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## SUPREME COURT ON WAIVER OF LIQUIDATED DAMAGES

### A. Introduction

Supreme Court, in the case of *Welspun Specialty Solutions Limited and Ors. v. Oil and Natural Gas Corporation Ltd. and Ors.*<sup>1</sup> held that liquidated damages (“LD”) which are once waived off cannot be imposed on the other party unless the other party expressly accepts the imposition of such LD.

### B. Facts

1. Oil and Natural Gas Corporation Ltd. (“ONGC”) floated a global tender for the purchase of seamless steel casing pipes and Welspun Specialty Solutions Limited (“Welspun”) was the successful bidder.
2. The contract between ONGC and Welspun contained certain conditions along with delivery-timelines which expressed that “*time is the essence of the contract.*” It contained an exception that delivery timelines were extendable without prejudice to claim LD, unless such right was expressly waived off.
3. Welspun delayed meeting delivery obligations for which ONGC granted extensions but deducted certain amounts as LD against bills raised by Welspun.
4. A dispute arose between the parties on the deduction of LD amount and the matter was presented before an Arbitral Tribunal (“Tribunal”).
5. The Tribunal held that mere presence of a clause stating time as the essence of the contract is not sufficient to determine the nature of the transaction. For truly determining whether the contract is time bound, an overall view of all the terms and conditions of the contract must be made. It also observed:
  - a. A provision for extension of time and payment of penalty on default renders the ‘time is the essence of the contract’ ineffective; and
  - b. LD are pre-estimated damages which are granted only on a breach of contract. In the present case, since time was not the essence of the contract, the contract was not breached, due to which LD cannot be imposed on the other party.
6. It held that ONGC was not entitled to claim any damages incurred during the extended period of delivery where LD was expressly waived.
7. Aggrieved by this order, ONGC appealed to the District Court (“DC”), which held a similar view.
8. Both parties approached the High Court of Uttarakhand (“HC”) which held that the DC had erred in construction of the contract with respect to time being its essence and that the Tribunal

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<sup>1</sup> *Welspun Specialty Solutions Limited and Ors. Vs. Oil and Natural Gas Corporation Ltd. and Ors.* (13.11.2021 – SC): MANU/SC/1059/2021.

and DC had wrongly imposed burden on ONGC to prove losses suffered before recovering damages. Review petitions were filed by the parties but were disposed of.

9. The parties approached the Supreme Court (“SC”) where the issue in consideration was whether the HC was correct in setting aside the arbitral award in relation to the LD.

### C. Observations and Judgment

SC observed:

1. DC and HC should not have intervened merely because an alternative view on facts and interpretation of contract exists unless “*the arbitral award portrays perversity unpardonable under Section 34 of the Arbitration Act.*”<sup>2</sup>
2. The Indian Contract Act, 1872<sup>3</sup> (“ICA”) recognizes provision of LD for breach of contract and in this particular case, breach of timelines set in the contract. But these provisions are recognized only if they are reasonable in nature.
3. Examining whether time was the essence of the contract, it concluded that the Tribunal was right in its observations of time not being the essence in this contract. The existence of extension clauses diluted the aspect of time being the essence of the contract and hence was in accordance with the rules of contractual interpretation.<sup>4</sup>
4. Since time was not the essence of the contract, the measure of determining damages by way of LD was not the appropriate procedure to meet the loss suffered by ONGC.
5. ONGC had waived of imposition of LD twice before giving extension along with claim of pre-estimated damages. Once LD is waived in the first extension, a clear intention of imposing the LD in the second extension should clearly be portrayed in the contract. However, the SC sustained the Tribunal’s view on allowing ONGC to claim actual damages.
6. Since ONGC clearly waived off its right on LD in the first instance, it cannot impose it later unless a clear intention of the same was expressed to Welspun.

### D. Conclusion

This judgment reiterates that once LD is waived off, it cannot be imposed on the party unless the party is agreeable to such imposition. It further emphasizes on the need for clarity in contracts on parties’ intention of imposition of LD at all stages of the contract to ensure that parties can claim LD even after waiver in the first instance.

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<sup>2</sup> Para 25 of the Judgment.

<sup>3</sup> Section 74 of the ICA.

<sup>4</sup> Para 27 of the Judgment.

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