To Stamp or Not to Stamp: Critiquing the Indian Supreme Court's Judgement in N.N Global

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A Constitution Bench of the Indian Supreme Court in *N.N Global* recently adjudicated the contentious issue of whether arbitration clauses in contracts that were not registered and stamped would be valid and enforceable. As two co-ordinate benches of the Supreme Court had passed conflicting opinions on this point of law, the matter was referred to a Constitution bench—who answered the question in the negative, by a 3:2 majority.

The majority posited that an insufficiently stamped arbitration agreement within the meaning of Section 7 of the Arbitration and Conciliation Act, 1996 (hereinafter "ACA") could not be acted upon in view of Section 35 of the Stamp Act unless following impounding and paying requisite duty. Furthermore, the bench held that the Court was bound to examine the agreement at Section 11 (appointment of arbitrators) stage itself and was duty bound to impound the agreement—if found to be unstamped.

In doing so, the Apex Court reiterated the principle cited in *SMS Tea Estates* and *Garware Wall ropes* and overturned the decision of the full bench of the same court in the 2021 *N.N Global* case. In this regard, the authors intend to critique this decision of the Constitution bench on three primary grounds-

1. **Limited review under Section 11**

The Court observed that the issue of stamping had to be looked at the very threshold, by the courts in the exercise of Section 11(6A) of the ACA, when the consideration with respect to the appointment of an arbitrator is undertaken. To that effect, it is argued that Section 11 (6A) merely allows the court to examine the "*existence of an arbitration agreement*" while dealing with the appointment of arbitrators. In fact, in *Pravin Electricals*, the court had held that the scope of

review under Section 11 (6A) was confined to scrutinizing whether the contractual essentials had been fulfilled and whether the requisites under Section 7 of the ACA (which lays down the necessary particulars of arbitration agreements) had been satisfied. It is imperative to note that Section 7 does not include stamping as a necessary particular of an arbitration agreement. Moreover, in *Sanjiv Prakash,* the court had observed that Section 11 (6A) only permitted a *prima facie* review for the existence of an agreement, and a more detailed review could only be carried out by the arbitral tribunal.

Thus, it is contended that at the Section 11 stage, if the court feels that a deeper consideration is required, it must appoint an arbitral tribunal and refer the matter for their adjudication. This is in line with the cardinal principle of *Kompetenz-Kompetenz* (which allows the tribunal to decide over its own jurisdiction) that is found in Section 16 (1) of the ACA. This provision permits the tribunal to make rulings on objections with respect to the "*existence and validity*" of the arbitration agreement, thereby allowing the arbitrator to make considerations with respect to the stamping of the document. These words have been adopted from Article 16 (1) of the UNCITRAL Model Law on International arbitration, in order to ensure that the Indian Act is in conformity with international standards and practices. In fact, most international arbitration institutions like LCIA, SIAC and HKIAC also use similar terminology to encapsulate the principle of *Kompetenz-Kompetenz,* thus showcasing that such extraneous factors are always left to the tribunal's discretion globally.

Accordingly, leaving the consideration of stamping to the arbitral tribunal is the only way to harmonize Sections 11 and 16 and ensure that the purpose of Section 16 is not defeated. Such an interpretation would cement India's position as a pro-arbitration country and ensure that international parties are not deterred from choosing India as the seat of their arbitration. The court's judgement in *NN Global* dilutes the *Kompetenz- Kompetenz* principle, consequently hampering India's position as a choice of seat for arbitrations between Indian parties or between Indian and International parties (as Section 11, by virtue of being part of Part I of the ACA, is applicable to international arbitrations seated in India).

1. **Grounds for invalidation of the arbitration agreement**

Internationally, there are two grounds on which the arbitration agreement is invalidated, namely, if the arbitration agreement is "*inoperative and incapable*" or

if it is "*null and void*". The words "*inoperative or incapable*" of being performed, which are enshrined in Section 45 of the ACA, have been mirrored from Article II (3) of the New York Convention. Redfern and Hunter on International Arbitration define these terms to describe situations in which the arbitration agreement is no longer in effect, such as when it has been revoked by the parties or when the arbitration cannot be set in motion. The latter may be a possibility if the arbitration clause is ambiguously worded or if the other provisions of the contract conflict with the parties' intention to arbitrate.

The other ground where an arbitration agreement becomes invalidated is if it is "*null and void*". Albert Jan Van Dan Berg, in an article, states that the terms "*null and void*" can be defined when referring to situations in which the arbitration agreement is affected by some invalidity from the start, such as lack of consent owing to misrepresentation, duress, fraud or undue influence. An insufficiently stamped arbitration agreement does not fall under the ambit of either of these grounds as being a curable defect; non-stamping would not render the instrument null and void. Thus, it can be inferred that the Indian courts have developed a new ground for invalidation of the arbitration agreement, which is not recognised internationally.

In fact, this new ground also violates Article 5 of the UNCITRAL Model law, which has been interpreted to prohibit domestic courts from adding any extra grounds for invalidation—grounds that are not mentioned in the model law.

The implications of this judgement could hamper India's position as an unfavourable seat for International Commercial Arbitration since this new caveat is not arbitration-friendly and could invalidate an agreement if a technical procedure such as stamping is not followed.

1. **Technical advancements**

This Court cannot be oblivious to electronic improvements given that commercial transactions are moving beyond pen-and-paper agreements. The ACA's definition of arbitration agreements was amended in 2015 to recognise electronic communication, bringing the procedure in line with Article 7 of the UNCITRAL Model law, which was revised in 2006. Dr. Peter Binder in International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions notes that "*The wording in exchange of letters, telex, telegrams or other means of*

telecommunication indicates Model law's flexibility towards future means of communication by being geared solely at the record of the agreement rather than the strict direct signature of the agreement." It expanded the form of the arbitration agreement to align with international contract conventions and practices. In the present times, a valid arbitration agreement includes communications via letters, telexes, telegrams, or other forms of communication, including electronic channels. From the foregoing, it follows logically that traditional laws cannot deem these new types of agreements unenforceable merely because of insufficient stamping. However, the court in *N.N Global* has failed to clarify the same, thereby rendering the validity of such agreements questionable.

In conclusion, the authors posit that it is imperative to note that the Indian ACA is based on the doctrine of *autonomie de la volonté* ("autonomy of the will"), enshrined in the policy objectives of the UNCITRAL. Accordingly, it is improper and undesirable for the courts to add a number of extra formalities that are not envisaged by the legislation. The courts' goal should be to achieve the legislative intention, and not to act as a barrier between parties and their aim of seeking an efficient, effective, and potentially cheap resolution of their dispute.