

An Arbitration Clause in an Unstamped or Insufficiently Stamped Agreement: The Supreme Court Decides

INTRODUCTION

A five-judge bench of the Supreme Court of India (the “**Supreme Court**”) has in *N.N. Global Mercantile Private Limited v. Indo Unique Flame Limited & Others*¹ (“**NN Global**”) held by a 3:2 majority that an arbitration clause contained in an agreement that is not duly stamped is legally unenforceable and void until such agreement is validated by payment of the requisite stamp duty following the procedure laid down under Indian Stamp Act, 1899 (the “**Stamp Act**”, and together with other relevant stamp duty legislations in India, the “**Stamp Duty Legislation**”).² The minority was of the view that non-payment of stamp duty on an agreement liable to stamp duty, being a curable defect, would not render the arbitration clause contained within such agreement to be void.³

The following are the key takeaways from the decision. First, if an arbitration agreement (either contained as a provision in a contract or on a standalone basis) is found to be unstamped, it is not enforceable and liable to be impounded immediately and returned only upon payment of the requisite stamp duty and penalty. Second, if such arbitration agreement is insufficiently stamped and the deficit in stamp duty is nominal, the parties may undertake a self-assessment and pay the deficit stamp duty and penalty. Should the parties not be able to self-assess the deficit in stamp duty,

¹ *M/s. N.N. Global Mercantile Private Limited v. M/s. Indo Unique Flame Limited & Others*, 2023 SCC OnLine SC 495. The majority judgment in NN Global was authored by Justice K.M. Joseph on his behalf and on behalf of Justice Aniruddha Bose with Justice C.T. Ravikumar authoring a separate opinion concurring with the majority judgment (the collectively, the “**Majority View**”). Justice Ajay Rastogi and Justice Hrishikesh Roy write separate dissenting opinions disagreeing with the majority judgment (the “**Minority View**”).

² *NN Global* (majority judgment authored by Justice Joseph), paragraph 120.

³ *NN Global* (minority opinion authored by Justice Rastogi), paragraph 226; *NN Global* (minority opinion authored by Justice Roy), paragraph 404.

they are required to formally submit the agreement for adjudication with the relevant authority. Third, the judgment notes that it does not comment on Section 9 of the Arbitration and Conciliation Act, 1996, as amended (the “**Arbitration Act**”), in relation to application by parties to the courts for interim relief.

THE REFERENCE BEFORE THE SUPREME COURT IN *NN GLOBAL*

The Reference was made by a three-judge bench of the Supreme Court in *N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd*⁴ which had earlier upheld the separability doctrine and observed that an arbitration clause contained in an unstamped or insufficiently stamped contract would survive independent of the validity of the broader agreement.⁵

The five-judge bench in *NN Global* modified the Reference as follows:

*“Whether the statutory bar contained in Section 35 of the Stamp Act 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, as being non-existent, pending payment of stamp duty on the substantive contract/instrument?”*⁶

THE MAJORITY VIEW IN *NN GLOBAL*

The majority judgment held that the purport of Section 5 of the Arbitration Act, which codifies the principle of minimal judicial intervention in arbitration, is not to take away the effects of Sections 33 and 35 of the Stamp Act.⁷ These provisions of the Stamp Act stipulate that an agreement which is otherwise required to be stamped and is either not stamped or is insufficiently stamped, when presented before a public authority, is liable to be impounded by such authority,⁸ and shall remain inadmissible as evidence, until such defect in payment of stamp duty is cured.⁹

The majority was of the view that the Stamp Act was indeed a fiscal measure to protect the interest of revenue and was not to be used as a weapon by a litigant to defeat the case of the opponent. However, this was not sufficient reason to prevent the

⁴ (2021) 4 SCC 379.

⁵ (2021) 4 SCC 379.

⁶ (2021) 4 SCC 379, paragraph 12.

⁷ *NN Global* (majority opinion authored by Justice Joseph), paragraph 97.

⁸ Section 33, Stamp Act.

⁹ Section 35, Stamp Act.

implementation of the Stamp Act, including the requirement of stamping at the time of execution of an agreement.¹⁰ It observed that an unstamped or insufficiently stamped agreement is legally unenforceable as it cannot be used as evidence for any purpose, and since a contract that ceases to be enforceable becomes void under Section 2(j) of the Indian Contract Act, 1872, an unstamped or insufficiently stamped agreement is void unless subsequently validated by payment of stamp duty.¹¹ It added that unless the requisite stamp duty has been paid and necessary certificates confirming such payment are placed before the court before which such agreement is presented, the court cannot act upon such agreement and appoint an arbitrator.¹²

The Supreme Court, therefore, upheld the observations in *SMS Tea Estates Pvt. Ltd. v. Chandmari Tea Company Pvt. Ltd* (“**SMS Tea Estates**”)¹³ and *Garware Wall Ropes v. Coastal Marine Constructions and Engineering Limited* (“**Garware Wall Ropes**”)¹⁴ which supported the position that an arbitration clause contained within an unstamped or insufficiently stamped instrument is invalid and that the court before which such agreement is presented should impound such agreement and only act upon it and appoint an arbitrator once the deficit stamp duty has been paid.¹⁵ It held that the three-judge bench of the Supreme Court in *N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd*,¹⁶ had wrongly decided, applying the separability doctrine, that an arbitration clause within an unstamped or insufficiently stamped agreement would survive the invalidity of the broader agreement.¹⁷

The Supreme Court was also of the view that courts cannot ignore their responsibility mandated by law to “examine” an agreement liable to stamp duty and cannot assign such duty to the arbitral tribunal.¹⁸ However, it clarified that if it appears to the court “on the face of it” that a claim by a party that such agreement is insufficiently stamped is “wholly without foundation”,¹⁹ then it can refer the issue to be decided by the arbitral tribunal.²⁰

¹⁰ *NN Global* (majority opinion authored by Justice Joseph), paragraph 69.

¹¹ *NN Global* (majority opinion authored by Justice Joseph), paragraph 81.

¹² *NN Global* (majority opinion authored by Justice Joseph), paragraph 124.

¹³ (2011) 14 SCC 66.

¹⁴ (2019) 9 SCC 209.

¹⁵ (2011) 14 SCC 66 paragraph 12; (2019) 9 SCC 209 paragraph 24.

¹⁶ (2021) 4 SCC 379.

¹⁷ (2021) 4 SCC 379, paragraph 6.8.

¹⁸ *NN Global* (majority opinion authored by Justice Joseph), paragraph 114.iv.

¹⁹ *NN Global* (majority opinion authored by Justice Joseph), paragraph 114.v.

²⁰ *NN Global* (majority opinion authored by Justice Joseph), paragraph 114.

The majority judgment clarified that their judgment does not comment on Section 9 of the Arbitration Act in relation to application by parties to the courts for interim relief.²¹

THE MINORITY VIEW IN *NN GLOBAL*

Justice Rastogi was of the view that since stamping issues in an agreement were rectifiable in the future, non-stamping or inadequate stamping would not render the agreement permanently invalid or non-existent in law.²² Justice Roy held that the legislative intent behind introducing the amendments to the Arbitration Act in 2015 was to avoid litigation procedures before the courts, and therefore, adopted a harmonious interpretation of the provisions of the Stamp Act and the Arbitration Act.²³ He added that impounding an arbitration agreement at the pre-referral stage will only defeat the purpose of the Arbitration Act, and should be avoided.²⁴

AUTHORS' VIEWS

- The decision in *NN Global* is a missed opportunity for the constitution bench of the Supreme Court to strengthen the Supreme Court's historical support for arbitration.
- Justice Roy's harmonious solution offered a practical approach that protected the state exchequer from loss of revenue and advanced the cause of a swift dispute resolution. The view that the issue of stamp duty payment in relation to an arbitration agreement has to be decided by a court at the time of appointment of the arbitrator may be a step back for India's arbitration ambitions.
- The majority's dictum that non-stamping or insufficient stamping of a contract containing an arbitration clause has the effect of rendering the arbitration clause void appears to be inconsistent with the provisions of the Stamp Act itself which merely renders such agreement to be 'inadmissible as evidence' and not 'void'.
- The majority's observation that an arbitration clause contained in an agreement that is not duly stamped is non-existent in law appears to have been driven by the limited judicial scrutiny permitted under Section 11(6)(A) of the Arbitration Act, viz. a prima facie test regarding 'the existence of an arbitration agreement'.
- While the Supreme Court may have stated that they have not pronounced a view in relation to Section 9 of the Arbitration Act (relating to interim relief by a court), a

²¹ *NN Global* (majority opinion authored by Justice Joseph), paragraph 127.

²² *NN Global* (minority opinion by Justice Rastogi), paragraph 178.

²³ *NN Global* (minority opinion by Justice Roy), paragraph 368.

²⁴ *NN Global* (minority opinion by Justice Roy), paragraph 368.

High Court (hearing an objection to the maintainability of a Section 9 application on the ground that the agreement containing the arbitration agreement is unstamped) may not be able to ignore the observation of a constitution bench of the Supreme Court that an unstamped agreement is unenforceable and void.

- Stamp duty adjudication in India to pay the correct stamp duty (together with any penalty) can be a lengthy process with no statutorily prescribed time-limits for the department to complete the process. This may lead to defendants and respondents (*mainly the parties alleged to be in breach*) exploring the possibility of making stamp duty payment-related objections at various stages of an arbitration proceeding. Interestingly, the Delhi High Court has in a recent decision directed the relevant stamp authority to adjudicate stamp duty within 30 days from the date of an application.²⁵
- While courts have been known to harmoniously interpret provisions under various statutes, protect the sanctity of contractual rights, ensure easy access to justice, and balance the interests of all stakeholders, the majority appears to have taken a narrow view of the matter in *NN Global*. Legislative amendments may be required to address the friction created by *NN Global* between the Arbitration Act and the Stamp Duty Legislation.

*This insight has been authored by **Shahezad Kazi** (Partner) and **Utkarsh Trivedi** (Associate). They can be reached at skazi@snrlaw.in and utrivedi@snrlaw.in, respectively, for any questions. This insight is intended only as a general discussion of issues and is not intended for any solicitation of work. It should not be regarded as legal advice and no legal or business decision should be based on its content.*

© 2023 S&R Associates

S&R
ASSOCIATES
ADVOCATES



NEW DELHI

64 Okhla Industrial Estate
Phase III
New Delhi 110 020
Tel: +91 11 4069 8000

MUMBAI

One World Center, 1403 Tower 2 B
841 Senapati Bapat Marg, Lower Parel
Mumbai 400 013
Tel: +91 22 4302 8000

²⁵ Order dated April 24, 2023 issued by the Delhi High Court in *Uno Minda Limited v. Deputy Commissioner, Revenue Department* (W.P. (C) 5148/2023 & CM APPL. 2009/2023) and *Reebok India Company v. Govt of NCT of Delhi & Others* (W.P. (C) 5160/2023 & CM APPL 2011/2023).