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SHOULD THE ARBITRATION AGREEMENT BE REGISTERED AND/OR STAMPED?

A Introduction:

¹ In general, the arbitration agreement provides the basis for arbitration. It is defined as an agreement to submit present or future disputes to arbitration.

² Section 7 of the Arbitration and Conciliation Act, 1996 (for short “the said Act”) defines the term Arbitration Agreement:

“Arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.”

³ An arbitration agreement may be in the form of an arbitration clause in an underlying contract or in the form of a separate agreement. The legal status of both are same. In practice, in more than 95% cases, the arbitration agreement is contained in the underlying contract as an arbitration clause.

⁴ However, it is the general and common practise to include understanding of the parties to refer the disputes to Arbitration in the underlying main contract itself. For example, in case of Lease Agreement containing an Arbitration clause, the underlying main contract shall be the Lease Agreement and the arbitration clause stated therein shall be the Arbitration Agreement as per the said Act.

B Arbitration Agreement is Independent of the terms of the Underlying Main Contract:

¹ An arbitration agreement even though it is included and forms part of the underlying main Contract is independent of the other terms of the contract.

² An arbitration agreement is separate and independent agreement and remains valid, even if the underlying main contract becomes unenforceable i.e. the arbitration agreement is enforceable irrespective of the validity of the underlying main contract.

³ Even Section 16 (1) of the said Act makes it clear that while considering any objection with regard to the existence or validity of the arbitration agreement - which formed part of the contract, had to be treated as

an agreement independent of the other terms of the contract.

⁴ Below Judicial precedents establishes that the arbitration agreement, which forms part of an underlying main contract has to be treated as an independent agreement:

a Reva Electrical Car Company Private Limited -Vs- M/s Green Mobil, [2012 (2) SCC 93]

b Today Homes and Infrastructure Private Limited -Vs- Ludhiana Improvement [Trust, (2014) 5 SCC 68]

c Enercon (India) Limited & Others -Vs- Enercon GmbH & Another [(2014) 5 SCC 1]

C Registration and/or Stamping of Arbitration Agreement:

¹ The question that normally arises is whether the registration and/or stamping of Arbitration Agreement is necessary for referring the dispute to Arbitration?

² The Hon’ble Supreme Court in SMS Tea Estates Private Ltd. vs. Chandmari Tea Company Private Ltd. [(2011) 14 SCC 66] had laid down that the validity of arbitration clauses in documents, which suffer from defects in terms of stamping and/or registration.

a Arbitration Agreement does not require registration under the Registration Act.

b Even when the underlying main contract is compulsorily Registerable under the Registration Act, but is not registered, then also the Arbitration Agreement is valid and not required to be registered.

c If the underlying main contract is found to be not duly stamped, Section 35 of Stamp Act bars the said underlying main contract being acted upon. Thereby, even the arbitration agreement forming the part of the main underlying contract cannot be acted upon.

d Thus, non-registration of the Arbitration Agreement shall not affect the Arbitration Agreement but the non-payment of stamp duty shall make it unenforceable.

e Thus, the Arbitration Agreement is compulsorily required to be adequately stamped but not required to be registered.



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³ The Hon'ble Supreme Court in its recent judgment in *Garware Walls Ropes Ltd. vs. Coastal Marine Constructions & Engineering Ltd.*, (2019) 9 SCC 209 has again reiterated that an arbitration agreement forming part of the underlying contract, cannot be given effect if the underlying contract is not stamped.

⁴ As such, it can be said that the stamping of the Arbitration Agreement is necessary to make it enforceable. Moreover, if an arbitration agreement specifies a state where the arbitration shall take place, stamp duty of that state shall be applicable on that arbitration agreement (*S. Satyanarayana & Co. v. West Quay Multisport Private Limited*, 2019 SCC Online Bom 4595).

D Conclusion:

¹ An arbitration agreement does not require registration under the Registration Act, 1908.

² Even if the Arbitration Agreement is forming the part of underlying main contracts which are not registered (when compulsorily registerable i.e. lease deed), the Arbitration Agreement can be enforced and acted upon for dispute resolution. Since it is an independent agreement to refer the disputes to Arbitration, which is independent of the main underlying contract or instrument.

³ When an arbitration agreement is contained "in a contract", it is significant that the agreement only becomes a contract, if, it is enforceable by law. Therefore, an agreement does not become a contract i.e. it is not enforceable in law unless it is duly stamped. Duly stamped means to be stamped according to the rates mentioned in the schedule of the Stamp Act.

⁴ The arbitration cannot proceed on the basis of an unstamped arbitration agreement since the arbitration agreement would be unenforceable.

⁵ Thus, it can be concluded that the Arbitration Agreement can be given effect only when it is duly stamped.

⁶ Therefore, for an Arbitration Agreement to be enforceable in law:

^a It must be stamped and stamp duty of that state shall be applicable where the arbitration shall take place, i.e. Seat of Arbitration.

^b The rates of the stamp duty payable for are to be ascertained as per the subject matter of the main underlying contract and according to schedules of rates given by each state.

^c However, when a separate Arbitration Agreement is entered into it is imminent that a stamp duty of Rs. 100/- be affixed on the same.

^d If the arbitration agreement is not stamped and deficiently stamped at the time of the execution then the person can get the same stamped at the time when the dispute arises and/ or before invocation of the arbitration.

^e In case of an unstamped or deficiently stamped arbitration agreement, the court must first impound the arbitration agreement and send for payment of applicable stamp duty and penalty be paid, and proceed further only when these have been paid. [*Garware Walls Ropes Ltd. vs. Coastal Marine Constructions & Engineering Ltd.*, (2019) 9 SCC 209]