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## Apex Court Holds Unstamped Arbitration Agreements To Be Invalid - A Critique!

*The majority opinion in the case of NN Global Mercantile raises critical questions for the reasons discussed in the article*



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A five-judge Constitution Bench of the Supreme Court of India in *M/s. N.N. Global Mercantile Private Limited v. M/s Indo Unique Flame Limited & Ors. (2023) SCC Online SC 495* (the "NN Global Mercantile") recently pronounced a judgement, which could have far-reaching implications for arbitration in India. The Supreme Court, in a 3:2 split verdict, held that an unstamped arbitration agreement could not be enforced until the stamp duty has been paid; similarly, an arbitration clause in an unstamped or unduly stamped Contract cannot be treated as valid until the stamp duty obligations have been duly complied with by the parties.

The majority view relied on the mandate of Section 35 of the **Indian Stamp Act, 1899** (the "Stamp Act") to arrive at its conclusion. Section 35 of the Stamp Act states that no instrument chargeable with duty shall be admitted in evidence for any purpose or shall be acted upon unless such instrument is duly stamped.

**Why is the judgement in NN Global Mercantile problematic?**

The court observed that it is important to examine whether the document in question is duly stamped before acting upon or admitting such a document into evidence. Subsequently, in *Garware Wall Ropes Ltd. v. Coastal Marina Constructions and Engineering Ltd. (2019) 9 SCC 209* (the "Garware Wall Ropes"), the Apex Court reaffirmed its earlier position that contracts (including agreements) are only enforceable if they are duly stamped.

In the instant case of NN Global Mercantile, following a dispute over the invocation of a bank guarantee in a coal transportation contract between the parties therein, Indo Unique Flame Ltd. approached the Supreme Court and claimed that the agreement was unstamped and hence, unenforceable under the applicable law. In January 2021, a 3-Judge Bench of the Hon'ble Supreme Court in *M/s N.N. Global Mercantile Private Limited v. M/s Indo Unique Flame Limited & Ors. (2021) 4 SCC 379* differed from the decisions rendered in the cases of SMS Tea Estates and Garware Wall Ropes, thereby overruling its earlier two decisions. The bench observed that an arbitration agreement is distinct and independent from its underlying contract, i.e., an independent arbitration agreement can be enforced even if the underlying contract is invalid because the non-payment of stamp duty will invalidate the said contract and not the arbitration agreement. However, the present matter was also referred to a 5-Judge Constitution Bench to settle the debate surrounding the validity of unstamped / insufficiently stamped arbitration agreements, which is how the present decision came into being.

The majority opinion in the case of NN Global Mercantile raises critical questions for the reasons discussed hereunder: -

- Under Section 11 of the Arbitration and Conciliation Act, 1996 (the "Act"), it is provided that if the parties fail to appoint an arbitrator, they may approach the High Courts or the Supreme Court to appoint an arbitrator for adjudication of the disputes arising between them. It is settled law that Courts are only empowered to undertake a prima facie review and confirm the 'existence' of an arbitration agreement at the stage of Section 11 application. This limitation to undertake a limited prima-facie review was introduced by the 2015 amendment to the Act in order to facilitate speedy disposal of the disputes. However, the present decision of the Hon'ble Supreme Court in NN Global Mercantile opens the doors to judicial intervention by allowing Courts to determine the validity of the contract, which would further determine the validity of the arbitration clause or agreement as the case may be.
- The principle of minimal judicial intervention is the cornerstone of arbitration and is well recognized in almost all jurisdictions. The Act was modelled on the lines of the UNCITRAL Model Law on International Commercial Arbitration. Article 5 of the model law provides for minimal judicial interference. It states, "In matters governed by this law, no court shall intervene except where so provided in this law." Section 5 of the Act of 1996 is coextensive with Article 5 of the model law. Section 5 of the Act begins with a non-obstante clause, which provides that in matters governed by Part I, no judicial authority shall intervene except where provided by Part I. This position of the Model Law was highlighted by Justice D. Bhandari in *Great Offshore Ltd. v Iranian Offshore Engineering & Construction Company (2008) 14 SCC 240*, wherein the bench observed the following:

#### Paragraph 59:

*The Court has to translate the legislative intention, especially when viewed in light of one of the Act's "main objectives": "to minimize the supervisory role of Courts in the arbitral process". If this Court adds a number of extra requirements, such as stamps, seals and originals, we would be enhancing our role, not minimizing it. Moreover, the cost of doing business would increase. It takes time to implement such formalities. What is even more worrisome is that the parties' intention to arbitrate would be foiled by formality. Such a stance would run counter to the very idea of arbitration, wherein tribunals all over the world generally bend over backwards to ensure that the parties' intention to arbitrate is upheld. Adding technicalities disturbs the parties' "autonomy of the will" (l' autonomie de la volenti).*

#### Paragraph 60:

*Technicalities like stamps, seals and even signatures are red tape that have to be removed before the parties can get what they really want - an efficient, effective and potentially cheap resolution of their dispute. The autonomie de la volenti doctrine is enshrined in the policy objectives of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration, 1985, on which our Arbitration Act is based. The courts must give primacy to legislative intent. It would be improper and undesirable for the courts to add a number of extra formalities not envisaged by the legislation. The courts' directions should be to achieve the legislative intention. The courts must implement legislative intention.*

- The last decade has witnessed the growth of India as an emerging global arbitration hub. Requiring the arbitration agreement to fulfil additional requirements works against India's efforts to become a pro-arbitration capital. Requiring payment of stamp duty at the appointment stage would defeat the purpose of The Act, which is to ensure an effective and efficient arbitration process. Scrutiny on stamp duty at the threshold stage could stymie the process of speedy referral to arbitration and result in prolonged litigation before the Courts.
- The doctrine of separability or severability, enshrined in Section 16 of the 1996 Act, is at the heart of arbitration. Section 16 of the 1996 Act replicates Article 16 of the Model law. The doctrine states that the arbitration agreement is a separate and autonomous agreement independent of the underlying substantive contract, which contains the commercial terms of the agreement between the parties. Even if the underlying contract is held to be invalid, it shall not invalidate the arbitration agreement/ clause. The party alleging invalidity of the main contract must establish that the alleged invalidity has a direct bearing upon the arbitration clause to avoid arbitration. Not only does the present judgement fail to uphold the doctrine of severability, but it also negates the autonomy of the arbitration agreement that is recognized worldwide.
- Section 16 of the 1996 Act, which also embodies the principle of Kompetenz-Kompetenz, implies that an arbitral tribunal has the competence to rule on its own jurisdiction, including answering questions about the existence or validity of the arbitration agreement itself. A perusal of Section 16 would reveal that the tribunal itself is empowered to decide the validity of the

• Further, given that the Act is a special Act, as held by the Supreme Court in the case of *M/s. Consolidated Engineering Enterprises vs Principal Secretary, Irrigation Department & Ors. (2008) 7 SCC 169*, it must take precedence over the Stamp Act. As a settled principle under law, i.e., *generalia specialibus non-derogant* meaning special law prevails over general law. However, the present judgement is a derogation of this settled principle.

### Conclusion

In light of the overarching principles of the Act and the spirit of the UNCITRAL Model Law on International Commercial Arbitration, it appears that the Hon'ble Supreme Court has erred in overlooking the bedrock of Arbitration law not just in India, but worldwide. The present judgement appears to be in the teeth of the legislative intent to make India the centre stage for arbitration and ensure smooth and expeditious resolution of arbitration disputes. It is recommended for the Supreme Court to revisit and re-adjudicate the question before a larger constitutional bench in order to resolve the ambiguity surrounding the subject. Making the Arbitration agreement non-existent until such time that the stamp duty is paid will only hinder the already arduous process of appointment of arbitrators, thereby foiling the primary objectives of the Arbitration and Conciliation Act of 1996. Furthermore, it is settled law that an arbitration agreement is an independent agreement. Therefore, despite the fact that a contract will only be deemed valid once the requisite stamp duty is paid, the underlying arbitration agreement being independent thereof should be construed as valid and subsisting. As the legislation is silent regarding stamp duty payable on arbitration agreements, parties must have an alternate recourse and courts should only check the existence and validity of the arbitration agreement thereby ensuring speedy dispute resolution.

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