

Kluwer Arbitration Blog

Stamping Out The Uncertainty – The Supreme Court’s Way Forward For A Modern And Efficient Arbitration Regime For India

Pranav Budihal (SIAC) · Sunday, February 18th, 2024

The Supreme Court of India (“**Supreme Court**”), in its recent landmark judgment in *In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899* (“**the 7J Judgment**”), provides welcome clarity on the question of enforceability of arbitration agreements contained in unstamped or inadequately stamped contracts, and reinforces principles of separability and *Kompetenz-Kompetenz* underlying the Indian Arbitration and Conciliation Act 1996 (“**Arbitration Act**”). The 7J Judgment is perhaps the most significant judgment on the Arbitration Act after its landmark decision in *BALCO Aluminium Co. v. Kaiser Aluminium Technical Services Co.*, which clarified the supervisory powers of the Indian courts in India-seated arbitrations and the powers of the Indian courts to grant interim relief.

The Singapore International Arbitration Centre (“**SIAC**”) intervened in both these landmark cases and shared relevant Singapore jurisprudence on the issues before the Supreme Court, as well as its experience in administering international arbitrations. Indian users have been among SIAC’s **most frequent foreign users** for most of the last decade, alongside users from the USA, China and ASEAN jurisdictions. Building off this experience, the SIAC Secretariat conducted an empirical study with respect to the performance of SIAC Awards in India from 2011 to 2022. During this time, SIAC administered more than 1,300 cases involving more than 2,000 Indian parties. In this period, 24 judgments of the Indian courts were rendered in relation to SIAC awards. 17 judgments were in respect of applications to resist the enforcement of an award in India, while 7 were in respect of applications to set aside an award in India. Importantly, no SIAC award was set aside or refused enforcement in India between 2011 and 2022.

The NN Global Cases

Given the substantial number of India-related arbitrations administered by SIAC, SIAC monitors the development of arbitration law in India closely. In 2023, the Supreme Court’s judgment in *NN Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.* (“**NN Global 5J**”) was particularly interesting.

In *NN Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.* (2021) 4 SCC 379 (“**NN Global 3J**”), a 3-judge bench of the Supreme Court held that arbitration agreements would not be rendered

void on account of the main contract being insufficiently stamped as commented on in a previous [post](#). Given the potentially conflicting decisions on this issue by the other Supreme Court benches, the matter was referred to a 5-judge bench. In NN Global 5J, the 5-judge bench, by a 3:2 majority, decided that the Indian Stamp Act 1899 (“**Stamp Act**”) renders an arbitration agreement invalid in cases where the main contract is insufficiently stamped. The unintended effect of this decision was to open the door for jurisdictional objections on the ground that the arbitration agreement is insufficiently stamped, which could arise at the pre-reference stage, during the arbitration, and in post-arbitration proceedings. Given the underlying factual matrix, the decision did not elaborate on the role of arbitral institutions in handling these jurisdictional objections when administering India-seated arbitrations.

To put this risk in context, under the SIAC Rules 2016, any jurisdictional objection on the grounds of the existence or validity of the arbitration agreement may be made initially before the Registrar. If the Registrar deems it appropriate, the SIAC Court will determine if it is *prima facie* satisfied that the arbitration ought to proceed, without prejudice to a tribunal’s power to determine any objection to its jurisdiction once constituted. The consequence of this decision was a marked increase in jurisdictional objections being made in India-related arbitrations on the basis that the arbitration agreement was invalid as the underlying contract was insufficiently stamped under applicable Indian revenue laws. These objections could, at times, result in uncertainty and delays and acted as an overall roadblock to the efficient conduct of an arbitration. Moreover, the decision did not clarify the powers (if any) of an arbitral institution to impound contracts that it found to be insufficiently stamped on a *prima facie* basis, unlike the clear mandate given to the courts and tribunals addressing such issues.

Noting the larger ramifications of the NN Global 5J judgment, a 5-judge bench of the Supreme Court referred two cases involving the issue of the effect of insufficient stamping on the validity of arbitration agreements to a 7-Judge bench. The various petitioners argued that NN Global 5J goes against the scheme of the Arbitration Act and the Stamp Act.

SIAC’s Intervention

SIAC filed an intervention to assist the 7-Judge bench of the Supreme Court in its deliberations. In its intervention, SIAC (represented by members of the [SIAC Court](#), [Darius Khambata SA](#) and [VP Singh](#)) supplied relevant jurisprudence from Singapore and other jurisdictions in support of the following propositions:

- The decision in NN Global 5J potentially affects institutional arbitration inasmuch as it creates roadblocks to steps in the arbitral process where parties raise objections based on stamp duty.
- Issues concerning the stamping of instruments are issues of arbitral procedure and admissibility of evidence and do not and ought not to concern the validity and enforceability of arbitration agreements.
- An arbitration agreement is separate from the main contract and, therefore, remains in force despite any insufficiency in stamping the main contract.
- The inadmissibility of a contract cannot be conflated with the invalidity of a contract under the Stamp Act.
- The doctrine of *Kompetenz-Kompetenz* requires that the tribunal should examine issues relating to insufficiency in stamping. By conducting a full review before referring the issue to the

tribunal, the court is potentially undermining the jurisdiction of the tribunal.

- The Singapore courts have recognised the friction between the jurisdiction of the court and the tribunal, and have upheld the *Kompetenz-Kompetenz* principle in allowing the tribunal to decide on its own jurisdiction if the court is satisfied, on a *prima facie* basis, of the validity of the arbitration agreement.
- NN Global 5J reverses the *prima facie* standard of review to examine the existence of an arbitration agreement by requiring the courts to review if an objection to the jurisdiction of the tribunal is ‘*on the face of it, wholly without foundation*’ instead of reviewing if the arbitration agreement has been proved to be in existence on a *prima facie* basis.
- Where courts are called upon to consider requests to refer cases to arbitration (under Sections 8 and 45), or to appoint arbitrators (under Section 11), they should refer any issues concerning the impact of non-payment of stamp duty to the tribunal, and should exercise limited jurisdiction at that stage.

The Supreme Court’s Judgment

The Supreme Court unanimously overruled the findings of NN Global 5J. In doing so, the Supreme Court distinguished between an inadmissible contract and a void one. It took the view that an insufficiently stamped contract would not be void, but merely inadmissible into evidence as it is a curable defect. As noted in a [previous post](#) commenting on NN Global 5J, the Supreme Court was of the view that the Arbitration Act is a self-contained code designed to make the arbitration process more efficient and exclude the application of general law like the Stamp Act. Crucially, the Supreme Court noted that the Arbitration Act does not allow the court to go beyond a *prima facie* review of the existence of the arbitration agreement at the stage of referring the dispute to a tribunal or appointing an arbitrator. A detailed analysis of arguments on insufficiency of stamping of the main contract at this stage goes beyond the *prima facie* standard, and ought to be left to be determined by the tribunal.

In reaching its decision, the Supreme Court reinforced the doctrines of separability and *Kompetenz-Kompetenz*. The Supreme Court also recognised and accepted SIAC’s submissions, in particular that the NN Global 5J decision reversed the *prima facie* standard by finding that the court could refer the matter to arbitration only if the objections to stamping are ‘*wholly without foundation*’ instead of examining on a *prima facie* basis if a valid arbitration agreement exists.

Conclusion

The 7J Judgment is a much-welcome decision and has far-reaching implications on the conduct of India-related arbitrations. The Arbitration Act is now defined to be a special statute that prevails over general statutes. This sets the stage and direction for any future interpretation of the Arbitration Act *vis-à-vis* general laws that might be applicable to contractual arrangements among parties, which may also include an agreement to arbitrate their disputes. Importantly, the Supreme Court has reinforced the doctrines of separability and *Kompetenz-Kompetenz*, thereby empowering tribunals to determine various issues concerning their jurisdiction and limiting the burden on the courts.

The Judgment additionally brings guidance and certainty in the interpretation of the *prima facie*

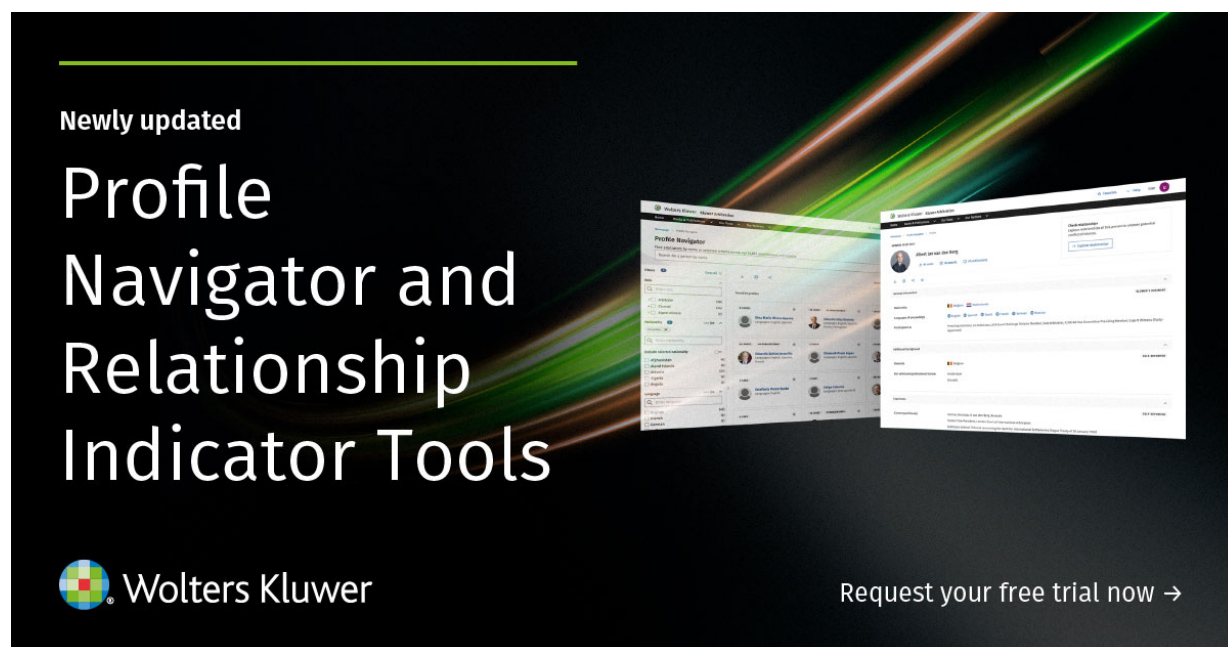
standard under the Arbitration Act. This figures to provide a boost to the efficiency in the constitution of tribunals by Indian courts. From an institutional standpoint, the Supreme Court's reading of the *prima facie* standard fits neatly within the current framework set out in the SIAC Rules 2016. In appropriate cases, SIAC, like the Indian courts, can proceed to appoint tribunals who are best placed to determine issues concerning their jurisdiction, including issues such as the effect of insufficient stamping of contracts.

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This entry was posted on Sunday, February 18th, 2024 at 9:37 am and is filed under [Arbitration Agreement, India, SIAC, Validity](#)

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