

THE N.N. GLOBAL TRILOGY: CHARTING THE COURSE FOR ARBITRAL AUTONOMY

Yashwardhan Singh*

ABSTRACT

Exploring the intersection of arbitration and the Indian Stamp Act, this piece dissects the landmark N.N. Global cases. Initially, N.N. Global I¹ challenged conventions by validating arbitration agreements in unstamped contracts, invoking the doctrine of severability and Kompetenz-Kompetenz. This was then overturned in N.N. Global II² However, as Justice K.M. Joseph meticulously dismantled each facet of the court's arguments in N.N. Global I.³ Recently, in the latest rendition of this case, N.N. Global III⁴ marked a culmination of three years of jurisprudential evolution, provided clarity on several contentious aspects of law and emphasised the need for a purposive interpretation. This journey illuminates arbitration's autonomy amidst stamping requirements, advocating for a harmonious construction of laws. N.N. Global III⁵ emerges as a beacon of clarity, fostering swift and effective arbitration, while reshaping the legal landscape for commercial dispute resolution in India.

N.N. GLOBAL I AND II AND THE PERTINENCE OF THE INDIAN STAMP ACT

Arbitration has gained popularity as a solution for commercial dispute resolution, but it has also faced legal scrutiny due to procedural requirements. In *N.N. Global Mercantile Ltd. v. Indo Unique Flame Ltd*⁶ (N.N. Global I), a 3 Judge bench ruled that an arbitration agreement in an unstamped or insufficiently stamped contract would be considered valid. The court used two arguments to arrive at this conclusion: the doctrine of severability, which states that an arbitration agreement exists independently of the commercial contract that contains it, and the doctrine of Kompetenz-Kompetenz, which asserts that the tribunal is sufficiently competent to rule on its own jurisdiction.

*BBA LLB, THIRD YEAR, O.P. JINDAL GLOBAL UNIVERSITY SONIPAT.

¹ *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.* [2021] (2021) 4 SCC 379.

² *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.* [2023] (2023) 7 SCC 1.

³ *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.* [2021] (2021) 4 SCC 379.

⁴ *Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re* [2023] 2023 SCC OnLine SC 1666.

⁵ *ibid.*

⁶ *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.* [2021] (2021) 4 SCC 379.

The court also opined that non-payment of stamp duty and insufficiency in stamping are "curable" defects, and once the penalty levied under § 62 of The Stamp Act⁷ is paid off, the validity of the instrument would be restored. However, these findings contradicted the position held by another full bench in *Vidya Drolia v. Durga Trading Corpn.*⁸, so the matter was referred to a larger bench. Justice Indu Kumar, when delivering the judgment in *N.N. Global I*⁹, referred the matter to a 5-judge bench to legitimize the opinions of the 3-judge bench. The 5-judge bench dismantled each facet of the full bench's reasoning to overturn its verdict. They argued that even if an arbitration agreement is its own entity separate from the underlying document, the court is still not absolved of its duty under the Stamp Act and cannot proceed further until the requisite stamp duty on both the arbitration agreement and the underlying contract is paid off.

The constitutional bench also clarified that while the Stamp Act¹⁰ is a fiscal enactment, it is a law meant to have teeth and must be implemented with full vigour. It also clarified that the document would not be legible to be considered a contract of law and would consequently be declared void as it is not enforceable.

N.N. Global III

Difference between 'inadmissible' and 'void'

The Constitutional bench at the outset noted that the bench in *N.N. Global II*¹¹ found that the inadmissibility of the unstamped instrument in the context of §2 of the Contract Act¹² made the instrument void in nature and this argument served as the crux of the final verdict. The 7-judge bench, however, opined that this view conflated the distinctions between 'enforceability' and 'admissibility' and went on to say that "When an agreement is void, we are speaking of its enforceability in a court of law. When it is inadmissible, we are referring to whether the court may consider or rely upon it while adjudicating the case. This is the essence of the difference between voidness and admissibility."¹³ It is then important to note that §35¹⁴ (which is an

⁷ The Indian Stamp Act 1899, s62.

⁸ *Vidya Drolia v. Durga Trading Corpn.* [2021] (2021) 2 SCC 1.

⁹ *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.* [2021] (2021) 4 SCC 379.

¹⁰ The Indian Stamp Act, 1899.

¹¹ *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.* [2023] (2023) 7 SCC 1.

¹² The Indian Contract Act 1872, s2.

¹³ *Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re* [2023] 2023 SCC OnLine SC 1666.

¹⁴ The Indian Stamp Act 1899, s 35.

unambiguous provision) of the Stamp Act only affects the admissibility of a document and not its enforceability.

Thus, the 7-judge bench opined that the 5-judge bench's reading of §2 of the Contract Act¹⁵, which replaced the word 'enforceability' with 'admissibility' to render the document void, was based on faulty assumptions as §2 of the Contract Act¹⁶ could have never been attracted in the first place. Further, the bench placed at the impetus the idea that if a contract is unenforceable but it is declared to be void, then the entire point of the contract is invalidated.

The court, in response to the reasoning in *N.N. Global II*¹⁷, also added that

“Non-stamping or improper stamping does not result in the instrument becoming invalid. The Stamp Act does not render such an instrument void. The non-payment of stamp duty is accurately characterised as a curable defect. The Stamp Act itself provides for the manner in which the defect may be cured and sets out a detailed procedure for it. It bears mentioning that there is no procedure by which a void agreement can be “cured.”

The 7-judge bench also relied on, and in turn, strengthened, the judgement of *Thiruvengadam Pillai v. Navaneethammal*¹⁸ by quoting it to substantiate the fact that the court can only deem an insufficiently stamped document to be “not properly stamped” and not “invalid” and that “admissibility of a document into evidence and proof of the genuineness of such document are different issues.”

Need for Purposive Interpretation

The court in *N.N. Global III*¹⁹, resonating with the judgement of *N.N. Global I*²⁰, also felt it fit to take a purposive approach to evaluate the matter in accordance with the legislative intent of all statutes. Employing this, the court expressly set out that despite the Stamp Act being a “mandatory statute”, it is a fiscal measure to ensure state revenue and it must not be used “to arm a litigant with a weapon of technicality to meet the case of his opponent.” The court relied on *Hindustan Steel (Supra)* to substantiate this take.

¹⁵ The Indian Contract Act 1872, s2.

¹⁶ *ibid.*

¹⁷ *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.* [2023] (2023) 7 SCC 1.

¹⁸ *Thiruvengadam Pillai v. Navaneethammal* [2008] (2008) 4 SCC 530.

¹⁹ *Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re* [2023] 2023 SCC OnLine SC 1666.

²⁰ *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.* [2021] (2021) 4 SCC 379.

With respect to the Arbitration Act, the court used Redfern and Hunter²¹ to elucidate the thrust of Arbitration Law who said “It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife”. A concept that is cardinal to ensure effective fulfilment of this idea is the concept of arbitral autonomy. Arbitral autonomy is founded on the basis that the parties should be able to distance themselves from the “risk of domestic judicial parochialism.” This ties back in with the doctrine of Kompetenz-Kompetenz which the 7-judge bench opined is a “fundamental aspect of arbitration jurisprudence”²² as it allows the arbitration procedure to insulate itself from the judicial process as well as the underlying agreement that might be rid of any anomalies. This doctrine is two-pronged as it also has a negative application on the courts as it limits their interference at the referral stage by deferring to the jurisdiction of the arbitral tribunal. An analysis of §11 of the Arbitration Act²³ is also imperative in this context as the bench held that the court’s examination of the arbitration clause extends only to check the ‘existence’ of the clause and not its ‘validity’. The only case where there would arise the need for any further judicial intervention would only be when there is a deadlock or failure of the parties to follow the appointment procedure. The bench also added that the court shall not look into the issue of sufficient stamping while evaluating applications for interim orders under §9 of the Act²⁴ either. It is important to note, however, that this doctrine in no way takes away from the powers of the court as it merely postpones their involvement, should the court choose to be involved, as once the arbitral tribunal has had the initial opportunity to rule on its own jurisdiction and resolve the conflict, the court can then subsequently determine if the tribunal exercised their powers correctly.

The 7-judge bench also called upon the model law which they used as a guidepost to show the way forward for the arbitration landscape in India. They opined that “The Model Law does not regulate or govern all matters related to international commercial arbitration as well as the arbitral process”. They used Article 5 of the Model law²⁵ which also inspired §5 of the Arbitration Act²⁶ to further reiterate that the arbitral tribunal should be the forum of first instance to take up any issues including those of scope, validity, and existence. This should

²¹ Nigel Blackaby and others, *Redfern and Hunter on International Arbitration*. (Oxford University Press 2018).

²² *Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re* [2023] 2023 SCC OnLine SC 1666.

²³ The Arbitration and Conciliation Act 1996, s 11.

²⁴ The Arbitration and Conciliation Act 1996, s 9.

²⁵ Richard Garnett, ‘Article 5 of the Model Law: Protector of the Arbitral Process?’ (2021) 38 *Journal of International Arbitration* 127.

²⁶ The Arbitration and Conciliation Act 1996, s 5.

especially be the case as §5²⁷ of the Arbitration Act contains a non-obstante clause that sets out the scope of judicial intervention.

Doctrine of Separability

Further building on its reasonings revolving around the model law the court opined that

“The separability presumption, as incorporated under Article 16(1) of the Model Law, as well as §16 of the Arbitration Act, is qualified by the expression “for that purpose.”²⁸ A plain reading may suggest that §16²⁹ has incorporated the separability presumption only for the particular purpose of allocation of competence over jurisdictional disputes. However, the Digest of Case Laws on UNCITRAL Model Law³⁰ states that “the language used in the second sentence does not prevent the application of the separability presumption when a jurisdictional question is raised before a court.”³¹

Finally, the court after a detailed evaluation of the doctrine of severability in various countries and settings concluded that in the realm of arbitration, the applicability of the separability presumption outlined in §16³² extends beyond a mere tool for arbitral tribunal jurisdiction determination. It serves as the guardian of the overarching principle of the substantive autonomy of an arbitration agreement. It is imperative to understand that within the arbitration agreement, there is an underlying mutual intention to reach an accurate and speedy decision with minimal external involvement. This intent is fortified by the separability presumption, which upholds the legitimacy of an arbitration agreement within an overarching contract. This upholding persists irrespective of the contract's potential invalidity, illegality, or termination. Further, the court found that when two parties append their signatures to a contract containing an arbitration agreement, the signatures are considered as two independent signatures for two independent agreements distinct from each other. Thus, against this backdrop, the court was satisfied in treating an arbitration agreement contained in an underlying contract as distinct

²⁷ *ibid.*

²⁸ *Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re [2023] 2023 SCC OnLine SC 1666.*

²⁹ The Arbitration and Conciliation Act 1996, s 16.

³⁰ Digest of Case Law on the Model Law on International Commercial Arbitration, (2012) 76.

³¹ Digest of Case Law on the Model Law on International Commercial Arbitration (2012) 76.

³² The Arbitration and Conciliation Act 1996, s 16.

from the other terms of the contract and as its own entity thereby overturning the holding in N.N. Global II³³.

Harmonious construction

N.N. Global III³⁴ also, towards the end of the judgement, set forth an idea that could possibly prescribe a general guideline regarding how conflicts between contradictory positions in the legislation might be resolved in times to come. The bench opined that when inconsistencies arise between statutes, it is the job of the court to bring about harmony between the workings of these statutes. In this endeavour, the court furthered its decision in *Sultana Begum v Prem Chand*³⁵ which set out that “The provisions of one section of a statute cannot be used to defeat the other provisions unless the court, despite its efforts, finds it impossible to effect reconciliation between them”.

In the context of N.N. Global III³⁶, the court held that the Arbitration Act, being a special law, must weigh over the Contract Act and the Stamp Act which are general laws. The court also held that the Arbitration Act and the Stamp Act were enacted on the same day and since then the Arbitration Act has undergone a “sea change” and the legislation has throughout been of the mandate of §33(2)³⁷, it did not require the court to act under §11³⁸ to also undertake the examination required by §33(2)³⁹. The bench also opined that a purposive approach towards the matter would ensure that the statutes are interpreted in a way that complies with the principles of modern arbitration.

Conclusion and opinions

All in all, the three N.N. Global cases, across 3 years and as many hearings, have woven quite a nuanced narrative. While N.N. Global I⁴⁰ may have faltered in persuasiveness, it inadvertently laid the groundwork for N.N. Global II⁴¹ to reshape its findings significantly. N.N. Global II⁴²

³³ *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.* [2023] (2023) 7 SCC 1.

³⁴ *Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re* [2023] 2023 SCC OnLine SC 1666.

³⁵ *Sultana Begum v. Prem Chand Jain*, [1996] (1997) 1 SCC 373.

³⁶ *Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re* [2023] 2023 SCC OnLine SC 1666.

³⁷ The Arbitration and Conciliation Act 1996, s 33(2).

³⁸ The Arbitration and Conciliation Act 1996, s 11.

³⁹ The Arbitration and Conciliation Act 1996, s 33(2).

⁴⁰ *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.* [2021] (2021) 4 SCC 379.

⁴¹ *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.* [2023] (2023) 7 SCC 1.

⁴² *ibid.*

almost mandated a mini-trial in the pre-referral stage slowing down the otherwise swift appointment process and fostered ambiguity in cases of emergency awards and interim reliefs and thus in some way felt like a sharp speed breaker on the way being paved towards fast and effective arbitration. N.N. Global III⁴³, however, emerges as a beacon of clarity, casting a promising glow on the pathway to swift and effective arbitration.

N.N. Global III⁴⁴ also expressly overruled *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.*, (2011) 14 SCC 66⁴⁵ and *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.*, (2019) 9 SCC 209⁴⁶ and left the judgement of *Vidya Drolia v. Durga Trading Corpn.*, (2021) 2 SCC 1⁴⁷ unchanged, holding that it does not deal with the issue of stamping.



⁴³ *Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re* [2023] 2023 SCC OnLine SC 1666.

⁴⁴ *ibid.*

⁴⁵ *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.*, (2011) 14 SCC 66.

⁴⁶ *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.*, [2019] (2019) 9 SCC 209.

⁴⁷ *Vidya Drolia v. Durga Trading Corpn.*, [2020] (2021) 2 SCC 1.