

# Supreme Court of India: An unstamped or insufficiently stamped arbitration agreement is not void or unenforceable

22 December 2023

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***This update covers:***

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1	Introduction	2
2	Background	2
3	Supreme Court's ruling	3
3.1	Difference between 'admissibility' and 'voidness' under law	3
3.2	The principle of minimal judicial intervention under Section 5 and kompetenz-kompetenz under Section 16 of the Arbitration Act	4
3.3	Doctrine of separability under Section 16 of the Arbitration Act	4
3.4	Overruling earlier decisions in SMS Tea, Garware and N.N. Global II	4
3.5	Appointment of an arbitral tribunal by a referral court does not mean the underlying contract and the arbitration agreement are enforceable	5
4	Observations	5

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## 1 Introduction

In a recent judgment delivered on 13 December 2023 in '*In Re: Interplay between arbitration agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899*,' a seven-judge bench of the Supreme Court of India (headed by the Chief Justice of India) has overruled the decision rendered by its five-judge bench in *M/s N.N. Global Mercantile Private Limited v M/s Indo Unique Flame Ltd. & Ors. (N.N. Global II)* earlier this year and held that arbitration agreements that are unstamped or insufficiently stamped are not rendered void or *void ab initio* or unenforceable. Consequently, it also held that objections relating to stamping do not fall for the determination of courts at the stage of reference under Sections 8 and 11 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) and must be left to the determination of the arbitral tribunal. The Court also clarified that courts are not required to deal with the issue of stamping while deciding an application for interim reliefs under Section 9 of the Arbitration Act. Through this judgment, the Court has reinforced the fundamental principles of Indian arbitration law, including *kompetenz kompetenz*, minimal judicial intervention, separability and party autonomy.

A seven-judge bench of the Supreme Court of India, while overruling its previous decisions in *SMS Tea, Garware* and *N.N. Global II*, has held that an unstamped or insufficiently stamped arbitration agreement is not void or unenforceable, and that courts are not required to determine the issue of stamping while dealing with applications under Sections 8, 9 and 11 of the Arbitration and Conciliation Act, 1996. This update analyses and discusses this pro-arbitration judgment in the context of the Indian arbitration landscape.

## 2 Background

The reference before a larger seven-judge bench of the Supreme Court arose in the context of the decision in *N.N. Global II* that sought to clarify disparate legal jurisprudence on the implications of an unstamped or insufficiently stamped agreement including, more specifically, on its enforceability at the stage of reference to arbitration under Sections 8 or 11 of the Arbitration Act.

To briefly recapitulate, on 25 April 2023, a five-judge bench of the Supreme Court in *N.N. Global II* (by a majority decision of 3:2) opined on the legality of an unstamped or insufficiently stamped arbitration agreement and held as under.

- a. The provisions of Sections 33 and 35 of the Indian Stamp Act, 1899 (**Stamp Act**) were held to have rendered an unstamped or insufficiently stamped arbitration agreement '*void*' under Section 2(g) of the Indian Contract Act, 1872 (**Contract Act**) as such an agreement is '*not enforceable in law*', '*bereft of life*' and '*non-existent in law*' as long as it remains unstamped.
- b. The view taken by the two-judge bench of the Supreme Court in *SMS Tea Estate v Chandmari Tea Company* (2011) (**SMS Tea**) and followed by another two-judge bench of the Supreme Court in *Garware Wall Ropes v Coastal Marine Constructions & Engineering Ltd.* (2019) (**Garware**) that courts should impound unstamped or insufficiently stamped agreements presented to them under Section 11 of the Arbitration

Act, and only upon payment of the requisite stamp duty proceed with the appointment of an arbitral tribunal, was held to be correct.

- c. The findings of the three-judge bench of the Supreme Court in *Vidya Drolia v Durga Trading Corpn.* (2021) (**Vidya Drolia**) to the extent that 'existence' and 'validity' are interrelated concepts such that an arbitration agreement exists only when it is legal and valid, were affirmed. This view was also held to be consistent with the altered legal position subsequent to the insertion of Section 11(6A) in the Arbitration Act, through amendments made in 2015 (**2015 Amendments**), that confined the scope of judicial review at the stage of appointment of arbitrators to "*examination of the existence of an arbitration agreement*".

Given the above, the five-judge bench in *N.N. Global II* held that the three-judge bench in *N.N. Global Mercantile Private Limited v Indo Unique Flame Limited and others* (2021) had wrongly decided that an unstamped or insufficiently stamped arbitration agreement being separate from the underlying contract would not be invalid, unenforceable and non-existent. (To read our detailed update on the *N.N. Global II* judgment, [click here](#).)

Subsequently, a five-judge bench of the Supreme Court was confronted with a curative petition against its decision in *Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram v Bhaskar Raju and Brothers* (2020) (**Bhaskar Raju**) for refusing to refer the parties therein to an arbitration arising out of an insufficiently stamped lease deed. On 14 August 2023, a three-judge bench of the Supreme Court in *Seka Dobric v SA Eonsoftech Private Limited* (2023) decided to list the arbitration petition therein for the appointment of an arbitrator in an unstamped agreement along with the curative petition in *Bhaskar Raju*. Considering the larger ramifications of the underlying legal issues, on 26 September 2023, a five-judge bench of the Supreme Court deemed it appropriate to refer the two matters before a seven-judge bench.

The seven-judge bench of the Supreme Court was called upon to resolve the following question in the context of three statutes, namely, the Arbitration Act, the Stamp Act, and the Contract Act:

*"Whether such arbitration agreements (agreements embedded in underlying instruments or substantive contracts) would be non-existent, unenforceable, or invalid if the underlying contract is not stamped?"*

## 3 Supreme Court's ruling

### 3.1 Difference between 'admissibility' and 'voidness' under law

At the very onset, the Supreme Court defined the difference between the concepts of 'admissibility' and 'voidness' under law. It clarified that while a void agreement implies that such an agreement is not enforceable in law, admissibility refers to whether that agreement can be introduced in evidence or considered or relied upon by a court while adjudicating a case. As such, it held that there need not be a correlation between voidness and inadmissibility since a void agreement (such as an agreement in restraint of trade under Section 27 of the Contract Act) can still be admissible in evidence should it be attempted to be enforced.

Relying upon the above, the Court ruled that the five-judge bench in *N.N. Global II* wrongly conflated the distinction between 'enforceability' and 'admissibility' while upholding the supremacy of the mandatory provisions of Sections 33 and 35 of the Stamp Act. The Court held that Section 35 of the Stamp Act unambiguously stipulates that "*no instrument chargeable with duty shall be admitted in evidence...*" Similarly, Section 42 of the Stamp Act provides that an instrument that is endorsed upon subsequent payment of the requisite stamp duty shall be "*admissible in evidence.*" Summarising its findings on these provisions, the Court

held that it was clear that the Stamp Act does not render an unstamped or insufficiently stamped instrument 'void' under Section 2(g) of the Contract Act but only renders it '*inadmissible*' in evidence; a defect that is '*curable*' under the provisions thereunder in contrast to '*voidness*' in an agreement that cannot be cured.

### **3.2 The principle of minimal judicial intervention under Section 5 and kompetenz-kompetenz under Section 16 of the Arbitration Act**

The Court extensively analysed the scope of the principle of minimal judicial intervention internationally and under Section 5 of the Arbitration Act to group this principle into two facets: positive and negative. The Court elaborated that the positive facet vested the judicial authorities with jurisdiction over arbitral proceedings in matters expressly allowed or dealt with in Part I of the Arbitration Act (applicable when the seat of arbitration is in India). In this context, the Court held that the power to impound agreements under Sections 33 and 35 of the Stamp Act is not recognised as being within the authority of a referral court under Sections 8 or 11 of the Arbitration Act. It also elucidated that the negative facet in Section 5 stems from its *non-obstante* clause that prohibits judicial authorities from intervening in matters where the arbitral tribunal exercises exclusive jurisdiction.

The Court then imported this negative facet to the doctrine of '*kompetenz-kompetenz*' under Section 16 of the Arbitration Act. It held that this doctrine ensures that courts should refrain from entertaining challenges to the jurisdiction of the arbitral tribunal before the arbitrators have had the opportunity to do so. It clarified that the scope of jurisdiction of an arbitral tribunal will include the determination of all preliminary issues affecting its jurisdiction including the sufficiency of stamping. It held this position to be in consonance with Sections 33 and 35 of the Stamp Act as an arbitral tribunal, being an authority by "*consent of parties*" to receive evidence, is empowered to impound and examine an instrument.

### **3.3 Doctrine of separability under Section 16 of the Arbitration Act**

The Court also alluded to the doctrine of separability under Section 16 of the Arbitration Act that acknowledges the separate nature and validity of the arbitration agreement from that of its underlying contract and "*insulates the arbitration agreement from the defects of the underlying contract.*" It held that this presumption of separability is not only relevant for determining the jurisdiction of the arbitral tribunal but encompasses the general rule on the substantive independence of an arbitration agreement. Basis the above analysis, the Court concluded that the five-judge bench in *N.N. Global II* was incorrect in refusing to apply the separability presumption at the referral stage in the context of Sections 33 and 35 of the Stamp Act.

### **3.4 Overruling earlier decisions in SMS Tea, Garware and N.N. Global II**

In the process, the Court overruled its earlier decisions in *SMS Tea, Garware and N.N. Global II*. The Court, while concurring with the minority view in *N.N. Global II*, reiterated that the position after the 2015 Amendments mandates that the referral courts are only required to *prima facie* determine the existence or validity of an arbitration agreement. To support this position, the Court also drew upon the semantical differences in the scope of review available to a court under Section 11 and that available to an arbitral tribunal under Section 16 of the Arbitration Act. It held that Section 11 uses the term '*examine*' to imply an inspection or scrutiny but not a '*laborious or contested inquiry*' into the existence of an arbitration agreement by courts. The Court then held that on the other hand, Section 16 empowers the arbitral tribunal to '*rule*' on its jurisdiction, including on issues pertaining to the existence and validity of an arbitration agreement that refers to adjudicating disputes following a detailed enquiry involving assessment of evidence. It also observed that

the findings in *Vidya Drolia* concerning the legal synonymity between 'validity' and 'existence' were not rendered in the context of stamping and thus, will not be applicable in this case.

### **3.5 Appointment of an arbitral tribunal by a referral court does not mean the underlying contract and the arbitration agreement are enforceable**

Lastly, the Court clarified that the appointment of an arbitral tribunal by a referral court will not necessarily mean that the underlying contract and the arbitration agreement contained therein are enforceable. The requisite stamp duty will have to be paid before the agreement is admitted in evidence and the matter is adjudicated by the arbitral tribunal. The Court stated that the point of contention has only been on the stage at which the agreement must be impounded and not on whether it would be impounded at all. The Court iterated that this will not only result in speedy disposals of applications under Sections 8 and 11 of the Arbitration Act but will also ensure that the principles of the Arbitration Act are balanced with that of the Stamp Act.

Notably, while the Court was ruling upon the implications of an unstamped or insufficiently stamped arbitration agreement at a referral stage, it also observed that for the same reasons, courts are not required to deal with the issue of stamping while deciding an application for interim reliefs under Section 9 of the Arbitration Act.

## **4 Observations**

The earlier ruling of the five-judge bench of the Supreme Court in *N.N. Global II*, though short-lived, had created some degree of uncertainty for parties initiating or pursuing arbitrations under unstamped or insufficiently stamped arbitration agreements. The pro-arbitration judgment of the seven-judge bench is expected to remove this uncertainty at the stage of referral of disputes to arbitration as well as at the stage of seeking interim reliefs before courts by deferring such issues for determination by the arbitral tribunal.

While the Supreme Court has clarified the position on the enforceability of unstamped or insufficiently stamped arbitration agreements, it will be interesting to see how some of the open issues, such as its applicability on foreign-seated arbitrations, validity and enforceability of arbitral awards based on unstamped or insufficiently stamped arbitration agreements and effect of impounding agreements on the timelines in the arbitral proceedings, will be decided in the future by Indian courts.

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