

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

- Dhruv Garg*

Abstract

The issue of non-stamping of contracts containing arbitration clauses is all pervasive in the sphere of arbitration. The parties during the reference stage contend that an arbitration agreement in the form of an arbitration clause would be invalid and unenforceable due to non-stamping of its underlying contract. This essay examines the legal perspective of unstamped contracts containing arbitration clauses and their stamping requirements and aims to resolve any uncertainty regarding the validity of arbitration clauses. It will analyze various judgements of the Supreme Court of India, and a new judgement by a seven-Judge bench in particular titled **“In Re: Interplay Between Arbitration Agreements Under The Arbitration And Conciliation Act 1996 And The Indian Stamp Act 1899”**. This essay will analyze and throw light on the principle of minimum judicial interference, separability of arbitration agreement, doctrine of competence-competence, legislative intent and also analyze provisions of The Arbitration and Conciliation Act, 1996, The Indian Stamp Act, 1899 and The Indian Contract Act, 1872. The legal position as evidenced by the judgements is that non-stamping of a contract which is required to be stamped containing an arbitration clause does not render such an agreement as void, invalid or unenforceable. The key argument for this position is that an arbitration agreement is separate and legally independent from its underlying contract and therefore, does not require stamping. The current legal position will allow the parties to put faith in the arbitral process by ensuring that their disputes are duly referred for arbitration by the courts as per the agreement and that applications for such reference are not merely dismissed on the ground of non-existence of the arbitration agreement due to non-stamping of the underlying contract. It may also lead to promotion of institutional arbitration.

* Student of Law (BA.LLB.) at Vivekananda Institute of Professional Studies, Guru Gobind Singh Indraprastha University.

INTRODUCTION

Arbitration is a mode of Alternative Dispute Resolution which has been seeing growth in the Corporate Sector and matters regarding contractual obligations. The Arbitration Act¹ was enacted to “consolidate and amend” the laws relating to arbitration in India. However, it is a condition precedent for the institution of arbitral proceedings that there must be “an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them”.² A clause as part of a contract providing an agreement for reference to arbitration for any or all disputes would be a valid arbitration agreement.³

Many parties put an arbitration clause within the underlying contract rather than drawing up a separate arbitration agreement for convenience. However, the issue which arises is that if the contract containing the arbitration clause is by itself invalid, unenforceable or void, then whether that defect will also extend to the arbitration clause or not, in which case, the arbitration clause would also be invalid, unenforceable or void and then the parties would have to take their matter to court rather than having their matter referred for arbitration.

Section 17 of the Indian Stamp Act, 1899⁴ provides that an instrument chargeable with stamp duty shall be stamped before or at the time of execution. The use of the word “Shall” imposes a necessary duty on such documents. Schedule I of the Act⁵ lists the instruments on which stamp duty is applicable (including contracts). Section 35 of the Act⁶ provides that an instrument which is not duly stamped will be inadmissible in evidence unless such instrument is duly stamped. Therefore, a contract which needs to be stamped but is not duly stamped will be unenforceable as it would be inadmissible in evidence.

In many cases, when an application is made in the court for reference to arbitration, it is common for the opposite party to contend that an arbitration clause would be invalid, unenforceable and void as the underlying contract is not duly stamped, and Section 35 of the Act extends to the arbitration clause, as the defect of non-stamping applies to the whole contract. However, such a proposition represents an incorrect position of law, as later discussed

¹ The Arbitration and Conciliation Act, 1996.

² *Supra* note 1, s.7(1).

³ *Supra* note 1, s. 7(5).

⁴ The Indian Stamp Act, 1899.

⁵ *Supra* note 4, sch. I.

⁶ *Supra* note 4, s.35.

in the essay. This proposition will render an arbitration agreement completely invalid and would vitiate the prior intention of the parties to refer the disputes for arbitration.

This essay will draw on rulings of the Supreme Court of India to argue that the correct position of law is that an arbitration clause is independent of the underlying contract and will be valid, legal and enforceable even if the underlying contract is not duly stamped. In other words, the non-stamping of an instrument or a contract which needs to be stamped as per the Stamp Act⁷, containing an arbitration clause, will not render such arbitration agreement as void or unenforceable.

TIMELINE OF THE LEGAL POSITIONS HELD BY THE SUPREME COURT OF INDIA

In **SMS Tea Estates Pvt. Ltd. v. Chandamari Tea Company Pvt. Ltd.**⁸, the issue before the court was whether an arbitration agreement can be enforced and be valid when such agreement is present within a compulsorily registrable document but that document is not registered. A two-judge Bench of the Apex Court of India held that it can be acted upon and enforced for referral to arbitration. It further held that an arbitration agreement in an unstamped contract could not be acted upon until the stamp duty and penalty amount is duly paid.

In **Garware Wall Ropes Ltd. v. Coastal Marine Constructions and Engineering Ltd.**⁹, the Supreme Court relied on **SMS Tea Estates**¹⁰ to hold that an arbitration agreement in an unstamped commercial contract would be non-existent in the eyes of the law and could not be acted upon unless the defect of non-stamping was duly cured by subsequent stamping.

Subsequently, a three-judge bench in **Vidya Drolia v. Durga Trading Corporation**¹¹ relied on **Garware Wall Ropes**¹² and held that an arbitration agreement would only “exist” when it is valid and legal. It also clarified that even if the agreement is in writing, it is still no agreement unless it can be made enforceable or that the parties are bound by that agreement.

The issue yet again reached the Apex Court and was adjudicated upon by a three-judge bench in **M/s. N.N. Global Mercantile Pvt. LTD v. M/s. Indo Unique Flame Ltd. & Others**¹³. This

⁷ *Supra* note 4

⁸ (2011) 14 SCC 66

⁹ (2019) 9 SCC 209

¹⁰ *Supra* note 8

¹¹ (2021) 2 SCC 1

¹² *Supra* note 9

¹³ (2021) 4 SCC 379

issue was extensively discussed with reference to the previous judgements, and the Court, speaking through Justice Indu Malhotra held that the non-stamping of a contract would not invalidate the arbitration clause to make it void and unenforceable, and that **SMS Tea Estates**¹⁴ and **Garware Wall Ropes**¹⁵ held incorrect positions in law. The court however referred the position held in **Vidya Drolia**¹⁶ to a Constitutional Bench of 5 Judges.

The five-judge bench headed by Justice K.M. Joseph overruled **N.N. Global 1**¹⁷ by a 3:2 majority and held that an arbitration clause contained in an underlying contract will be void and unenforceable if it is not stamped properly. This judgement¹⁸ came to be known as **N.N. Global 2** and the bench concurred with **Vidya Drolia**.¹⁹

The Supreme Court vide Order dated 26.09.2023 in a curative petition²⁰ in the case of **M/S. Bhaskar Raju and Brothers & Anr. v. M/S. Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram Other Charities & Ors.** referred the issue of **NN Global 2** to a seven-Judge Bench to “reconsider the correctness of the view of the five-Judge Bench” in view of the larger consequences of the judgement on the arbitral procedure in India. The seven-Judge Bench headed by the CJI Dr. D.Y. Chandrachud, unanimously gave its judgement titled “**In Re: Interplay Between Arbitration Agreements Under The Arbitration And Conciliation Act 1996 And The Indian Stamp Act 1899**”.²¹

It is this judgement which has now settled the legal perspective of an arbitration agreement in an underlying unstamped contract by overruling **NN Global 2**. The Court, speaking through the Hon’ble CJI, held that non-stamping of a contract which is required to be stamped containing an arbitration agreement in the form of an underlying clause does not render such an agreement as void or void ab initio or unenforceable. The ratio decidendi of this judgement will be discussed further in this essay. The Court also importantly held that any objections pertaining to stamp duty on the agreement will be governed under the jurisdiction of the arbitral tribunal under the doctrine of competence-competence.

LEGAL STATUS OF UNSTAMPED CONTRACTS CONTAINING ARBITRATION CLAUSES

¹⁴ *Supra* note 8

¹⁵ *Supra* note 9

¹⁶ *Supra* note 11

¹⁷ *Supra* note 13

¹⁸ *M/s. N.N. Global Mercantile Pvt. LTD v. M/s. Indo Unique Flame Ltd. & Others* (2023) 7 SCC 1

¹⁹ *Supra* note 11

²⁰ CuPC 44/2023

²¹ 2023 INSC 1066

Stamping is not a precondition as to the existence of an arbitration agreement. The arbitration agreement is a type of agreement which does not, either by itself or even as a clause in a contract, require any stamp duty or to be made on stamp paper of any amount.

Section 17 Stamp Act²² provides for stamping of instruments. The list of the instruments chargeable with stamp duty is provided in Schedule I of the Act²³ and the provisions of this schedule are exhaustive, i.e., no other instrument is chargeable except the one which is provided herein. However, Schedule I nowhere mentions any stamp duty for an arbitration agreement as was also observed in **NN Global 1**²⁴. Section 7(4) of The Arbitration Act²⁵ provides that an arbitration agreement is in writing, inter alia, if it is contained in any means of electronic communication which provide a record of the agreement, and also in an exchange of statement of claim where the existence of an arbitration agreement is alleged by one party and not denied by the other. This leads to the conclusion that an independent arbitration agreement, though in “writing”, need not be formal or registered. Naturally, such an “agreement” cannot be stamped. Hence, neither the Stamp Act nor the Arbitration act provides for any stamp duty for an arbitration agreement. Therefore, it means that an unstamped arbitration agreement, by itself, is perfectly valid, legal and enforceable, because if the legislature had wished to impose any stamp duty on such agreement, it could have easily done so. The non-stamping requirement of an agreement is important to identify its distinct legal character and to give it enforceability. The non-stamping requirement also prevents an arbitration agreement from being impounded.

An unstamped or under-stamped agreement cannot be impounded except when it is produced for being received in evidence. Section 33 of the Indian Stamp Act²⁶ provides for impounding of an instrument which is not duly stamped by any person who has the authority to receive evidence. However, as per section 36 of the Act²⁷, where an instrument has been admitted into evidence regardless of the status of its stamping, such admission of an unstamped instrument cannot be called into question later on the ground that it has not been duly stamped. Therefore, when a contract has been admitted into evidence, such an instrument cannot be impounded at any stage solely on the basis of insufficient stamping.²⁸

²² *Supra* note 4, s.17.

²³ *Supra* note 4

²⁴ *Supra* note 13 at 31

²⁵ *Supra* note 1, s. 7(4).

²⁶ *Supra* note 4, s.33.

²⁷ *Supra* note 4, s.36.

²⁸ *Supra* note 21 at 139

An unstamped agreement is inadmissible but not void. That is, an unstamped agreement, though not admissible in evidence, is legally valid and existent in the eyes of the law. The court in the most recent **Interplay between Arbitration Agreements**²⁹ observed that the inadmissibility of a document because of under-stamping or non-stamping does not make an instrument void, invalid or non-existent in the eyes of the law. The court further observed that the defect of non-stamping can be cured, after which the instrument will be admissible and that non-payment of stamp duty cannot affect the legal validity of an arbitration agreement.³⁰ This is important to note as “admissibility of an instrument in evidence” differs from its “validity or enforceability”. Section 2(g) of the Contract Act³¹ states that an agreement not enforceable by law is said to be void. However, the court observed that the admissibility of a contract refers to whether it can be introduced to give evidence or not. On the other hand, voidness relates to the enforceability of a document, and a void instrument cannot be enforced.³² A void agreement cannot be cured; however, an unstamped agreement is curable by subsequent stamping. To put it simply, an agreement which is inadmissible but not void can be enforced, but an agreement which is admissible yet void cannot be enforced. This observation is very important as through this, it is certain that even if the contract containing an arbitration agreement within a clause is not stamped, the arbitration agreement can be enforced, regardless of the inadmissibility of the underlying contract in evidence.

DOCTRINE OF SEPARABILITY AND COMPETENCE-COMPETENCE

The arbitration agreement is legally independent from the underlying contract it is contained in.³³ That is, an arbitration agreement, even if contained as an arbitral clause in a contract, will be deemed to be totally independent of the contract, as if it was separately drawn up from the beginning. Section 16(1) of the Arbitration Act³⁴ provides for this separability presumption as it states that an arbitration clause in a contract “shall” be treated as an independent agreement from other terms of the contract and also that a decision by the arbitral tribunal that a contract is “null and void” does not, by the law itself, invalidate the arbitration clause. The use of the

²⁹ *Supra* note 21 at 129

³⁰ *ibid*

³¹ The Indian Contract Act, 1872. S. 2(g).

³² *Supra* note 21 at 32

³³ Redfern and Hunter on International Arbitration (7th edn, Oxford University Press, 2023) 81

³⁴ *Supra* note 1, s. 16(1).

word “shall” imposes a necessary and binding legal fiction that the arbitration clause must be deemed to be independent from the contract.

The Court in **Interplay between Arbitration Agreements**³⁵ observed that Section 16 of the Arbitration Act not only contains presumption of separability for the jurisdiction of arbitral tribunal, but also as a general rule of “substantive independence” of an arbitration agreement. Court further observed that the Indian judicial opinion also suggests that an arbitration agreement is “distinct and separate” from the underlying contract. It was observed by the Supreme Court in a case³⁶ that even if the underlying contract is a nullity, the arbitration agreement contained within would survive and enforceable for resolution of disputes. This further attests the independence of the arbitration clause as a separate legal agreement. The legal validity of an arbitration clause as an independent agreement allows the tribunal to exercise its jurisdiction to determine the “existence and validity” of the arbitration agreement.³⁷ The independent character of the clause reinforces the argument that the Stamp Act³⁸ does not provide any stamp duty for an arbitration agreement, and therefore such would be valid and enforceable without stamping. This validity of an arbitration clause, even if its underlying contract is invalid, gives effect to the doctrine of competence-competence, as it allows the tribunal to exercise its jurisdiction.

The arbitral tribunal has the power to rule upon the existence of an arbitration agreement through doctrine of competence-competence. This doctrine says that arbitral tribunal is empowered to rule on its own jurisdiction. Such ruling cannot be challenged and the only remedy is to challenge the arbitral award under Section 34 of the Act.³⁹ It allows the tribunal to decide all “substantive issues” pertaining to the underlying contract, and naturally includes the issue of “existence and validity” of the arbitration agreement.⁴⁰ Section 16(2) and 16(3) of the Act⁴¹ allow the parties to challenge the jurisdiction of the tribunal on the basis of invalidity or voidness of an arbitration agreement; however, if the tribunal rules that the such an agreement is valid, then it can enforce arbitral proceedings and even pass an award. Section 16(6)⁴² is a testament to the legislative intent of ousting jurisdiction of courts as it posits the

³⁵ *Supra* note 21 at 64,65

³⁶ National Agricultural Coop. Marketing Federation India Ltd. v. Gains Trading Co (2007) 5 SCC 692

³⁷ *Supra* note 21 at 69

³⁸ *Supra* note 23

³⁹ *Supra* note 21 at 74

⁴⁰ Uttarakhand Purv Sainik Kalyan Nigam Ltd v. Northern Coal Field (2020) 2 SCC 455

⁴¹ *Supra* note 1, s. 16(2), 16(3).

⁴² *Supra* note 1, s. 16(6).

role of the court only after the passing of an arbitral award. This doctrine also restricts the courts from allowing challenges to jurisdiction of the tribunal.⁴³ It is important as it gives efficacy to presumption of separability.⁴⁴ This doctrine allows the tribunal to declare an arbitration agreement as valid even in cases where the underlying contract is not stamped and such a declaration cannot be challenged in a court before the arbitral award is passed.

LEGISLATIVE INTENT FOR THE ARBITRATION ACT

The Arbitration Act⁴⁵ is a “self-contained code” and must take precedence over general laws like Stamp Act and Contract Act.⁴⁶ Section 5 of the Arbitration Act⁴⁷ provides that notwithstanding anything contained in any other law for the time being in force, no judicial authority shall intervene except when provided in the Act itself. The Court in **Interplay between Arbitration Agreements**⁴⁸ observed that “any intervention by the courts” (which includes impounding of a contract with an arbitration clause) is only permitted if the Arbitration Act⁴⁹ specifically provides for such. Therefore, Section 33 and 35 of the Stamp Act⁵⁰ will be inoperable in arbitral proceedings. This will prevent the stagnation of arbitral proceedings due to minor technicalities of law such as fiscal measures in the Stamp Act⁵¹ (like impounding of the main contract) and would allow for expediting the arbitral process.

The legislature intended to limit the involvement of courts in arbitration matters, and by extension, in the matters relating to the existence of arbitration agreements.⁵² Section 8 of the Arbitration Act⁵³ imposes a necessary condition on judicial authorities to refer the parties to arbitration “unless it finds that prima facie no valid arbitration agreement exists.” However, the court held that the word “non-existence” cannot be taken to mean an agreement being “null and void, inoperative or incapable of being performed”.

⁴³ *Supra* note 21 at 74

⁴⁴ *Supra* note 21 at 70

⁴⁵ *Supra* note 1.

⁴⁶ *Supra* note 21 at 53

⁴⁷ *Supra* note 1, s. 5.

⁴⁸ *Supra* note 21 at 104

⁴⁹ *Supra* note 1.

⁵⁰ *Supra* note 4, s.33, s.35.

⁵¹ *Supra* note 4

⁵² *Supra* at 40

⁵³ *Supra* note 1, s. 8.

In **Vidya Drolia**⁵⁴, one of the issues was whether the court would decide the question of non-arbitrability of an agreement at the reference stage. In order to determine this, the court observed that the words “existence” and “validity” are connected in relation to Section 11(6A)⁵⁵ which provides that Courts “must confine to the existence of an arbitration agreement”. It was held that arbitration agreement will not “exist” if it is void, illegal or does not meet statutory requirements. However, the court in **Interplay between Arbitration Agreements**⁵⁶ overruled this position and held that “**Vidya Drolia** did not deal with the issue of stamping”⁵⁷. It held that the omission of Section 11(6A)⁵⁸ of the Act was not notified and therefore, the ambit of determination of “existence” of an arbitration agreement was confined to Section 7.⁵⁹ The Court further held that Section 11(6A)⁶⁰ uses the word “examination”, unlike in Section 16⁶¹, where the section uses the word “rule”. It was observed by the court that “examination” by the court only means “inspection or scrutiny” of the existence of the agreement. Meanwhile, under Section 16 the tribunal can “rule” on the validity of the agreement, which means adjudication.⁶² This conveys that the legislature intended to limit the intervention of the courts and embodies the principle of “minimum judicial interference”. If the court gave a prima facie opinion, the arbitral tribunal would not be bound by such opinion.⁶³ Such position of law will prevent the curtailment of the tribunal’s jurisdiction and also prevent the unnecessary delay in the commencement of arbitration proceedings on account of non-stamping of instruments.

CONCLUSION AND PROGNOSTICATIONS

The issue of non-stamping as discussed above pervaded a vast majority of arbitration agreements in India. Through the Supreme Court’s latest and conclusive judgement **Interplay between Arbitration Agreements**⁶⁴, it is well settled that an arbitration clause is independent of the underlying contract and will be valid, legal and enforceable even if the underlying

⁵⁴ *Supra* note 11

⁵⁵ *Supra* note 1, s. 11(6A).

⁵⁶ *Supra* note 21

⁵⁷ *Supra* note 21 at 126.

⁵⁸ *Supra* note 21 at 93.

⁵⁹ *Supra* note 21 at 94.

⁶⁰ *Supra* note 55

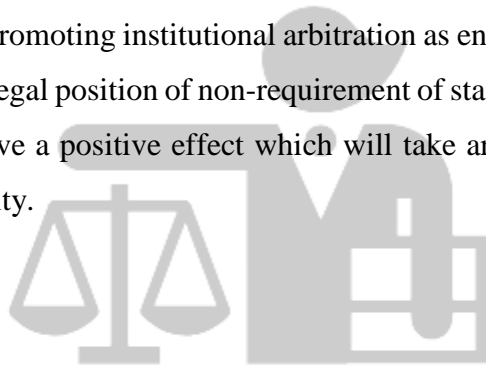
⁶¹ *Supra* note 1, s. 16.

⁶² *Supra* note 21 at 96.

⁶³ *Supra* note 21 at 97.

⁶⁴ *Supra* note 21

contract is not duly stamped. Therefore, this ruling will expedite the arbitral process and allow arbitral autonomy and consolidation of powers to the Arbitration tribunal. It will also disarm a malicious litigant so that he cannot challenge an award under Section 34⁶⁵ solely on the basis of non-existence of an arbitration agreement due to non-stamping. This judgement recognizes the special character of the Arbitration Act⁶⁶ and held that it will take precedence over general laws. This position especially, can lead to further consolidation of arbitral independence, which would be consistent with and benefit the Alternative Dispute Resolution methods greatly and would provide a sense of “security” to the parties choosing to resolve disputes outside of the judicial system. This judgement also conclusively decided that the legislature intended to minimize the involvement of the judicial authorities within the sphere of arbitration, which will have a positive impact in promoting institutional arbitration as envisaged in Section 43D of the Act.⁶⁷ Therefore, the new legal position of non-requirement of stamping of contracts containing arbitration clauses will have a positive effect which will take arbitration in India to a higher level of certainty and quality.



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⁶⁵ Supra note 1, s. 34.

⁶⁶ Supra note 1.

⁶⁷ Supra note 1, S. 43D.