

# STAMPING FOR APPROVAL: CRITIQUING THE LEGAL CONUNDRUM OF UNSTAMPED ARBITRATION CLAUSES IN INDIA\*

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## ABSTRACT

*On April 25th, 2023, the Constitutional Bench of the Supreme Court of India rendered a pivotal decision on the issue of unstamped arbitration agreements. While resolving a long-standing legal ambiguity, the decision has ignited considerable controversy due to its perceived adverse implications for the Indian arbitration landscape. This paper critically examines the ramifications of the Court's ruling, particularly its expansion beyond a mere "prima facie" assessment during arbitrator appointment. Our study delves into the resultant procedural complexities and delays introduced by the Court's intervention, especially concerning the re-examination of stamp duty by the arbitral tribunal, extending the application process and impeding parties' substantive rights. We argue for a streamlined process, proposing either the court or the arbitral tribunal to conclusively determine stamp duty, eliminating the need for further re-evaluation. Additionally, the ruling's use of the term "void" establishes a new dimension in contract and arbitration law, potentially reshaping the legal landscape significantly. Ultimately, the authors scrutinise the impacts of the Court's decision, which was aimed to address concerns related to unstamped arbitration agreements, but has inadvertently introduced complexities that obstruct the smooth functioning of arbitration process.*

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\* [This piece was written in anticipation of *Interplay between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899*, In re 2023 SCC OnLine SC 1666, Supreme Court of India, and its findings were affirmed by the said judgment].

## 1. INTRODUCTION

On April 25, 2023, the Supreme Court's Constitutional Bench in *N.N. Global Mercantile (P) Ltd v Indo Unique Flame Ltd*<sup>1</sup> (**'NN Global'**) deliberated upon a disputed question of law in arbitration— whether an arbitration agreement in an unstamped substantive contract would render it as unenforceable. The disagreement arises from differing views on whether the arbitration agreement must be duly stamped to be considered as 'existing' in law.

According to the majority, when a contract exigible to stamp duty is not stamped, then an arbitration clause within such contract would be unenforceable and would be rendered invalid in law. In stipulating so, the authors argue that the Court intrudes upon the tribunal's competence by looking at the arbitration agreement beyond a prima facie review. Further, the authors also demonstrate that this intrusion causes practical hurdles and delays since the Apex Court additionally envisages that the stamp duty may be re-examined by the tribunal. These hurdles are exacerbated due to a need for a separate stamp for the arbitration agreement itself. The authors also raise concerns regarding the use of the term "void" and argue that the judgment has resulted in creation of a new species of "void" in contract law which can have far-reaching contract law implications.

## 2. A TIMELINE OF THE ISSUE

The Supreme Court in *SMS Tea Estates (P) Ltd v Chandmari Tea Co (P) Ltd*<sup>2</sup> (**'SMS Tea'**) had to engage with an application for appointing an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 (**'Arbitration Act'**). Here, the arbitration agreement was not duly stamped as per the provisions of the Indian Stamp Act, 1899 (**'Stamp Act'**). The Court ruled that an unstamped arbitration agreement cannot be acted upon for the purposes of appointing an arbitrator. This was founded on the argument that under Section 35 of the Stamp Act, an agreement that is compulsorily registrable or subject to stamp duty cannot be used as evidence or as a basis for any other purpose, if it is not stamped.

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1. *N.N. Global Mercantile (P) Ltd v Indo Unique Flame Ltd* (2023) 7 SCC 1 : 2023 SCC OnLine SC 495.

2. *SMS Tea Estates (P) Ltd v Chandmari Tea Co (P) Ltd* (2011) 14 SCC 66.

In *Garware Wall Ropes Ltd v Coastal Marine Constructions and Engineering Ltd*<sup>3</sup> (**'Garware'**), the question was regarding the then added Section 11(6A) in the Arbitration Act. This provision limited the court's scope of examination of an arbitration agreement solely to its 'existence', when an application for appointment of arbitrator is received. The Supreme Court here applied and reaffirmed *SMS Tea*. The Court opined that the position of law as stated in *SMS Tea* has not changed as a result of the addition of Section 11(6A). In *Vidya Drolia v Durga Trading Corpn*<sup>4</sup> (**'Vidya Drolia'**), a three-judge bench of the Supreme Court, approved the holdings in *SMS Tea* and *Garware* that were decided by benches of two judges.

In the three-judge bench ruling by the Supreme Court in the case that ultimately resulted in *NN Global, N.N. Global Mercantile (P) Ltd v Indo Unique Flame Ltd (2020)*<sup>5</sup> (**'Old Case'**), the Court had an appointment of arbitrator application before it. The Court determined that the insufficiency or lack of stamping did not render the substantive or principal contract void. The Court relied on the doctrine of separability to determine that the Arbitration Agreement, contained within the substantive contract, would be a separate and independent contract. The Court hence observed that, since the arbitration agreement is an independent agreement between the parties, it would not be subject to the non-payment of stamp duty on the principal contract. In this regard, the Court concluded that, despite the lack of stamping of the principal contract where the arbitration agreement was situated, the arbitration agreement itself would not be considered invalid, unenforceable, or non-existent, hence, deeming the arbitration agreement to be in 'existence' under Section 11(6A).

The Court here overruled their decision in *SMS Tea Estate* with respect to the issue that an arbitration agreement in an unstamped commercial contract cannot be acted upon, or is rendered un-enforceable in law. The Court further observed that the three Judge Coordinate Bench in *Vidya Drolia* was incorrect in approving the findings in *Garware*, wherein it was held that an arbitration agreement can only be considered to 'exist' in law if it is valid and legal. Due to this dichotomy in interpreting 'existence' under Section 11(6A), the Supreme Court in the *Old Case* deemed it fit to refer the difference in opinions to the Constitution Bench, in *NN Global*.

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3. *Garware Wall Ropes Ltd v Coastal Marine Constructions and Engineering Ltd* (2019) 9 SCC 209.

4. *Vidya Drolia v Durga Trading Corpn* (2019) 20 SCC 406.

5. *N.N. Global Mercantile (P) Ltd v Indo Unique Flame Ltd* (2021) 4 SCC 379.

*NN Global* pertained to appointment of arbitrators in the pre-referral stage of arbitration under Section 11(6A) of the Arbitration Act. The Court opined that at this stage the examination was confined to the ‘existence’ of the arbitration agreement. Accordingly, the Court stated that ‘existence’ is intertwined with the concept of ‘validity’. Hence, the Court observed if the arbitration agreement satisfied the statutory requirements of both the Arbitration Act and the Indian Contract Act, 1872 (**‘Contract Act’**) and when it is enforceable in law, it would be ‘existing’ to satisfy Section 11(6A).

The Court then connected the Contract Act and Stamp Act by drawing the fact that only on an agreement being stamped, would it become enforceable under the Contract Act. Here, the Court stated that upon a contract ceasing to be enforceable, it becomes *invalid* and *void*.

The Court relied on the Doctrine of Separability to determine that the arbitration agreement would have an independent existence. In line with this understanding, the Court proposed that the arbitration agreement must undergo separate stamping, the lack of which would render the arbitration agreement non-existent in law. Accordingly, only on the agreement being *validated would it become enforceable, but until then, it will not exist in law* and cannot be acted upon.

### 3. JURISPRUDENTIAL LANDSCAPE OF SECTION 11(6A) OF THE ARBITRATION ACT

When it comes to Section 11(6A), a central issue circling it has been the use of the term ‘*prima facie* existence’ in the provision. Before *NN Global*, courts have debated whether at this pre-referral stage, existence only related to mechanically finding the arbitration agreement on paper, *i.e.*, *prima facie* existence, or diving into and looking at enforceability of such an agreement, *i.e.*, existence.

As per the Supreme Court in *Duro Felguera SA v Gangavaram Port Ltd*,<sup>6</sup> the role of the judicial authorities at the Section 11(6A) stage is to see whether an arbitration agreement exists, “*nothing more, nothing less*”. The Court here had opined that the legislative intent behind Section 11(6A) is to reduce the Court’s involvement during arbitrator appointments, a principle that should be upheld and honoured. Further, in *Vidya Drolia*, which again pertained to appointment of arbitrators in the pre-referral stage of arbitration

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6. *Duro Felguera SA v Gangavaram Port Ltd* (2017) 9 SCC 729.

under Section 11(6A), the Court stated that a court's conclusions must be founded on and be restricted to a concise presentation of documents rather than a thorough evaluation of the available evidence, hence, a '*prima facie existence*'. *Vidya Drolia* established, "*when in doubt, do refer*".

The Law Commission of India,<sup>7</sup> when recommending the insertion of Section 11(6A), as even quoted in *NN Global*, stipulated that courts should leave the determination of 'existence' of the arbitration agreement to the arbitration tribunal under Section 16 of the Act, after finding existence at a *prima facie* level. Further, if the judicial authority, after a *prima facie* assessment *concludes* that the agreement does not exist at the stage of Section 11(6A), then this conclusion would entail finality. Courts here only assess the question of existence, while the arbitral tribunal decides all other initial and preliminary matters.<sup>8</sup>

#### 4. INTRUDING INTO THE TRIBUNAL'S COMPETENCE

Coming to *NN Global*, it is unambiguous that in cases where the agreement is not stamped at all, the Court under Section 33 of the Stamp Act would impound the agreement, till it is validated. This is of course, is a *prima facie* observation. However, the Majority has also made it clear that courts have the power at Section 11(6A)'s stage, apart from seeing whether the agreement is stamped, to delve into whether the value and description of the stamp follows Section 33 of the Stamp Act.

In certain situations, even if the stamp is present, the value of the stamp may be a matter of dispute between parties. This does not leave the issue as a *prima facie* examination, rather enters the scope of merits-based examination. Drawing from *Vidya Drolia*, this would require an examination of evidence, and in such situations, where there is an element of doubt, the court must refer the matter to arbitration. However, the Apex Court in *NN Global* regarding a '*prima facie*' check, only seems to opine that,

*"...in view of the power of the Court under Section 11, to find only prima facie, the existence of the Arbitration Agreement, it would enable the Court to make a Reference and appointment*

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7. Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1946* (Law Com No 246, 2014).

8. Constantine Partasides QC and Manish Aggarwal, 'Jurisdiction of the Arbitral Tribunal' in Dushyant Dave and others (eds), *Arbitration in India* (Wolters Kluwer 2021) 96.

*and relegate the issue of impounding of the document to the Arbitrator...the view that cases under Section 11 of the Act would consume more time and hinder the timely progress of arbitration and that the matter must be postponed so that the Arbitrator will more suitably deal with it, does not appeal to us ...this would hardly furnish justification for the Court to ignore the voice of the Legislature couched in unambiguous terms.”*

In essence, the Court acknowledges that examining the specifics under the Stamp Act may not be a *prima facie* check, but since it is a statutory mandate, they must honour it. This line of argumentation, however, breaches the other statutory mandate placed by the Arbitration Act, i.e., to have minimal judicial interference and respect the competence of the arbitral tribunal, which is competent to hear such a claim.

The Supreme Court has taken away the arbitral tribunal’s ability to determine its own jurisdiction and the existence of the arbitration agreement by requiring a mini-trial regarding stamping prior to the selection of arbitrators.<sup>9</sup> As per the jurisprudence discussed above, there should be no substantive proceeding pending before the court during the appointment of arbitrators or the granting of temporary relief before the formation of the arbitration tribunal. The court’s actions should be merely supportive, intended to assist the arbitral tribunal’s early formation or safeguard the dispute’s substance in the actual arbitration proceedings.

##### **5. DUTY UNDER STAMP ACT: DELEGATION OR REPETITION?**

As is aforesaid, the Court stated that the mandate under the Stamp Act to impound an instrument is reconcilable with Section 11(6A). Consequently, the rule of law is that the court is duty-bound to impound an arbitration agreement at the pre-referral stage if it sees a deficiency in stamp duty. It cannot pass over this duty to the arbitral tribunal.

The Court draws a caveat wherein it distinguishes between an agreement with ‘no visible stamp duty’ and one ‘that is not duly stamped’. In the former case, the court states the need for an unambiguous duty under Section 33 and Section 35 of the Act. However, in the latter, the Court acknowledges that when a party raises such a claim and the court ‘on the

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9. Vivekanandh SM, ‘Setting the Clock Back: Judicial Interference in the Appointment of Arbitrators in India (NN Global Decision and its Implications)’ (The American Review of International Arbitration, 5 June 2023) <<https://aria.law.columbia.edu/setting-the-clock-back/>> accessed on 30th November 2023.

face of it' observes that claim to be baseless, it will pass its 'mandate' under the Stamp Act to the tribunal. This is stated to as harmonious construction of the two acts.

If finding the claim of the party contesting to be baseless is a pre-requisite for the Court to pass on this statutory mandate to the tribunal, it creates practical and logical hurdles. The Stamp Act envisages an 'examination' of the instrument according to Section 33. It entails an examination of 'whether it is stamped with a stamp of the value and description required by the law', and passing this duty onto the tribunal will entail another such 'examination' of the stamp.

The Stamp Act makes no distinction between an unambiguously unstamped agreement and an unduly stamped one. The duty is uniform, and the court has to 'examine' it as required. The Court can exhaust the duty under Section 33 entirely at this stage, without making a distinction in the nature of deficiency with respect to the stamp duty.

Effectively, the practical burden is that the court, under its 'statutory duty', examines the agreement to see whether it is duly stamped and then subsequently leaves it to the arbitrator to 'examine' it again. The exercise of examination under Section 33 ends up being repeated if not extended, and the judiciary, on top of interfering itself, also adds another duty on the Tribunal to examine it under the same provision in the same manner as the Stamp Act prescribes. The authors believe that either the court or the tribunal should be able to discharge the duty altogether and not both consecutively.

The Supreme Court in the Old Case proposed a counterfactual at the stage of Section 11 and stated that the court should "*impound the substantive contract which is either unstamped or inadequately stamped and direct the parties to cure the defect, before the arbitrator/tribunal can adjudicate upon the contract*". The mandate under the Stamp Act was restricted to the court,<sup>10</sup> and once extinguished, the tribunal does not have to concern itself with the Stamp Act at all. According to the authors, this is the apposite view.

## 6. A NEW "VOID" IN CONTRACT LAW

The Court, in its reasoning, has stated that an arbitration agreement that is not stamped cannot be enforceable for any purpose, including Section 11 of the Arbitration Act. According to the majority, the agreement cannot 'exist'

in law, and the same would be *void* as per Section 2(j) of Contract Act as something that ‘ceases to be unenforceable’ becomes *void* and *invalid*. To quote, the Court enunciated that:

*“Our view in this regard that voidness is conflated to unenforceability receives fortification from Section 2(j) of the Contract Act which renders a contract which ceases to be enforceable void... an agreement which is unstamped or insufficiently stamped is not enforceable, as long as it remains in the said condition. Such an instrument would be void as being not enforceable.”*

The Court has elaborated further on the nature of this ‘void’, as something that “*is not invalid or void in the sense of it being still born or null and void,*” and that life can be poured into it. The Court attempted to emphasize that the ‘void’ in the present context is a void that can be rectified or cured. Such curable interpretation of the word ‘void’ seems to deviate from the traditional meaning of ‘void’.

In *Anukampa Avas Vikas (P) Ltd v State of Rajasthan*,<sup>11</sup> the Rajasthan High Court defined ‘void’ as an instrument or transaction that is “*so nugatory and ineffectual that nothing can cure it*”. This is as against ‘voidable’, where a defect “*can be cured by the act or confirmation of him or who could take advantage of it*”. Furthermore, the Supreme Court in *Kalawati v Bisheshwar*<sup>12</sup> distinguished between something that is ‘void’ and something that is not recognised by statute. The Court held that a property transaction was not recognised for the purposes of UP-Zamindari and Land Reforms Act, 1951 but that lack of recognition does not affect the transfer under the Contract Act, and the transaction under the Contract Act was not void. Effectively, the legislature therein intended to bar recognition and not allow certain rights to vest and such implication should be extended to the stamp act as well. Therefore, it can be argued that, the Stamp Act merely denies recognition to the impugned instrument for the purposes envisaged under Section 35 of the Stamp Act. It does not make it completely *void* for the purposes of the Contract Act. The court in the present case presumably did not recognise this distinction.

Rather, in *NN Global*, we have a species of ‘void’ that can be cured and acted upon. It does not negate the agreement completely, which is the usual effect of ‘void’. However, the authors believe that this goes against the

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11. *Anukampa Avas Vikas (P) Ltd v State of Rajasthan* 2008 SCC OnLine Raj 427.

12. *Kalawati v Bisheshwar* AIR 1968 SC 261.



essence of what a ‘void’ contract entails. Therefore, the deviation in NN Global may muddle the difference between ‘void’ and ‘voidable’ contracts.

In certain instances, such as the Supreme Court’s holding in *State of Kerala v M.K. Kunhikannan Nambiar Manjeri Manikoth*,<sup>13</sup> ‘void’ may not entirely be determinative of the legal impact, and it has a relative meaning, not an absolute one. The Court herein opined that the term ‘void’ may not mean that the said order or decision is ‘non-existent’ in all cases. Applying this principle, if the court in NN Global deems an unstamped agreement to be this curable void, then it cannot deem it to be ‘non-existent’ as well. The implication of the agreement being curable void is that it must be existing. This would negate the Court’s ultimate conclusion.

Moving on, the Court in NN Global ruled that non-compliance with Section 33 of the Stamp Act invalidates the agreement; therefore, the agreement does not exist in the eyes of the law. However, the Stamp Act does not mention validity, and lack of proper stamping only leads to inadmissibility as evidence and inability to act upon it. This is temporary and curable under Section 35, 36, and 42 of the Stamp Act.

The deficiency in stamp duty should not defeat a party’s substantive rights and cause injustice. The Apex Court<sup>14</sup> has held that curable defects and irregularities should not be allowed to defeat substantive rights or cause injustice.

Further, according to the Supreme Court in *Hindustan Steel v Dilip Construction Co*,<sup>15</sup> the Stamp Act’s intent concerns revenue generation. Once that is achieved, the instrument and transaction cannot be nullified based on the primary defect. An unstamped agreement will still exist in the eyes of the law. The Court in NN Global, however, did not address this precedent in its ruling that the unstamped agreement would exist in the eyes of the law.

Therefore, either the court should have called the agreement ‘void’ in the typical fashion, which is not curable, or should not have used ‘void’ to determine existence. Creating a ‘void’ qualifier that is curable and yet somehow invalidates the ‘existence’ in law is an inconsistent position and muddles contract law jurisprudence with respect to the term ‘void’.

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13. *State of Kerala v M.K. Kunhikannan Nambiar Manjeri Manikoth* (1996) 1 SCC 435 : AIR 1996 SC 906.

14. *Uday Shankar Triyar v Ram Kalewar Prasad Singh* (2006) 1 SCC 75.

15. *Hindustan Steel v Dilip Construction Co* (1969) 1 SCC 597 : AIR 1969 SC 1238.

Furthermore, the practical implications of this ruling might have a greater impact on standard contracts than on arbitration agreements. In the past, if an agreement was deemed to be ‘void’ at the Section 11 stage, the only way to correct it would be through novation, as the previous arbitration agreement would not be considered legal. However, now that we have a ‘void’ agreement that can be cured and enforced without novation, the implications may be different for future cases surrounding contracts.

## 7. PROMULGATING FURTHER COMPLIANCES

The Court acknowledged the *Doctrine of Separability*, and that the arbitration agreement forms a distinct and separable agreement from the substantive contract. In the Old Case, the Supreme Court had stated that since the arbitration agreement is separable from the main contract, the main contract being unstamped does not make the arbitration agreement invalid.

In NN Global, however, while the Apex Court agreed with the fact that the arbitration agreement is separate from the substantive contract, in an unexpected development, they added a fresh requirement to the arbitration agreement of being stamped as well. Accordingly, it leads to the implication that the arbitration agreement requires to be stamped along with the main agreement, otherwise any arbitration proceedings would also be invalid.

There are two perspectives here. From the practitioner’s perspective, and as suggested by the slew of preceding case laws of *SMS Tea, Garware, Vidya Drolia*, and the Old Case, none of them presented a situation where the arbitration agreement independently is exigible to stamp duty. Secondly, from the Stamp Act legislation’s perspective, the only stamp specific to arbitration is stamping of the award, with no mention of stamping the arbitration agreement itself.<sup>16</sup> The legislature providing for stamping an arbitration award highlights their knowledge of arbitration, and no mention of stamping the arbitration agreement independently implies a cognizant necessary exclusion of the same.

Hence, the Court in NN Global may have overreached their judicial powers by taking on the role of the legislature by adding an additional requirement of stamping arbitration agreements, for which the legislation is inadequately equipped to govern its specifics.

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16. The Indian Stamp Act 1899 (2 of 1899) sch I, Item 12.

## 8. WHAT DOES THE FUTURE ENTAIL?

The 2019 amendment<sup>17</sup> proposes to transfer many of the court's current responsibilities to various arbitration institutions and to entirely repeal Section 11(6A). In conclusion, the planned legislative omission of judicial intervention in combination with the judgment's major influence on the arbitration regime is likely to uproot the foundation of the current arbitration system. Whether the transfer of responsibilities to arbitration institutions will be sufficient to prevent the probable knock-on effects of widening '*prima facie*' and while the contempt of *kompetenz-kompetenz* is still up in the air.

There are other principles of law emerging from the ruling which concern Contract law and the Stamp Act, which may alter certain basic principles. The new species of 'void', and the potential division of 'examination' under Section 33 of the Stamp Act are principles that the amendment does not impact and may be problematic in the future. Because of this, this historic change may mark the beginning of a new era for arbitration, with repercussions for years to come for the practise of law and the resolution of disputes.

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17. The Arbitration and Conciliation (Amendment) Act 2019 (33 of 2019) s 3(v).