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Enforceability of an Unstamped Arbitration Agreement

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Arbitration is considered a type of Alternative Dispute Resolution (ADR), which is an efficient and comprehensive mechanism to resolve conflicts or disputes in litigation. The normal procedure of litigation in the courts takes a lot of time and is fairly detailed in each step. Therefore, the introduction of legislation like the Arbitration and Conciliation Act, 1996 is a progressive step towards less court interference. This research paper is primarily focusing on the concept of enforceability in case an arbitration agreement is unstamped or insufficiently stamped. It is important to note that the stamp duty and penalty provisions are regulated by the Indian Stamp Act, 1899 and it involves a cumbersome and fairly detailed process for it. It is possible that in the near future, the legislation introduces amendments to the Stamp Act or any other Act that streamlines the interplay of arbitration and law procedures to avoid potential delays in the dispute resolution process. The aim is to understand the judicial mindset on this concept and interpret it while analyzing all judicial decisions relating to this concept.

Keywords: *arbitration, enforceability, agreement, unstamped, contract.*

INTRODUCTION

Over the years, Arbitration has become quite popular and gained influential importance as a remedy for Alternative Dispute Resolution in India. It provides a mechanism to the parties an opportunity to resolve commercial disputes outside of the Court. This method is cost-effective and efficient therefore, the legislation intends to develop Arbitration as the key developer that helps India to become an international hub for dispute resolution processes. For, enhancing

India's position in the global marketplace, the government has ensured steps to promote arbitration. However, the enforceability of Arbitration Agreements has been a debatable issue for a country like India.¹

As per the Arbitration and Conciliation Act 1996, an 'Arbitration Agreement' is defined as an agreement between the parties to agree to settle disputes arising between them with the means of arbitration. This agreement must be in writing, signed by the parties with an arbitration clause in the agreement to settle all disputes among them². As per this Act, the Arbitral Tribunal is the only one with jurisdiction to rule over such cases. Whereas, the Indian Stamp Act 1899 does require instruments to get duly stamped for their validity to be executed in a manner prescribed by the law. Unless an instrument is duly stamped, it cannot be considered a part of the evidence in the Court of law.

Stamp fees or costs need to be duly paid in full before the execution of such an instrument, this is important to make that agreement legally enforceable. In the case of G.E.O. Group Communication Incorporation v I.O.L. Broadband Ltd, it was held by the Supreme Court that the reason for not getting an agreement duly stamped is essential however, the argument that the applicant was not entitled to relief because of it will not be maintainable. Thus, the arbitration clause in any legally enforceable instrument or contract is considered to be an independent agreement than that on its substantive rights. So, a void or null contract would not be considered the same as invalidity of the Arbitration clause in the agreement.

UNDERSTANDING THE ENFORCEABILITY OF AGREEMENTS

The Arbitration clause in the agreement is something agreed upon by the mutual consent of the parties. In case of any violation or breach of those conditions or terms laid in the agreement, the clause for resolving disputes and conflicts comes into the picture. Even if, the contract gets terminated some clauses still survive and then, comes the Doctrine of Separability.³ It means that the Arbitration clause in the contract is completely different, autonomous and separate from

¹ Mohit Rohatgi, 'Supreme Court on enforceability off an unstamped or insufficiently stamped arbitration agreement' (*Trilegal*, May 2023) <<https://trilegal.com/wp-content/uploads/2023/05/Supreme-Court-on-the-enforceability-of-an-unstamped-or-insufficiently-stamped-arbitration-agreement.pdf>> accessed 22 June 2023

² Arbitration and Conciliation Act 1996, s 7

³ Constitution of India 1950, art 13

the other clauses or terms laid under the agreement. This Doctrine is the foundation of International Arbitration. In the case of National Agriculture Cooperative Marketing Federation (India) Ltd. v Gains Trading Ltd, the Supreme Court held that the presence of the Doctrine of Separability observes the arbitration clause as a separate independent clause in the underlying contract. The Court also opined that in case, the contract is declared null and void then, as per the law the arbitration agreement wouldn't end with it. The goal of the arbitration clause in an agreement is to provide the parties with the opportunity of a fair, efficient and quick out-of-court settlement. This also helps in lowering the burdens on the court system. The aim is to achieve the settlement or dispute resolution among the parties in a private space unlike public courts. Most often, the arbitration clauses are as per the law principles of a legally valid contract⁴. Most states like India, require the consent of both parties to embody an arbitration clause in the contract for dispute resolution among them. Some states require 'consideration' for an arbitration clause to hold the legally binding contract between the parties. The waiver for an arbitration clause is hardly enforced by a court of law. The parties also have an option to file an appeal, in case they are not satisfied with the decision of the Arbitrator. However, the provisions of the law do provide for a reasonable time under which such an appeal can be filed.

For any contract to be valid and legally enforceable, it must satisfy all conditions laid under Section 10⁵ of the Indian Contract Act 1872. Whereas, for those agreements that have an arbitral clause, it must be according to Section 7(4) of the Arbitration and Conciliation Act, 1996 which states that the valid arbitration agreement requires the exchange of letters it can be in writing and must be properly signed by the parties. In the case of Shakti Bhog Foods Limited v Kola Shipping Ltd., the Supreme Court held that Section 7⁶ of the Arbitration and Conciliation Act can be purposely interpreted and the exchange of emails, letters or fax can be considered an agreement even if, the parties have not signed it. Thus, the precision of this Act is conquered and so, alternate is considered valid in such cases.

⁴ Nihit Nagpal and Anuj Jhavar, 'Legality and Enforceability of electronic arbitration agreements in India' (Mondaq, December 2022) <<https://www.mondaq.com/india/arbitration--dispute-resolution/1262248/legality-and-enforceability-of-electronic-arbitration-agreements-in-india>> accessed 22 June 2023

⁵ Indian Contract Act 1872, s 10

⁶ Arbitration and Conciliation Act 1996, s 7

PREVIOUS JUDICIAL DECISIONS OF THE INDIAN COURTS

Initially, the approach of the Hon'ble Supreme Court regarding the enforceability of unstamped or insufficiently stamped Arbitration Agreements was strict, rigid and lacked objectivity. Like, in the case of *Hindustan Steel Ltd. v Dilip Construction Co.* (1969), the Supreme Court observations did not consider Section 17 of the Stamp Act which states the precise time for an instrument to be duly stamped as per the provisions laid under this Act.⁷ In the case of *M/S SMS Tea Estates (P) Ltd. v M/S Chandamari Tea Co. Ltd.*,⁸ the Supreme Court dealt with the issue of whether an unregistered arbitration agreement that is not duly stamped is valid and enforceable. The Court observed that unduly stamped agreements are not admissible in court as evidence and examination of such instruments is mandatory, and must be impounded if, not duly stamped.⁹ It was held that an unstamped agreement with an arbitration clause in it, which is completely a registrable instrument does not form the basis for the appointment of an arbitrator. In this case, the Supreme Court undermined the presence of the Doctrine of Separability.

Whereas, in *Garware Wall Ropes Ltd. v Coastal Marine Constructions and Engineering Ltd.*¹⁰, the Judges reiterated the principle laid down in the SMS Tea case. It was held that the insertion of Section 11(6A)¹¹ by the Arbitration and Conciliation (Amendment) Act in 2015, does not affect the position of law enunciated in the above-mentioned case. The same was also followed in *Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram v Bhaskar Raju and Bros.*¹² and in the *Vidya Drolia & Ors. v Durga Trading Corporation* case. In this case, the Supreme Court affirmed the legal decision and position of law in the Garware case and asserted that looking for the basis of an agreement would lead to looking for its validity as well. This all surely includes the agreement's basic requirements are completed for it to be enforceable and that includes stamping. In all the above cases, the judicial decisions concluded that the

⁷ Apoorva, 'Unstamped Arbitration Agreements are not valid in law: Supreme Court' (*SCC Online*, 25 April 2023) <<https://www.sconline.com/blog/post/2023/04/25/unstamped-arbitration-agreements-are-not-valid-in-law-supreme-court-legal-research-legal-news-updates/>> accessed 23 June 2023

⁸ *M/S SMS Tea Estates (P) Ltd. v M/S Chandamari Tea Co. Ltd.* (2011) 14 SCC 66

⁹ Indian Stamp Act 1899, ss 33, 35

¹⁰ *Wall Ropes Ltd. v Coastal Marine Constructions and Engineering Ltd.* (2019) 9 SCC 209

¹¹ Arbitration and Conciliation (Amendment) Act 2015, s 11(6A)

¹² *Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram v Bhaskar Raju and Bros* (2020) 4 SCC 612

termination of a contract or the severability would not save the Arbitration Agreement or such clause in the same contract and a part of the same instrument.

CASE STUDY

M/S N.N. Global Mercantile Private Limited V M/S Indo Unique Flame Ltd. & Ors.¹³

In this latest judgment of 2023, the Supreme Court of India held that an Arbitration Agreement is a separate agreement and is distinctly independent of any commercial contract. As per the Arbitration jurisprudence, when any commercial contract has an arbitration clause then, they form two different agreements. As, first guarantees the rights and obligations of the parties arising from that commercial transaction. While other contains binding obligation of parties to resolve all conflicts and disputes through Arbitration. Thus, it was observed by the Apex Court that the Stamp Act is a fiscal requirement and cannot be ignored. As, per the provisions under the Stamp Act, the penalty due and required stamp fee must be paid thus, nothing mentioned here indicates that the instrument can be made a collateral transaction.¹⁴

This judgment on the enforceability of an Unstamped or insufficiently stamped Arbitration agreement has left an undesirable footprint on the dispute resolution regime in India. With a 3:2 majority, Court held that in accordance with the Indian Stamp Act 1899 an arbitration agreement not duly stamped would be rendered non-existent in the Court of law and hence, will be unenforceable.¹⁵ This case decided the validity of an Arbitration Agreement where it is not stamped properly as per the Stamp Act legislation. The Appellant contended that the absence of stamping won't render the contract from being enforced. However, the Respondent argued that the agreement cannot be considered to be valid as it was not as per the provisions laid down in the Indian Stamp Act.

The majority judgment held that since Stamp Act is a fiscal structural statute it cannot be ignored and all instruments falling under its purview must be duly stamped. The Supreme Court held

¹³ *M/S N.N. Global Mercantile Private Limited V M/S Indo Unique Flame Ltd. & Ors* Civ App Nos 3802-3803/2020

¹⁴ Indian Stamp Act 1899, s 35

¹⁵ Aviral Tripathi, 'Enforceability of Unstamped Arbitration Agreements in India: An Unending Conundrum' (Mondaq, 15 May 2023) <<https://www.mondaq.com/india/arbitration--dispute-resolution/1315390/enforceability-of-unstamped-arbitration-agreements-in-india-an-unending-conundrum>> accessed 25 June 2023

that insufficient stamped or not stamped contracts cannot be enforceable under the Indian Contract Act 1972. This is the rule universally applicable to all national and international Arbitration Agreements. This meant that for all contracts to be valid and enforceable by law, they must be as per provisions provided in both the Indian Contract Act 1872 and the Indian Stamp Act 1899. It further interpreted Section 35¹⁶ of the Stamp Act that prohibits unstamped or insufficiently stamped documents from being presented as pieces of evidence in a Court of law, without any exemptions.

The Supreme Court held that an arbitration clause in an unstamped instrument cannot be used as evidence in the Court of law as it would give rise to collateral transactions. Thus, Arbitrator is not solely responsible to deal with the issue of unstamped or insufficiently stamped agreement and the Court is obligated to mandate the agreement as per provisions of the law. The majority compared the view of Section 2(j)¹⁷ and Section 2(g)¹⁸ of the Indian Contract Act 1872 to conclude their opinions and render unenforceable agreements as void. Thus, the procedure laid under the Stamp Act and the Contract Act both must be followed in order, to get it enforceable.

POSITION IN OTHER JURISDICTIONS

The analysis of some judicial decisions in other jurisdictions can give a picture of how other countries deal with the issue of enforceability of an unstamped arbitration agreement. Whether this validity of the arbitration clause is still maintained when the contract itself is rendered invalid in a court of law.¹⁹

UK: As per Section 7²⁰ of the United Kingdom's Arbitration Act 1996 an arbitration agreement is intended to form part of another agreement and is a separate contract in itself even, if it is laid within the same agreement. It must be in writing and is not rendered invalid or ineffective

¹⁶ Indian Stamp Act 1899, s 35

¹⁷ Indian Contract Act 1872, s 2(j)

¹⁸ Indian Contract Act 1872, s 2(g)

¹⁹ Abhileen Chaturvedi and Saqib Ali, 'Enforceability of an unstamped Arbitration Agreement' (Cyril Amarchand Mangaldas, 08 May 2023) <<https://corporate.cyrilamarchandblogs.com/2023/05/enforceability-of-an-unstamped-arbitration-agreement/>> accessed on 25 June 2023.

²⁰ United Kingdom's Arbitration Act 1996, s 7

because the substantive part of the agreement is invalid or void. The aim is to treat both as distinct agreements.

USA: As per the case of *Buckeye Check Cashing, Inc v Cardegna et al.*, the Supreme Court of the USA relied on the point that federal arbitration law renders that arbitration clauses in a contract can be separated from the other clauses of the same contract. If, in a situation, there is a challenge to the validity of the other clauses of the contract then, the arbitrator will decide on this matter first. Here, the types of challenges to an arbitration agreement were distinguished from each other. It was held that any objection to other clauses of the contract that render it invalid would not affect the arbitration agreement within that same agreement. The arbitration clause is separate and severed from the rest of the contract.²¹

Singapore: The High Court of Singapore, in the case of *BNA v BNB and BNC*²² held that the doctrine of separability has only one limit that cannot go further than the reasonable effect it has on the parties and their intention to solve their disputes with the arbitration. The Court observed that the primary objective of this doctrine is to protect the efficient yet, comprehensive arbitration agreement between the parties as it denotes the intention of parties to opt for arbitration as a mechanism to resolve disputes. Thus, even if the underlying contract is rendered invalid, the protection of this doctrine makes the arbitration agreement within the same agreement valid for other reasons.

CONCLUSION

The growing importance of Alternate Dispute Resolution (ADR) and especially Arbitration as a mechanism to resolve disputes has taken India's arbitration regime to another level. The hope that India can become a hub for Arbitration proceedings has led to drastic changes in the regime and this approach. The dynamic and driven Arbitration is viable for investments because of its additions to the businesses and transactions globally. With the new judicial decision in the case of *N. N. Global Mercantile*, the Supreme Court has proved to eradicate the dilemma that emerged from the previous contradicting decisions. This will have a deep impact on the ongoing

²¹ *Buckeye Check Cashing, Inc v Cardegna et al.* [2006] US SC 440

²² *BNA v BNB and BNC* (2019) SGHC 142

Arbitration proceedings in India. Legislations like the Arbitration and Conciliation Act 1996 are proof of promoting ADR and Arbitration as a dispute resolution mechanism for the parties. The terms of an agreement can describe the intention of the parties to enter into an arbitration agreement.

This recent judgment has finally settled the long-standing debate on the issue of the enforceability of an unstamped or insufficiently stamped Arbitration Agreement. However, this has deviated the Supreme Court from their no or low court interference objective as, this additional step will now be mandatory and thus, may cause a delay in the appointment of Arbitrators for each case. However, the Supreme Court could have laid down detailed guidelines for the courts to deal with the sufficiency of stamping on the pre-reference stage of the trial. While there is no doubt that this is a positive and forward-looking judgment that will help in setting a benchmark for future Arbitration Agreements. This will change the dynamics and scope of the ADR in the future. It will surely have serious implications on the preliminary issue of the unenforceability of agreements having arbitration clauses due to unduly stamping. Thus, it can be concluded that the arbitration clause is separate and distinct in an independent contract that even survives after the termination of any contract.