

THE UNSTAMPED ARBITRATION AGREEMENT PEREGRINATION: A RIDDLE RESOLVED

AUTHOR(S)

Mansi Verma
IV Year, Student at Gujarat National Law
University

Aarush Sajit Kumar
III Year, Student at Gujarat National Law
University

Background

The enforceability of arbitration agreements contained within unregistered and unstamped instruments remained a contentious and unresolved area of Indian Arbitration law until very recently when the courts gave a resolute verdict on the enforceability of such contracts in its *Supreme Court Reference on Interplay between Arbitration agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899* Judgement²²⁵ [“**NN Global 3**”]. Conflicting legal precedents and a complex interplay of statutory regulations created considerable ambiguity for those seeking to utilize the alternate dispute resolution mechanisms. Several High Courts and even Supreme Court pronouncements in the past failed to lay down a conclusive position as to the enforceability of arbitration clauses contained within instruments subject to mandatory stamping under the Indian Stamp Act, 1899.²²⁶ [“**Stamp Act**”] At the heart of this conundrum lied section 35 of the Stamp Act which declared that instruments which are unstamped or insufficiently stamped are inadmissible as evidence and unenforceable in Court.²²⁷ Such a verdict created a conundrum which underwent a meandering journey of conflicting verdicts before finding resolution in the NN Global 3 judgement.

²²⁵ *Re: Supreme Court Reference on Interplay between Arbitration agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act*, 2023 SCC OnLine SC 1666.

²²⁶ Indian Stamp Act 1899

²²⁷ Indian Stamp Act 1899, s 35.

SMS Tea Estates: The Pre Amendment Implications of an Unregistered Instrument

*SMS Tea Estates Pvt. Ltd. v. Chandmari Tea Co. Pvt. Ltd.*²²⁸ [“**SMS Tea Estates**”] was one of the first cases wherein the Supreme Court dealt with the issue of an arbitration agreement included in an unregistered contract. This case marked the starting point of the conflict wherein a Division Bench of the Supreme Court addressed the enforceability of an arbitration clause contained within an unregistered instrument. Examining Section 35 of the Stamp Act, the court opined that such a clause could potentially remain valid and enforceable even if the document embodying it was not registered, despite being mandatorily registrable under the law. However, the unregistered document, including the arbitration clause, could not be admitted as evidence in court until the deficiency of unpaid stamp duty is cured and penalty paid under Section 35.

Post 2015 Amendment: Scope and applicability of SMS Tea Estates

In pursuance of the 246th Report of the Law Commission of India,²²⁹ the Arbitration and Conciliation Act, 1996 [“**Arbitration Act**”] was amended in 2015. The amendment sought to align India's arbitration framework with contemporary international best practices. This resulted in the inclusion of section 11(6A) in the Act, which specifies that the Court's assessment of the arbitration agreement during the appointment phase should solely focus on verifying the “existence” of such an agreement. **This amendment raised several questions on the authority of the court to adjudicate on the “validity” of unstamped agreement at the Section 9 stage.**²³⁰ The limited scope of the newly inserted provision implied that disputes, regardless of the stamping or registration status, had to be referred to arbitration, allowing the tribunal to determine the agreement's validity.

In the case of *Gautam Landscapes Pvt. Ltd. v. Shailesh S. Shah*²³¹ [“**Gautam Landscapes**”], the Bombay High Court, sitting in a full bench, *inter alia*, examined the question of whether courts can grant relief under Section 9 of the Arbitration Act when the original arbitration agreement is found in a document that lacks proper stamping or has insufficient stamping. The Bench distinguished between the court's authority and scope of inquiry under Section 9 applications compared to those under Section 11 applications. The Bench referred to the Supreme Court's decision in *Firm Ashok Traders v. Gurumukh Das Saluja*,²³² [“**Firm Ashok Traders**”] emphasizing that the scope of inquiry

²²⁸ *SMS Tea Estates Pvt. Ltd. v Chandmari Tea Co. Pvt. Ltd.* (2011) 14 SCC 66.

²²⁹ 246th Law Commission Report of India, Amendments to the Arbitration and Conciliation Act 1996, (246th, 2014)

²³⁰ Arbitration and Conciliation Act 1996, s 9.

²³¹ *Gautam Landscapes Pvt. Ltd. v Shailesh S. Shah* 2019 SCC OnLine Bom 563.

²³² *Firm Ashok Traders v. Gurumukh Das Saluja* (2004) 3 SCC 155.

in a Section 9 application is constrained to verifying the existence of the arbitration agreement. The doctrine of severability, as enshrined in Sections 7(2) and 16(1)(a) of the Act,²³³ was reaffirmed. It highlighted that Section 9 pertains to interim or ad interim reliefs to protect the eventual award. It stated that technical objections based on insufficient stamp duty should not hinder the grant of necessary relief through a Section 9 application.

A swift shift in precedent: Garware Wall Ropes

In *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.*,²³⁴ [“**Garware Wall Ropes**”] the Supreme Court promptly overturned the verdict in *Gautam Landscapes* within a span of one week. This judgment, delivered by a division bench, reaffirmed the Court's prior stance in *SMS Tea Estates*, rejecting the contention that an arbitration clause contained within an agreement can be treated as an independent entity, separate from the broader agreement itself. On a thorough reading of the statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Act, 2016, the Court held that the introduction of Section 11(6A) did not bear upon or supersede the reasoning established in *SMS Tea Estates* in any manner. The Court observed the Stamp Act, the Arbitration Act, and the Contract Act when read harmoniously, dictate that an unstamped agreement, including its embedded arbitration clause, cannot be said to form a valid agreement or a contract. In *Vidya Drolia v. Durga Trading Corporation*,²³⁵ [“**Vidya Drolia**”] a three-judge bench of the Apex Court reiterated the decision in *Garware Wall Ropes* and held that existence and validity are inextricably linked. Consequently, an agreement is deemed to be non-existent if it is either illegal or fails to fulfil the mandatory prerequisites for enforceability, such as the appropriate payment of stamp duty.

The conflicting judgements in the aforementioned cases created significant challenges for parties seeking to rely on arbitration agreements within unstamped contracts. It was unclear whether courts would uphold such agreements and refer disputes to arbitration, or deem them inadmissible and unenforceable.

The NN Global Peregrination

The conundrum regarding the interplay of Indian Stamp Act and the Arbitration finally sought resolution in the *Supreme Court Reference on Interplay between Arbitration agreements under the Arbitration*

²³³ Arbitration and Conciliation Act 1996, ss 7(2) & 16(1)(a).

²³⁴ *Garware Wall Ropes Ltd. v Coastal Marine Constructions & Engg. Ltd.* (2019) 9 SCC 209.

²³⁵ *Vidya Drolia v Durga Trading Corporation* (2021) 2 SCC 1.

*and Conciliation Act 1996 and the Indian Stamp Act 1899.*²³⁶ A three judge bench of Supreme Court under *NN Global v. Indo Unique Flame*²³⁷ [“**NN Global 1**”] held that the arbitration agreement included in an unstamped contract can be enforced as the arbitration agreement is separate from the main contract and it is valid and enforceable even when the underlying contract is declared invalid, unenforceable or non-existent. The bench came to such a conclusion based on Section 11(6A)²³⁸ of the Arbitration Act, which stipulates that the court shall confine their examination under Section 11²³⁹ to the existence of the arbitration agreement alone. Additionally, the court opined that it is a curable defect. However, in light of the contrary position taken in *Vidya Drolia and Garware Wall Ropes*, the bench in *NN Global 1* referred the matter to a constitution bench [“**NN Global 2**”].

Thereafter, the constitution bench while upholding the separability presumption, refused to apply the doctrine in the context of Sections 33 and 35 Stamp Act.²⁴⁰ The court noted that agreements lacking proper stamping or with insufficient stamping are not enforceable under the Stamp Act. These agreements only gain legal validity after undergoing the validation process specified in the statute. By a narrow 3:2 majority, the court held that the arbitration clause, being distinct from the main contract, cannot be utilized if the document is unstamped, as it would constitute a separate transaction.

In the background of this judgement, the matter was referred to a 7-judge bench to determine the validity of an arbitration agreement included in an unstamped contract or an unstamped arbitration agreement. The Supreme Court, while examining the interplay between Indian Stamp Act and the Arbitration Act held that unstamped agreements despite being inadmissible under the Stamp Act are not void or unenforceable. Non-stamping of an arbitration agreement is a curable defect and that the courts shall merely examine as to whether the Arbitration agreement prima facie exists or not.

The Main Iterations of NN Global 3: An Analysis of the Verdict on Enforceability

The main commercial contract in *NN Global* case did not pass muster under Chapter IV of the Indian Stamp Act, particularly Section 33 and 35.²⁴¹

²³⁶ *Re: Supreme Court Reference on Interplay between Arbitration agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act*, 2023 SCC OnLine SC 1666.

²³⁷ *NN Global Mercantile Pvt. Ltd. v Indo Unique Flame (2021) 4 SCC 379*.

²³⁸ The Arbitration and Conciliation 1996, s. 11(6A).

²³⁹ The Arbitration and Conciliation 1996, s. 11(6).

²⁴⁰ Indian Stamp Act 1899, S. 35.

²⁴¹ Indian Stamp Act 1899, S. 35.

Lex Specialis to prevail over Lex Generalis: Under the general rule of Interpretation of Statutes, when two laws are in conflict with each other and harmonious construction of the two legislations is not possible, then the special legislation shall prevail over the general law.²⁴² In the present case, the Arbitration Act is the lex specialis whereas the Stamp act and the Indian Contract Law are the general legislations with respect to the law governing arbitration agreements. The Bench identified an incongruity between the provisions of the Stamp Act and the well-established principle of party autonomy enshrined within the Arbitration Act. Consequently, the court held that the provisions of the Arbitration Act shall prevail since it is the lex specialis legislation dealing with the subject matter at hand with respect to the contracting parties' freedom to enter into dispute resolution through mutually agreed-upon arbitration agreements.²⁴³

Doctrine of Competence-Competence: The ruling expands the Kompetenz-Kompetenz principle, granting arbitral tribunals the authority to rule on matters arising from improperly stamped arbitration agreements. This expansion is enabled through a broad interpretation of Sections 33 and 35 of the Stamp Act,²⁴⁴ acknowledging that the arbitral tribunal, deriving its jurisdiction from the "consent of parties," possesses the competence to handle and settle disputes arising from such agreements.

Doctrine of Severability: The doctrine of Severability permits the "Arbitration Clause" to stand independently from rest of the contract and its clauses. This principle, rooted in Article 16(1)²⁴⁵ of the UNCITRAL Model Law on International Commercial Arbitration, 1985 and included under Section 16 of the Arbitration Act,²⁴⁶ is further upheld by numerous decisions of the Supreme Court. These decisions affirm that the invalidity of a contract or any of its clauses does not impair the separate existence of an autonomous arbitration clause. This doctrine was upheld by the 3-judge bench of NN Global 1.

It is crucial to grasp that Section 34²⁴⁷ of the Arbitration Act effectively incorporates the 'Doctrine of Severability' as outlined in the proviso to Section 34(2)(a)(iv).²⁴⁸ This proviso grants the court the authority to nullify solely those segments of the arbitral award that were not subjected to arbitration, given they can be distinctly separated from the rest of the award. Hence, if such separation isn't feasible, the court retains the discretion to invalidate the entire arbitral award. In

²⁴² G.P. Singh, *Principles of Statutory Interpretation*, (15th edn, Lexis Nexis 2021).

²⁴³ *Re: Supreme Court Reference on Interplay between Arbitration agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act*, 2023 SCC OnLine SC 1666.

²⁴⁴ Indian Stamp Act 1899, S. 33.

²⁴⁵ UNCITRAL Model Law on International Commercial Arbitration, 1985, Article 16(1).

²⁴⁶ The Arbitration and Conciliation Act 1996, s. 16.

²⁴⁷ The Arbitration and Conciliation Act 1996, s. 34.

²⁴⁸ The Arbitration and Conciliation Act 1996, s. 34(2)(a)(iv).

the NN Global 3 judgement, the doctrine of severability was upheld and relied upon to conclude that the arbitration agreement is separately and differently situated from the main unstamped agreement.

The NN Global 2 judgement lacked clarity regarding the protocol for addressing urgent requests for interim relief or emergency awards in cases where there are concerns about the sufficiency of stamp duty. As per the NN Global 2 ruling, it seemed that parties must initially resolve the stamping matter before pursuing such requests. One of the impending challenges posed by such an arrangement is that despite the interim relief being granted to one of the parties in the interest of justice, if it subsequently emerges that the arbitration agreement lacked proper stamping, it could nullify the entire agreement. NN Global 3 rectified the possibility of such an outcome by upholding party autonomy.

One significant outcome of NN Global 3 is that objections concerning stamping will not obstruct the courts from exercising their authority under Section 8,²⁴⁹ and Section 11²⁵⁰ of the Arbitration Act since the courts will merely refer the parties to arbitration and seek the appoint of an arbitrator without requiring to address the question of whether the arbitration agreement or the underlying contract is sufficiently stamped or not. This promotes a more efficient and hands-off judicial approach, aligning with the legislative intent of Section 5 of the Arbitration Act. Moreover, by discouraging courts from prematurely adjudicating stamp duty matters, the Supreme Court has underscored the significance of the competence-competence principle as embodied in Section 16 of the Arbitration Act.

Additionally, the ruling, in tackling the contentious stance seen in NN Global 2, broadens the application of the kompetenz-kompetenz principle, strengthening the jurisdiction of arbitral tribunals. This development is consistent with legislative objectives, aiming to minimize judicial interference and promote swift resolution and commencement of proceedings. Such harmonization with the legal frameworks of the UK and the US signifies a convergence in interpretation. The verdict highlights a deliberate endeavour to streamline legal procedures in India, bringing them in line with established international norms and practices.

Conclusion

The ruling notably improves the arbitration landscape in the nation, representing a notable advancement toward India's ambitions of becoming a prominent centre for international

²⁴⁹ The Arbitration and Conciliation Act 1996, s. 8.

²⁵⁰ The Arbitration and Conciliation Act 1996, s. 11.

arbitration. Nevertheless, various challenges may emerge following the judgment, requiring thorough deliberation and analysis. These potential issues encompass the potential deceleration of arbitral processes as tribunals confront stamp duty-related conflicts. Improper stamping of arbitration agreements could also be exploited as a strategic delaying tactic by parties with ulterior motives. An effective remedy involves advocating for a disciplined and universally recognized practice of separately fulfilling stamp duty obligations prior to initiating arbitration proceedings.