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**STAMPING REQUIREMENTS AND THE VALIDITY OF ARBITRATION
CLAUSES: EXAMINING THE INDIAN LEGAL LANDSCAPE**

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ABSTRACT

Arbitration, the prevailing mode of Alternative Dispute Resolution (ADR), is renowned for its expeditious nature. This essay examines verdicts on enforcing arbitration clauses in unstamped instruments, including the recent Supreme Court verdict on the said matter, navigating the complex relationship between stamping and arbitration.

While reviewing cases like N N Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd. in 2021 and 2023, the essay highlights essential aspects such as Justice Indu Malhotra's departure from historical norms in NN Global 1, viewing the lack of stamping as a curable defect. With a contrast set under NN Global 2's majority, deeming unstamped instruments, including arbitration clauses, void under Section 2(g) of the Indian Contract Act, 1872, the essay brings out its impact on the said issue.

NN Global 2 posed challenges, such as the risk of invalidating all instruments and delays in dispute resolution. It contrasts with the minority view, which advocated for stamping issues to be delegated to the Arbitration Tribunal, which aligns with the competence-competence principle.

In a subsequent review, a seven-judge bench clarified that stamping should not impede the arbitration process.

Considering the impact and legislative considerations, the ruling raises questions about the cost-effectiveness of arbitration. The essay suggests a potential legislative amendment for streamlined interplay between the Indian Stamp Act of 1899 and the Arbitration & Conciliation Act of 1996, ensuring continued growth and effectiveness. Balancing tribunal empowerment and practical efficiency emerge as crucial considerations for the future of arbitration in India.

KEYWORDS

Arbitration, Stamping, Contracts, Indian Stamp Act of 1899, Arbitration and Conciliation Act, 1996, UNCITRAL Law

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INTRODUCTION

In the contemporary legal landscape, arbitration has become the preferred Alternative Dispute Resolution (ADR) in our time-constrained world. This legal mechanism provides parties with a structured framework for resolving disputes outside traditional court proceedings, fostering efficiency and flexibility in dispute resolution. According to its definition, an "arbitration agreement" is a contractual agreement between two parties to submit all or certain disputes about a specific legal relationship to arbitration. (Dalmia, 2023) An arbitration agreement may be included as a stand-alone document or as a clause in a contract.

Stamping maintains a historical and contentious relationship with the arbitration. A stamp, as defined under Section 2(26) of the ISA, 1899, signifies any engraved or printed mark affixed to an instrument to denote the payment of stamp duty. This mark operates as a mechanism to confer legal validity upon an instrument, a validity achieved by fulfilling the prescribed duty mandated by law.

The pivotal question arises when an instrument is either unstamped or improperly stamped: What becomes of the arbitration clause or agreement within? Is it rendered void ab initio, is it a separate entity, or is it enforceable? This essay delves into the recent verdict by the Supreme Court concerning the enforceability of an arbitration clause embedded within an unstamped instrument and its consequential impact on the Indian Arbitration system. Additionally, it scrutinizes the Court's rationale, shedding light on areas where previous judgments may have fallen short in addressing pertinent issues.

MATERIAL AND METHODS

The material used in this research is a combination of various sources like websites, articles and cases which are analyzed and interpreted in a simple approach in order to explain the stamping issue in detail targetting both legal and non-legal professionals. The method used for this research is of qualitative method through primary sources like Arbitration and Conciliation Act, 1996 and UNCITRAL Law itself along with other sources like that of articles, blogs, journals and others.

DATA ANALYSIS

STAMPING DILEMMA: UNRAVELING THE ENFORCEABILITY OF ARBITRATION CONTRACTS IN UNSTAMPED DOCUMENTS

In the context of unstamped or improperly stamped documents, the question of their admissibility and enforceability, mainly when they contain arbitration agreements, has been a legal debate. The *NN Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.* (2021) (from now

referred to as "NN Global 1") sought to address this dilemma by examining a Special Leave Petition (SLP) filed to determine whether such agreements remain valid and enforceable when embedded in inadequately stamped instruments.

In her analysis of the issue, Justice Indu Malhotra characterized the lack of proper stamping as a curable defect and opined that arbitration agreements, even within unstamped documents, should not be deemed invalid. This stance marked a departure from historical cases, such as the *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd* (2011), which had previously held that arbitration agreements in unstamped contracts could not have an effect. The *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.* (2019) further affirmed this position, asserting that an arbitration agreement would not legally "exist" if not duly stamped, emphasizing the significance of stamping in the due process of contract formation.

The *Vidya Drolia v. Durga Trading Corporation* (2021) ,drawing upon the Garware case, underscored the necessity for an agreement to be valid and legally enforceable, a status achieved through proper stamping. However, NN Global 1 wondered if the views adopted in the earlier cases were correct.

Consequently, NN Global 1 referred the matter to a Bench of five Judges to seek a clear and conclusive resolution. The central concern, as observed, pertained to the requirement of stamping for the performance or enforcement of the primary instrument and the lack of a coherent legal framework and understanding regarding the status and enforceability of arbitration agreements or clauses within such instruments.

NN GLOBAL CASE: A FIVE-BENCH ANALYSIS

In the adjudication of *N N Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.* (2023) (after this referred to as "NN Global 2"), the majority judgment, authored by Justice K. M. Joseph, supported by Justice Aniruddha Bose, and supplemented by a concurring opinion from Justice C. T. Ravikumar, affirmed the precedent set by the Court in *SMS Tea Estates* and *Garware* case. This alignment with prior decisions contradicts the dissenting views articulated by Justice Ajay Rastogi and Justice Hrishikesh Roy. The five-judge bench explicitly stated that the NN Global 1 case decision did not accurately represent the legal position.

The majority opinion, forming the basis of the verdict with a ratio of 3:2, established critical points. First, it asserted that Section 2(g) of the ICA, 1872 renders an unstamped document containing an arbitration agreement null and void. The arbitration agreement within such an instrument can only be acted on after proper stamping. Additionally, the opinion emphasized that the "existence" of an arbitration agreement under Section 11(6A) of the ACA, 1996 transcends mere facial or factual existence, extending to "existence in law." In addition, the Court, operating under Section 11 of the ACA, 1996, must comply with the requirements of

Sections 33 and 35 of the ISA, 1899, which demand that instruments that are not stamped or not stamped sufficiently be examined and seized. Lastly, a certified copy of an arbitration agreement must unambiguously indicate the stamp duty paid.

These stipulations present specific challenges. They were first deeming unstamped instruments void under Section 2(g) of the ICA, 1872 risks invalidating the entire instrument, thereby creating uncertainty regarding the enforceability of arbitration clauses. Secondly, delaying the enforceability of arbitration agreements until proper stamping occurs introduces a potential impediment to timely dispute resolution. The interpretation that the "existence" of an arbitration agreement includes "existence in law" adds complexity, raising questions about the conditions necessitating "existence" and potential legal debates. These challenges may undermine the efficiency of arbitration, posing obstacles to swift and effective dispute resolution.

The minority ruling, which Justice Rastogi supported, presented a viewpoint that suggested the Arbitration Tribunal itself handle the stamping matter by Section 16 of the Arbitration and Conciliation Act, 1996. Justice Hrishikesh Roy, aligning with the standpoint established in NN Global 1, characterized stamping as a curable defect. He further asserted that embracing such an approach would align with the fundamental principle of minimal judicial interference.

However, the NN Global case 2 exhibited a notable deficiency by overlooking essential legal principles, including the separability and Competence-Competence features. This omission left various aspects unresolved, needing more contemplation of the far-reaching repercussions of the judgment, thereby giving rise to uncertainty. Subsequently, recognizing the need for comprehensive scrutiny, the case was referred to a distinguished seven-bench panel and converted into a curative Petition combined with a Review Petition under the descriptive caption: "IN RE: INTERPLAY BETWEEN ARBITRATION AGREEMENTS UNDER THE ARBITRATION AND CONCILIATION ACT 1996 AND THE INDIAN STAMP ACT 1899."

JUDICIAL REVIEW: RESOLVING ISSUES AND ESTABLISHING LEGAL PRECEDENCE

The combined review petition represents a landmark in legal jurisprudence, providing a comprehensive analysis of pertinent issues with clarity and precision. This verdict's examination and exposition set a benchmark for comprehensibility and precision in addressing complex legal matters in the upcoming arbitration matters in India. In particular, the verdict's impact on the concept of stamping as a curable defect necessitates a nuanced understanding. This clarity is especially crucial in understanding the distinction between inadmissibility and voidness. 'Admissible' in a legal context refers to the capability and worthiness of evidence for reliability in Court. At the same time, voidness, as outlined in Section 2(g) of the ICA, 1872,

pertains to an agreement being unenforceable by law. The eligibility of documents or for introduction as evidence is found in statutes such as the Indian Evidence Act of 1872.

Voidness and admissibility are not intrinsically interconnected. For example, an agreement restraining trade, void under Section 27 of ICA, 1872, remains admissible despite being unenforceable. Section 35 of the ISA, 1899 underscores this distinction. The majority judgment in *NN Global 2* erroneously posited that an unstamped or insufficiently stamped instrument is void under Section 2(g) of the ICA, 1872. Contrary to this, Section 35 of the ISA, 1889 explicitly states that an instrument not duly stamped is inadmissible in evidence. The failure to pay or inadequate payment of stamp duty renders the instrument inadmissible, not void. The Indian Stamp Act of 1899 provides a curative procedure for this defect, enabling the instrument to achieve admissibility after proper stamp duty payment. This starkly contrasts with void agreements, where there is no procedural mechanism for curing the defect, reinforcing the fundamental difference between voidness and inadmissibility under the respective statutory frameworks.

Section 35 of the ISA, 1899 plays a pivotal role in this statutory framework, rendering instruments only duly stamped inadmissible in evidence if the required duty and penalty are paid. This aligns with the provisions of Section 38(1) of ISA, 1899, granting the Collector the power to impound an instrument and prescribe subsequent procedures. Acting under Section 40 of ISA, 1899, the Collector can certify an instrument as duly stamped, not chargeable, or demand proper duty payment and any penalty deemed necessary. Section 42 of the ISA, 1899 finalizes the procedural sequence, certifying the completion of duty and penalty payment and permitting admissibility in evidence, registration, and authentication. This comprehensive procedure serves dual purposes by aligning with revenue collection objectives and maintaining the integrity of stamped instruments in legal proceedings.

The *Thiruvengadam Pillai v. Navaneethamma* (2008) and *Gulzari Lal Marwari v. Ram Gopal* (1936), and *Boottam Pitchiah v. Boyapati Koteswara Rao* (1964) underscored the non-voidness of unstamped agreements, maintaining a clear distinction between invalidity and inadmissibility. The distinction lies in the legal efficacy of a matter, with invalidity addressing its substantive legality, while inadmissibility pertains to its acceptance as evidence in proceedings.

However, the *NN Global 2* introduced a departure from this position, emphasizing the need to carefully reconsider the legal principles involved in stamping agreements and their impact on arbitration agreements.

ARBITRATION AUTONOMY: NAVIGATING THE STAMPING ISSUE WITH MINIMAL JUDICIAL INTERVENTION

Arbitration autonomy, a fundamental principle in arbitration law, empowers parties to an arbitration agreement with the contractual freedom to bestow authority upon the arbitral tribunal to decide disputes arising between them. (Kumar, 2023) This foundational concept aligns with the principle of minimal judicial interference, which is fundamental to domestic and international commercial arbitration. The latter ensures that arbitral proceedings unfold according to the parties' agreement or under the tribunal's guidance, without unnecessary interference by national courts. Article 5 of the Model Law underscores the paramount authority of arbitral tribunals in deciding legal matters, jurisdiction, and the scope of authority. This foundational principle resonates with Section 5 of the ACA, 1996, which, in alignment with the Model Law, incorporates a non-obstante clause. This clause delineates the extent of judicial intervention, limiting it to circumstances outlined in Part I of the Arbitration & Conciliation Act of 1996. This strategic legislative choice demonstrates a conscious effort to curtail court interference in arbitration proceedings.

The principle of minimal judicial interference is further emphasized by Section 16 of the ACA, 1996, which empowers the arbitral tribunal to rule on its jurisdiction, including objections to the existence or validity of the arbitration agreement. This provision operates in harmony with the principle of minimum judicial interference, preventing courts from intervening in matters falling within the jurisdiction of the arbitral tribunal. *The Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd.* (2022) case highlighted that the non-obstante clause was recognized as a mechanism to reduce excessive judicial interference not contemplated under the ACA, 1996.

SEPARABILITY PRINCIPLE: PRESERVING AUTONOMY OF EMBEDDED/UNDERLYING ARBITRATION CLAUSES

The Arbitration & Conciliation Act of 1996 serves as a comprehensive legal framework governing various aspects of arbitration, from the appointment of arbitrators to award execution. As a self-contained code, it excludes general legal procedures, emphasizing adherence to its specified procedures for arbitration agreements, arbitrator appointments, and tribunal jurisdiction. The Act's exhaustive nature restricts assessments related to arbitration matters to its provisions, barring interference from other statutes unless expressly specified otherwise.

A fundamental principle in arbitration law is the separability of an arbitration agreement from the underlying contract. Schwebel, Sobota, and Manton's separability presumption underscore the parties' intent to insulate the arbitration agreement, allowing arbitral tribunals rather than

courts to resolve disputes. (Stephen M. Schwebel, 2020) This concept ensures the survivability of the arbitration agreement, even in the face of the invalidity or termination of the underlying contract.

International legal perspectives, including those of Switzerland and the United States, recognize and reinforce the presumption of separability. The U.S. Federal Arbitration Act and decisions like *Prima Paint Corporation v. Flood & Conklin Mfg. Co.* (1967) emphasizes the distinct nature of arbitration agreements from underlying contracts. In Singapore, statutory recognition through Section 21 of the International Arbitration Act underscores the separability of an arbitration clause. The Singapore High Court in *BNA v. BNB* (2019) further elucidates that parties intend for the arbitration agreement to remain effective despite challenges to the substantive contract.

The separability presumption, enshrined in Article 16(1) of the Model Law (Berger, 2016) Moreover, Section 16 of the ACA, 1996, is qualified by the phrase "for that purpose." While a literal interpretation may limit it to jurisdictional disputes, legal experts and case law suggest a broader application for all purposes. This aligns with Indian judicial views, which treat the arbitration agreement as distinct and separate from the underlying contract as a general rule of substantive validity.

Magma Leasing & Finance Ltd. v. Potluri Madhaviata (2009) reaffirms the separability presumption, emphasizing that terminating the main contract does not render the arbitration agreement inoperative. The Court acknowledges the arbitration agreement's survival for resolving disputes related to the underlying contract, reflecting the parties' intention to maintain its independence.

In contrast, the NN Global 2 case needed to have analyzed the separability principle adequately in the context of Sections 33 and 35 of ISA, 1899. The final verdict emphasized that the separability principle applies to the conflict of stamping and arbitration clauses, treating them distinctively or separately.

BALANCING COMPETENCE – COMPETENCE WITH THE COURT'S ROLE

In arbitration, the Competence-Competence principle assumes a pivotal role internationally and domestically, endowing arbitral tribunals with the initial authority to adjudicate upon their jurisdiction. Rooted in Section 16 of the ACA, 1996, a mirror of Article 16 of the Model Law, this principle facilitates arbitrators to address challenges to their jurisdiction, including disputes over the existence or validity of arbitration agreements. This principle manifests a dual nature, encapsulating positive and negative competence-competence components.

Positively, Competence-Competence empowers arbitral tribunals to make initial determinations on jurisdiction, aligning with the parties' mutual intent to entrust such matters to the tribunal.

Conversely, the negative facet restrains courts from delving into the merits during the referral stage, mandating that the arbitral tribunal be afforded the inaugural opportunity to rule on jurisdiction and non-arbitrability, thereby minimizing judicial intervention.

The interplay between Competence-Competence and the doctrine of separability highlights the autonomy of the arbitration agreement. Positive competence-competence allows tribunals to assess its validity, separate from the underlying contract independently. While promoting efficiency, this autonomy may pose challenges, leading to potential conflicts between tribunal and court interpretations. Balancing tribunal autonomy with judicial oversight is essential for a harmonious and effective arbitration process.

In the *Uttarakhand Purv Sainik Kalyan Nigam Ltd v. Northern Coal Field* (2020), the Supreme Court bolstered the positive competence-competence principle, asserting that issues impacting jurisdiction, such as limitation, should be adjudicated by the arbitral tribunal. Similarly, in the *Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products* (2018), the Court affirmed that matters within the ambit of Section 16, such as limitation, exemplify the positive competence-competence principle.

The Court emphasized that an arbitration agreement must satisfy the Indian Contract Act, 1872 and Section 7 of the ACA, 1996, ensuring its validity. The 2019 Arbitration and Conciliation (Amendment) Act, omitting Section 11(6A), was addressed in the *Vidya Drolia* case. The Court elucidated that this omission was presumptively erroneous and that the amendment would be found in effect only once notified as per section 1(2) of the 2019 Arbitration and Conciliation (Amendment) Act. The Court underscored that Section 11(6A), ACA, 1996 confined the Court's role to a prima facie examination of the existence of an arbitration agreement, emphasizing substantive existence and validity as within the arbitral tribunal's purview under Section 16, ACA, 1996. (Kumar, 2023, p. 91)

Analyzing the language of Section 11(6A) of ACA, 1996, the Court noted that the term "examination" implied a prima facie review by the referral court. In contrast, Section 16 of ACA, 1996 empowered the arbitral tribunal to "rule" on its jurisdiction, involving a comprehensive adjudication. This interpretation aligns with the perspective in *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.* (2005), emphasizing the preliminary nature of the referral court's function and the detailed ruling authority of the arbitral tribunal.

In *NN Global 2*, the Competence-Competence doctrine clashed with the assumption that the referral court had the authority to determine the issue of stamping ahead of analyzing its presence in an underlying instrument. The final verdict clarified that the arbitral tribunal had the authority to determine the arbitration agreement's enforceability or clauses while ruling over the stamping issue. The Court's jurisdiction generally arises only in two stages: when an application for interim measures is filed under Section 9 of the ACA, 1996 or when the award

is challenged under Section 34 ACA, 1996. It was noted in the verdict that the courts are not mandated to address stamping issues during the stage of granting interim measures under Section 9 of ACA, 1996.

A corollary of Competence-Competence is that courts, guided by a prima facie standard, are confined to examining the existence of an arbitration agreement. Stamp-duty objections are not amenable to prima facie determination and necessitate a thorough analysis. The Competence-Competence principle safeguards the legislative intent of the ACA, 1996, ensuring that substantive disputes fall within the arbitral tribunal's domain, with court jurisdiction arising only at defined stages.

ADDITIONAL HIGHLIGHTS AND LEGAL ASPECTS:

A) NAVIGATING GENERAL LAW VS SPECIAL LAW APPLICATION

The specific law takes precedence in a conflict between general and specific law. The Indian Contract Act of 1872 and the Indian Stamp Act of 1899 are general laws, whereas the Arbitration & Conciliation Act of 1996 is a specific law. According to legal principles, Section 5 and, consequently, the provisions of the ACA, 1996, must prevail over any other law in force. Any court intervention, such as impounding an agreement containing an arbitration clause, is permissible only if the ACA, 1996 explicitly provides for such action, which it does not. Sections 33 and 35 of the ISA, 1899 cannot operate in proceedings under Section 11 (or Section 8, as the case may be) due to the non-obstante clause in Section 5 of the ACA, 1996. Consequently, the decision in NN Global 2, suggesting that the Court in a Section 11 proceeding must adhere to Sections 33 and 35 of the ISA, 1899, does not align with the statutory interdiction in Section 5 of ACA, 1996.

B) DECODING LEGISLATIVE INTENT: ACA vs. ISA

Regarding the legislative intent, it is noteworthy that Parliament was cognizant of the ISA, 1899 when enacting the ACA, 1996. Despite this awareness, ACA, 1996 does not prescribe stamping as a precondition for the validity of an arbitration agreement. Furthermore, the Court is required by Section 11(6-A) of the ACA, 1996 to confine its investigation to the arbitration agreement's existence. This provision contrasts with Section 33(2) of the ISA, 1899, which uses "examine." According to Section 33(2) of ISA, 1899, the person in front of whom an instrument is produced must verify that its stamp complies with the laws in effect at the time the document was executed or initially executed. Even though Parliament was aware of Section 33(2) of ISA, 1899, it did not require the Court to conduct the probe required by Section 33(2) while acting under Section 11 of ACA, 1996.

C) IMPACT OF THE RULING

The collective review petition asserts that stamping provisions should not impede the arbitration process at the preliminary stage. The verdict distinguishes between the validity/enforceability of an agreement and its admissibility, signaling a shift away from technical obstacles. Preserving objections on unstamped/inadequately stamped instruments for arbitral tribunals adds intrigue to how these issues will be addressed in practice.

The decision establishes clear principles, aligning with the intent to limit judicial interference in arbitration. It advances the ideas of contemporary arbitration law by giving arbitral tribunals the authority to rule on arbitration agreements and substantive rights disputes.

CONCLUSION

The ruling is lauded for removing bottlenecks in the arbitration process during the tribunal constitution, prioritizing party autonomy and competence-competence. However, placing the onus on tribunals to address stamping and jurisdictional issues raises questions about the cost-effectiveness of arbitration compared to litigation. Given the government's pro-arbitration stance, efforts to position India as an arbitration hub may prompt legislative amendments to the Indian Stamp Act of 1899 and the Arbitration & Conciliation Act of 1996. Clarity and streamlining of their interplay could mitigate potential delays from the recent court decision. Striking a balance between tribunal empowerment and practical efficiency will be crucial for India's continued growth of arbitration.

RECOMMENDATION

To avoid conflicts with the Arbitration & Conciliation Act (ACA), 1996, it is recommended to amend the Indian Stamp Act, 1899 to specifically exclude arbitration agreements from its scope or clarify its limited application. Additionally, the ACA, 1996 should be updated to include provisions that upfront addresses the issue of stamping, ensuring consistency and reducing ambiguity in the dispute resolution process.