

# N.N. Global Dictum: Has the Stamping Issue's Resolution Opened a Pandora Box?

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A 5-Judge Bench of the Supreme Court of India, in a recent decision in *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.*,<sup>1</sup> [*N.N. Global II*] has addressed the interplay of the requirements of stamping vis-à-vis the validity of arbitration agreements. This article attempts to present a critique of the decision in *N.N. Global II*<sup>2</sup> while discussing the way forward.

### **A. The decision of the three-Judge Bench and reference to the 5-Judge Bench**

A three-Judge Bench of the Supreme Court, while deciding on the validity of an arbitration agreement on an unstamped or insufficiently stamped contract, rendered a judgment in *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.*<sup>3</sup> [*N.N. Global I*] on 11-1-2021.

The Supreme Court in *N.N. Global I*<sup>4</sup> opined that an arbitration agreement is a distinct and

separate agreement which is independent from the substantive underlying commercial contract in which it may be embedded. This is based on the doctrine of severability or separability<sup>5</sup>, which provides that when parties enter into a commercial contract containing an arbitration clause, they are entering into two separate agreements viz. (i) the substantive contract, which contains the rights and obligations of the parties arising from the transaction; and (ii) the arbitration agreement which contains the binding obligation of the parties to resolve their disputes through arbitration.

Further, the Supreme Court in *N.N. Global I*<sup>6</sup> held that the doctrine of Kompetenz-Kompetenz as captured under Section 16(1) of the Arbitration and Conciliation Act, 1996 (Arbitration Act) does not leave any doubt that an Arbitral Tribunal alone has the competence to rule on its jurisdiction encompassing objections with regard to existence, validity and the scope of the arbitration agreement.

In *N.N. Global I*<sup>7</sup>, a reference was also made to the decision in *SBP & Co. v. Patel Engg. Ltd.*<sup>8</sup> to hold that the decision in *SBP*<sup>9</sup> was rendered basis the pre-amendment version of Section 11 of the Arbitration Act. Post the amendment introducing sub-section (6-A) in Section 11 of the Arbitration Act, a court acting under Section 11 was only required to look into the existence of an arbitration agreement. In this regard, the Supreme Court referred to the decision in *Duro Felguera SA v. Gangavaram Port Ltd.*<sup>10</sup> and another decision<sup>11</sup> to hold that the legislative intent called for minimal judicial intervention and it was clear that at the pre-reference stage, the only issue to be decided was of the existence of an arbitration agreement and nothing more.

Thus, in *N.N. Global I*<sup>12</sup>, the Supreme Court, while negating the legal position laid in *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.*<sup>13</sup> and *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.*<sup>14</sup> held that the non-payment of stamp duty on the underlying contract would not invalidate the arbitration agreement and render it non-existent in the eye of the law. However, while holding so, the Supreme Court doubted the correctness of certain findings<sup>15</sup> rendered by a Coordinate Bench in *Vidya Drolia v. Durga Trading Corpn.*<sup>16</sup>, affirming the findings in *Garware Wall Ropes*<sup>17</sup>. Accordingly, the Supreme Court referred the matter to a Larger Bench to settle the issue authoritatively.

## **B. Arguments for the validity of the arbitration agreement**

(i) *The doctrine of severability or separability provides that an arbitration agreement is a distinct agreement in itself*

The doctrine of severability came to be extensively discussed in *N.N. Global I*<sup>18</sup>. It is a well-recognised principle of international arbitration jurisprudence that an arbitration agreement is a separate agreement in itself, independent from the underlying commercial contract in which it may be embedded. The doctrine of severability or separability of the arbitration agreement connotes that the invalidity, ineffectiveness, or termination of the underlying contract would not affect the validity of the arbitration agreement. The United Nations Commission on International Trade Law (UNCITRAL)

Model Law on International Commercial Arbitration (Model Law) recognises arbitration agreements as separate from the underlying agreement.<sup>19</sup> Since the Arbitration Act is based on the Model Law, the Arbitration Act contains similar provisions under Sections 16(1)(a)<sup>20</sup> and 16(1)(b)<sup>21</sup>. Thus, in presence of an arbitration clause in a contract, unless the arbitration agreement is itself null and void, inoperative, or incapable of being performed, the parties would be duty-bound to resolve their disputes through the mode of arbitration.

*(ii) Non-payment of the stamp duty will not invalidate an instrument as it is a curable defect*

Another argument that was put forth in *N.N. Global II*<sup>22</sup> to support the validity of the arbitration agreement was that the non-payment of stamp duty was a “curable defect”. An unstamped document could be acted upon after the payment of requisite stamp duty and penalty.<sup>23</sup> Since the defect could be cured with the payment of a penal amount, it was argued that it could not be stated that an unstamped instrument did not exist in the eye of the law. Many other judgments<sup>24</sup> were also cited before the Larger Bench in *N.N. Global II*<sup>25</sup> to contend that the failure to stamp a document did not affect the document’s validity, but it merely rendered the document inadmissible in evidence. From the perspective of the Stamp Act, 1899 (Stamp Act), it was argued that the same was a fiscal law which could not be used to clothe a litigant with an arm of “technicality”.

A reference was made to the decision in *Great Offshore Ltd. v. Iranian Offshore Engg. & Construction Co.*<sup>26</sup> where the Supreme Court in context of stamping under a Section 11 application held that 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 disputes. The Single Judge of the Supreme Court in *Great Offshore*<sup>27</sup> further went to state that it would be improper and undesirable for the courts to add a number of extra formalities not envisaged by the legislation.

*(iii) The post-2016 Amendment version of Section 11 under the Arbitration Act vests the “court” with limited jurisdiction*

In *N.N. Global (2)*<sup>28</sup>, heavy emphasis was also laid on the post-2016 Amendment<sup>29</sup> version of Section 11 Arbitration Act. As per the sub-section (6-A) of Section 11, the courts, while considering an application under Section 11, would confine their examination to the existence of an arbitration agreement.

Subsequent to the 2016 Amendment, the Supreme Court in *Duro Felguera*<sup>30</sup> and *Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman*<sup>31</sup> opined that at the stage of considering a Section 11 application, the court was only required to ascertain the “existence” of an arbitration agreement and not the “validity”. Thus, the adjudication upon the aspect of stamp duty being a time-consuming affair and requiring a mini trial in itself should be left in the arbitrator’s domain. Such an interpretation would also align with the longstanding goal of

making India an arbitration hub and expedite the arbitral process, especially the appointment of arbitrators.

It must be noted that the aforesaid provisions contained in sub-section (6-A) stand omitted by the 2019 Amendment<sup>32</sup> of the Arbitration Act. However, the 2019 Amendment qua Section 11 has not been brought into effect.

*(iv) Doctrine of kompetenz-kompetenz mandates the handover of the issues of stamping to the Arbitral Tribunal*

Another argument that was taken in *N.N. Global II*<sup>33</sup> pertains to the doctrine of Kompetenz-Kompetenz which implies that the Tribunal has the competence to determine and rule on its own jurisdiction, including objections with respect to the existence, validity and scope of the arbitration agreement. The doctrine has evolved over time to minimise the intervention of courts at the pre-reference stage, and reduce unmeritorious challenges raised on the jurisdiction of the Arbitral Tribunal. In *N.N. Global II*<sup>34</sup>, it was argued that the having regard to the legislative intent<sup>35</sup>, the effort must be to facilitate an unhindered and smooth passage for an application seeking reference to arbitration. In other words, unless patently void, the facet of subject-matter arbitrability should be left to the Arbitral Tribunal.

### **C. Solution suggested by amicus**

Mr Gourab Banerji, Senior Advocate acting as an amicus in the matter proposed the possible solution to overcome this conundrum. While keeping with the purpose of Section 11(6-A) and the need for minimal interference, as contemplated under Section 5<sup>36</sup> of the Arbitration Act, when the courts determined that there was a prima facie existence of an arbitration agreement, a reference must be made to the Arbitral Tribunal. It was then for the Arbitral Tribunal, if the need be, to fulfil the duties set out under the Stamp Act.

### **D. Arguments against the validity of arbitration agreement and majority decision in *N.N. Global II***

*(i) On requirements under the Stamp Act and their importance*

The Supreme Court while expressing its majority view in *N.N. Global II*<sup>37</sup>, reiterated the relevant provisions of amongst others, the Arbitration Act and the Stamp Act. Then the Supreme Court referred to the decision in *Hindustan Steel Ltd. v. Dilip Construction Co.*<sup>38</sup> to cull out the broad principles on stamping of instruments. It was held that the Stamp Act is a fiscal measure to be implemented with full vigour, and its stringent provisions are meant to raise and protect revenue. The duty of a court must be to adopt an interpretation which results in the enforcement of the law, rather than allowing the law to be flouted with impunity.

While the Stamp Act is not intended to be used as a weapon by a litigant to defeat the

cause of the opponent, it is only upon the endorsement being made under Section 42(2) of the Stamp Act that a document would be admissible as evidence. It was observed that an unstamped instrument is compulsorily impoundable under Section 33 of the Stamp Act and only upon the payment of the penalty would the instrument be endorsed to become enforceable/actionable under law.

Under Section 35 of the Stamp Act, the legislature has disabled the admission in evidence of an instrument not stamped or insufficiently stamped for any purpose. In other words, the unstamped or insufficiently stamped cannot be used as evidence for any purpose.

(ii) On the opinions expressed in *N.N. Global I* on the decision in *SMS Tea Estates*

The Supreme Court in *N.N. Global II*<sup>39</sup> opined that the findings in *N.N. Global I*<sup>40</sup> on the decision in *SMS Tea Estates*<sup>41</sup> do not lay down the correct law. The Supreme Court observed that the argument that an arbitration agreement being an independent contract would not be invalidated upon the non-stamping or insufficient stamping of the underlying contract would not serve any purpose. The arbitration agreement being an independent agreement on its own is exigible to stamp duty. Therefore, the whole premise in *N.N. Global I*<sup>42</sup> that the arbitration agreement not being exigible to duty, and it has a separate existence cannot hold good. In this regard, reference was made to Article 5 of the Stamp Act<sup>43</sup>.

The Supreme Court while expressing its majority opinion in *N.N. Global II*<sup>44</sup> went on to clarify that parties may act upon an unstamped document, goods or services may change hands under such instruments which are otherwise exigible to stamp duty. What is, however, relevant is that the State will not extend its protection, by appropriate sanctions. The rights which would have been available if the instrument was stamped would not exist.

### **E. An unstamped agreement is lifeless; non-stamping is not a “curable defect” in true sense**

The Supreme Court in *N.N. Global II*<sup>45</sup> explained that an agreement which was unstamped was unenforceable in law and would not be a contract under Section 2(h) of the Contract Act, 1872.<sup>46</sup> Hence, the Supreme Court opined that it may not be apposite to merely describe an unstamped arbitration agreement as a “curable defect”. As long as an arbitration agreement remained unstamped, it cannot be taken notice of for any other purpose as contemplated under Section 35 of the Stamp Act. As per the Supreme Court in *N.N. Global II*<sup>47</sup>, Section 11(6-A) of the Arbitration Act cannot be understood as merely predicating for an arbitration agreement “existing” literally but it relates to existence in law.

Based on the above reasons, the Supreme Court in *N.N. Global II*<sup>48</sup> opined that the decisions rendered in *SMS Tea Estates*<sup>49</sup> and *Garware*<sup>50</sup> as approved in the findings in *Vidya Drolia*<sup>51</sup> are correct. The Supreme Court further clarified that only on the basis of a

prima facie finding on the existence of an arbitration agreement, it would not be permissible to refer the matter to the arbitration and relegate the issue of impounding to the Arbitral Tribunal. Any shirking or abdication of the statutory duty under Section 11 would be unjustifiable.

## **F. Implications of the judgment and the future of arbitration regime in India**

The decision of the Supreme Court in *N.N. Global II*<sup>52</sup> has brought to light a multitude of legal issues that would require immediate addressal. The following are a few such aspects that need to be looked into:

### *(i) Expeditious appointment of arbitrators – what should be the way forward?*

After the decisions rendered in *Duro Felguera*<sup>53</sup> and *Mayavati Trading*<sup>54</sup>, the courts acting under Section 11 were almost acting on a mechanical basis checking for the *prima facie* existence of an arbitration agreement. The threshold until now was the test of “when in doubt, refer”. This made the appointment of arbitrators a relatively swifter process by the standards of Indian litigation. The pace and tendency of referring matters to arbitration post the 2016 Amendment was such that the Supreme Court in a recent decision<sup>55</sup> opined that the courts acting under Section 11 of the Arbitration Act were not expected to mechanically deliver a dispute at the arbitrator’s door. Having said that, the Supreme Court was quick to caveat the aforesaid statement with a cautionary note that a limited scrutiny through the “eye of the needle” was necessary to protect parties from being forced to arbitrate when matters are demonstrably non-arbitrable.

It is felt that the decision in *N.N. Global II*<sup>56</sup> lacks certain guidelines that would permit the courts to not engage in a mini trial for determining the sufficiency of stamping prior to referring the matter to arbitration. There appears to be some respite in the judgment as the Supreme Court held that where a claim of insufficiency of stamping appears to be wholly without foundation, a reference may be made to the arbitration leaving it open for the Arbitral Tribunal to exercise powers under the Stamp Act if necessary.

### *(ii) What happens to the grant of urgent interim reliefs and emergency awards especially those invoked under international commercial arbitrations covered under Part I of the Arbitration Act?*

While the Supreme Court in its majority view appears to not be pleased with the argument that the adjudication over the sufficiency of stamp duty is a time-consuming affair, there is no clarity on how parties are required to act in case they wish to seek urgent interim reliefs or emergency awards. From the decision in *N.N. Global II*<sup>57</sup>, it appears that the parties first need to establish the sufficiency of the stamping prior to proceeding with the submissions on urgent reliefs/emergency awards sought. This would be especially challenging in matters of international commercial arbitrations covered under Part I of the Arbitration Act. Even if in the interest of justice, the arbitral reliefs come to be rendered prior at the parties’ cost, there could be circumstances where it is

shown that the underlying arbitration agreement was insufficiently stamped. This would attract a number of judicial precedents which indicate that the illegality of an arbitration agreement is matter going to the very foundation<sup>58</sup> and as such anything emerging out of such arbitration agreement is null and void ab initio.

*(iii) What is the treatment meted out to arbitration agreements which may not necessarily be in form of a contract as understood under the Stamp Act?*

The Arbitration Act expressly permits parties to have an arbitration agreement in writing by way of exchange of letters, telex, telegrams, or other means of telecommunication including electronic means<sup>59</sup>. As rightly pointed out in one of the dissenting opinions in *N.N. Global II*<sup>60</sup>, traditional laws must now render new forms of agreement unenforceable on the basis of insufficient stamping. As more and more jurisdictions move for a substance over form approach in arbitration, it would be interesting to understand as to how the requirement of stamping would be met in cases such as electronic exchanges. Some guidance appears to have been provided in the majority view in *N.N. Global II*<sup>61</sup> which provides that the Stamp Act does contemplate a contract or agreement being formed through two or more letters. It then suffices that any one of the letters bears the proper stamp.<sup>62</sup>

*(iv) How to carve out trivial challenges put forth by unscrupulous litigants?*

The judgment in *N.N. Global II*<sup>63</sup> appears to leave a foot in the door for unscrupulous litigants to find another avenue to pose unwarranted challenges taking the arbitral process off the track. The requisite guidance on this aspect appears to be missing in the judgment. The additional time spent in determining the issue of stamping at the courts even prior to the reference to arbitration would most certainly add to the time and cost spent by the parties at dispute.

*(v) Whether the decision in N.N. Global II is truly aligned with the scheme and ethos of the Arbitration Act and the goal of encourage private modes of resolving disputes?*

There is no debate that there exists a large pendency of commercial cases before various courts across India. The objective of the Arbitration Act was to align with the international norms of arbitration in view of the formulation of the Model Law and to provide for a reliable, efficient, potentially quicker method of dispute resolution. However, the decision in *N.N. Global II*<sup>64</sup> necessary appears to take a step back on these objectives and commitments as it now provides for conducting a mini trial at the pre-reference stage on the sufficiency of the stamping. One of the dissenting views in *N.N. Global II*<sup>65</sup> aptly points out that the question to be asked is whether “we then push the Section 11 Judge to deal with so many things...?”.

## **Conclusion**

For India to continue rising in the ease of doing business rankings and establish itself as a hotspot of arbitration across the world, there is a need to address the concerns emerging



out of the decision in *N.N. Global II*<sup>66</sup>. Appropriate steps may be taken to ensure that the overall scope, purpose, ethos of the Arbitration Act remains unaffected due to the interplay of arbitration agreement with requirements of stamping.

The present case is a fit one for the legislature to come up with appropriate amendments in the Stamp Act in regards of agreements to arbitrate. By letting go of the potential revenue that the State may gain from the stamping of arbitration agreements, a huge portion of the exchequer's money would be saved in preventing an otherwise unwarranted court litigation adding to the post-pandemic docket explosion.

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### † Founder and Head of Chambers at Trinity Chambers.

1. 2023 SCC OnLine SC 495
2. 2023 SCC OnLine SC 495.
3. (2021) 4 SCC 379.
4. (2021) 4 SCC 379.
5. The doctrine was expounded in *Heyman v. Darwins Ltd.*, 1942 AC 356 and subsequently has been affirmed in several international and Indian cases including *Bremer Vulkan Schiffbau und Maschinefabrik v. South India Shipping Corpn. Ltd.*, 1981 AC 909, *Harbour Assurance v. Kansa General International Insurance*, (1993) 1 Lloyd's Rep. 455; *Lesotho Highlands Development Authority v. Impregilo SpA*, (2006) 1 AC 221 : (2005) 3 WLR 129 : 2005 UKHL 43; *Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd.*, 2007 Bus LR 1719 : 2007 UKHL 40; *Firm Ashok Traders v. Gurumukh Das Saluja*, (2004) 3 SCC 155; *National Agricultural Coop. Mktg. Federation India Ltd. v. Gains Trading Ltd.*, (2007) 5 SCC 692; and *India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd.*, (2007) 5 SCC 510.
6. (2021) 4 SCC 379.
7. (2021) 4 SCC 379.
8. (2005) 8 SCC 618.
9. (2005) 8 SCC 618.
10. (2017) 9 SCC 729.
11. *Mayavati Trading (P) Ltd. v. Pradyut Deb Burman*, (2019) 8 SCC 714.
12. (2021) 4 SCC 379.
13. (2011) 14 SCC 66.
14. (2019) 9 SCC 209.
15. Para 92 of *Vidya Drolia v. Durga Trading Corpn.*, (2021) 2 SCC 1 which affirms the decision in *Garware Wall Ropes*, (2019) 9 SCC 209.

16. (2021) 2 SCC 1.
17. (2019) 9 SCC 209.
18. (2021) 4 SCC 379.
19. Model Law, Art. 16(1) reads that, "(1) The arbitral may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause".
20. Arbitration and Conciliation Act, 1996, S. 16(1)(a) reads as, "(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract".
21. Arbitration and Conciliation Act, 1996, S. 16(1)(b) reads as, "(b) a decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause".
22. 2023 SCC OnLine SC 495
23. *Lachmi Narayan Agarwalla v. Braja Mohan Singh*, 1924 SCC OnLine PC 34 : (1923-24) 51 IA 332; *Hindustan Steel Ltd. v. Dilip Construction Co.*, (1969) 1 SCC 597.
24. *Joyman Bewa v. Easin Sarkar*, 1926 SCC OnLine Cal 19; *Gulzari Lal Marwari v. Ram Gopal*, 1936 SCC OnLine Cal 275; *Purna Chandra Chakrabarty v. Kalipada Roy*; 1942 SCC OnLine Cal 24.
25. 2023 SCC OnLine SC 495.
26. (2008) 14 SCC 240.
27. (2008) 14 SCC 240.
28. 2023 SCC OnLine SC 495.
29. Arbitration and Conciliation (Amendment) Act, 2016 with effect from 23-10-2015.
30. (2017) 9 SCC 729.
31. (2019) 8 SCC 714.
32. Arbitration and Conciliation (Amendment) Act, 2019 (33 of 2019).
33. 2023 SCC OnLine SC 495
34. 2023 SCC OnLine SC 495
35. Arbitration and Conciliation Act, 1996, S. 16(1).
36. Arbitration and Conciliation Act, 1996, S. 5 reads as, "Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

37. 2023 SCC OnLine SC 495.
38. (1969) 1 SCC 597.
39. 2023 SCC OnLine SC 495.
40. (2021) 4 SCC 379.
41. (2011) 14 SCC 66.
42. (2021) 4 SCC 379.
43. S. 5 of the Stamp Act provides for a residuary clause (c) titled "if not otherwise provided for" for the category of "Agreement or Memorandum of an Agreement".
44. 2023 SCC OnLine SC 495
45. 2023 SCC OnLine SC 495.
46. The judgment in *N.N. Global II* refers to Fourteen Edition of the *Indian Contract and Specific Relief Acts* by Pollock and Mulla to quote a portion on unenforceable contracts which reads as "unenforceable contracts are valid in all respects, but may not be sued upon by the parties. Such disability may arise for want of registration; or because the time prescribed for filing the suit has expired; or the document or instrument does not bear the requisite stamp duty; or because the lender of money does not possess a licence under moneylending laws".
47. 2023 SCC OnLine SC 495
48. 2023 SCC OnLine SC 495
49. (2011) 14 SCC 66.
50. 2019) 9 SCC 209.
51. (2021) 2 SCC 1.
52. 2023 SCC OnLine SC 495.
53. (2017) 9 SCC 729.
54. (2019) 8 SCC 714.
55. *NTPC Ltd. v. SPML Infra Ltd.*, 2023 SCC OnLine SC 389.
56. 2023 SCC OnLine SC 495.
57. 2023 SCC OnLine SC 495.
58. *TRF Ltd. v. Energo Engg. Projects Ltd.*, (2017) 8 SCC 377; and *Bharat Broadband Network Ltd. v. United Telecoms Ltd.*, (2019) 5 SCC 755.
59. Arbitration and Conciliation Act, 1996, S. 7(4).
60. 2023 SCC OnLine SC 495
61. 2023 SCC OnLine SC 495
62. Stamp Act, 1899, S. 35(c).

63. 2023 SCC OnLine SC 495

64. 2023 SCC OnLine SC 495

65. 2023 SCC OnLine SC 495

66. 2023 SCC OnLine SC 495

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