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**STAMPING OUT UNCERTAINTY: Unshackling Arbitral
Agreements in Unstamped Contracts**

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STAMPING OUT UNCERTAINTY: Unshackling Arbitral Agreements in Unstamped Contracts

*Anushka Ajay**

[Abstract: *The Supreme Court recently ruled on the interplay between three statutes in the Indian legal framework: the Arbitration and Conciliation Act of 1996¹, the Indian Stamp Act of 1899², and the Indian Contract Act of 1872³. The Indian Stamp Act⁴ imposes a responsibility on "instruments," stating that under its provisions, an instrument that is not stamped or is not stamped sufficiently is not accepted as evidence and cannot be enforced. Arbitration agreements, often integral to underlying instruments or substantive contracts, become contentious when objections are raised during applications for arbitrator appointments. These arguments claim that because the arbitration agreement is a component of an inadequately stamped or unstapled document, it is inadmissible. The main query that arises is whether, in the event that the underlying contract is not stamped as needed, such arbitration arrangements may be regarded as non-existent, unenforceable, or void. In essence, the crux of the matter lies in determining the legal status of arbitration agreements when read with contracts that are not appropriately stamped. Resolving this issue requires a nuanced analysis of the provisions within the three statutes and an exploration of how they intersect in the specific context of arbitration agreements embedded in unstamped or inadequately stamped instruments. The paper goes into analyzing the relevant laws present in the above-mentioned statutes as well as the interplay amongst all three statutes.]*

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¹ Arbitration and Conciliation Act, 1996

² Indian Stamp Act, 1899

³ Indian Contract Act, 1872

⁴ Indian Stamp Act, 1899

I

Introduction: Setting The Legal Landscape

The court recently ruled that non-payment of stamp duty, as per the Arbitration Act⁵, Stamp Act,⁶ and Contract Act⁷, does not render the underlying contract invalid as such a defect is curable in nature. The court departed from the precedent set in *SMS Tea Estates Ltd. v. Chandmari Tea Co. Ltd*⁸ and *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd*⁹. In *SMS Tea Estates*, a two-Judge Bench decided that an arbitration agreement in an unstamped contract is unenforceable. *Garware Wall Ropes*¹⁰ followed this decision, stating that an arbitration agreement in an unstamped commercial contract does not "exist" as a matter of law until the contract is stamped. Thereafter, "*Vidya Drolia v. Durga Trading Corporation*"¹¹, citing *Garware Wall Ropes* and its paragraph 29, a three-judge bench upheld the decision, holding that an arbitration agreement only comes into existence when it is legitimate and lawful.

This legal dilemma recently came into legal limelight in the case of "*N N Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd*"¹². This case involved Indo Unique Flame Ltd. (Respondent), which, after securing a Work Order, entered into a sub-contract with N.N. Global Mercantile Pvt. Ltd. (Appellant). The Work Order contained an arbitration clause, but the paper wasn't properly stamped.

Notably, the Commercial Court rejected the Respondent's plea for arbitration under Section 8 of the Arbitration Act¹³. A significant argument surfaced about the Arbitration Agreement's unenforceability because the Work Order was not stamped.

On appeal, the High Court, by granting the Respondent's Writ, triggered an essential examination into the enforceability and effectiveness of the Arbitration Agreement in the absence of stamping compliance under the Indian Stamp Act.

In the background of *N N Global* case¹⁴, a three-Judge Bench of the SC emphasized the autonomy of an Arbitration Agreement, distinct from commercial contract that underlies. The Court interpreted Section 34 of the Maharashtra Stamp Act¹⁵,

⁵ Arbitration and Conciliation Act, 1996

⁶ Indian Stamp Act, 1899

⁷ Indian Contract Act, 1872

⁸ *SMS Tea Estates Ltd. v. Chandmari Tea Co. Ltd*, (2011) 14 SCC 66

⁹ *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd*, (2019) 9 SCC 209

¹⁰ *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd*, (2019) 9 SCC 209

¹¹ *Vidya Drolia v. Durga Trading Corporation*, (2021) 2 SCC 1

¹² *N N Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd*, (2023) 7 SCC 1

¹³ Arbitration and Conciliation Act, 1996, S. 8

¹⁴ *N N Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd*, (2023) 7 SCC 1

¹⁵ Maharashtra Stamp Act, S. 34

equivalent to Section 35 of the Indian Stamp Act¹⁶, as not rendering an unstamped instrument null, void, or unenforceable. Referring to decisions in *Vidya Drolia*¹⁷ and *Garware Wall Ropes Ltd.*¹⁸, the bench then sought a definitive resolution from a Constitution Bench on whether the statutory impediment outlined in Section 35 of the Stamp Act¹⁹ would extend to considering an arbitration agreement within a non-stampable instrument as non-existent, unenforceable, or invalid until the required stamp duty for the overarching contract is fulfilled.

In its ruling, the SC reiterated the jurisprudential stance articulated in *SMS Tea Estates*²⁰, *Garware*, and *Vidya Drolia*. Particularly, “*SMS Tea Estates*” highlighted that court recognition of any agreement depends on fulfilling stamp duty obligations, stressing the inseparability of stamp duty and its enforceability. “*Garware*” clarified that the legal existence of an arbitration clause depends on its enforceability, as outlined by Section 11(6A)²¹ and Section 7(2) of the Arbitration Act²² and Section 2(h) of the Contract Act²³. “*Vidya Drolia*”, in alignment with “*Garware*”, underscored the indispensability of validity, including stamping as a mandatory prerequisite when assessing the existence of an agreement.

II

Unearthing the Challenges and in Outdated Legislations

It is also argued that deeming an agreement, including an arbitration agreement, unenforceable due to a lack of stamping not only contradicts the kompetenz kompetenz principle, which empowers an arbitral tribunal to decide such matters, but also creates an opportunity for a respondent to temporarily hinder the initiation of arbitration based on a technically sound argument of fiscal non-compliance. The process of impounding and stamping instruments can be time-consuming, subjecting parties to a waiting period until the stamping deficiency or penalty is rectified. In cases where stamp duty in a specific Indian state is ad-valorem, parties may be discouraged from commencing arbitration proceedings, weighing the commercial considerations against the cost of addressing the stamp deficit. From a

¹⁶ Indian Stamp Act, 1899, S. 35

¹⁷ *Vidya Drolia v. Durga Trading Corporation*, (2021) 2 SCC 1

¹⁸ *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.*, (2019) 9 SCC 209

¹⁹ Indian Stamp Act, 1899, S. 35

²⁰ *SMS Tea Estates Ltd. v. Chandmari Tea Co. Ltd.*, (2011) 14 SCC 66

²¹ Arbitration and Conciliation Act, 1996, S. 11(6A)

²² Arbitration and Conciliation Act, 1996, S. 7(2)

²³ Indian Contract Act, 1872, S. 2(h)

respondent's perspective, these procedural mechanisms provide a chance for defense and leverage against a hastily rendered award.

The current legal framework relies on Section 35 of the Stamp Act²⁴, along with Section 2(g)²⁵ and 2(j) of the Indian Contract Act, 1872²⁶, in conjunction with Section 7(2) of the Arbitration Act.²⁷ This leads to both unstamped and insufficiently stamped agreements being treated as unenforceable and, consequently, not actionable.

In contrast, the dissenting judgment of the minority, considering the historical context and rationale behind the incorporation of Section 11(6A) of the Act²⁸, concludes that the arbitration agreement document submitted during proceedings pursuant to Section 11 possesses enforceability regardless of the stamp duty paid. The minority contends that, in line with Section 16 of the Act, the arbitral tribunal should decide matters pertaining to the appropriateness of the stamp duty or the legality of the arbitration agreement.²⁹ Emphasizing the Act's objective to streamline processes and reduce delays in court litigation, the minority asserts that deferring the decision on stamping adequacy to the arbitration tribunal would effectively achieve this overarching objective.

The minority in the NN Global case³⁰ also took a similar stance. Justice Ajay Rastogi emphasized that the jurisdiction of the referral court under Section 11 is confined to assessing the "existence" of an arbitration agreement. According to his view, all other contentious issues, including matters related to stamping, should be left for determination by the arbitral tribunal, as outlined in Section 16 of the Arbitration Act.³¹

Justice Hrishikesh Roy, in alignment with the Stamp Act's structure, asserted that an unstamped or inadequately stamped document does not become invalid or void ab initio because the absence of stamping is a correctable flaw. Additionally, Justice Roy traced the development of the Arbitration Act, noting its inclination towards minimizing judicial intervention in the arbitral process. He proposed that Section 11 of the Arbitration Act³² should be reconciled with Section 35 of the Stamp Act³³ by deferring stamping issues to the arbitrator. In summary, Justice Roy concluded that

²⁴ Indian Stamp Act, 1899, S. 35

²⁵ Indian Contract Act, 1872, S. 2(g)

²⁶ Indian Contract Act, 1872, S. 2(j)

²⁷ Arbitration and Conciliation Act, 1996, S. 7(2)

²⁸ Arbitration and Conciliation Act, 1996, S. 11(6A)

²⁹ Arbitration and Conciliation Act, 1996, S. 16

³⁰ *N N Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd*, (2023) 7 SCC 1

³¹ Arbitration and Conciliation Act, 1996, S. 16

³² Arbitration and Conciliation Act, 1996, S. 11

³³ Indian Stamp Act, 1899, S. 35

SMS Tea Estates³⁴ and Garware Wall Ropes³⁵ did not accurately articulate the legal position.

The article would first dive into the relevant sections and principles of the Stamp Act³⁶ followed by the relevant sections and principles of the Arbitration and the Conciliation Act³⁷. Following our completion of the first two processes, we would examine how the two acts interact harmoniously when reading and constructing the law.

III

The Battle of Perspectives Between Parties Involved

Petitioner's Perspective

Section 11(6A) of the Arbitration Act³⁸ explicitly confines the authority of the referral court to examining the arbitration agreement's existence. This scrutiny does not extend to assessing the adequacy of stamping under Section 33 of the Stamp Act³⁹, as doing so would exceed the scope of examination. The Arbitration Act⁴⁰ limits the referral court's jurisdiction to evaluating the arbitration agreement, not the instrument itself. Given that the determination of stamp duty is a laborious procedure, the referral courts ought to forward stamping-related matters to the arbitral tribunal during the pre-arbitral phase.

- A. The tribunal possesses the required competence to adjudicate on its jurisdiction, including matters related to stamping. The inclusion of the non-obstante clause in Section 5 of the Arbitration Act⁴¹ restricts judicial intervention in the arbitration process and should be interpreted harmoniously with the provisions of the Stamp Act⁴².
- B. The requirement for stamping does not leave an instrument void; it only makes the instrument inadmissible in evidence until the deficiency is rectified following the Stamp Act provisions. The insufficiency in stamping is a correctable defect that ceases to have an effect as soon as the state's

³⁴ *SMS Tea Estates Ltd. v. Chandmari Tea Co. Ltd.*, (2011) 14 SCC 66

³⁵ *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.*, (2019) 9 SCC 209

³⁶ Indian Stamp Act, 189

³⁷ Arbitration and Conciliation Act, 1996

³⁸ Arbitration and Conciliation Act, 1996, S. 11(6A)

³⁹ Indian Stamp Act, 1899, S. 33

⁴⁰ Arbitration and Conciliation Act, 1996

⁴¹ Arbitration and Conciliation Act, 1996, S. 5

⁴² Indian Stamp Act, 1899

revenue interest is secured. Non-stamping does not nullify an instrument; even if unstamped, the instrument exists in fact and law.

- C. Mandating courts at the Section 8⁴³ or Section 11⁴⁴ stage of the Arbitration Act to examine stamping issues would contradict the legislative intent of minimal judicial interference in Section 5 of the Arbitration Act⁴⁵ and go against the goal of promptly appointing arbitrators outlined in Section 11(13) of the Arbitration Act⁴⁶.
- D. Section 33 of the Stamp Act ⁴⁷allows a person to have the authority by "consent of parties" to decide stamping issues. This authority inherently includes an arbitral tribunal, which is constituted by the consent of parties through an arbitration agreement.
- E. The legislature's objective in enacting the "Indian Stamp Act" is to safeguard public revenue without disrupting commercial activities by invalidating essential instruments for the smooth conduct of trade and commerce.

Respondent's Reasoning

- A. The respondents strongly argue in favor of the correctness of the Judgement in *N N Global*⁴⁸, asserting that it aligns with the stance taken by SC in *SMS Tea Estates*⁴⁹ and *Garware Wall Ropes*⁵⁰, and they contend that no need is there to disturb this established position. The key points made by the respondents' learned counsel are outlined below.
- B. To establish the maintainability of the curative petition, they assert that the petition does not meet the requirements set out in *Rupa Ashok Hurra v. Ashok Hurra*⁵¹. Since the curative petition is deemed not maintainable, the reference to a seven-Judge Bench is argued to be without jurisdiction.
- C. According to the respondents, the court's investigation under Section 11(6A) of the Arbitration Act⁵² goes beyond confirming the agreement to arbitrate on its face. As per their stance, the referral court bears the responsibility of initially evaluating the presence and legality of an arbitration agreement, which includes examining the adequacy of stamping.

⁴³ Arbitration and Conciliation Act, 1996, S. 8

⁴⁴ Arbitration and Conciliation Act, 1996, S. 11

⁴⁵ Arbitration and Conciliation Act, 1996, S. 5

⁴⁶ Arbitration and Conciliation Act, 1996, S. 11

⁴⁷ Indian Stamp Act, 1899, S. 33

⁴⁸ *N N Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd*, (2023) 7 SCC 1

⁴⁹ *SMS Tea Estates Ltd. v. Chandmari Tea Co. Ltd*, (2011) 14 SCC 66

⁵⁰ *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd*, (2019) 9 SCC 209

⁵¹ *Rupa Ashok Hurra v. Ashok Hurra*, (2002) 4 SCC 388

⁵² Arbitration and Conciliation Act, 1996

- D. Pointing to Section 33 of the Stamp Act⁵³, the respondents assert that it imposes a mandatory legal obligation on courts in Section 11⁵⁴ proceedings to impound a not stamped/insufficiently stamped instrument. They emphasize that such an instrument cannot be admitted as evidence or acted upon until the required stamp duty as well as the penalty are paid.
- E. The respondents argue that Section 5 of the Arbitration Act⁵⁵ does not curtail the applicability of the mandatory provisions of the Indian Stamp Act⁵⁶.
- F. Addressing the principle of separability in Section 16 of the Arbitration Act⁵⁷, the respondents contend that arbitration agreement can be considered a distinct agreement solely for determining its validity or enforceability.
- G. According to the respondents, Section 11(6A) of the Arbitration Act shall not prevent the appointment of an arbitrator at the referral stage even in cases where an instrument containing an arbitration agreement is not properly stamped.⁵⁸

IV

Stamped Perspective: Decoding the Stamp Act's Relevant Legal Landscape

'The Indian Stamp Act' serves as a fiscal legislation designed to generate revenue for the government, constituting a mandatory statute. In the case of *Hindustan Steel Ltd. v. Dilip Construction Co.*⁵⁹, the SC addressed the significance of Sections 35⁶⁰, 36⁶¹, and 42 of the Stamp Act.⁶² In this context, a party contended that the distinction in phrasing between Sections 35 and 36 allowed an instrument that was inadequately stamped or unstamped to be admitted in evidence upon payment of the requisite duty and penalty, but it could not be acted upon once admitted. The argument posited that Section 35 acted as a dual bar, affecting both the admission of the instrument into evidence and its subsequent enforcement. Conversely, it was put forth that Section 36 removed the bar only with respect to the admissibility of

⁵³ Indian Stamp Act, 1899, S. 33

⁵⁴ Arbitration and Conciliation Act, 1996, S. 11

⁵⁵ Arbitration and Conciliation Act, 1996, S. 5

⁵⁶ Indian Stamp Act, 1899

⁵⁷ Arbitration and Conciliation Act, 1996, S. 16

⁵⁸ Arbitration and Conciliation Act, 1996, S. 11(6A),

⁵⁹ *Hindustan Steel Ltd. v. Dilip Construction Co.* (1969) 1 SCC 597

⁶⁰ Indian Stamp Act, 1899, S. 35

⁶¹ Indian Stamp Act, 1899, S. 36

⁶² Indian Stamp Act, 1899, S.42

the instrument into evidence. The Stamp Act's provisions expressly permit an instrument to be entered into evidence and used once the necessary duty has been paid and it has been properly endorsed, the Court rejected this argument.

In making this determination, the Court made a noteworthy observation regarding the purpose of the Stamp Act and how it should be construed by the judiciary.

*"The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments: It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the Act are conceived in the interest of the revenue once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument. Viewed in that light the scheme is clear."*⁶³

General Understanding

The Indian Stamp Act is a legislative framework enacted keeping in mind revenue generation. Its interpretation must be undertaken with careful consideration of its intended purpose. Section 35 of the Act⁶⁴ establishes that an instrument not adequately stamped is not admissible in evidence for any purpose and should not be acted upon, registered, or authenticated. The proviso to Section 35(a)⁶⁵ specifies that this restriction is lifted once the payment of the required duty and penalty is done, if applicable. The responsible party or parties may discharge the duty to the authorized person designated by law or with the consent of the parties. Section 35 holds significance as it reinforces the payment of stamp duty as a prerequisite before enforcing rights as well as obligations arising from an agreement.

The Act grants the Collector the authority to impound an instrument under Section 33⁶⁶. If any other person or authority also impounds an instrument, it must be forwarded to the Collector as per Section 38(2).⁶⁷ Upon receiving the instrument, the Collector, under Section 40⁶⁸, may:

- a. Endorse that the instrument is duly stamped if they hold such an opinion.⁶⁹
- b. Endorse that the instrument is not chargeable with duty if they hold such an opinion.⁷⁰

⁶³ *Hindustan Steel Ltd. v. Dilip Construction Co.*, (1969) 1 SCC 597

⁶⁴ Indian Stamp Act, 1899, s 35

⁶⁵ Indian Stamp Act, 1899, s 35(a)

⁶⁶ Indian Stamp Act, 1899, S. 33

⁶⁷ Indian Stamp Act, 1899, 38(2)

⁶⁸ Indian Stamp Act, 1899, S. 40

⁶⁹ Stamp Act, 1899, S. 40(1)(a)

⁷⁰ Stamp Act, 1899, S. 40(1)(a)

- c. Demand the payment of the proper duty or the amount needed to fulfill the proper duty if they believe the instrument is chargeable with duty and is not duly stamped.⁷¹

Additionally, the Collector may impose a penalty as outlined in Section 40. If the instrument has been sent to the Collector under Section 38⁷², it shall be returned to the impounding officer after the required procedures have been carried out.⁷³

Section 42 of the Stamp Act⁷⁴ outlines that an instrument becomes admissible as evidence as and when the duty and penalty, if any, are fully paid. It mandates either the person admitting the instrument or the Collector, as applicable, to certify through endorsement that the proper duty has been paid. The Stamp Act's procedural framework, which permits instruments to be seized by both authorized public officers and anyone with the parties' consent permitted to accept evidence, makes tax collection easier. After a document is impounded, the Act specifies what must be done to make sure stamp duty is paid. The Stamp Act permits the confirmation of such payment by an endorsement by the authorized authority after the payment of the necessary sum and penalty (if applicable). An instrument that has been endorsed can be used as evidence, registered, acted upon, or validated much as one that has been correctly stamped.

The permissibility of introducing an instrument as evidence differs from its legal validity or enforceability. Section 2(g) of the Contract Act⁷⁵ states that an agreement that is not legally enforceable is deemed void. In contrast, the admissibility as evidence of a specific document or oral testimony concerns whether it can be presented as evidence. P Ramanatha Aiyar's *The Law Lexicon* provides the following definition of 'admissible':

*"Admissible Proper to be received, capable and worthy of being admitted. As applied to evidence, the term means that it is of such a character that the court or judge is bound to receive it, that is, allow it to be introduced in evidence"*⁷⁶

Delineating the Abyss: Voidness v. Admissibility in Legal Realm

Numerous statutes, including the Indian Evidence Act of 1872⁷⁷, contain provisions governing the admissibility of documents. It is essential to see that the voidness of an agreement, as determined by its nature under Section 27 of the Contract Act⁷⁸, does not impact its admissibility as evidence. Conversely, an agreement may be

⁷¹ Stamp Act, 1899, S. 40(1)(b)

⁷² Stamp Act, 1899, S. 38

⁷³ Stamp Act, 1899, S. 40(3)

⁷⁴ Stamp Act, 1899, S. 42

⁷⁵ Indian Contract Act, 1872, S. 2(g)

⁷⁶ P Ramanatha Aiyar, *THE LAW LEXICON*, (Second edition, 1997)

⁷⁷ Indian Evidence Act, 1872

⁷⁸ Indian Contract Act, 1872, S. 27

valid but still rendered inadmissible as evidence. For instance, if parties A and B enter into an agreement restraining B from engaging in a specific trade, the agreement is not valid/ void under Section 27 of the Contract Act.⁷⁹ However, this voidness does not prevent its admissibility in evidence if A seeks to enforce it against B. Although the court will not enforce the void agreement, it remains admissible in evidence.

The distinction between voidness and admissibility becomes evident when considering Section 35 of the Stamp Act⁸⁰. This section explicitly states, "No instrument chargeable with duty shall be admitted in evidence..."⁸¹ The term "admitted in evidence" pertains to the admissibility of the instrument. Similarly, Sub-section (2) of Section 42⁸² specifies that one instrument, upon payment of stamp duty and endorsement, becomes "admissible in evidence." It is crucial to recognize that the failure to pay or the not up to the mark payment of stamp duty renders an instrument inadmissible but not void. Non-stamping or improper stamping does not invalidate the instrument; instead, it is considered a curable defect. The Stamp Act provides a detailed procedure for rectifying this defect, and notably, no mechanism is in place for curing a void agreement.

The established legal stance in India regarding the Stamp Act has been consistent over time. An illustrative case is *Gulzari Lal Marwari v. Ram Gopal*⁸³, where a party argued that one agreement was invalid due to improper stamping. It's noteworthy that the relevant portion of Section 35⁸⁴, which prohibits the admissibility of unstamped instruments, was unchanged at that time and remains so today. The Calcutta High Court rendered a decision in this case, and the ruling was as follows:

*"...The effect of the section is to make such an unstamped document inadmissible as evidence, and unable to be acted upon by persons having authority to receive evidence or by any public officer. It does not affect the validity of the document. No section of the Indian Stamp Act has this effect..."*⁸⁵

The consistent legal position has been acknowledged by various High Courts, as seen in cases such as *Boottam Pitchiah v. Boyapati Koteswara Rao*⁸⁶ in the Andhra Pradesh High Court. Additionally, in *Thiruvengadam Pillai v. Navaneethammal*⁸⁷, the Court addressed a situation where doubts were brought forth about the authenticity of an agreement for the sale of immovable property due to it being written on two

⁷⁹ Indian Contract Act, 1872, S. 27

⁸⁰ Stamp Act, 1899, S. 35

⁸¹ Stamp Act, 1899, S. 35

⁸² Stamp Act, 1899, S. 42(2)

⁸³ *Gulzari Lal Marwari v. Ram Gopal*, 1936 SCC OnLine Cal 275

⁸⁴ Stamp Act, 1899, S. 35

⁸⁵ *Gulzari Lal Marwari v. Ram Gopal*, 1936 SCC OnLine Cal 275

⁸⁶ *Boottam Pitchiah v. Boyapati Koteswara Rao*, 1964 SCC OnLine AP 5

⁸⁷ *Thiruvengadam Pillai v. Navaneethammal*, (2008) 4 SCC 530

stamp papers purchased on different dates. The Court emphasized that such a circumstance alone would not invalidate the agreement.

Upon a simple reading of Section 11(6A)⁸⁸, it becomes apparent that it specifically pertains to arbitration agreement. This section dictates that courts should limit themselves to examining the existence of an arbitration agreement. The usage of the term "confine" signifies the legislative intent to restrict the jurisdiction of courts during the arbitrator appointment stage.

In *Vidya Drolia*, the SC held that the term "agreement" is not explicitly defined in the Arbitration Act⁸⁹, although it is defined in Section 10 of the Contract Act, 1872⁹⁰. It defines agreements as contracts made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and not expressly declared to be void.⁹¹ Additionally, Section 10 of the Contract Act⁹² specifies that these requirements do not affect any law in force in India by which a contract is required to be made in writing, in the presence of witnesses, or any law relating to the registration of documents. Therefore, an arbitration agreement must meet the stipulations of Section 10 of the Contract Act⁹³, in addition to satisfying other requirements outlined in Section 7 of the Arbitration Act.⁹⁴

While it is true that an arbitration agreement must adhere to the Contract Act's criteria, the arbitral tribunal, as specified in Section 16 of the Arbitration Act, is the body tasked with determining whether these requirements have been met.⁹⁵

V

The Labyrinth of Resolution: Unravelling the Complexities of the Arbitration and Conciliation Act

Arbitration serves as an alternative dispute resolution method wherein involved parties mutually agree to submit their disputes to an impartial third party, referred to as an arbitrator. The primary objective of arbitration is to offer a prompt, efficient, and binding resolution for disputes arising from their substantive obligations. The

⁸⁸ Arbitration and Conciliation Act, 1996, S. 11(6A),

⁸⁹ Arbitration and Conciliation Act, 1996

⁹⁰ Indian Contract Act, 1872, S.10

⁹¹ Indian Contract Act, 1872, S.10

⁹² Indian Contract Act, 1872, S.10

⁹³ Indian Contract Act, 1872, S.10

⁹⁴ *Vidya Drolia v. Durga Trading Corporation*, (2021) 2 SCC 1

⁹⁵ Arbitration and Conciliation Act, 1996, S. 16

essence of arbitration law is succinctly summarized in Redfern and Hunter's statement:

"It is meant to be expeditious where the legal process is slow, cost-effective where the legal process is expensive, straightforward where the legal process is technical, and a reconciler rather than an instigator of conflict."⁹⁶

In order to harmonize and modify the legislation pertaining to domestic arbitration, international commercial arbitration, and the enforcement of foreign arbitral rulings, the Arbitration Act⁹⁷ was passed.

It also defines the law pertaining to conciliation and related matters. In this process, the Arbitration Act replaced the 1940 Act, the Arbitration (Protocol and Convention) Act of 1937⁹⁸, and the Foreign Awards (Recognition and Enforcement) Act of 1961⁹⁹. It harmonized both domestic and international commercial arbitration with the Model Law, the New York Convention, and the Geneva Convention.

The Arbitration Act is structured into four parts:

- (i) Part I addresses domestic arbitration and international arbitration conducted within India;
- (ii) The enforcement of international arbitral rulings under the Geneva and New York Conventions is the main topic of Part II.
- (iii) Part III deals with conciliation; and
- (iv) Part IV contains supplementary provisions.

In this specific discussion, our focus is primarily on Part I of the Arbitration Act. The subsequent segment delves into the fundamental principles that underpin arbitration law, including those embodied in the Arbitration Act. These principles serve as crucial interpretative guides for understanding the nuances of the Arbitration Act.

Arbitral Autonomy

A cornerstone of the ever-evolving field of arbitration law is the concept of arbitral autonomy. Arbitral autonomy refers to the contractual freedom that parties have when entering into an arbitration agreement to grant the arbitral tribunal the power to decide any issues that may arise between them. This autonomy derives from the parties' desire to avoid the "risk of domestic judicial parochialism," or the potential

⁹⁶ Redfern and Hunter on International Arbitration, 7th edn, Oxford University Press, 2023, 3.

⁹⁷ Arbitration and Conciliation Act, 1996

⁹⁸ Arbitration (Protocol and Convention) Act of 1937

⁹⁹ Foreign Awards (Recognition and Enforcement) Act of 1961

biases of domestic legal systems, in order to promote an unbiased and knowledgeable resolution.¹⁰⁰

The principle of judicial non-interference underscores the independence of arbitral tribunals. These tribunals operate autonomously, having been constituted to uphold the mutual intent of parties to resolve their disputes through a neutral and expert body of their choosing. Notably, the competence of an arbitral tribunal to decide on its own jurisdiction, including addressing objections regarding the existence or validity of the arbitration agreement, underscores the tribunal's autonomy from national courts.

In the context of legal provisions, Section 9 of the Code of Civil Procedure 1908¹⁰¹ establishes the jurisdiction of courts to hear civil suits, with exceptions for suits expressly or impliedly barred.¹⁰² Meanwhile, Section 28 of the Contract Act addresses agreements restricting a party from enforcing contractual rights through legal proceedings, deeming such restrictions void.¹⁰³ However, this provision explicitly recognizes the validity of contracts wherein parties agree to arbitrate disputes, signifying a voluntary surrender of the right to litigate in national courts in favor of arbitration.

Parties that choose arbitration forfeit their ability to litigate in national courts and also give up their right to follow national procedural laws. Any nation's procedural laws have no bearing on how the arbitral tribunal does business. The Arbitration Act's Section 19 makes it clear that the tribunal is not subject to the Indian Evidence Act of 1872 or the Code of Civil Procedure 1908.¹⁰⁴ Moreover, in the event that the parties can not agree on a method, it gives the arbitral tribunal the authority to conduct proceedings in any way it sees fit. As will be covered in the parts that follow, arbitral tribunals are not completely free from the laws of the nation in which they are located, even if they have autonomy in procedural and substantive matters.

1. Minimal Supervisory Role of Courts in Arbitration

The principle of judicial non-interference holds significant importance in both domestic and international commercial arbitration, respecting the autonomy vested in parties to shape arbitral procedures according to their preferences. This principle is not only a fundamental aspect of arbitration law but is also enshrined in

¹⁰⁰ Redfern and Hunter on International Arbitration, 7th edn, Oxford University Press, 2023, 388

¹⁰¹ Code of Civil Procedure 1908, S. 9

¹⁰² Code of Civil Procedure, 1908, S.9

¹⁰³ Indian Contract Act, 1872, S.28

¹⁰⁴ Indian Arbitration Act, S.19, 1996

international instruments such as the New York Convention¹⁰⁵ and the Model Law¹⁰⁶.

The Model Law's Article 5¹⁰⁷ outlines the parameters for court participation, stressing that unless otherwise specified, no court may get involved in topics covered by the Model Law. This provision aims to provide certainty to parties and arbitrators by delineating instances where court supervision or assistance may be expected. The phrase "in matters governed by this law" confines the scope of the provision to issues regulated by the Model Law, ensuring that judicial authorities do not arrogate powers exclusively bestowed upon the arbitral tribunal.¹⁰⁸

Section 5 of the Arbitration Act¹⁰⁹ mirrors Article 5 of the Model Law¹¹⁰ but includes a non-obstante clause outlining the extent of judicial intervention. It explicitly states that, notwithstanding any other law in force, judicial authorities shall not intervene in matters governed by Part I of the Arbitration Act unless expressly provided for.

The legislative intent behind Section 5¹¹¹ is to minimize the courts' supervisory role in the arbitral process, aligning with the principles of party autonomy and dispute resolution through an arbitral tribunal.¹¹² While Section 5 does not entirely exclude the role of courts in arbitral proceedings, it restricts such intervention to circumstances explicitly provided for in Part I of the Arbitration Act. The aim is to provide necessary aid and assistance to the arbitration process when required by law.¹¹³

The non-obstante clause in Section 5¹¹⁴ signifies Parliament's intention to limit judicial intervention during arbitral proceedings. While its impact is broad, it is confined to the legislative policy, as interpreted by the judiciary. The phrase "in matters governed by this Part" in Section 5¹¹⁵ circumscribes judicial intervention to issues expressly covered by Part I of the Arbitration Act¹¹⁶, including the referral to arbitration (Section 8)¹¹⁷, interim measures¹¹⁸ (Section 9), appointment of

¹⁰⁵ New York Convention, 1958

¹⁰⁶ UNCITRAL

¹⁰⁷ Article 5, UNCITRAL

¹⁰⁸ Report of the Working Group on International Contract Practices on the work of its seventh session, A/CN.9/246 (New York, 23 January-3 February 1984) 45.

¹⁰⁹ Arbitration and Conciliation Act, 1996, S. 5

¹¹⁰ Article 5, UNCITRAL

¹¹¹ Arbitration and Conciliation Act, 1996, S. 5

¹¹² *Rio Algam v. Sammi Steel Co.*, [1991] O.J. No. 268

¹¹³ Richard Garnett, 'Article 5 of the Model Law: Protector of the Arbitral Process?' (2021) 38(2), *Journal of International Arbitration* 127-146.

¹¹⁴ Arbitration and Conciliation Act, 1996, S. 5

¹¹⁵ Arbitration and Conciliation Act, 1996, S. 5

¹¹⁶ Arbitration and Conciliation Act, 1996, Part 1

¹¹⁷ Arbitration and Conciliation Act, 1996, S. 8

¹¹⁸ Arbitration and Conciliation Act, 1996, S. 9

arbitrators¹¹⁹ (Section 11), assistance in taking evidence¹²⁰ (Section 27), and setting aside arbitral awards¹²¹ (Section 34).

Section 5 operates in two facets – positive and negative. The positive facet grants judicial authorities jurisdiction over arbitral proceedings in matters expressly allowed under Part I, while the negative facet prohibits judicial intervention in situations where the arbitral tribunal has exclusive jurisdiction. This dual approach, guided by the non-obstante clause, underscores the legislative intention to uphold the UNCITRAL Model Law and reduce excessive judicial interference not contemplated under the Arbitration Act.

The Arbitration Act aims to minimize the courts' role of supervising by confining their involvement to circumstances stipulated by the legislature. While Sections 8¹²² and 11 empower courts to refer parties to arbitration or appoint arbitrators¹²³, Section 5¹²⁴ limits the courts from addressing substantive objections regarding the existence and validity of arbitration agreements at the referral or appointment stage. Referral courts can only make a prima facie determination during the Section 8 or Section 11 stage.¹²⁵

2. Arbitration is a Self Contained Code

In the case of *Girnar Traders v. State of Maharashtra*¹²⁶, a Constitution Bench of the SC articulated the idea of a self-contained code, defining it as comprehensive legislation designed to address a specific purpose. Such legislation encompasses a complete framework, including machinery, to effectively achieve its intended objectives, minimizing or eliminating reliance on other statutes.¹²⁷

With respect to the Arbitration Act, it serves as a self-contained code, covering various aspects such as the appointment of arbitrators, initiation of arbitration proceedings, issuance of awards, challenges to arbitral awards, and the execution of such awards. As a self-contained and exhaustive legal framework for arbitration, the Arbitration Act explicitly outlines procedures to be followed. In such cases, the applicability of general legal procedures is implicitly excluded. Compliance with the

¹¹⁹ Arbitration and Conciliation Act, 1996, S. 11

¹²⁰ Arbitration and Conciliation Act, 1996, S. 27

¹²¹ Arbitration and Conciliation Act, 1996, S. 34

¹²² Arbitration and Conciliation Act, 1996, S. 8

¹²³ Arbitration and Conciliation Act, 1996, S. 11

¹²⁴ Arbitration and Conciliation Act, 1996, S. 5

¹²⁵ *Food Corporation of India v. Indian Council of Arbitration*, (2003) 6 SCC 564

¹²⁶ *Girnar Traders v. State of Maharashtra*, (2011) 3 SCC 1

¹²⁷ *Girnar Traders v. State of Maharashtra*, (2011) 3 SCC 1

procedures specified in the Arbitration Act is imperative, and actions permissible under the law must adhere strictly to the prescribed methods.¹²⁸

The fundamental principle is that matters falling under the purview of the Arbitration Act, including the arbitration agreement, arbitrator appointments, and the jurisdiction of the arbitration tribunal, must be evaluated according to the procedures outlined in the law. Conversely, actions not expressly sanctioned by the Arbitration Act are impermissible. Consequently, provisions of other statutes are not allowed to interfere in the functioning of the Arbitration Act¹²⁹ unless expressly stated otherwise. The Arbitration Act¹³⁰ thus stands as an independent and self-sufficient legal framework for arbitration matters, maintaining its integrity and autonomy in the absence of conflicting statutory provisions.¹³¹

3. Doctrine of Separability

Regarding an arbitration agreement and its separation from the underlying contract, the legal notion of separability, also known as severability, recognizes the unique characteristics of the arbitration agreement. This idea—that an arbitration agreement functions independently of the principal contract—is seen as a legal fiction. Redfern and Hunter emphasize an arbitration agreement's distinct procedural function in resolving disputes arising from the underlying contract, as well as its juridical independence from the substantive contract.¹³² This distinction has important implications, one of which is that an arbitration agreement is enforceable regardless of the termination or invalidity of the underlying contract.

Four factors—the parties' intention to arbitrate any disputes, including those pertaining to the validity of the contract—are outlined by Schwebel, Sobota, and Manton as supporting the separability presumption. These factors include preventing a party from evading its obligations by contesting the validity of the contract, treating the arbitration agreement and the contract as separate entities to prevent defects in the contract from affecting the arbitration agreement, and avoiding court rulings on disputes that arbitral tribunals are better suited to handle.¹³³

The rationale behind separability lies in the contractual freedom of parties to solve disputes through arbitration, insulating the arbitration agreement from challenges

¹²⁸ *Pasl Wind Solutions (P) Ltd v. GE Power Conversion (India) (P) Ltd.*, (2021) 7 SCC 1; *Kandla Export Corporation v. OCI Corporation*, (2018) 14 SCC 715

¹²⁹ Arbitration and Conciliation Act, 1996

¹³⁰ Arbitration and Conciliation Act, 1996

¹³¹ *Subal Paul v. Malina Paul*, (2003) 10 SCC 361

¹³² Redfern and Hunter on International Arbitration, 7th edn, Oxford University Press, 2023, 81

¹³³ Stephen Schwebel, Luke Sobota, and Ryan Manton, *International Arbitration: Three Salient Problems*, Cambridge University Press, 2nd edn, 2020, 4.

to the underlying contract. This presumption ensures the arbitration agreement's survival even in cases of contract termination, repudiation, or frustration, aligning with the parties' true intentions and maintaining the sanctity of the arbitration process.¹³⁴

In Switzerland, the separability presumption was recognized early on¹³⁵, although Gary Born notes that the arbitration agreement can never be entirely independent in certain situations where defects in the underlying contract may also affect the arbitration agreement.¹³⁶

In the UK, the separability presumption gradually evolved, culminating in the "House of Lords" decision in *Heyman v. Darwins*¹³⁷, confirming that an arbitration agreement would remain in effect even after the main contract expires. Subsequent decisions, such as *Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd.*¹³⁸, reiterated this presumption, considering the arbitration agreement as a self-contained collateral to the containing contract.

The United States, under the Federal Arbitration Act, also presumes the separability of an arbitration agreement from the underlying contract.¹³⁹ *Prima Paint Corporation v. Flood & Conklin Mfg. Co.*¹⁴⁰ established this presumption, emphasizing the desire of parties to insulate the arbitration agreement from challenges directed at the contract underlying. This was reaffirmed by the US Supreme Court in *Rent-A-Center, West, Inc. v. Jackson*¹⁴¹ and "*Buckeye Check Cashing Inc. v. Cardegna*"¹⁴². It was decided in *Rent-A-Center* (above) that the remainder of the contract's content is irrelevant when applying the severability criterion.

In Singapore, the doctrine of separability is codified in Section 21 of the Singaporean Arbitration Act¹⁴³, treating an arbitral clause as an agreement independent of other contract terms.¹⁴⁴ The separability presumption is seen as a means to safeguard the arbitration agreement from invalidity challenges related to the substantive contract. In *BNA v. BNB*, the Singapore expounded on the separability presumption. As per the observations made by the High Court, the parties want for their arbitration agreement to stay in effect even in case a clause within the substantive contract it is

¹³⁴ *Mulheim Pipecoatings GmbH v. Welspun Fintrade Ltd.*, 2013 SCC OnLine Bom 1048

¹³⁵ *Tobler v. Justizkommission des Kantons Schwyz*, DFT 59 I 177 (1933)

¹³⁶ Gary Born (n 62) 377

¹³⁷ *Heyman v. Darwins* [1942] AC 356

¹³⁸ *Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd.* [1993] Q.B. 701

¹³⁹ Gary Born (n 62) 382

¹⁴⁰ *Prima Paint Corporation v. Flood & Conklin Mfg. Co.* 388 US 395 (1967)

¹⁴¹ *Rent-A-Center, West, Inc. v. Jackson* 2 561 U.S. 63 (2010)

¹⁴² *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 440 (2006)

¹⁴³ Singaporean Arbitration Act, S. 21

¹⁴⁴ Arbitration Act 2001 (No. 37 of 2001)

integrated into could potentially invalidate it due to certain factual or legal circumstances.¹⁴⁵ Accordingly, the Singapore High Court determined that the separability presumption serves to shield an arbitration agreement from being declared void in the event that the substantive contract is contested.

International conventions like the New York Convention¹⁴⁶ and the Model Law¹⁴⁷ support the separability presumption. Article II of the New York Convention treats an arbitration agreement as different from the underlying contract, acknowledging the possibility of different laws governing them. Article 16 of the Model Law¹⁴⁸ explicitly addresses the competence of an arbitration tribunal and upholds the separability presumption.¹⁴⁹

According to the UNCITRAL Working Group, the competence idea is supplemented by the separability presumption in Article 16(1). Furthermore, the legal presumption of separability ensures that the invalidity of the underlying contract will not affect the arbitral tribunal's jurisdiction to rule on the validity of the underlying contract or any other matter brought before it by the parties, "unless it finds that the defect which causes the nullity of the contract also affects the arbitration clause itself."¹⁵⁰ The last language of Article 16(1) (extracted above) states the basic rule for the contractual legitimacy of arbitration clauses.¹⁵¹

The Arbitration Act, namely Section 16¹⁵², adopts the separability assumption under Indian law. This clause ensures that an arbitration agreement is lawful even in the event that the underlying contract is declared void by treating it as separate and apart from the other provisions of the contract. In Indian jurisprudence, the separability assumption has developed as a result of the courts' recognition of the unique and independent character of an arbitration agreement, particularly following the passage of the Arbitration Act in 1996.

To sum up, the separability presumption is a fundamental premise of arbitration law that is widely acknowledged and incorporated into a number of legal systems. It maintains the arbitration agreement's independence and guarantees its survival even in the event that the underlying contract is contested.

¹⁴⁵ *BNA v. BNB*, [2019] SGHC 142

¹⁴⁶ New York Convention, 1958

¹⁴⁷ UNCITRAL

¹⁴⁸ Article 16, UNCITRAL

¹⁴⁹ Gary Born (n 62) 378

¹⁵⁰ Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, A/CN.9/264 (25 March 1985) 38.

¹⁵¹ Gary Born (n 62) 403

¹⁵² Arbitration and Conciliation Act, 1996, S. 16

4. *Competenz-Competenz*

The doctrine of competence-competence, originating in Germany, traditionally conferred arbitrators with the authority to conclusively decide on their own jurisdiction, immune from subsequent judicial review.¹⁵³ In numerous jurisdictions, however, arbitral tribunals can rule on jurisdiction subject to substantive judicial scrutiny.¹⁵⁴ This principle aligns with established tenets of public international law, affirming that a legal authority endowed with adjudicatory powers possesses the right to determine its own jurisdiction itself. In international arbitration law, the competence-competence doctrine empowers an arbitral tribunal to decide its jurisdiction, supporting the separability presumption.¹⁵⁵

The 1940 Act gave the courts the sole jurisdiction to decide whether an arbitration agreement exists or is lawful in light of Indian law and the previous arbitration regime. However, the current Arbitration Act, specifically Section 16¹⁵⁶, reflects a paradigm shift by recognizing the competence-competence doctrine. Section 16 empowers an arbitral tribunal to adjudicate on its own jurisdiction itself, including objections regarding the existence or validity of the arbitration agreement. Notably, parties retain the right, under Section 16(2)¹⁵⁷ and 16(3),¹⁵⁸ to challenge the tribunal's jurisdiction on grounds such as non-existence or invalidity of the arbitration agreement. The doctrine emphasizes procedural competence-competence, allowing the tribunal to address jurisdictional challenges comprehensively. While the tribunal's decision is subject to judicial review, courts can only intervene after the tribunal renders an award.

Applications to set aside arbitral awards are governed by Section 34 of the Arbitration Act¹⁵⁹. A number of particular reasons exist for throwing aside awards, such as incapacity, the arbitration agreement's invalidity, improper notice, disputes outside the purview of arbitration, procedural violations, and conflicts with public policy. Crucially, the Arbitration Act strengthens the competence-competence concept by clearly defining the boundaries between the tribunal's authority and the reasons for annulling verdicts.¹⁶⁰

¹⁵³ Fouchard, Gaillard, Goldman on International Commercial Arbitration (edited by Emmanuel Gaillard and John Savage, 1999) 396

¹⁵⁴ Gary Born (n 62) 1143

¹⁵⁵ Interpretation of Greco-Turkish Agreement of December 1st, 1926, Advisory Opinion, Series B – No. 16 (August 28, 1928).

¹⁵⁶ Arbitration and Conciliation Act, 1996, S. 16

¹⁵⁷ Arbitration and Conciliation Act, 1996, S. 16(2)

¹⁵⁸ Arbitration and Conciliation Act, 1996, S. 16(3)

¹⁵⁹ Arbitration and Conciliation Act, 1996, S. 34

¹⁶⁰ *Dhanrajamal Gobindram v. Shamji Kalidas & Co.*, 1961 SCC OnLine SC 28; *Khardah Co. Ltd. v. Raymon & Co. (India) Private Ltd.*, 1962 SCC OnLine SC 28.

Noteworthy cases, such as *Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products*¹⁶¹ and *Uttarakhand Purv Sainik Kalyan Nigam Ltd v. Northern Coal Field*¹⁶², underscore the importance of competence-competence in minimizing judicial intervention and allowing the arbitral process to proceed seamlessly.

The problem of stamping, as discussed in Section 35 of the Stamp Act¹⁶³, is considered a preliminary issue affecting the arbitral tribunal's jurisdiction. Section 35 states that an unstamped instrument cannot be used unless it has been properly stamped. With the parties' cooperation, the tribunal was established, and it is considered authorized to deal with preliminary matters, such as whether stamping is sufficient, in accordance with the broad jurisdiction that *Uttarakhand Purv Sainik Kalyan Nigam Ltd.* established.¹⁶⁴

In conclusion, the competence-competence theory, as it is applied to Indian arbitration law, marks a departure from the prior practice of courts having exclusive authority to decide whether or not arbitration agreements are legitimate. The theory gives arbitral tribunals the right to decide cases within their own purview, with little possibility of judicial review. It also gives them the power to decide preparatory matters, such whether or not stamping is sufficient, guaranteeing a thorough and efficient arbitration procedure.

VI

Judicial Ballet: Balancing the Dynamics between Referral Courts and Arbitral Tribunals

Referral courts do not bind the arbitral tribunal or the court in charge of upholding the arbitral judgment to such an initial assessment when they form a prima facie opinion. A reference court does not prevent the arbitral tribunal from conducting a thorough investigation, even if it renders a prima facie determination about the existence of an arbitration agreement. The referral court can find and remove arbitration agreements that appear to be void at first glance with the help of this legal strategy. Additionally, it supports arbitral tribunals' jurisdiction to rule on matters pertaining to the existence and legality of arbitration agreements. Usually, the burden of proof rests with the party stating the existence of an arbitration agreement. In countries that follow the competence-competence theory, such as India, the referral court just has to see preliminary proof that an arbitration

¹⁶¹ *Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products* (2018) 2 SCC 534

¹⁶² *Uttarakhand Purv Sainik Kalyan Nigam Ltd v. Northern Coal Field* (2020) 2 SCC 455

¹⁶³ Stamp Act, 1899, S. 35

¹⁶⁴ *Sukh Lal Sheikh v. Tara Chand Ta*, 1905 SCC OnLine Cal 164

agreement exists. The parties should not be allowed to conduct a mini-trial in which they present evidence about the existence or legitimacy of an arbitration agreement in the referral court. The statute's clear wording makes this legal position clear.

Section 11(6A) uses the phrase "examination of the existence of an arbitration agreement."¹⁶⁵ The word "examination" implies that the legislature wants the reference court to closely examine the parties' exchanges in order to determine whether or not an arbitration agreement is in place. Moreover, "examination" does not suggest a thorough or contentious investigation. In contrast, Section 16 gives the arbitral tribunal the authority to "rule" on everything within its competence, including whether or not an arbitration agreement is genuine.¹⁶⁶ A "ruling" refers to the resolution of disputes following the parties' presentation of evidence. Thus, it is evident that the arbitral tribunal has the duty to rule on issues pertaining to its jurisdiction, which includes the existence and validity of arbitration agreements, while the referral court is responsible for investigating the existence of arbitration agreements. The Supreme Court supported a similar viewpoint in *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.*¹⁶⁷

In the *Shin-Etsu* case, the Court addressed the nature of adjudication under the unamended Section 45 of the Arbitration Act¹⁶⁸ when objections regarding the arbitration agreement being "null and void, inoperative, or incapable of being performed" are raised before a judicial authority. According to the majority opinion, as expressed by Justice B N Srikrishna, Section 45¹⁶⁹ does not necessitate the judicial authority to provide a final determination.

VII

Sculpting Harmony: The Art of Construing Statutes in Unity

In the case of *Sultana Begum v. Prem Chand Jain*¹⁷⁰, this Court conducted an analysis of pertinent decisions and established the following principles regarding the harmonious construction of statutes:

- a. Courts have a duty to prevent a direct conflict between two sections of the Act and should interpret provisions that seem to be in conflict in a way that harmonizes them.

¹⁶⁵ Arbitration and Conciliation Act, 1996, S. 11(6A)

¹⁶⁶ P Ramanatha Aiyar, *The Law Lexicon*, Second edition, 1997, 666

¹⁶⁷ *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.* (2005) 7 SCC 234

¹⁶⁸ Arbitration and Conciliation Act, 1996, S. 45

¹⁶⁹ Arbitration and Conciliation Act, 1996, S. 45

¹⁷⁰ *Sultana Begum v. Prem Chand Jain*, (2005) 7 SCC 234

- b. Provisions of one section cannot be employed to undermine other provisions unless the court, despite efforts, finds reconciliation impossible.
- c. When two conflicting provisions in an Act cannot be reconciled, they should be interpreted so that, if possible, effect is given to both, embodying the essence of the rule of harmonious construction.
- d. Courts must consider that an interpretation rendering one provision a "dead letter" or "useless lumber" is not harmonious construction.
- e. Harmonization should not lead to the destruction or rendering otiose of any statutory provision.

The maintainability of a counterclaim in arbitration proceedings started under Section 18(3) of the Micro, Small and Medium Enterprises Development Act 2006 was at question in the case of *Silpi Industries v. Kerala State Road Transport Corporation*¹⁷¹. The respondent is entitled to file a counterclaim or assert a set-off under Section 23(2A) of the Arbitration Act¹⁷², the Court said, and the arbitral tribunal will have to decide on these claims. The MSME Act grants the right to file a counterclaim before statutory authorities since Section 18(3) of the Act¹⁷³ expressly states that proceedings under it must be handled as though they were in accordance with an arbitration agreement under Section 7(1) of the Arbitration Act.¹⁷⁴

This Court's task in the present case is to harmonize the Stamp Act's and the Arbitration Act's provisions. The purpose of the Arbitration Act is to minimize the court's supervisory role in arbitration and to guarantee an efficient arbitration process. On the other hand, the Stamp Act is intended to bring in money for the state. The cardinal principle of statute interpretation is that in order to fully implement both statutes, provisions from both must, if at all feasible, be read harmoniously.¹⁷⁵ The Court must use caution in interpreting the legislation so as to avoid negating their intent or making them ineffectual.¹⁷⁶

The Current Canvas: Implication on the Present Scenario

The Arbitration Act¹⁷⁷ is a piece of legislation that was passed, among other things, to unify Indian arbitration law. For a number of reasons, it will supersede both the Stamp Act and the Contract Act with regard to arbitration agreements.

¹⁷¹ *Silpi Industries v. Kerala State Road Transport Corporation* 2021 SCC OnLine SC 439

¹⁷² Arbitration and Conciliation Act, 1996, S. 23(2A)

¹⁷³ MSME Act, S. 18(3)

¹⁷⁴ Arbitration and Conciliation Act, 1996, S. 7(1)

¹⁷⁵ *Jagdish Singh v. Lt. Governor, Delhi*, (1997) 4 SCC 435

¹⁷⁶ *State of Tamil Nadu v. M K Kandaswami*, (1975) 4 SCC 745

¹⁷⁷ Arbitration and Conciliation Act, 1996

1. *Generalis Specialibus Non Derogant*

It is an established legal principle that a general law should yield to a special law, based on the doctrine of "*generalia specialibus non derogant*". This interpretation arises from the decision in *LIC v. D.J. Bahadur*¹⁷⁸, where the Court emphasized that the determination of whether a statute is general or special should focus on the principal subject-matter along with the particular perspective. This principle was reaffirmed in *Sundaram Finance Ltd. v. T. Thankam*¹⁷⁹.

The following legal position can be deduced from these precedents:

- a. The nature of the principal subject-matter and the specific perspective guide the assessment of whether a law is general or special.
- b. The Court must use caution in interpreting the legislation so as to avoid negating their intent or making them ineffectual.

To identify which of the three statutes under consideration is a special law, it is crucial to examine their subject-matter:

- a. The Stamp Act pertains to the payment of stamp-duty for various instruments, with Schedule I outlining the types of instruments covered.
- b. The Contract Act addresses the rules regarding contracts in general, including arbitration agreements among various types of contracts.
- c. The Arbitration Act includes the laws pertaining to conciliation, foreign arbitral awards enforcement, domestic arbitration, and international commercial arbitration.

Furthermore, in the context of this case, the "particular perspective" revolves around whether an unstamped arbitration agreement becomes unenforceable until stamp-duty is paid, thereby preventing the referral court from directing parties to arbitration. The crucial issue is not whether all agreements are rendered unenforceable under the Stamp Act but specifically whether arbitration agreements face unenforceability.

Since the Arbitration Act regulates arbitration law, including arbitration agreements, it is considered a unique law in this instance. The Stamp Act, on the other hand, defines "instruments."¹⁸⁰ jointly, and the definition of "agreements" in the Contract Act¹⁸¹ and 'contracts.'¹⁸² The purpose of the Arbitration Act is to guarantee that arbitration is an efficient substitute for court cases by offering a framework for its conduct. The broad scope of domestic, international, and

¹⁷⁸ *LIC v. D.J. Bahadur* (1981) 1 SCC 315

¹⁷⁹ *Sundaram Finance Ltd. v. T. Thankam* (2015) 14 SCC 444

¹⁸⁰ Stamp Act, 1899, S. 2(14)

¹⁸¹ Contract Act, 1872, S. 2(e)

¹⁸² Contract Act, 1872, S. 2(h)

commercial arbitration and conciliation is emphasized by the legislative objective as stated in the Statements of Objects and Reasons of the Arbitration Act.

Sec. 5 of the Arbitration Act 183

In the preceding sections, we have examined the extent of Section 5 of the Arbitration Act¹⁸⁴, which delimits the extent of judicial involvement in various matters governed by Part I of the Arbitration Act.¹⁸⁵ The non-obstante clause within this provision holds particular significance, signalling that the rule outlined in Section 5, and consequently the rules of the Arbitration Act, must take precedence over other existing law. Judicial intervention, including the act of impounding an agreement containing an arbitration clause, is therefore permissible only if expressly provided for by the Arbitration Act, which, in this instance, it is not. Consequently, in proceedings under Section 11¹⁸⁶ (or Section 8¹⁸⁷, as applicable), the operation of Sections 33¹⁸⁸ and 35 cannot be sanctioned¹⁸⁹, given the overriding nature of the non-obstante clause in Section 5.¹⁹⁰

2. Parliament's Legislative Consciousness on the Stamp Act during the Enactment of the Arbitration Act

When Parliament drafted the Arbitration Act, it was aware that the Stamp Act already existed. However, stamping is not expressly required by the Arbitration Act to be a requirement for an arbitration agreement to be enforceable. Notably, the Arbitration Act's Section 11(6-A)¹⁹¹ directs the court to focus only on determining whether the arbitration agreement is in place. This clause is in contradiction to Stamp Act Section 33(2), which also uses the word "examine." Section 33(2) obliges the entity receiving an instrument to assess whether it bears the appropriate stamp, considering its value and description as stipulated by the law at the time of execution. Despite Parliament's awareness of the provisions of Section 33(2), it did not impose a parallel obligation on the court operating under Section 11 to conduct the examination outlined in Section 33(2).

¹⁸³ Arbitration and Conciliation Act, 1996, S. 5

¹⁸⁴ Arbitration and Conciliation Act, 1996, S. 5

¹⁸⁵ *CDC Financial Services (Mauritius) Ltd. v. BPL Communications Ltd.*, (2003) 12 SCC 140; *Empire Jute Co. Ltd. v. Jute Corpn. of India Ltd.*, (2007) 14 SCC 680; *Associate Builders v. DDA*, (2015) 3 SCC 49; *Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd.*, (2022) 1 SCC 75

¹⁸⁶ Arbitration and Conciliation Act, 1996, S. 11

¹⁸⁷ Arbitration and Conciliation Act, 1996, S. 8

¹⁸⁸ Stamp Act, 1899, S. 33

¹⁸⁹ Stamp Act, 1899, S. 35

¹⁹⁰ Stamp Act, 1899, S. 5

¹⁹¹ Arbitration and Conciliation Act, 1996, S. 11(6A)

3. The Effect of *Competenz Kompetenz* Doctrine

In the case of *A. Ayyasamy v. A. Paramasivam*,^{192a} a two-judge Bench, including Justice DY Chandrachud, emphasized the need for arbitration to serve as a comprehensive forum for dispute resolution. The court stressed that judicial intervention should be minimized, and the enforcement of arbitration clauses and agreements should be upheld. According to Section 10 of the Contract Act, agreements are considered contracts if they fulfil certain criteria, including free consent, lawful consideration, lawful object, and not being expressly declared void. These requirements do not affect specific laws requiring written contracts or contracts in the presence of witnesses.¹⁹³

Section 7 of the Arbitration Act¹⁹⁴ outlines the conditions for the presence of an arbitration agreement. The arbitral tribunal, not the court, is responsible for assessing the validity of the contract and the arbitration agreement. Section 16 of the Arbitration Act¹⁹⁵ allows the preliminary enforcement of an agreement to arbitrate, even if it is only an agreement. The tribunal, appointed under Sections 8¹⁹⁶ or 11¹⁹⁷, has jurisdiction to determine all disputes between parties.

The doctrine of competence-competence dictates that courts can only examine the presence of an arbitration agreement based on a prima facie standard. Objections related to jurisdiction, such as unpaid or inadequate stamp duty, require a detailed consideration of evidence and law, making them unsuitable for prima facie determination at the Section 8¹⁹⁸ or Section 11¹⁹⁹ stage. Courts' jurisdiction is limited to interim measures under Section 9 or challenges to the award under Section 34.²⁰⁰

Stamp-duty issues come within the jurisdiction of the arbitration tribunal, which can impound the agreement under Section 33 of the Stamp Act and receive evidence under Section 35. The competence-competence doctrine ensures that arbitration proceedings can proceed efficiently, providing a faster alternative to traditional court actions.

¹⁹² *A. Ayyasamy v. A. Paramasivam*, (2016) 10 SCC 386

¹⁹³ Contract Act, 1872, S. 10

¹⁹⁴ Arbitration and Conciliation Act, 1996, S. 7

¹⁹⁵ Arbitration and Conciliation Act, 1996, S. 16

¹⁹⁶ Arbitration and Conciliation Act, 1996, S. 8

¹⁹⁷ Arbitration and Conciliation Act, 1996, S. 11

¹⁹⁸ Arbitration and Conciliation Act, 1996, S. 8

¹⁹⁹ Arbitration and Conciliation Act, 1996, S. 11

²⁰⁰ Stamp Act, 1899, S. 34

4. The Command of 'Shall': Deciphering its Impact in Sections 33 and 35 of the Stamp Act

Sections 33 and 35 of the Stamp Act employ the term "shall," typically indicating a mandatory requirement, yet it can be interpreted as directory. As established in *Sainik Motors v. State of Rajasthan*, when deciding whether to employ the word "shall" in an obligatory or directory manner, the court must take the legislative intent and larger context into account.²⁰¹

In *State of U.P. v. Babu Ram Upadhyaya*, specific principles for construing statutes using the mandatory term "shall" were outlined. The court should examine the nature and design of the statute, potential consequences of different constructions, the presence of penalties for non-compliance, and whether the legislation's objective would be furthered or hindered.²⁰²

5. Preserving the Essence: Fulfilling the Objectives of the Stamp Act

This ruling's interpretation of the Stamp Act does not excuse any breaking of the law. The Stamp Act's provisions, particularly those concerning admission and impounding, continue to be binding on the arbitral tribunal. This interpretation guarantees the enforcement of the Arbitration Act's provisions without compromising the intent of the Stamp Act.

The revenue's interests are not compromised, as the chargeable duty must be settled before the agreement becomes admissible for adjudicating the dispute between the parties. The focus is on determining the stage at which the agreement should be impounded, not whether impoundment is necessary. The courts are not relinquishing their responsibility; instead, they are giving effect to:

- a. The principle of minimal judicial intervention outlined in Section 5 of the Arbitration Act;²⁰³
- b. The prima facie standard applicable to Sections 8²⁰⁴ and 11 of the Arbitration Act²⁰⁵;
- c. The purpose of the Stamp Act, which aims to safeguard revenue interests and prevent litigants from exploiting technicalities to delay dispute resolution.

²⁰¹ *Sainik Motors v. State of Rajasthan*, 1961 SCC OnLine SC 15

²⁰² *State of U.P. v. Babu Ram Upadhyaya* 1960 SCC OnLine SC 5

²⁰³ Arbitration and Conciliation Act, 1996, S. 5

²⁰⁴ Arbitration and Conciliation Act, 1996, S. 8

²⁰⁵ Arbitration and Conciliation Act, 1996, S. 11

6. Aligning Purposes: Ensuring Coherence between the Arbitration Act²⁰⁶ and the Stamp Act

The judgement given by the Constitution Bench in *N N Global 2* primarily upholds the Stamp Act's objective, emphasizing revenue collection over the rules of the Arbitration Act. The goal of the Arbitration Act, as was previously said, is to provide non-commercial and commercial parties with an efficient alternative dispute settlement process. The interpretation given to the Stamp Act in *N N Global 2* poses a threat to this objective. Impounding an agreement containing an arbitration clause during the appointment of an arbitrator under Section 11²⁰⁷ (or Section 8, as applicable) of the Arbitration Act would inevitably delay the initiation of arbitration.

It is a well-recognized reality that courts are inundated with a multitude of cases, resulting in a sluggish pace of proceedings for each case. In contrast, arbitral tribunals handle a smaller caseload, allowing them to dedicate more extensive time to the adjudication of individual cases. If an agreement is impounded by the arbitral tribunal in a specific case, the procedures for stamp-duty payment, potential penalties, and other Stamp Act requirements are likely to progress more expeditiously compared to the court system.

Therefore, the interpretation of Sections 33 and 35 requires an assessment of their mandatory nature in the context of proceedings under Section 8 or Section 11. Factors to consider include the context, the statute's scope, nature, and design, potential consequences, the impact of other provisions, the repercussions of non-compliance, and whether the legislation's objectives will be advanced or compromised.

The mentioned decisions were made in regard to individual provisions within a single statute. However, in cases involving multiple statutes addressing a common issue, additional factors must be considered. The court should evaluate the interplay of these statutes and legislative intent, considering whether the collective objectives of the applicable legislation will be advanced or impeded.

VIII

Conclusion

The article explores the interplay between the Stamp Act and the Arbitration Act in the Indian legal context. It emphasizes that the Stamp Act serves fiscal purposes

²⁰⁶ Arbitration and Conciliation Act, 1996

²⁰⁷ Arbitration and Conciliation Act, 1996, S. 11

and, while non-stamping makes an instrument inadmissible, it doesn't render it void. The distinction between voidness and admissibility is clarified and we can finally come to the conclusion that an unstamped contract can be inadmissible as evidence but not void due to non-fulfilment of the procedural technicality.

Further, Arbitral autonomy, a principle of Arbitration grants parties the freedom to shape dispute resolution mechanisms, emphasizing the independence of arbitral tribunals. The principle of judicial non-interference limits court intervention in arbitration matters, ensuring autonomy for arbitral tribunals. Section 5 of the Arbitration Act²⁰⁸ reinforces minimal court supervision in arbitral proceedings. The doctrine of separability recognizes the independence of arbitration agreements from underlying contracts, ensuring their validity even if the main contract is void. The competence-competence doctrine, acknowledged in Section 16²⁰⁹, empowers arbitral tribunals to rule on their jurisdiction, subject to limited judicial review. Together, these principles establish the Arbitration Act as a self-contained code, providing a comprehensive framework for efficient dispute resolution in India. On the part of the arbitration principles it is clear that it is a separate agreement and its fate should not be decided based on the fate of the underlying contract.

The legal analysis presented in the case of *Sultana Begum v. Prem Chand Jain* establishes key principles for the harmonious construction of statutes. These principles emphasize the duty of courts to prevent conflicts between statutory provisions, the necessity to reconcile conflicting provisions, and the importance of giving effect to all relevant provisions without rendering any of them redundant. The current matter involves reconciling the Arbitration Act and the Stamp Act, with a focus on the enforceability of arbitration agreements. The consideration the principles of *generalis specialibus non derogant*, emphasizing that the special law, in this case, the Arbitration Act, takes precedence over the general law. Section 5 of the Arbitration Act²¹⁰, with its non-obstante clause, underscores that the provisions of the Arbitration Act and should prevail over any conflicting provisions of other laws. The legislative intent behind the Arbitration Act when examined, its comprehensive coverage of arbitration law and the overriding nature of its provisions can be witnessed. The competence-competence doctrine is invoked to assert that the arbitral tribunal, not the court, has jurisdiction over issues such as stamp duty on arbitration agreements. The analysis delves into the impact of the term "shall" in Sections 33 and 35 of the Stamp Act, considering whether it should be interpreted as mandatory or directory.

The decision aims to align the aim of the Arbitration Act and the Stamp Act, ensuring coherence between the two statutes. It emphasizes the minimal judicial

²⁰⁸ Arbitration and Conciliation Act, 1996, S. 5

²⁰⁹ Arbitration and Conciliation Act, 1996, S. 16

²¹⁰ *Arbitration and Conciliation Act, 1996, S. 5*

intervention principle, the prima facie standard in Sections 8 and 11 of the Arbitration Act, and the overarching objective of the Stamp Act to safeguard revenue interests. The interpretation provided seeks to prevent delays in arbitration proceedings by allowing stamp-duty issues to be addressed by the arbitral tribunal rather than the court.

In conclusion, the legal analysis navigates through various principles, doctrines, and statutory provisions to harmoniously interpret the Arbitration Act and the Stamp Act, preserving their respective objectives and ensuring an effective alternative dispute resolution mechanism.