

De Jure

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Stamping of Arbitration Agreement



ENFORCEABILITY OF AN ARBITRATION CLAUSE IN AN UNSTAMPED CONTRACT / AGREEMENT

The article focuses on the issue regarding the enforceability of an arbitration agreement where the underlying contract has not been duly stamped as required under the relevant Stamp Act *viz.*

The case of N.N. Global Mercantile Pvt. Ltd. vs. Indo Unique Flame Ltd¹ (***N.N. Global***) talks about this very issue regarding the application of the doctrine of separability of an arbitration agreement where the underlying contract required to be stamped under the relevant Stamp Act has not been duly stamped.

It is well settled in arbitration jurisprudence that an arbitration agreement is a distinct and a separate agreement which is independent from the substantive commercial contract in which it is embedded. This is based on the premise that when the parties enter into a commercial contract containing an arbitration clause, they are entering into two separate agreements *viz.* (i) the substantive contract which contains the rights and obligations of the parties arising from the commercial transaction; and (ii) the arbitration agreement itself which contains the binding contract between the parties to resolve their disputes through the mode of arbitration.

The autonomy of the arbitration agreement is based on the twin concepts of separability *i.e.* the arbitration clause being separate from the substantive contract agreed between the parties and kompetenz – kompetenz *i.e.* jurisdictional principle to empower an adjudicating body (arbitral tribunal), to exercise on the issues on its own jurisdiction submitted before it.

¹ (2021) 4 SCC 379

The Apex Court in N.N Global therefore opined that the findings given in matters by it in SMS Tea Estates² and Garware Wall Ropes³ regarding the non-payment of stamp duty on the commercial contract would invalidate even the arbitration agreement, and render it non-existent in law and un-enforceable, is not the correct position of law, specifically pursuant to the amendment of the Arbitration and Conciliation Act, 1996 ("ICA") by the Arbitration and Conciliation (Amendment) Act, 2015 ("**Amendment Act 2015**") whereby Section 11 (6-A) was introduced. Section 11 (6-A) reads as under –

11(6-A): The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

Further, in Vidya Drolia vs. Durga Trading Corporation⁴, though the judgement analyses the concept of ‘existence’ and ‘validity’ of an arbitration agreement, it has affirmed the ratio decidendi in the Garware Judgement on the issue as to the effect of an arbitration clause contained in an unstamped contract which is required to be stamped. The Garware Judgement was delivered by a 2 Judge Bench of the Hon’ble Apex Court of India, which was later on affirmed by a 3 Judge Bench of the same Court in Vidya Drolia’s case.

The Apex Court in N.N. Global case, considered it appropriate to refer the following issue, to be authoritatively settled by a Constitution bench of five judges of this Court, which has been extracted verbatim as under:

² (2011) 14 SCC 66

³ (2019) 9 SCC 209

⁴ (2021) 2 SCC 1

IS AN UNSTAMPED ARBITRATION AGREEMENT ENFORCEABLE? THIS QUESTION IS PENDING BEFORE A LARGER BENCH OF SC



"Whether the statutory bar contained in Section 35 of the Indian Stamp Act, 1899 applicable to instruments chargeable to Stamp Duty under Section 3 read with the Schedule to the Act, would also render the arbitration agreement contained in such an instrument, which is not chargeable to payment of stamp duty, as being non-existent, un-enforceable, or invalid, pending payment of stamp duty on the substantive contract / instrument?"

In light of the same, the Registry may place this matter before the Hon'ble Chief Justice of India for appropriate orders / directions.

We understand that the above matter has been heard by the Constitutional Bench assigned to it and the orders are awaited.

We are equally awaiting the orders that will be passed by the Constitution Bench in this regard.

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