

Institutional arbitration may suffer collateral damage

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SYNOPSIS

The Supreme Court's ruling that an unstamped instrument that is otherwise exigible to stamp duty is unenforceable and must be impounded by the court has big implications for arbitration.

An important ruling that will have far-reaching consequences, a five-judge bench of the Supreme Court has held that an unstamped instrument (including an arbitration agreement) which is otherwise exigible to stamp duty is non-existent in law and must be impounded by a court if presented with it (say, by a party seeking arbitration). This process for impounding is usually marred by delays under the Stamp Act, resulting in a long wait for parties before they can avail their remedies under the arbitration clause contained in such instruments.

In its recent ruling, the Supreme Court has confirmed findings in *SMS Tea Estates vs. Chandmari Tea Co* and *Garware Wall Ropes Ltd vs. Costal Marine Constructions & Engg* and overruled *NN Global Mercantile Private Limited vs. Indo Unique Flame Ltd and Others* and held that an instrument which is exigible to stamp duty if not

stamped is non-existent in law and cannot be relied on to appoint an arbitrator. The ruling stipulates that: (a) where the instrument exigible to stamp duty and is not stamped, the court cannot appoint an arbitrator, and the instrument must be impounded and the procedure contemplated under the Stamp Act must be followed; (b) where the instrument may be stamped but an objection is raised by a party that it is not duly stamped, and where it appears that such an objection is without any foundation, then the court may refer the parties to arbitration and leave it open to the arbitrator to exercise the power of impounding the instrument.

This issue has been the subject of debate in various rulings of the Supreme Court. In 2011, the Supreme Court in *SMS Tea Estates* had held that if an arbitration clause is contained in an unstamped agreement, the judge would be required to impound the agreement and ensure that stamp duty and penalty (if any) are paid before appointing an arbitrator. In 2019, the Supreme Court in *Garware Wall* agreed with the findings of *SMS Tea Estates* but provided a practical solution that where the underlying agreement with the arbitration clause is insufficiently stamped, the court cannot appoint an arbitrator, and must impound the agreement and hand it over to the relevant stamp authority for rectification. It clarified that the stamp authority should resolve issues relating to stamp duty and penalty as expeditiously as possible, and preferably within 45 days from the date on which the authority receives the agreement. However, the Supreme Court in *NN Global* (in 2021) held that *SMS Tea Estates* does not set out the correct position of Indian law and overruled that judgement after observing that an arbitration agreement is independent and separable from the underlying contract which may not have been adequately stamped. As their prevailed conflicting judgements, in *NN Global*, the Supreme Court referred the issue to a five-judge constitutional bench for determination.

While this ruling will have wide-ranging implications and delay the appointment of arbitrators in ad-hoc arbitrations, it will also cause collateral damage to the progress of institutional arbitration or when an institution is nominated for arbitral appointments by the courts. Given the present ruling, if the arbitration agreement contained in the unstamped instrument refers to institutional arbitration, parties in dispute may not have any recourse but to file an application before the courts, as courts alone can impound such an instrument, as per the new ruling. Institutions will struggle to appoint an arbitrator in such instances. A high-level committee under the chairmanship of retired Justice B.N. Srikrishna had advocated the adoption of institutional arbitration in India and recommended nominating institutions for this even in ad-hoc cases of arbitration, but the path has steepened.

The latest ruling does not deal with a situation where the instrument is executed outside India between an Indian and a foreign domiciled party, and where courts in India are approached as the arbitration is either governed by the ad-hoc mechanism prescribed under the Arbitration Act or seated in India.

The judgement could also impact arbitrations arising under unstamped instruments seated outside India, where the instrument is governed under the Indian law, as the ruling deems the instruments which are insufficiently stamped as unenforceable under our law.

In India, where new businesses are rapidly adopting technology and executing their contacts electronically (for example, with DocuSign), the applicability of the stamp duty law has not kept pace with developments. The ruling is likely to impact existing arbitrations as well as fresh arbitrations that parties in dispute may be contemplating filing for under unstamped instruments.

In an earlier decision in 2019, the Supreme Court had provided a timeline of 45 days to cure defects so that the rights of parties in dispute under an unstamped instrument are not substantially delayed. The current ruling does not prescribe any time limit, and the parties are likely to face substantial delays in enforcement of rights, as the impounding of the relevant instrument may consume a significant amount of time.

The ruling also clarifies that it has not opined on anything in relation to the grant of interim relief under the Arbitration Act. Hence, the decision will not have any impact on the grant of interim protection, which is granted by courts in emergent situations where litigants need to be protected for arbitration to serve its purpose.

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