

UPDATE

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Enforceability of Arbitration Clause in an Unstamped Agreement

A. Background

A five-judge bench of the Hon'ble Supreme Court in *M/s. N.N. Global Mercantile Private Limited v. Indo Unique Flame Ltd. & Ors.*, Civil Appeal No(s) 3802-3803 of 2020 recently settled a long-drawn debate regarding acting on unstamped arbitration agreements or agreements containing arbitration clause under the Arbitration and Conciliation Act, 1996 ("Act").

The dispute in *N.N. Global* was regarding invocation of a bank guarantee issued under the terms of the work order. The bank guarantee did not provide for an arbitration clause, hence the arbitration clause in the work order was relied on. However, the work order was unstamped.

In *N.N. Global*, a three-judge bench of the Hon'ble Supreme Court doubted the correctness of the views expressed by a coordinate three-judge bench in *Vidya Drolia and Others v. Durga Trading Corporation*, (2021) 2 SCC 1 which had cited with approval the judgement in *Garware Wall Rope Limited v. Coastal Marine Constructions & Engineering Limited*, (2019) 9 SCC 209 which had found an unstamped agreement to be unenforceable but referred the matter to a five-judge bench to be settled authoritatively.

The five-judge bench of the Hon'ble Supreme Court held that agreements containing arbitration clause which are not duly stamped cannot be acted upon unless, following impounding and payment of the requisite duty, necessary certificate is provided by the appropriate authority.

B. Analysis

Instances of acting on an arbitration agreement *inter alia* are wherein the parties to an arbitration agreement approach the Hon'ble Supreme Court and High Courts for interim reliefs (S 9 of the Act), reference of parties to arbitration (S 8 of Act), appointment of arbitrator (S 11 of Act), etc.

The five-judge bench of the Hon'ble Supreme Court in *N.N. Global* held that the judicial examination under S 8 (for reference to arbitration) of the Act and S 11 (for appointment of arbitrator) of the Act included a *prima facie* examination of the validity or existence of an arbitration agreement. "Validity" and "existence" of the arbitration agreement have been held to be inter-changeable by the five-judge bench and the factors that the courts need to look into at the reference stage include whether the agreement is in writing, if contractual essentials are fulfilled, rarely if subject-matter is arbitrable, and if stamp duty was duly paid.

Thus, if an agreement containing an arbitration clause or an arbitration agreement or letters or correspondences are not duly stamped, arbitration proceedings cannot commence till the document is

impounded and the stamp duty is paid along with penalty, if any, and necessary certificate to this effect is obtained from the appropriate authority. This will add a substantial amount of time to the commencement of the arbitration proceeding thereby defeating the purpose of timely resolution of commercial disputes.

C. Applications under S 9 of the Act

The five-judge bench did not propound on the impact of this judgement on the operation of S 9 (interim reliefs) of the Act and left it open to be discussed in other appropriate proceedings. In light of this, the observation of the three-judge bench in *N.N. Global* becomes relevant which had held that if an application for urgent interim relief is filed under S 9 of the Act before the court, and it is brought to the attention of the court that the substantive contract is not duly stamped, the court would grant *ad-interim* relief to safeguard the subject-matter of the arbitration. However, the substantive contract would then be impounded and the concerned party be directed to take the necessary steps for payment of the requisite stamp duty in accordance with the provisions of the relevant stamp law within a time-bound period.

D. Stamping of Work Orders

We have often noticed that works contract/work orders/purchase orders are misunderstood as not having the impact of an agreement even though they contain substantive clauses of an agreement such as arbitration, indemnity, guarantee, etc. and hence are not stamped. We have also seen that parties often do not have counter copies of works contract/work orders/purchase orders. At times of disputes, parties end up relying on clauses of works contract/work orders/purchase orders as they do not enter into other agreements for the transactions, especially frequent transactions in the ordinary course of business. However, in light of this judgement, it is now advisable that work contracts/work orders/purchase orders are executed in multiple copies and are duly stamped for efficient dispute resolution.

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