

Dispute Resolution Hotline

January 08, 2024

ENFORCEABILITY OF UNSTAMPED OR INADEQUATELY STAMPED ARBITRATION AGREEMENTS: SEVEN-JUDGE BENCH SETTLES THE LAW

court distinguished between the enforceability and admissibility of a contract. While an agreement that is *void* is unenforceable, an agreement that cannot be produced as evidence, is inadmissible. An arbitration agreement can be declared *void* if it is found that fraud permeates the entire contract including the arbitration agreement.⁷ *A defect in the arbitration agreement does not render it void ab initio unless the defect is so fundamental or irretrievable as to negate the parties' intent or agreement to arbitrate.*⁸ As per Section 35 of the Stamp Act, the non-payment or inadequate payment of stamp duty on an instrument only renders it inadmissible and not unenforceable. Further, per Section 42 of the Stamp Act, the non-payment or inadequate payment of stamp duty is a curable defect. The Stamp Act provides the procedure for the curing of such a defect. The fact that non-payment or inadequate payment of stamp duty is a curable defect underpins the conclusion that such a defect cannot render an arbitration agreement void, as a contract that is void cannot be cured.

b. Principle of separability of arbitration agreements

While *NN Global II* acknowledged the separability presumption, it was not applied in the context of Sections 33 and 35 of the Stamp Act. This position was held to be contrary to law in the *Stamping Judgment*.

The Supreme Court held that by virtue of the presumption of separability contained in Section 16 of the Arbitration Act an arbitration agreement is considered substantively independent. Thus, the validity of the arbitration agreement is independent of the validity of the substantive contract.⁹ By way of the arbitration agreement, the parties themselves confer jurisdiction on the arbitral tribunal to determine jurisdictional as well as substantive issues. Hence, the principle of separability allows an arbitral tribunal to determine the existence and validity of the arbitration and rule on its own jurisdiction, thereby giving effect to the doctrine of *kompentze-kompentze*.

c. Principle of *kompentze-kompentze*

The principle of *kompentze-kompentze* is enshrined in the scheme of the Arbitration Act, more particularly, Section 16. Section 16 allows an arbitral tribunal to rule on its own jurisdiction including on issues of the validity of the arbitration agreement. Under Section 34 of the Arbitration Act, courts may review the decision of an arbitral tribunal on jurisdiction only at the stage of challenge of the final award. Hence, as per the principle of *kompentze-kompentze* as provided in the Arbitration Act, the arbitral tribunal is vested with the jurisdiction to determine all preliminary issues affecting its jurisdiction, including the issue of sufficiency of stamping.¹⁰

The corollary is that the appointment of an arbitrator is not determinative of the enforceability of the arbitration agreement. As discussed above, the issue of enforceability is independent of the issue of admissibility. Hence, a document that is inadmissible could be enforceable.

d. Minimum judicial interference

The principle of negative *kompentze-kompentze* prohibits courts from hearing disputes which the parties have mutually intended to submit to the jurisdiction of an arbitral tribunal. Article 5 of the UNCITRAL Model Law ("**Model Law**") limits court intervention to matters expressly governed by the law, respecting the arbitral tribunal's exclusive jurisdiction, as outlined in Article 16.

Section 5 of the Arbitration Act, unlike Article 5 of the Model Law, begins with a non-obstante clause and explicitly restricts judicial intervention to instances "*so provided*" in Part I of the Arbitration Act. Section 5 of the Arbitration Act highlights the positive and negative facets of minimal judicial interference – by vesting judicial authorities with jurisdiction over arbitral proceedings in matters allowed by Part I but prohibiting intervention when the arbitral tribunal has exclusive jurisdiction. The Supreme Court therefore held that every provision of the Arbitration Act ought to be construed in view of Section 5 to give true effect to the legislative intention of minimal judicial intervention and party autonomy.

Section 16 of the Arbitration Act reinforces the principle of minimum judicial interference by allowing the arbitral tribunal to rule on its own jurisdiction, limiting courts from dealing with substantive objections including those pertaining to the validity of the arbitration agreement, during referral or appointment stages. Thus, the issue of stamping is left to be decided by the arbitral tribunal in the first instance. This aligns with the separability presumption, acknowledging that the arbitral tribunal will later rule on these issues.

e. Power of courts under Sections 8 and 11 of the Arbitration Act while referring parties to arbitration or appointing arbitrators

Research Papers

Handbook on New Labour Codes

April 29, 2024

Compendium of Research Papers

April 11, 2024

Third-Party Funding for Dispute Resolution in India

April 02, 2024

Research Articles

Private Client Insights - Sustainable Success: How Family Constitutions can Shape Corporate Governance, Business Succession and Familial Legacy

January 25, 2024

Private Equity and M&A in India: What to Expect in 2024?

January 23, 2024

Emerging Legal Issues with use of Generative AI

October 27, 2023

Audio

Third-Party Funding: India & the World

April 27, 2024

IBC allows automatic release of ED attachments: Bombay HC reaffirms

April 15, 2024

The Midnight Clause

February 29, 2024

NDA Connect

Connect with us at events, conferences and seminars.

NDA Hotline

Click here to view Hotline archives.

Video

Q&A 2024 Protocol to the Mauritius India Tax Treaty

April 22, 2024

Boost to India's Space Potential: India Liberalizes Foreign Direct

Section 11 of the Arbitration Act empowers the court to appoint an arbitral tribunal upon a mere positive determination of the existence of an arbitration agreement. Section 8 of the Arbitration Act empowers the court to refer parties to arbitration upon a positive determination of the *prima facie* existence of a valid arbitration agreement. However, Section 16 empowers an arbitral tribunal to 'rule' on its own jurisdiction. The scope of 'rule' includes a determination of the existence and validity of an arbitration agreement. This demonstrates the legislative intent to differentiate between the power and jurisdiction of the courts under Section 8 and 11 and arbitral tribunals under Section 16 of the Arbitration Act.

f. Arbitration Act as a complete code

The Supreme Court reiterated that the Arbitration Act is a self-contained code,¹¹ specifically while addressing matters related to the appointment of arbitrators, commencement of arbitration proceedings, award-making, challenges to awards and their execution. As a self-contained and exhaustive code on arbitration law, the Arbitration Act implies the exclusion of general legal procedures. It dictates specific procedures for matters within its scope, and actions not explicitly mentioned within its provisions are impermissible. The Supreme Court further held that the provisions of other statutes cannot interfere with the operation of the Arbitration Act unless expressly specified. Section 7 of the Arbitration Act lays down the exhaustive requirements of an arbitration agreement.

g. Harmonious construction of the Arbitration Act, the Contract Act and the Stamp Act

The Supreme Court applied the rules of statutory interpretation to harmoniously construe the Arbitration Act, the Contract Act and the Stamp Act. In *Sultana Begum v. Prem Chand Jain*,¹² the Supreme Court had held that the provisions of one statute cannot be used to render the provisions of another statute *otiose* unless it is impossible to reconcile the two statutes. The Supreme Court in the *Stamping Judgment* observed that the object of the Arbitration Act is to preserve the efficacy of arbitration and minimise judicial interference, and the object of the Stamp Act is to secure revenue. The Arbitration Act and the Stamp Act must be construed harmoniously to "*preserve the [ir]workability and efficacy*" and not defeat their purpose or render them ineffective.¹³ For the reasons stated below, the Supreme Court held that Arbitration Act would have primacy over the Stamp Act and the Contract Act in relation to arbitration agreements:

- Applying the doctrine of *generalia specialibus non-derogant*, the Supreme Court held that the Arbitration Act is a special law, and the Contract Act and Stamp Acts are general laws in terms of the laws governing arbitration, including the laws governing an arbitration agreement. This is because, while the Arbitration Act specifically defines and lays down the essentials of an arbitration agreement the Contract Act and the Stamp Act define contracts, agreements and instruments broadly and in general.
- The non-obstante clause in Section 5 of the Arbitration Act excludes the operation of Section 33 and 35 of the Stamp Act at the pre-referral stage under Section 11 of the Arbitration Act.
- The Arbitration Act was enacted after the Stamp Act; even so, it does not make stamping an essential ingredient of an arbitration agreement.

DECISION

The *Stamping Judgment* recognises the purpose of the Arbitration Act to make "*speedy and efficacious alternative dispute resolution*" available to parties. The impounding of an arbitration agreement by courts at the pre-referral stage to cure stamping defects compounded with the burden of cases before the courts, has the potential to cause a substantial delay in the arbitration process. In contrast, an arbitral tribunal with a smaller volume of cases before it can dedicate sufficient time to adjudicate on the issue at a quicker pace.

The Supreme Court held that (i) inadequately stamped as well as unstamped agreements are inadmissible in evidence under Section 35 of the Stamp Act but enforceable in law; (ii) such agreements are not *void* or *void ab initio*; (iii) inadequate stamping and non-stamping are curable defects.

With regard to jurisdiction, the Supreme Court found that the courts at the pre-referral stage, possess limited jurisdiction to adjudicate on the *prima facie* existence of an arbitration agreement. It is the arbitral tribunal and not the court which may test whether the requirements of a valid contract and a valid arbitration agreement are met. If the tribunal finds that these conditions are not met, it will decline to hear the dispute any further; if it finds that a valid arbitration agreement exists, it may assess whether the underlying agreement is a valid contract.¹⁴

The Supreme Court held that the arbitral tribunal has the power to decide on the issue of stamping. It has the authority to receive evidence by consent of the parties, in terms of Section 35 of the Stamp Act, following which the procedure under Section 35 may be followed. This preserves the principle of *kompetenze-kompetenze* and purposes of arbitration as well as of the Stamp Act. Further, as per Section 33 of the Stamp Act, only an authority before whom an insufficiently stamped or unstamped contract is produced as evidence, is empowered to impound it.

Therefore, the Supreme Court overruled the judgments in the cases of *NN Global II* and *SMS Tea Estates* and partially overruled *Garware Wall Ropes* to the extent that it held unstamped or insufficiently stamped arbitration agreements to be non-existent in law.

The Supreme Court recognized that the Arbitration Act embodies modern arbitration principles, aiming to fulfil the parties' mutual intent by utilizing neutral arbitral tribunals, whose decisions are final and binding. This approach allows parties to customize procedures, ensuring efficient dispute resolution. Businesses favour arbitration to avoid costly, complex, and protracted judicial processes. Legal jurisdictions globally support arbitration, with national courts acknowledging principles like separability and *kompetenze-kompetenze*. While modern arbitration law doesn't fully exclude national courts, it prioritizes arbitral tribunals in deciding disputes and addressing issues related to arbitration agreements and substantive rights. The Arbitration Act reflects these modern aspects, and it is the court's duty to interpret it in a way that gives effect to modern arbitration principles in India.

CONCLUSION

The *Stamping Judgment* clarifies and reshapes the legal landscape surrounding inadequately stamped and

unstamped arbitration agreements in India. The judgment strategically aligns with the global trajectory of minimizing judicial interference in arbitration, aligning with principles from the Model Law and Section 5 and 16 of the Arbitration Act. This bolsters the autonomy of parties as well as arbitral tribunals and positions India within the framework of contemporary international arbitration practices.

Importantly, the *Stamping Judgment* also aligns with the purpose of the Arbitration Act which is to provide parties with a “*speedy and efficacious*” dispute resolution mechanism by minimising the jurisdiction and powers conferred on courts and allowing the arbitral tribunal to determine its own jurisdiction alongside the substantive disputes between the parties. By reinforcing the salient and essential features of arbitration, the *Stamping Judgment* ensures that the practical considerations behind parties’ choice of arbitration as a mechanism to resolve their disputes are preserved.

The judgement in *NN Global II* had the potential of delaying the process of appointment of arbitrators by institutions in a Section 11 application and defeating the purpose of the Arbitration and Conciliation (Amendment) Act, 2019 (“**2019 Amendment**”) which was to promote institutional arbitration. This is because parties could have relied on *NN Global II* to argue that an insufficiently stamped arbitration agreement would have to first be impounded by the supervisory court, following which the parties would have to cure the defect in stamping and only then could the supervisory court direct an arbitral institution to appoint an arbitrator. However, as per the *Stamping Judgment*, the jurisdiction of the supervisory courts in case of non-stamping / inadequate stamping, has been now bestowed upon the arbitral tribunal. Therefore, courts can promptly designate arbitral institutions for appointment of arbitrators in a Section 11 application. Even so, the 2019 Amendment seeks to amend Section 11 to: (a) omit Section 11(6A) which limits the scope of jurisdiction of supervisory courts in a Section 11 application, and (b) allow the supervisory courts to designate arbitral institutions to appoint arbitrators. Since this omission remains to be notified, it must be noted that the *Stamping Judgment* does not expressly consider the amended Section 11. Nevertheless, it is a positive step towards implementing the push towards institutional arbitration, as envisaged in the 2019 Amendment.

– Soumya Gulati, Shruti Dhonde, Shweta Sahu and Sahil Kanuga

You can direct your queries or comments to the authors.

¹(2021) 4 SCC 379.

²Our hotline can be found [here](#).

³(2011) 14 SCC 66.

⁴(2019) 9 SC 209.

⁵(2021) 4 SCC 379.

⁶(2021) 2 SCC 1.

⁷*Vidya Drolia and Others v. Durga Trading Corporation*, (2021) 2 SCC 1; *Avitel Post Studios Ltd. v. HSBC PI Holdings (Mauritius) Ltd.*, (2021) 4 SCC 713.

⁸*BNA v. BNB and Another* [2019] SGHC 142.

⁹*Damodar Valley Corporation v. K K Kar*, (1974) 1 SCC 14; *National Agricultural Coop. Marketing Federation India Ltd. v. Gains Trading Co.*, (2007) 5 SCC 692; *P Manohar Reddy & Bros. v. Maharashtra Krishna Valley Development Corp.*, (2009) 2 SCC 494; *Magma Leasing & Finance Ltd. v. Potluri Madhavalata*, (2009) 10 SCC 103.

¹⁰*Uttarakhand Purv Sainik Kalyan Nigam Ltd v. Northern Coal Field* (2020) 2 SCC 455.

¹¹*Bhaven Construction v. Sardar Sarovar Namada Nigam Ltd.*, (2022) 1 SCC 75.

¹²(1997) 1 SCC 373.

¹³*Stamping Judgment*, 165.

¹⁴*Stamping Judgment*, 183.

DISCLAIMER

The contents of this hotline should not be construed as legal opinion. View detailed disclaimer.

This Hotline provides general information existing at the time of preparation. The Hotline is intended as a news update and Nishith Desai Associates neither assumes nor accepts any responsibility for any loss arising to any person acting or refraining from acting as a result of any material contained in this Hotline. It is recommended that professional advice be taken based on the specific facts and circumstances. This Hotline does not substitute the need to refer to the original pronouncements.

This is not a Spam mail. You have received this mail because you have either requested for it or someone must have suggested your name. Since India has no anti-spamming law, we refer to the US directive, which states that a mail cannot be considered Spam if it contains the sender's contact information, which this mail does. In case this mail doesn't concern you, please unsubscribe from mailing list.