

# PRACTICAL IMPLICATIONS OF THE NN GLOBAL JUDGMENT ON THE ARBITRATION REGIME IN INDIA

Authors: Amitava Majumdar (Raja), Pabitra Dutta

The contested interplay between the process of dispute resolution and an unstamped or insufficiently stamped instrument was long under judicial scrutiny until it was recently decided by the Constitutional Bench of the Supreme Court of India in the case of N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd (“NN Global Judgement”) wherein the Court by 3: 2 majority held that an unstamped arbitration agreement is non-est and therefore, unenforceable in the eyes of law. This landmark judgement was delivered in a constitutional reference made by a three Judge bench in the case of N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd (“NN Global SC”). The pronouncement was delivered in the context of an action for appointment of an arbitrator prior to the commencement of the arbitral proceedings.



## Indian Position before the NN Global Judgment

The NN Global Judgment is a significant pronouncement as it primarily opines on the confluence of the provisions of the Maharashtra Stamp Act, 1958 and the Indian Stamp Act, 1899 (“Stamp Act”) and resolution under arbitration agreements, specifically the appointment of arbitrators under Section 11 of the Arbitration and Conciliation Act, 1996 (“Arbitration Act”). Prior to the NN Global Judgment, the law of the land was the position as laid down in the case of Garware Wall Ropes v Coastal Marine Constructions & Engg Ltd. wherein, the two-Judge Bench of the Supreme Court upholding the case of SMS Tea Estates (P) Ltd v Chandmari Tea Co. (P) Ltd., held that an unstamped document containing arbitration agreement would not be enforceable and thus, cannot be acted upon in law until it was duly stamped under the provisions of the Stamp Act. The judgment in Garware Wall Ropes was further upheld by a three Judge Bench of the Hon’ble Supreme Court in the case of Vidya Drolia v Durga Trading Corpn. However, the findings of the Garware Wall Ropes judgement were doubted by a three-judge bench in NN Global SC wherein they opined that the view taken by the Courts in SMS Tea and Garware Wall Ropes is not the correct position in law. Therefore, the three Judge Bench of the Supreme Court of India referred the matter to a Constitutional Bench to appropriately settle the disputed issue.

**BOSE & MITRA  
& CO.**

Lawyers for  
Shipping & Trade

12th Floor,  
Sakhar Bhavan,  
230, Nariman  
Point, Mumbai

This update is meant for information purposes only & is not to be construed or used as a legal reminder advice or a legal opinion under any circumstances Bose & Mitra & Co. is not responsible for any error or omission in the update or for any action taken based on its contents. All rights reserved.

## Current Position basis the NN Global Judgement

Section 35 of the Stamp Act enumerates that any instrument that is not duly stamped in accordance with law shall not be admitted in evidence for any purpose whatsoever until the same is duly stamped. Such instruments that are not duly stamped shall be dealt by the concerned authority as per the procedure laid down under Section 33 of the Stamp Act. The Hon'ble Court in the NN Global Judgement, considering the above provisions and applying Section 2(h) of the Indian Contract Act, 1872, eventually concluded that an agreement that is unenforceable on account of substantive law including the Stamp Act, would not be a contract. The majority opinion ruled the following:

“an instrument which is exigible to stamp duty may contain an arbitration clause and which is not stamped cannot be said to be a contract enforceable in law within the meaning of sec 2 (h) of the Contract Act and is not enforceable under sec 2 (g) of the Contract Act”.

In light of the above pronouncement, until such time that the instrument is duly stamped, the same cannot be taken notice of for any purposes as iterated in Section 35 of the Stamp Act. However, once the instrument is impounded and the duty and the penalty (if any) are paid subsequent to which an endorsement to such effect is received by the concerned authority, the defect/bar as stated in Section 35 of the Act shall be permanently removed and the instrument shall be deemed “validated” under law. The Hon'ble Court clarifies the position to the limited extent that when the Court is acting under Section 11 of the Arbitration Act and the Original of the relevant unstamped instrument is produced, the Court is ‘duty-bound’ to apply and act in accordance with the procedure laid down in Section 33 of the Stamp Act.

It is albeit interesting to note that the Apex Court whilst reaching the above conclusion, has categorically clarified for all practical aspects that the judgment is silent on its applicability to Section 9 of the Arbitration Act.



**BOSE & MITRA  
& CO.**

Lawyers for  
Shipping & Trade

12th Floor,  
Sakhar Bhavan,  
230, Nariman  
Point, Mumbai

## Practical implications and prospective challenges

The pronouncement is set to have far-reaching and lasting consequences for all parties to an arbitral reference. The understanding of the practical repercussions owing to the NN Global Judgment in the national and international transactional market is paramount and essential. Indian proceedings are fraught with delays and generally, the adverse party leaves no stone unturned in ensuring that the proceedings are dragged. The pronouncement is set to impact the arbitral proceedings at all stages (pre-reference, post-reference, and ongoing). The authors have attempted to enumerate some of the possible scenarios in all of these proceedings.



### A) Pre-reference:

Every agreement which is unstamped/ insufficiently stamped would have to be mandatorily impounded by the Court to which an application for the appointment of an arbitrator is made. The same is likely to take time. Though the Apex Court in *Garware Wall Ropes* had directed the concerned authority to adjudicate the issues relating to stamping within a period of 45 days, in practice, the said timeline is almost always breached. That said the Court has held that in situations wherein a plea of insufficient stamping is taken and the same appears to be complete without foundation, the same may be referred to the arbitrator to adjudicate. Further, in shipping, original agreements such as B/l's, C/Ps, CoAs, etc., are seldom available with the parties. The document which is to be impounded is either the original or the certified copy. In a situation where the original or its certified copy (as certified as per the manner of certification for secondary evidence under the Indian Evidence Act, 1872) is not available, the position therein of invoking arbitration is now doubtful. One more situation wherein therein is limited clarity is where the underlying agreement may not be amenable to a stamp duty but the arbitration agreement present therein may be so. The majority opinion suggests that in such a situation there may not be any duty that is payable since the underlying agreement is not amenable to any duty. However, the situation appears to be muddy. Another situation is that parties to an unstamped instrument may not be able to mutually agree upon a tribunal as the underlying agreement is non-est in law. The same may now require an imprimatur of the Court.

**BOSE & MITRA  
& CO.**

Lawyers for  
Shipping & Trade

12th Floor,  
Sakhar Bhavan,  
230, Nariman  
Point, Mumbai

This update is meant for information purposes only & is not to be construed or used as a legal reminder advice or a legal opinion under any circumstances Bose & Mitra & Co. is not responsible for any error or omission in the update or for any action taken based on its contents. All rights reserved.

This is also as parties are precluded to approach the concerned authority themselves after a year from the execution of the agreement for payment of the differential plea. The situation may even affect institutional arbitrations as they would not be in a position to impound a document and again parties may be constrained to approach Courts for such an appointment. Further, a significant of agreements in the shipping industry are concluded over email and may not fall within the definition of being executed since they are not signed (electronically or otherwise) as per the provisions of the Stamp Act which in turn refer to the provisions of the Information Technology Act, 2011 (which provide for them to be electronically/digitally signed). That said, the judgment though clarifies that an agreement may be electronic, by exchange of letters/emails, telex, etc., and that it is sufficient for any part of the said exchanges to be stamped. However, practical difficulties may arise in relation to having such a document stamped and liaising with the authorities on the same. Though the judgment has said that it has decided the question in relation to grant of interim reliefs, the said question is bound to come up. That said, there appears to be a line of argument that ad-interim reliefs may be granted by a court even when admissibility/jurisdiction issues are raised by a party. Further, this also seriously puts into spanner institutional emergency arbitrations and parties may be constrained to approach the Court.

#### B) Ongoing arbitrations

It is expected that party is likely to raise an issue qua stamping in the proceedings. The powers of the arbitrator to impound the same and refer it for payment have been re-iterated but the process may lead to costs and time.

#### C) Post award

Should stamping be not an issue which was either raised or adjudicated upon during the proceedings, the same may be taken upon by the parties whilst challenging the award and the courts may be bound to impound the same.



**BOSE & MITRA  
& CO.**

Lawyers for  
Shipping & Trade

12th Floor,  
Sakhar Bhavan,  
230, Nariman  
Point, Mumbai

## Foreign Seated Arbitrations

Should the agreements in a foreign seated arbitration not be stamped/ insufficiently stamped, the same may not be enforceable and challenges on such a ground are inevitable.

## Possible ways to avoid/rectify the situation

Every instrument should as far as practicable be stamped. Further, advice should be sought on the state wherein the agreement is to be enforced as the duties differ, and should the document be brought to a state having a higher duty, the differential duty is required to be paid. Further, it would be beneficial if the agreements are executed in multiple counterparts and a part is retained by each party. In ongoing arbitrations, parties may consider bringing the issue of stamping themselves to keep things under check. Where agreements are already executed, it needs to be verified they contain the arbitration agreement and if so, the duty payable needs to be assessed and if possible paid immediately. As far as possible, the documents need to be signed (physically or electronically). For documents executed outside India, the same may be stamped within a period of 60-90 days from the day they enter India and the said provision should be availed.

## CONCLUSION

The dissenting opinion rightly records that the provisions of the Stamp Act need the attention of the legislature at this junction in order to curb the hurdles of technical complexities and encourage speedy adjudication of disputes in arbitration. Further, it also sides with the practical view that such technical scrutiny of an instrument basis of the issue of stamping at a pre-reference stage would unnecessarily stall the dispute resolution proceedings delaying the remedies that the parties can otherwise avail under the agreement. A re-visit of provisions of the Indian Stamp Act by the Legislature to amend it to the limited extent of adapting them to the evolved nature of business transactions would be a requisite metamorphosis into the development of national and international commercial arbitration in India and is the need of the hour.



**BOSE & MITRA  
& CO.**

Lawyers for  
Shipping & Trade

12th Floor,  
Sakhar Bhavan,  
230, Nariman  
Point, Mumbai