ‘reference of parties’ and ‘reference of disputes’ to arbitration. In the present case, the Respondent had not set out any ‘reference of disputes’ as its Application did not state material particulars of its counterclaim, but was only a request made to a judicial authority for the ‘reference of parties’ to arbitration. Further, even if an application under Section 8 were to be allowed, it was up to the parties to thereafter commence arbitration. If no such steps were taken, it would be erroneous to assume that arbitration had commenced by mere filing of an application under Section 8.

Issue (ii): In its first notice, the Respondent, while stating that certain sums were due from the Appellant, did not expressly call upon the Appellant to pay these sums or make a request for reference of the dispute to arbitration. It merely stated that if the Appellant did not desist from advancing threats through its correspondence, the Respondent would initiate appropriate legal proceedings before the “competent court of jurisdiction”.

In this Issue

Brief Facts

Issues

Judgment

Analysis



In its second notice, the Respondent called upon the Appellant to make payments but did not make a reference of the dispute to arbitration. Therefore, neither of the two notices included a request that the disputes relating to the Respondent's claims be referred to arbitration. These notices were therefore, not notices within the meaning of Section 21. In these circumstances, the notices could not be construed as having saved the Respondent's counterclaim from being barred by limitation.

The Court accordingly allowed the Appeal, and set aside the Interim Award and the Impugned Order.

Analysis

The Court's decision makes it clear that a party must be diligent in making sure that arbitration is commenced and that its counterclaim is filed on time notwithstanding the pendency of an application under Section 8 of the Arbitration Act. It is also advisable that an application under Section 8 must contain material particulars of the proposed counterclaim, though this in itself would not entitle an applicant to claim exclusion under Section 14 of the Limitation Act.

The Court further clarified the scope of Section 21 of the Arbitration Act to the extent that for a notice to commence arbitration, it must specifically seek to refer the 'matter in issue' to arbitration. The mere filing of an application under Section 8 or the issuance of a notice calling for payment, without seeking reference of the dispute to arbitration, would not amount to commencement of arbitration under Section 21.

Endnotes

- 1 Authored by Karan Joseph, Partner and Dushyanth Narayanan, Associate; *Web Overseas Limited v. Universal Industrial Plants Manufacturing Company Private Limited*, FAO (COMM) No. 8/2021, High Court of Delhi, 2022 SCC OnLine Del 4111, judgment dated 28 November 2022.

Coram: Vibhu Bakhru and Amit Mahajan, JJ.

- 2 (2008) 7 SCC 169.
- 3 (2005) 13 SCC 1.
- 4 2019 SCC OnLine Del 6503.

In this Issue

Brief Facts

Issues

Judgment

Analysis

PRACTICE AREA EXPERTS

Pallavi Shroff

Managing Partner and
National Practice Head Dispute Resolution
+91 98100 99911
E: pallavi.shroff@AMSShardul.com

Siddhartha Datta

Partner
+91 90070 68488
E: siddhartha.datta@AMSShardul.com

Binsy Susan

Partner
+91 96500 80397
E: binsy.susan@AMSShardul.com

Shruti Sabharwal

Partner
+91 98107 46183
E: shruti.sabharwal@AMSShardul.com

Shreya Gupta

Partner
+91 9930543295
E: shreya.gupta@amsshardul.com

Tejas Karia

Partner and Head, Arbitration Practice sub-group
+91 98107 98570
E: tejas.karia@AMSShardul.com

Aashish Gupta

Partner
+91 98189 19857
E: aashish.gupta@AMSShardul.com

Smarika Singh

Partner
+91 97170 98075
E: smarika.singh@AMSShardul.com

Karan Joseph

Partner
+91 98452 11270
E: karan.joseph@amsshardul.com

Aditya Mukherjee

Partner
+91 98717 92744
E: aditya.mukherjee@amsshardul.com

Anirudh Das

Partner
+91 98100 98329
E: anirudh.das@AMSShardul.com

Ila Kapoor

Partner
+91 98717 92737
E: ila.kapoor@AMSShardul.com

Gauhar Mirza

Partner
+91 70423 98844
E: gauhar.mirza@AMSShardul.com

Bikram Chaudhuri

Partner
+91 84339 48356
E: bikram.chaudhuri@amsshardul.com

Disclaimer

This is intended for general information purposes only. It is not a substitute for legal advice and is not the final opinion of the Firm. Readers should consult lawyers at the Firm for any specific legal or factual questions.