



# FUNDAMENTAL ASPECTS OF ARBITRATION AGREEMENT[1]

## • WHAT CONSTITUTES AN ARBITRATION AGREEMENT?

As per Section 7(1) of Arbitration and Conciliation Act, 1996 an arbitration agreement is a clear agreement which may be in the form of a clause, wherein the parties agree to submit their disputes which have arisen, or which may arise between them in respect of a defined legal relationship, (whether contractual or not) to arbitration. Thus, key aspects that shall demonstrate the existence of an arbitration agreement amongst the parties:

- Willingness of parties to refer the matter to arbitration recorded in a written form through a clause or arbitration;
- An arbitration clause as the only way of dispute resolution in case of any disputes;
- Existence of a defined legal relationship amongst the parties whether contractual or otherwise

# • HOW TO DETERMINE THE EXISTENCE OF AN ARBITRATION AGREEMENT AMONGST THE PARTIES?

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- If the agreement containing an arbitration clause is executed/ signed between the parties
- If the parties have not signed an agreement but have entered into communication through letters, e-mails or other modes of telecommunication (whether electronic or physical) with each other and such communication provides a record of the agreement amongst parties to refer any possible disputes to arbitration;
- If the parties have exchanged statements of claim and defense in which the existence of the agreement is alleged by one party and not denied by the other.
- If an unsigned agreement is pending due to other clauses being negotiated but the “arbitration provision/ clause” has already been agreed upon by the parties. In such cases if any dispute arises before execution of the said agreement, the parties have a right to refer the matter to arbitration as the exchange of emails and their attachments as well as response of email by the other party clearly constitutes written contract between parties with respect to the transaction between the parties.[2]
- If there is a reference in a contract to a document containing an arbitration clause and the contract is in writing and the reference is such as to make that arbitration clause part of the contract[3]

[2] Lets Engineering & Technology vs Manoj Das on 4 January, 2013 (Arbitration Petition 250 of 2012)

[3] Section 7 (5) of the Act

# • IS EVERY DISPUTE ARBITRABLE?



No. The Supreme Court in *Booz Allen and Hamilton Inc vs SBI Home Finance Ltd & Ors*<sup>[4]</sup> enumerated some well recognized examples of non-arbitrable disputes such as:

- disputes relating to rights and liabilities which give rise to or arise out of criminal offences;
- matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;
- guardianship matters;
- insolvency and winding up matters<sup>[5]</sup>;
- testamentary matters (grant of probate, letters of administration and succession certificate); and
- eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

Generally, the distinction proceeds on the basis of the rights of the parties i.e. if the dispute involves rights in rem instead of a right in personem, then the disputes shall not be referred to arbitration. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property.

<sup>[4]</sup> Civil Appeal No.5440 Of 2002

<sup>[5]</sup> A recent judgment of Delhi High Court in *Brilltech Engineers Private Limited v/s Shapoorji Pallonji and Company Private Limited*<sup>[1]</sup>, stated that the parties are at liberty to raise their respective objections before the arbitrator even if an insolvency proceeding has already been initiated in front of NCLT.

## • ARE THERE ANY CONDITIONS PRECEDENT TO DECIDE THE ARBITRABILITY?

Yes, the conditions precedent for arbitrability as stated below were particularly explained in a Supreme Court judgement P. Anand Gajapathi Raju & Ors vs P.V.G. Raju (Died) & Ors<sup>[6]</sup>,

- Existence of an arbitration provision or a separate arbitration agreement;
- a party to the agreement brings an action in the Court against the other party;
- subject matter of the action is the same as the subject matter of the arbitration agreement
- the other party moves the Court for referring the parties to arbitration before it submits his first statement on the substance of the dispute.

## • DOES INCLUSION OF AN ARBITRATION PROVISION EXCLUDE POWER OF COURT TO LOOK AT A DISPUTE?

Yes, under Section 8 of the Act, if the Parties approach a court in spite of existence of an arbitration agreement, then the Court is required to refer a matter to arbitration provided:

- a valid arbitration agreement exists amongst the parties, and
- the respondent applies for such transfer not later than the due date of submitting his/her first statement of defense; and
- makes such application along with the original arbitration agreement or a duly certified copy of the same.
- The dispute is arbitrable.

<sup>[6]</sup>(2000) 4 SCC 539

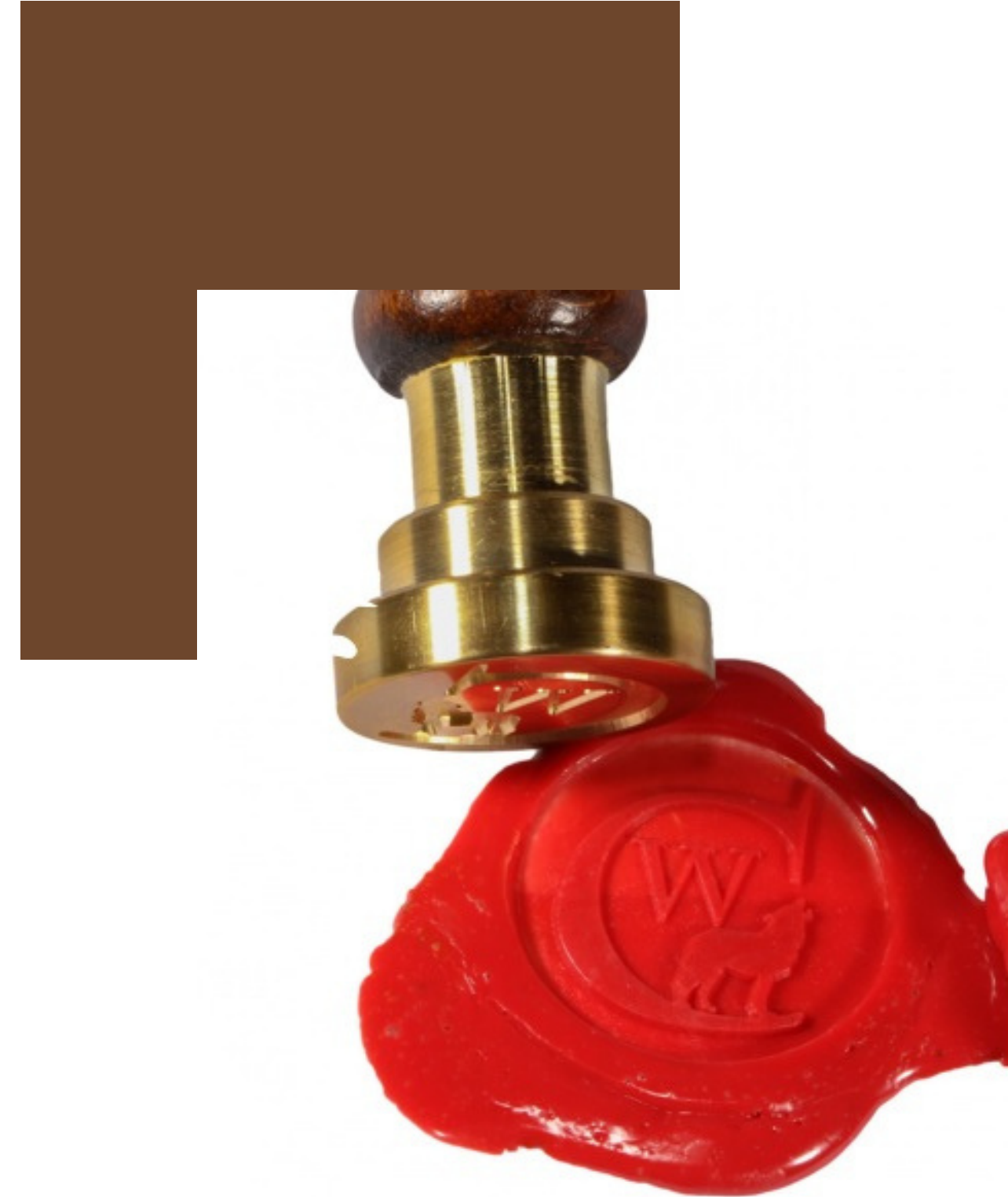


## • ARE ARBITRATION AGREEMENTS REQUIRED TO BE STAMPED?

This question is currently being considered by constitution bench of a Supreme Court. As per the earlier judgement under SMS Tea[7] , an arbitration clause in an unstamped agreement that is compulsorily registrable or chargeable to stamp duty could not be the basis for the appointment of an arbitrator. However, recently in M/s. **N.N. Global Mercantile Pvt. Ltd V/S M/S. Indo Unique Flame Ltd. & Others**[8]., this proposition was questioned and the Supreme Court stated that “We are of the considered view that the finding in SMS Tea Estates and Garware that 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 in law.”

The Supreme Court has referred the question to a larger constitution bench and the matter is pending before the larger bench.

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 ?



[7] (2011) 14 SCC 66.

[8] CIVIL APPEAL NOS. 3802 - 3803 / 2020 (Arising out of SLP (Civil) Nos.13132-13133 of 2020)

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