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Stamping the Path to Validity: A Critical Analysis of Arbitration Agreements in Indian Legal Landscape

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ABSTRACT

Arbitration is a widely used method for resolving commercial disputes. It comprises of an agreement between the parties, specifying that any dispute arising between parties shall be referred to arbitration. If an agreement is found to be unstamped or insufficiently stamped, it may not be enforced as per the provisions of Indian Stamp Act, 1899. However, the question concerning the validity of the arbitration clause in that agreement has been a source of controversy since long and had resulted in conflicting views adopted by the Court in various judgements. An analysis of these contrasting views is imperative to appreciate the evolution of Indian legal landscape regarding the validity of an unstamped arbitration agreement. This long running dispute has finally come to an end with the recent verdict passed by a 7 Judge bench in the case of In Re: The Interplay between arbitration agreements under the Arbitration and Conciliation Act, 1996, and the Indian Stamp Act, 1899. The court in this case clarified the position by ruling that a clause mandating the parties to refer their disputes to arbitration would not be hit by the provisions of the Stamp Act, and therefore, would be enforceable under the law. The judgement also clarified the position on various other aspects including the power of the Courts to intervene in the matter involving an unstamped arbitration agreement. The judgement has a lot of practical implications on the Indian arbitration framework and leaves certain questions unanswered as well. Overall, the judgement can be seen as a positive step taken by the Indian judiciary that shows their pro-arbitration mind set.

Keywords*: Arbitration, Stamping, Separability, Kompetenz.*

I. INTRODUCTION

Stamping of an arbitration agreement per se, on the face of it does not appear like an issue that should require much deliberation. But until now, there have been six major Hon'ble Supreme Court decisions on the mere issue of stamping of arbitration agreements. Further, each of these decisions has oscillated to and fro from giving courts the authority to impound unstamped

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arbitration agreements to ruling otherwise and passing on the responsibility to the arbitral tribunal in the recent decision of *In Re: The Interplay between arbitration agreements under the Arbitration and Conciliation Act, 1996, and the Indian Stamp Act, 1899 (**Re: The Interplay**).*[3] The decision is significant as it clears the ambiguity and reinforces the position regarding many aspects that are central to arbitration framework like separability, kompetenz-kompetenz, and minimal judicial interference amongst others. The decision also offers a read down of many important provisions of the *Indian Stamp Act, 1899 (***Stamp Act***)*[4], like section 35 and section 36, and their interplay with the *Arbitration and Conciliation Act, 1996* (***Act***)[5].

In the present article, the authors have briefly traced the history of the stamping issue. Further, the authors have analysed the two contrasting viewpoints on cardinal principles of arbitration associated with stamping taken by the courts over the years. Finally, the article deals with the practical implications of the final decision of the Supreme Court in *Re: The Interplay* and tries to understand if it has been successful in effectively addressing the concerns that arise out of the stamping issue.

II. EVOLUTION OF STAMPING ISSUE

SMS Tea Estates Private Limited v. Chandmari Tea Company Limited [6](***SMS Tea Estates***) was the first case in 2011 wherein the Supreme Court had comprehensively dealt with the issue of stamping. The dispute in question was related to the lease deed containing an unregistered and unstamped arbitration agreement. The Supreme Court in its two judge bench decision had interpreted section 35 of the *Indian Stamp Act, 1899 (***Stamp Act***)*[7] that makes unstamped agreement inadmissible as evidence. It was held that unless the stamp duty is paid, the court cannot act upon the lease deed that contained the arbitration agreement.

The decision in *SMS Tea Estates* was followed by another two judge bench decision in the case of *Garware Wall Ropes Limited v. Coastal Marine Constructions and Engineering Limited*[8](***Garware Wall Ropes*****)** wherein a similar question was considered. Here the issue of stamping was considered in the greater context of the amendment brought in 2015 which led to the insertion of section 11(6A) in the *Act.*[9] Section 11(6A) mandates the courts to check for the

[3] In Re: The Interplay between arbitration agreements under the Arbitration and Conciliation Act, 1996, and the Indian Stamp Act, 1899, 2023 INSC 1066 [hereinafter "Re: The Interplay"]
[4] The Indian Stamp Act, 1899, No. 2, Acts of Parliament, 1899 (India) [hereinafter "Stamp Act"].
[5] The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India) [hereinafter "Arbitration Act"].
[6] SMS Tea Estates Private Limited v. Chandmari Tea Company Limited, (2011) 14 SCC 66.
[7] Stamp Act, *supra* note 3, §35.
[8] Garware Wall Ropes Limited v. Coastal Marine Constructions and Engineering Limited, (2019) 9 SCC 209.
[9] Arbitration and Conciliation (Amendment) Act, 2015, § 11(6A), No. 3, Acts of Parliament, 2016 (India)

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existence of an arbitration agreement before referring the parties to arbitration. The two judge bench affirmed the decision of SMS Tea Estates and held an unstamped arbitration agreement as invalid.

The decision in Garware Wall Ropes was followed by a three-judge bench of *Vidya Drolia and Others v. Durga Trading Corporation*[10] (***Vidya Drolia***). The Supreme Court herein had dealt with the issue of whether section 11(6) of Act deals with deciding the mere existence or validity as well, of an arbitration agreement in the context of stamping requirement and rendered a decision in favour of the former. However, a subsequent co-ordinate bench decision of *NN Global 1*[11] never agreed with the decision given in Vidya Drolia. Hence, the matter was deliberated by a larger five-judge bench that led to the decision of *M/s N.N. Global Mercantile Private Limited v. M/s Indo Unique Flame Limited*[12] ***(N N Global 2)***.

N.N. Global 2 was a constitutional bench decision by a split majority of 3:2. The majority ruled in the favour of the position taken in *Vidya Drolia*. The decision of *NN Global 2* was vastly criticized and considered hyper technical by many leading industry experts as rather than seeing the overall objective behind the *Act*, the court went into an in-depth analysis of section 11(6A) of the *Act*, Stamp Act, and the Contract Act.[13] . In order to fix finality to the issue of stamping the matter was further referred to a large seven-judge bench that resulted in the decision of *Re: The Interplay*.

The judgements in *N.N. Global 2* and *Re: The Interplay* are extremely contrasting on fundamental principles that constitute the arbitration framework. The stamping issue impacted the interpretation of these fundamental principles and hence it's important to understand the two school of thoughts, one of *NN Global 2* and the other of *Re Interplay*. The two viewpoints lead to the evolution and finality of making unstamped arbitration agreements as valid.

III. ANALYSIS OF CONTRASTING VIEWPOINTS

a) Doctrine of Kompetenz-Kompetenz

The doctrine of kompetenz-kompetenz refers to the power of arbitral tribunal to decide its own jurisdiction.[14] This power gives the tribunal to rule on issues relating to validity of arbitration

[10]Vidya Drolia and Others v. Durga Trading Corporation, (2021) 2 SCC 1.
[11] N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd, (2021) 4 SCC 379.
[12] M/s N.N. Global Mercantile Private Limited v. M/s Indo Unique Flame Limited, (2023) 7 SCC 1 [hereinafter "NN Global 2"].
[13] Tejas Karia & Vrinda Pareek, *Stamping of Arbitration Agreements: An Analysis of the Evolving Arbitration Landscape in India*, 3 INDIAN REVIEW OF INTERNATIONAL ARBITRATION 44,48 (2023), http://iriarb.com/Volume_3_Issue_1_(IRIArb).pdf.
[14] EMMANUEL GAILLARD & JOHN SAVAGE, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, ¶ 651 (Kluwer Law International 1999).

agreements, voidness of the underlying contract and other challenges that can prohibit an arbitral tribunal from presiding over the dispute. The concept of kompetenz-kompetenz is embedded in the UNCITRAL Model Law on International Commercial Arbitration[15] and has also been recognized by various states[16], emphasizing its global acceptance in international arbitral proceedings. In the Indian context, Section 16(1) of the *Act* deals with the principle of kompetenz-kompetenz. The Hon'ble Supreme Court has interpreted this to mean that, during the pre-reference stage, courts should minimize their involvement and focus solely on determining the *prima facie* existence of an arbitration agreement.[17]

The scope of power that an arbitral tribunal possesses is sufficiently broad to cover all preliminary problems that have an impact on its jurisdiction. This includes the question of sufficiency of stamping as well.[18] Thus, the matter of stamping is deemed a jurisdictional concern, and therefore, the kompetenz-kompetenz necessitates that the courts abstain from adjudicating on stamping issues, deferring such matters to the initial determination of the arbitral tribunal.[19]

While considering the doctrine of kompetenz-kompetenz specific to the Indian context, it is important to acknowledge the significant strain on the judiciary and the large number of pending cases in our courts. The purpose of favouring arbitration would be undermined if the courts are required to address not only the question *of prima facie* existence, but also its validity, during the appointment of the arbitrator under section 11(6A) of *Act*. The determination of validity often involves going into the merits of the case that amounts to court's time as well as delay in the arbitration process. Given the substantial backlog of cases, as emphasized in the 246th Law Commission of India Report[20], it becomes imperative to fully implement and adhere to the provisions of Section 16 of the *Act*.

Hence, the Supreme Court in the *Re: The Interplay* was correct in rectifying the error made in the *NN Global 2* which disregarded the argument that the arbitrator should be the competent authority to deal with the issue concerning the sufficiency of stamping. The bench in *Re: The Interplay* gave effect to the doctrine of kompetenz – kompetenz in its true sense, thereby empowering the arbitral tribunal to decide on the issue of its own jurisdiction in case of

[15] UNCITRAL Model Law on International Commercial Arbitration, art. 16(1), 1994 (hereinafter "UNCITRAL Model Law").
[16] Arbitration Act 1996, § 30, Acts of Parliament, 1996 (UK) [hereinafter "UK Arbitration Act"]; Prima Paint Corporation v. Flood & Conklin Mfg. Co., 388 US 395 (1967).
[17] Duro Felguera v. Gangavaram Port Ltd., (2017) 9 SCC 729.
[18] Uttarakhand Purv Sainik Kalyan Nigam Ltd v. Northern Coal Field, (2020) 2 SCC 455.
[19] Re: The Interplay, *supra* note 2, ¶132.
[20] Law Commission of India, *Report No. 246 – Amendments to the Arbitration and Conciliation Act 1996*, August 2014, https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081615.pdf.

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insufficient/unstamped arbitration agreements.

b) Separability of arbitration agreement

The Doctrine of Separability in arbitration implies that the arbitration agreement can be separated from the underlying contract of which the arbitration agreement is a part. It acts like a shield in cases where the arbitration agreement survives, though the main contract may become invalid by reasons of fraud, illegal object amongst others. The doctrine was formally recognised for the first time in 1993 in Switzerland and later evolved through the UK case of *Heyman v Darwins*.[21] In India, the Act expressly recognises the Doctrine of Separability in the form of section 16(1)(b) of *Act*, which takes its inspiration from UNCITRAL Model Law.

The Court in the case of *N.N. Global 2* recognised the applicability of this doctrine but restricted its scope only to the extent of separating the arbitration agreement from the main contract in cases of invalidity of the main contract. They were of the opinion that people will start misusing the doctrine if the doctrine is upheld with respect to stamping as parties by invoking the doctrine can circumvent the provisions of the Stamp Act.[22] However, *Re: The Interplay* corrected the position with respect to separability and stated that it will apply with respect to stamping issues as well.

The court was correct when it said the very reason separability has been made part of section 16 of kompetenz-kompetenz not only to ensure that arbitrators can rule on their own jurisdiction but also it encapsulates the general rule of substantive independence of an arbitration agreement which extends to the issue of stamping as well.[23] The clarification provided by *Re: The Interplay* was much needed to ensure separability as a principle, that is central to arbitral practice, is applied uniformly. It bodes well with the position that an unstamped agreement is valid therefore an arbitral tribunal by separating the arbitration agreement from the underlying contract can rule on it as a jurisdictional issue. Further selectively applying the separability principle would have been bad in law and against the principles of arbitration jurisprudence.

c) Minimum Judicial Interference

The fundamental idea of judicial non-interference in arbitral proceedings is integral to both domestic as well as international commercial arbitration. This principle dictates that the arbitration process shall adhere to the parties' agreement or the tribunal's instructions, with

[21] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, §3.02 (Kluwer Law International, Updated August 2022).
[22] N N Global 2, *supra* note 11, ¶ 107, ¶¶ P.
[23] Re: The Interplay, *supra* note 2 ¶112.

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minimal unwarranted interference by domestic courts.[24] This doctrine is also enshrined in international frameworks such as the New York Convention[25] and the Model Law[26], and similar provisions can be found in the national laws of various countries[27] as well.

In India, a significant shift was observed in the year 2016 regarding the court's intervention while constituting the arbitral tribunal. This was implemented by the incorporation of Section 11(6A) into the *Act*, through an amendment in 2015.[28] This was done to limit the extent of judicial involvement to only those "*instances where the court finds that the arbitration agreement does not exist or is null and void.*"[29] Thus, the legislative intent behind the Section 11(6A) is to restrict the Court's role only to assess the *prima facie* existence of an arbitration agreement the factors for which are enshrined in Section 7[30] of the *Act*. This approach also adheres to the core tenets of party autonomy and the kompetenz-kompetenz doctrine as well. It emphasises the legislative aim of reducing judicial involvement, encouraging the speedy resolution of conflicts, and maintaining the overarching objectives outlined in Section 5 of the Arbitration Act.[31] This not only conforms to globally recognised standards but also signifies a dedication to establishing a just and an effective system for settling conflicts beyond the confines of conventional judicial processes.

The bench in the case of *NN Global 2* had refrained from acknowledging the applicability of Section 11(6A) in the right sense and accorded the courts the authority to adjudicate on the merits of the issue as well. This was done by mandating the courts to check the validity of the arbitration agreement in the form of stamping thereby leading to increased judicial involvement. However, this view is corrected by the Court in *Re: The Interplay*, wherein the Supreme Court asserted that the courts are only required to check the *prima facie* existence of an agreement under section 11(6A) and the tribunal can later on can impound the agreement in case of insufficient stamping.

d) Harmonious Construction of Stamp Act, Contract Act and Arbitration Act

Stamp Act is a fiscal enactment whose purpose is to generate revenue.[32] It also provides for

[24] Gary Born, *The Principle of Judicial Non-Interference in International Arbitration Proceedings'*, 30 U. PA. L. REV. 999, 1002 (2009).
[25] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. II (3), June 10, 1958. (hereinafter "New York Convention").
[26] UNCITRAL Model Law, *supra* note 14, art.5.
[27] UK Arbitration Act, *supra* note 15, § 9(4); Civil Code of the French, art. 1458.
[28] Arbitration Amendment Act, *supra* note 8, § 11(6A).
[29] Re: The Interplay, *supra* note 2, ¶ 143.
[30] Arbitration Act, *supra* note 4, § 7.
[31] Food Corporation of India v. Indian Council of Arbitration, (2003) 6 SCC 564.
[32] Hindustan Steel Ltd. v. Dilip Construction Co, (1969) 1 SCC 597.

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remedies in case of non-adherence to the stamping provisions in the form of impounding, imposing of penalties under section 35 and prosecuting defaulters for evasion.[33] The bench in *NN Global 2* had interpreted Stamp Act to be a mandatory statute without adhering to the provisions of which, an arbitration agreement would be void and inadmissible. In order to justify this line of reasoning, the Court had brought in section 2(g) and 2(h) of the Contract Act[34] that renders a document that is unenforceable as void. Hence, an agreement not satisfying the fundamentals of the Contract Act was held to be void-ab-initio in the eyes of *NN Global 2*.[35]

The Bench in *Re: Interplay* clarified the position and rightly so by stating that the Stamp Act is remedial in nature and not mandatory though it provides for penalties.[36] The Court further made a distinction between voidness and admissibility by stating that unstamped arbitration agreement merely renders a document inadmissible but not void.[37]

The Court was right in making this distinction as *NN Global 2* had failed to take into account that a document can be insufficiently stamped because of multiple factors even when excessive or less stamp duty is paid[38] or a similar document is written on two different stamped papers.[39] If the position in *NN Global 2* would have been upheld then the threshold for making an agreement void would have been set low.

Also, the *Act* is a special statute as it codifies all laws relating to arbitration in a single legislation.[40] The dissenting opinion of Justice Hrishikesh Roy in *N.N. Global 2* had mentioned about *Act* being a special statute and the general law of Stamp Act should yield to the special law.[41] This viewpoint was further endorsed by the bench in The *Re: The Interplay* by relying on section 5 of the *Act* that expressly signifies judicial intervention only at places where the *Act* specially mentions for it.[42] This further strengthens the point that the *Act* holds primacy in terms of Contract Act and Stamp Act and its provision cannot be side-lined to fulfil the purposes of other legislations. Further by allowing the supremacy of *Act* over other legislations the ultimate aim of generating revenue via Stamp Act is not compromised since the arbitral tribunal has been given the power to impound agreements as well. Thus it can be said that judgement in *Re: The Interplay* has interpreted the harmonious construction of the three statutes in the right sense that

[33] SK KATARIA, K KRISHNAMURTHY THE INDIAN STAMP ACT 16(Lexis Nexis 2021).
[34] The Indian Contract Act, 1872, § 2(g), 2(h), No. 9, Acts of Parliament, 1872 (India).
[35] NN Global 2, *supra* note 11, ¶ 62, ¶¶ ii.
[36] Re: The Interplay, *supra* note 2, ¶48.
[37] Re: The Interplay, *supra* note 2, ¶47.
[38] Gulzari Lal Marwari v. Ram Gopa, 1936 SCC OnLine Cal 275.
[39] Thiruvengadam Pillai v. Navaneethammal, (2008) 4 SCC 530.
[40] UPSEB v. Hari Shanker Jain, 1980 AIR 65, ¶9.
[41] N N Global 2, *supra* note 11, dissent of Hrishikesh Roy J., ¶ 78, ¶¶ 7.
[42] Re: The Interplay, *supra* note 2, ¶175.

doesn't comprise the revenue generation object of the Stamp Act and the same time upholds the primacy of the *Act.*

IV. INTERNATIONAL PERSPECTIVE ON INVALIDITY OF ARBITRATION AGREEMENTS

As per international arbitration practice, for an arbitration agreement to be held invalid, an arbitration agreement must become "inoperable and incapable" of being performed or is "null and void".[43] Similar wordings have been envisaged in the Section 45 of the *Act*[44] as well which is adopted from Article II (3) of the New York Convention.[45]

The word 'inoperable' refers to cases where the arbitration clause is ineffective, such as, where the parties have failed to comply with time line or if they have expressly or impliedly revoked the arbitration agreement.[46] The word 'incapable' of being performed seems to apply to features of the arbitration process when the arbitral tribunal cannot be established for some reason, for example, where the arbitration clause is too vaguely worded, or other terms of the contract contradict the parties intention to arbitrate.[47] The other ground "null and void" can be understood as referring to circumstances in which the arbitration agreement is intrinsically invalid from the outset, such as where there is a lack of consent because of misrepresentation, coercion, fraud, or undue influence.[48]

Thus, the problem concerning the non-stamping of an arbitration agreement does not fall under the purview of either of the grounds mentioned above. Therefore, invalidating an arbitrating agreement merely on the ground of insufficient/non-stamping is not in line with the international commercial arbitration jurisprudence. Moreover, the introduction of this new ground also goes against the Article 5 of the Model Law[49] which forbids the courts from adopting any other extra ground for invalidating the arbitration agreement that isn't explicitly stated in it.

Also, when we look at other jurisdictions, stamping of arbitration agreement has nowhere been deliberated like it has been in India. This can be primarily attributed to the clear distinction on

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[43] Harold Leonel Pineda Lindo v. NCL (Bahamas), Ltd., 652 F.3d 1257, pg. 70; Gas Authority Of India Ltd. vs Spie Capag, S.A. And Ors, AIR 1994 Del 75 ¶89.
[44] Arbitration Act, *supra* note 4, §45.
[45] New York Convention, *supra* note 24, at Art. II (3).
[46] 7 NIGEL BLACKABY KC, CONSTANTINE PARTASIDES KC, & ALAN REDFERN, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (OUP 2022).
[47] Stefan Kröll, *The 'Incapable of Being Performed' Exception in Article II (3) of the New York Convention*, in Enforcement of Arbitration Agreements and International Arbitral Awards—The New York Convention 1958 in Practice 323, 326 (2008).
[48] Albert Jan van den Berg, *The New York Convention of 1958: An Overview*, INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION https://cdn.arbitration-icca.org/s3fs-public/document/media_document/media012125884227980new_york_convention_of_1958_overview.pdf; Williams v. NCL (Bahamas) Ltd., No. 11-12150 (11th Cir. 2012)
[49] UNCITRAL Model Law, *supra* note 14.

laws related to separability. For example, in the USA, the position is that the arbitration agreement is considered separate from the main contract. The arbitrator is supposed to decide on any matter that relates to the validity of the agreement, including stamping. Further, in Singapore as well, the position has been clearly stated regarding separability and any question regarding validity of the underlying contract is to be dealt with by the tribunal.[50]

V. PRACTICAL IMPLICATIONS AND CONSEQUENCES OF *RE: THE INTERPLAY*

a) Arbitral Institutions

The position in *NN Global 2* had created an anomaly with respect to institution-administered arbitration. Most of the arbitral institutions had rules wherein the reference for arbitration is made to the Registrar and not to the court.[51] Further, any challenge to the existence or validity of the agreement is to be determined by a Council and a Registrar.[52] In such a case if a court under section 33 of the Stamp Act had been given the power to impound and collect the stamp duty, the role of arbitral institutions would have been infructuous. The parties to such an agreement would have been required to first get the stamp duty paid in the courts before the proceedings could begin before the institution. Such a step would have resulted in undue delays and would have been contrary to the principle of minimum judicial interference and party autonomy. The position now is cleared since the arbitral tribunal can impound the agreement as well and the reasoning complements with rules of the arbitral institutions across India.

b) Difficulty in Interim Relief

The bench in *NN Global 2* had categorically abstained from ruling on section 9 of the Act.[53] This had amounted to lacunae in the law as the position stood uncleared on whether an unstamped arbitration agreement would act as a bar to obtain interim relief under section 9. However, the Supreme Court in *Re: The Interplay* had clarified the position and held that interim relief can be granted even in cases of an insufficiently stamped agreement.[54] The position corresponds well as insufficiency makes an agreement only inadmissible and not invalid. Further, even the ruling laid down in the case of *Amazon Holdings*[55] recognising emergency arbitration in India would have been held infructuous. Emergency Arbitration in India flows from section 9 of *Act* as an interim relief but in the case where an insufficiently

[50] Abhileen Chaturvedi & Saqib Ali, Enforceability of an Unstamped Arbitration Agreement, INDIA CORPORATE LAW, CAM (February 11, 2024), https://corporate.cyrilamarchandblogs.com/2023/05/enforceability-of-an-unstamped-arbitration-agreement/.
[51] Arbitration Rules for the Mumbai Centre for International Arbitration, 2017, Rule 3.1 (15 Jan., 2017).
[52] *Id.*at Rule 20.1.
[53] NN Global 2, *supra* note 11, ¶ 117.
[54] Re: The Interplay, *supra* note 2, ¶186.
[55] Amazon.Com Nv Investment Holdings Llc. v. Future Retail Limited, AIR 2021 SC 3723.

stamped agreement would have been held to be invalid, it would have been difficult to get interim relief under section 9. It is important to note that even before the seven judge bench in *Re: The Interplay* had rendered their decision, many High Courts had already found a way around by holding insufficiency of stamping not a ground to deny interim relief under section 9 of the *Act*. [56]

c) Section 36 of Stamp Act

Section 36 of the Stamp Act says that once an agreement is admitted into evidence, then a question of stamping cannot be subsequently raised in the suit or proceeding. For example, if an agreement is admitted in evidence at the trial stage then subsequently its validity cannot be questioned later in the appellate stage. There has often been confusion regarding the interpretation of section 35 and 36 of the Stamp Act. While section 35 says that an insufficiently stamped agreement cannot be '*admitted in evidence*' as well as '*acted upon*', section 36 only mentions '*admission into evidence'*. The bench in *NN Global 2* vaguely relying on the case of *Hindustan Steel,*[57] had endorsed the view that section 36 only creates a bar with respect to '*admission into evidence'* and not regarding '*acting upon'* thereby meaning that a claim could still be brought regarding the insufficiency in stamping later in the proceeding.[58] The position that stands as of now is that any authority under the Stamp Act can admit the concerned document in evidence but cannot act upon or enforce it.

The Bench in *Re: The Interplay* failed to deliberate on the above dilemma except we can find certain reference to the issue in the concurrent opinion of Justice Sanjeev Khanna that cannot be considered a binding precedent.[59] Justice Khanna seemed to defer with the above reasoning and considered section 36 as a total bar in terms of *'admission into evidence'* as well as 'acting upon' with respect to an unstamped/insufficient agreement. If we see the intention behind section 35, the word '*acted upon*' in section 35 was inserted to cover documents that cannot be admitted into evidence but still require stamping like security bonds.[60] Recently the Delhi HC also seemed to agree with this point wherein it held that an arbitration agreement once admitted into evidence cannot be called into question and will have to be acted upon by virtue of section 36 of the Stamp Act.[61] The lack of clarity is bound to create confusions during arbitral proceedings as parties can anytime ask the arbitrator to not act upon the agreement because of

[56] L&T Finance Limited v. Diamond Projects Limited & Ors, Comm. Arbitration Petition No. 1430 of 2019 (Bom HC).
[57] Hindustan Steel Ltd. v. Dilip Construction Company, (1969) 1 SCC 597.
[58] NN Global 2, *supra* note 11, ¶ 51.
[59] Re: The Interplay, *supra* note 2, concurrent of Sanjiv Khanna J.,¶ 15.
[60] Bittan Bibi v. Kunta Lal, AIR 1952 All 996.
[61] M/s. Arg Outlier Media Private Limited v. HT Media Limited, 2023 SCC Online Del 3885.

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its insufficiency. Further there remains a lacuna in cases where arbitration starts after preliminary adjudication in a lower court and the agreement is already admitted into evidence thereby leaving scope for future litigation.

d) Advent of Technology and Stamping Requirements

The landscape of commercial transactions has experienced an important transition with the advent of technological advances. The 2015 amendment to Section 7 of the *Act* recognized the significance of electronic communication in arbitration agreements.[62] However, the technicality of stamping, introduces hurdles that might hinder the effectiveness and efficiency of arbitration procedures, particularly in an age where electronic communication is the norm. The Supreme Court, in the case of *Trimex International FZE Ltd. v. Vedanta Aluminium Ltd.*[63] also opined that the technicalities such as seals or stamps should not impede the parties from obtaining an effective settlement to their dispute in the context of commercial arbitration.

The recent judgment leaves this pivotal question largely unanswered, leaving room for contemplation and legislative consideration. The rise of smart contracts and the metaverse arbitration highlights the need for a nuanced approach to stamping of arbitration agreements. In an age of electronic signatures, block chain, and AI, stamp duty appears anti-modern. Lawmakers must address this incongruity, assessing if the stamping mandate is in line with the idea of effectiveness, inclusivity, and technical impartiality. A recalibration of the stamping process, such as exempting specific electronic arbitration agreements or providing alternative procedures, has the potential to enhance the agility and adaptability of the legal system.

VI. CONCLUSION

The long-standing issue of the power of the Courts to impound an unstamped arbitration agreement is finally settled by a seven judge bench in the case *Re: The Interplay*. The Supreme Court in this case also laid down an important precedent that an unstamped arbitration agreement would be enforceable, but inadmissible in evidence. This is a welcome step and aligns well with the international arbitration practices. The judgement is supposed to decrease the unnecessary judicial involvement in the arbitration proceedings and accord priority to the arbitral tribunal in dealing with the jurisdictional issues to uphold the mutual intention of the parties. The judgment clearly and emphatically shows a pro-arbitration mindset by the Supreme Court. This should be a strong signal to other courts that the mantra is '*keep calm and arbitrate'*.

The ruling is likely to boost the ease of arbitration in the country, helping India reaching one

[62] Arbitration Amendment Act, *supra* note 8, § 7.
[63]Trimex International FZE Ltd. v. Vedanta Aluminium Ltd., (2010) 3 SCC 1.

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step closer to its goal of becoming a hub for international arbitration. However, there are few challenges that need to be addressed. Though Arbitral Tribunal is now empowered to determine the fate of unstamped arbitration agreements, the position regarding section 36 of Stamp Act still remains unresolved. Further with technological advances coming in, we will require rethinking of stamping legislation as well and the recent announcement by the Government to introduce a revamped Stamp Act seems a step in the rights direction. Another potential issue that could be faced is slowdown of arbitral proceedings due to an influx of questions over the sufficiency of stamp duty paid on arbitration agreements before arbitral tribunal. To avoid such delay, the arbitral system must adapt itself to effectively deal with these stamping concerns. This adjustment is essential for creating an effective and expeditious arbitration process.

In all, this entire issue serves as a precaution for the Indian Courts to restrain themselves as much as possible from unnecessary intervening in arbitral procedures. Only when the international established practices are adhered to, can India truly become a hub for international arbitration.

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