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THE VALIDITY CONUNDRUM: UNSTAMPED AGREEMENTS AND LIMITATION PERIODS IN INDIAN ARBITRATION

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ABSTRACT

Two questions have repeatedly delayed the constitution of arbitral tribunals in India. The first is whether an arbitration clause in an unstamped instrument can be given effect. The second is whether a court hearing an application under Section 11 of the Arbitration and Conciliation Act, 1996 may refuse to appoint an arbitrator because the underlying claim is time-barred. This paper traces the Supreme Court's treatment of both questions, from the strict stamping cases decided before 2023, through the five-judge decision in N.N. Global Mercantile in April 2023, to its reversal by a seven-judge bench in December 2023, and then to the limitation framework in Arif Azim and its later clarification in Krish Spinning. It argues that these decisions apply one idea. The referral court asks whether an arbitration agreement exists and leaves stamping, limitation and similar questions to the tribunal under Section 16. The paper compares this approach with the Model Law and with English, American and Singaporean practice, identifies the tensions that remain, including the uncertain reach of the ex-facie standard, and examines the absence of a statutory limitation period for Section 11 applications.

Keywords: Section 11(6); competence-competence; separability; Indian Stamp Act, 1899; limitation; admissibility; Section 16; referral courts.

INTRODUCTION

The Arbitration and Conciliation Act, 1996 (the Arbitration Act) was meant to give commercial parties a quick and predictable route from agreement to award. In practice the route has often been blocked at the first step. A tribunal has to exist before it can hear anything, and where the parties cannot agree on an arbitrator, the High Court or the Supreme Court must

make the appointment under Section 11.¹ Disputes at that stage have sometimes lasted longer than the arbitrations they were supposed to start.

The Act borrows its structure from the UNCITRAL Model Law, which tells courts to stay out of arbitral matters unless the statute itself lets them in.² Indian practice did not follow that design in its first decade. In 2005 a seven-judge bench held that the power to appoint an arbitrator was judicial and not administrative, which allowed the appointing court to decide whether a valid agreement existed, whether the claim was still alive, and a range of other preliminary issues.³ The Supreme Court later sorted those issues into three groups: those the court must decide, those it may decide, and those it should leave to the tribunal.⁴ Even so, the appointment stage had become a small trial of its own.

Parliament stepped in during 2015. The amendment inserted Section 11(6A), which directs the court, notwithstanding any earlier judgment, to confine itself to the examination of the existence of an arbitration agreement.⁵ The Law Commission of India had urged the change on the footing that an appointing court should not do the tribunal's work.⁶ Later decisions read the new provision as Parliament intended and described the court's task as a *prima facie* check.⁷

Two obstacles survived. The first was the unstamped agreement. Section 35 of the Indian Stamp Act, 1899 provides that an instrument not duly stamped cannot be admitted in evidence or acted upon, and for years the Supreme Court held that an arbitration clause inside such an instrument could not support an appointment until duty and penalty had been paid.⁸ The second was limitation. Respondents regularly argued that the underlying claim had expired and that the court should therefore decline to appoint anyone.⁹ Both objections generated satellite litigation before the arbitration had begun.

This paper argues that decisions delivered between 2023 and 2024 resolved both difficulties by applying one idea. The court asked to appoint an arbitrator check whether an

¹Arbitration and Conciliation Act, 1996, No. 26 of 1996, § 11, India Code (1996).

²U.N. Comm'n on Int'l Trade L., UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, art. 5, U.N. Sales No. E.08.V.4 (2008); Arbitration Act § 5. *See also Bharat Aluminium Co. v. Kaiser Aluminium Tech. Servs., Inc.*, (2012) 9 SCC 552 (India) (describing the Act as drawn from the Model Law and as limiting judicial intervention).

³*SBP & Co. v. Patel Eng'g Ltd.*, (2005) 8 SCC 618 (India).

⁴*Nat'l Ins. Co. Ltd. v. Boghara Polyfab Pvt. Ltd.*, (2009) 1 SCC 267 (India).

⁵Arbitration and Conciliation (Amendment) Act, 2015, No. 3 of 2016, § 6, India Code (2016); Arbitration Act § 11(6A).

⁶Law Comm'n of India, Report No. 246: Amendments to the Arbitration and Conciliation Act, 1996 (2014).

⁷*See Duro Felguera, S.A. v. Gangavaram Port Ltd.*, (2017) 9 SCC 729 (India); *Mayavati Trading Pvt. Ltd. v. Pradyut Deb Burman*, (2019) 8 SCC 714 (India); *Vidya Drolia v. Durga Trading Corp.*, (2021) 2 SCC 1 (India).

⁸Indian Stamp Act, 1899, No. 2 of 1899, § 35, India Code (1899); *SMS Tea Estates Pvt. Ltd. v. Chandmari Tea Co. Pvt. Ltd.*, (2011) 14 SCC 66 (India); *Garware Wall Ropes Ltd. v. Coastal Marine Constr. & Eng'g Ltd.*, (2019) 9 SCC 209 (India).

⁹*See Bharat Sanchar Nigam Ltd. v. Nortel Networks India Pvt. Ltd.*, (2021) 5 SCC 738 (India).

arbitration agreement exists. Stamping, limitation and similar questions go to the tribunal, which can decide them under Section 16 and whose conclusions remain open to review under Section 34. The paper also argues that the idea is only partly secure. The standard for claims that are ex facie time-barred is hard to apply, the later decisions do not speak in exactly the same voice about how much inquiry is allowed, and the statute still has no limitation period of its own for Section 11 applications.

Part II sets out the statutory framework and the movement toward narrow referral scrutiny. Part III explains the doctrines of competence-competence and separability on which that movement rests. Part IV examines the stamping decisions and Part V the limitation decisions. Part VI shows how the two lines fit together, and Part VII places the Indian position beside that of the Model Law, England, the United States and Singapore. Part VIII considers the criticisms and the unsettled points, Part IX the case for legislative reform, and Part X concludes.

THE STATUTORY FRAMEWORK AND THE MOVE TO NARROW SCRUTINY

Sections 8 and 11

Two provisions bring a court into contact with an arbitration agreement before any tribunal has ruled. Section 8 applies when a party sues in court on a matter covered by an arbitration agreement. The judicial authority must refer the parties to arbitration if a party applies in time, unless it finds that prima facie no valid arbitration agreement exists.¹⁰ Section 11 applies when the arbitration has not yet begun and the machinery for appointing the tribunal has failed. If a party does not appoint within thirty days of a request, or the appointed arbitrators do not agree on a presiding arbitrator within thirty days, the court may be asked to step in.¹¹

The two provisions operate at different moments, but they put a similar question to the court: should this dispute go to a tribunal? The legislature also signalled that the answer should come quickly. A decision under Section 11 is final and carries no appeal, and the court is told to try to dispose of the application within sixty days of notice to the opposite party.¹² The wording differs in one respect that has caused trouble. Section 8 speaks of a “valid” agreement, while Section 11(6A) speaks of “existence.” Whether that difference carries any weight has been argued repeatedly, and the answer given in the later decisions is that both provisions call

¹⁰Arbitration Act § 8(1).

¹¹*Id.* § 11(4)–(6).

¹²*Id.* § 11(7), (13).

for a limited, prima facie review.¹³

The Early Broad Approach

The pendulum had already swung once before 2005. In the late 1990s and early 2000s the Supreme Court treated the Chief Justice's order under Section 11 as an administrative act that decided nothing and could be revisited by the tribunal.¹⁴ The seven-judge bench in *SBP & Co.* rejected that view. It held that the order was judicial, that the court should satisfy itself of the preconditions for appointment, and that the court could decide questions such as whether a valid agreement existed and whether a live claim was presented.¹⁵ Later decisions carried the approach into other settings. The majority in *Shin-Etsu*, dealing with the reference of disputes under the part of the Act that governs foreign awards, took a similarly demanding view of what the court must decide at the threshold.¹⁶

The practical result was that appointment applications turned into contested hearings on fraud, accord and satisfaction, limitation and the validity of the contract. The Law Commission recorded the delay this caused and the dissatisfaction of commercial users.¹⁷ The classification developed in *Boghara Polyfab* helped to organise the case law but did not reduce the amount of inquiry. A court asked to appoint an arbitrator still had to read the pleadings and decide whether the claim was alive or settled.¹⁸

The Statutory Correction and the Judicial Response

The 2015 amendment was a direct answer to this experience. By inserting Section 11(6A) and the words “notwithstanding any judgment, decree or order of any court,” Parliament reversed the reasoning of *SBP & Co.* and its successors on the scope of the appointing court's inquiry.¹⁹ The judicial response came in stages. In *Duro Felguera* the Court said that after the amendment the examination was limited to the existence of the agreement and that the earlier tests no longer governed.²⁰ In *Mayavati Trading* the Court went further and

¹³*Vidya Drolia*, (2021) 2 SCC 1; *In re Interplay Between Arbitration Agreements under the Arbitration & Conciliation Act 1996 & the Indian Stamp Act 1899*, (2024) 6 SCC 1 (India).

¹⁴*Konkan Ry. Corp. Ltd. v. Mehul Constr. Co.*, (2000) 7 SCC 201 (India); *Konkan Ry. Corp. Ltd. v. Rani Constr. Pvt. Ltd.*, (2002) 2 SCC 388 (India).

¹⁵*SBP & Co.*, (2005) 8 SCC 618.

¹⁶*Shin-Etsu Chem. Co. v. Aksh Optifibre Ltd.*, (2005) 7 SCC 234 (India). *But see Vidya Drolia*, (2021) 2 SCC 1 (preferring a prima facie standard).

¹⁷Law Comm'n of India, Report No. 246, *supra* note 6.

¹⁸*Boghara Polyfab*, (2009) 1 SCC 267.

¹⁹Arbitration Act § 11(6A); Law Comm'n of India, Report No. 246, *supra* note 6.

²⁰*Duro Felguera*, (2017) 9 SCC 729.

treated the wide reading in *SBP & Co.* and *Boghara Polyfab* as legislatively removed.²¹ Decisions in 2020 followed the same line.²²

Vidya Drolia then restated the law for the Section 8 and Section 11 stages. The Court held that the referral court looks at the existence of the agreement and at non-arbitrability only on a prima facie basis, and that where the position is doubtful the dispute should go to the tribunal.²³ Two years later the Court described the referral court's task in a case on accord and satisfaction as passing the claim through the "eye of the needle," refusing only where the dispute is plainly non-arbitrable or frivolous.²⁴

This movement was uneven. *Vidya Drolia* narrowed the inquiry on arbitrability and at the same time affirmed the strict stamping rule from *Garware Wall Ropes*, so the Court was reducing scrutiny with one hand and keeping it with the other.²⁵ The stamping cases and the limitation cases examined below are the two places where the older, broader scrutiny survived longest.

COMPETENCE-COMPETENCE AND SEPARABILITY

The Positive and Negative Effects

The rulings discussed in this paper depend on two doctrines that are easy to state and harder to apply. The first is competence-competence, the principle that an arbitral tribunal may rule on its own jurisdiction. Section 16(1) of the Arbitration Act gives the tribunal that power, including power to rule on objections to the existence or validity of the arbitration agreement.²⁶ Commentators divide the principle into a positive and a negative effect. The positive effect is the tribunal's authority to decide. The negative effect is the court's duty to hold back, so that the tribunal rules first and the court reviews later.²⁷

Section 16 builds in a timetable. A plea that the tribunal lacks jurisdiction must be raised no later than the statement of defence. The tribunal decides the plea, continues with the proceedings if it rejects it, and the party objecting may challenge the ruling under Section 34

²¹*Mayavati Trading*, (2019) 8 SCC 714.

²²*Patel Eng'g Ltd. v. N.E. Elec. Power Corp. Ltd.*, (2020) 7 SCC 167 (India); *Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd.*, (2020) 2 SCC 455 (India).

²³*Vidya Drolia*, (2021) 2 SCC 1. See also *Booz Allen & Hamilton Inc. v. SBI Home Fin. Ltd.*, (2011) 5 SCC 532 (India) (discussing arbitrability); *A. Ayyasamy v. A. Paramasivam*, (2016) 10 SCC 386 (India) (treating allegations of serious fraud as capable of taking a dispute outside arbitration).

²⁴*NTPC Ltd. v. SPML Infra Ltd.*, (2023) 9 SCC 385 (India).

²⁵*Vidya Drolia*, (2021) 2 SCC 1; *Garware Wall Ropes*, (2019) 9 SCC 209.

²⁶Arbitration Act § 16(1); UNCITRAL Model Law art. 16(1).

²⁷See FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (Emmanuel Gaillard & John Savage eds., 1999); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION ch. 7 (3d ed. 2021).

once the award is made.²⁸ The statute thus provides for judicial review, but it places that review after the award and not before the proceedings begin. The negative effect depends on keeping the court out of the early stage, and every inquiry the referral court undertakes eats into it.²⁹

Separability

The second doctrine is separability. Section 16(1)(a) treats an arbitration clause that forms part of a contract as an agreement independent of the other terms, and Section 16(1)(b) adds that a decision by the tribunal that the contract is null and void does not by itself make the arbitration clause invalid.³⁰ The idea has a long pedigree. The House of Lords accepted in 1942 that an arbitration clause could survive the termination of the contract that contained it, and the Supreme Court of India took the same view in 1959.³¹ The principle was later applied to allegations that the main contract was procured by fraud or was otherwise defective, in India, England and the United States.³²

Separability matters to stamping because the defect arises in the instrument and not in the arbitration clause as such. If the clause is an independent agreement, a fiscal flaw in the document that carries it does not obviously reach the clause. The courts that required stamping before appointment did not deny the principle. They held that where the clause is physically part of an unstamped instrument, the Stamp Act prevents the court from acting on it.³³ As Part IV shows, the seven-judge bench ultimately rested its decision less on separability than on a distinction between inadmissibility and invalidity, but separability supplied the background against which that distinction made sense.³⁴

Restraint in the Statutory Scheme

Section 5 states that in matters governed by Part I no judicial authority shall intervene except where the Part so provides.³⁵ The Supreme Court has relied on that provision to discourage supervisory interference, including by High Courts exercising constitutional

²⁸Arbitration Act § 16(2)–(6).

²⁹NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (6th ed. 2015); JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION (2003).

³⁰Arbitration Act § 16(1)(a)–(b).

³¹*Heyman v. Darwins Ltd.*, [1942] A.C. 356 (H.L.) (appeal taken from Eng.); *Union of India v. Kishorilal Gupta & Bros.*, A.I.R. 1959 S.C. 1362 (India).

³²*Enercon (India) Ltd. v. Enercon GmbH*, (2014) 5 SCC 1 (India); *Fiona Tr. & Holding Corp. v. Privalov*, [2007] UKHL 40 (appeal taken from Eng.); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

³³*SMS Tea Estates*, (2011) 14 SCC 66; *Garware Wall Ropes*, (2019) 9 SCC 209.

³⁴*In re Interplay*, (2024) 6 SCC 1.

³⁵Arbitration Act § 5.

jurisdiction, in the course of arbitrations.³⁶ Read with Sections 11(6A) and 16, Section 5 supports a structure in which the court acts at three points: at the start, to see whether an agreement exists; during the proceedings, in the limited ways the Act allows; and after the award, on the grounds in Section 34. The stamping and limitation questions are examined below against that structure.

THE STAMPING QUESTION

The Stamp Act and Its Mechanism

The Indian Stamp Act, 1899 is a revenue statute. It charges duty on instruments and seeks to make sure the duty is paid. Section 33 requires every person with authority to receive evidence, whether by law or by consent of the parties, to impound an instrument that appears to be chargeable with duty and is produced before them without proper stamping. Section 35 provides that such an instrument shall not be admitted in evidence or acted upon until duty and penalty have been paid.³⁷ The proviso to Section 35 allows admission once the deficiency is made good. Sections 40 and 42 provide for the Collector to assess duty on an impounded instrument and for the instrument to be endorsed once duty is paid.³⁸

Two features of the scheme matter for arbitration. First, the bar in Section 35 is one of admissibility and of acting upon the document. Courts have treated it as strict, and an unstamped instrument cannot be used in evidence until the deficiency is cured.³⁹ Second, the duty to impound falls on a person who has authority to receive evidence by consent of the parties. The Supreme Court has recognised that an arbitrator is such a person.⁴⁰ That recognition is important because it shows that the Stamp Act already contemplated enforcement by the tribunal, which later became the foundation for the view that stamping can be left to the arbitrator.

The Era of Strictness

In *SMS Tea Estates* the Supreme Court held that a court asked to appoint an arbitrator under Section 11 must first examine whether the instrument containing the arbitration clause is duly stamped. If it is not, the court must impound it and direct payment of duty and penalty,

³⁶*Bhaven Constr. v. Exec. Eng'r, Sardar Sarovar Narmada Nigam Ltd.*, (2022) 1 SCC 75 (India).

³⁷Stamp Act §§ 33, 35.

³⁸*Id.* §§ 35, 40, 42.

³⁹*Avinash Kumar Chauhan v. Vijay Krishna Mishra*, (2009) 2 SCC 532 (India).

⁴⁰*Hindustan Petroleum Corp. Ltd. v. Pinkcity Midway Petroleums*, (2003) 6 SCC 503 (India).

and only then may it proceed to appoint.⁴¹ The reasoning was short. An arbitration clause in an unstamped instrument could not be acted upon, and an appointment is an act of acting upon it.

Garware Wall Ropes confirmed this after the 2015 amendment. The Court rejected the argument that Section 11(6A) displaced the Stamp Act and held that an agreement which is not duly stamped is not enforceable in law and therefore does not “exist” in the sense relevant to Section 11(6A).⁴² The decision was reaffirmed in *Vidya Drolia*, which treated the position as settled.⁴³ The practical effect was easy to predict. A respondent who wished to delay arbitration needed only to point to a deficiency in stamp duty. The dispute would then enter impounding proceedings, often before the Collector, and the appointment would wait for months or years.

The First N.N. Global Decision

The issue returned in a dispute over a work order that carried an arbitration clause but had not been stamped. A three-judge bench reasoned in 2021 that the arbitration agreement is distinct from the substantive contract, that a failure to pay duty on the work order does not make the arbitration agreement invalid, and that the strict approach in the earlier cases sat badly with Section 16.⁴⁴ Because a coordinate bench had approved *Garware Wall Ropes* in *Vidya Drolia* shortly before, the matter was referred to a Constitution Bench.⁴⁵

The Second N.N. Global Decision

In April 2023 the five-judge Constitution Bench, by a majority of three to two, went in the opposite direction. It held that an arbitration agreement in an instrument that is not stamped is void, not enforceable in law, and cannot be acted upon until the instrument is stamped.⁴⁶ The majority reasoned that an agreement unenforceable by law is void under Section 2(g) of the Contract Act, so that an unstamped agreement could not be said to exist in the sense required by Section 11(6A).⁴⁷ The two dissenting judges regarded the defect as one that could be cured and that did not go to the existence of the agreement.⁴⁸

The decision raised immediate objections. It required the referral court to examine stamping in detail, and it made the fate of the arbitration agreement depend on a fiscal

⁴¹*SMS Tea Estates*, (2011) 14 SCC 66.

⁴²*Garware Wall Ropes*, (2019) 9 SCC 209.

⁴³*Vidya Drolia*, (2021) 2 SCC 1.

⁴⁴*N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd.*, (2021) 4 SCC 379 (India).

⁴⁵*Vidya Drolia*, (2021) 2 SCC 1; *N.N. Global Mercantile (2021)*, (2021) 4 SCC 379.

⁴⁶*N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd.*, (2023) 7 SCC 1 (India).

⁴⁷Indian Contract Act, 1872, No. 9 of 1872, § 2(g), India Code (1872); *N.N. Global Mercantile (2023)*, (2023) 7 SCC 1.

⁴⁸*N.N. Global Mercantile (2023)*, (2023) 7 SCC 1.

formality. Critics said it confused the evidentiary restriction in a revenue statute with contractual invalidity, and that it left Section 5 with little work to do.⁴⁹ Within months, in curative proceedings arising from the decision, the Court referred the question to a larger bench.⁵⁰

The Seven-Judge Bench

On 13 December 2023 a bench of seven judges, in a unanimous decision, overruled the Constitution Bench decision and the line of authority that included *SMS Tea Estates* and *Garware Wall Ropes*. The Court also corrected the observations in *Vidya Drolia* that had approved the strict rule.⁵¹

The bench rested its reasoning on two distinctions. The first is between evidentiary inadmissibility and invalidity. Section 35 of the Stamp Act makes an unstamped instrument inadmissible in evidence. That is a consequence the statute attaches to non-payment of duty, and it can be removed by paying duty and penalty. It says nothing about whether a contract has come into existence or can be enforced.⁵² The second distinction is between the Stamp Act and the law of contract. An agreement is void only if it falls within the Contract Act's own grounds, such as the lack of a lawful object or consideration, and non-payment of stamp duty is not among them.⁵³ The Court therefore held that an unstamped instrument is not void, not void ab initio and not unenforceable. It is inadmissible until stamped, and the defect is curable.

Three further holdings followed. First, the inquiry under Section 11 is limited to whether an arbitration agreement exists in the sense of Section 7, and the question whether the instrument is stamped is not part of it.⁵⁴ Second, the stamping objection belongs to the tribunal, which as a person with authority to receive evidence can impound the instrument and have duty paid.⁵⁵ Third, the Arbitration Act is a special law with its own timelines and its policy of minimal interference, and a reading of the Stamp Act that suspends arbitration at the threshold fits poorly with Sections 5, 8, 11 and 16.⁵⁶ The result is that an unstamped arbitration clause survives the pre-referral stage, and the State's interest in revenue is protected later, at a stage where it does not hold up the reference.

⁴⁹See *In re Interplay*, (2024) 6 SCC 1 (summarising and rejecting the majority's reasoning).

⁵⁰*Id.*

⁵¹*Id.*

⁵²*In re Interplay*, (2024) 6 SCC 1; Stamp Act § 35.

⁵³Contract Act §§ 2(g), 23; *In re Interplay*, (2024) 6 SCC 1.

⁵⁴Arbitration Act §§ 7, 11(6A); *In re Interplay*, (2024) 6 SCC 1.

⁵⁵Stamp Act § 33; *Hindustan Petroleum*, (2003) 6 SCC 503.

⁵⁶Arbitration Act §§ 5, 8, 11, 16.

How the Tribunal Is Expected to Proceed

The decision leaves some practical questions for tribunals. A tribunal faced with an unstamped agreement must decide whether to impound it at once or at the point the instrument is tendered in evidence. The better course, in the view of the author, is to raise the matter at the first procedural meeting, record the deficiency and give the parties a period to pay duty and penalty, since a tribunal that postpones the question may later find that it cannot rely on the instrument at the stage of the final hearing.⁵⁷ Where the instrument is stamped within the period fixed, the proceedings continue without loss of time. Where it is not, the tribunal may refuse to act on the instrument until the Collector has dealt with it. This is a case-management step and not a jurisdictional bar, which is the sense in which the decision treats the stamping defect as a curable one.⁵⁸

LIMITATION AND THE “EYE OF THE NEEDLE” TEST

Two Different Limitation Questions

Two questions about limitation are often run together and should be kept apart. The first concerns the Section 11 application itself: has the party asking the court to appoint an arbitrator come to court in time? The second concerns the underlying claim: is the claim that the party wants to arbitrate already barred, for instance because it was raised more than three years after the cause of action arose?

The Arbitration Act answers neither directly. Section 43 applies the Limitation Act, 1963 to arbitrations as it applies to proceedings in court, and Section 43(2) treats an arbitration as commenced on the date the request for arbitration is received by the respondent under Section 21.⁵⁹ Claims in arbitration are therefore subject to limitation in the same way as claims in a suit, a principle that predates the 1996 Act.⁶⁰ As for the application to the court, the Limitation Act contains no article that mentions Section 11, so the residuary Article 137 applies, which gives three years from the time the right to apply accrues.⁶¹ In *Bharat Sanchar Nigam* the Supreme Court held that the right to apply accrues when the other party fails or refuses to make the appointment after notice, and it also said that a court need not appoint

⁵⁷Stamp Act §§ 33, 35, 42.

⁵⁸*In re Interplay*, (2024) 6 SCC 1.

⁵⁹Arbitration Act §§ 21, 43.

⁶⁰*Panchu Gopal Bose v. Bd. of Trs. for Port of Calcutta*, (1993) 4 SCC 338 (India).

⁶¹Limitation Act, 1963, No. 36 of 1963, art. 137, India Code (1963); *Inder Singh Rekhi v. Delhi Dev. Auth.*, (1988) 2 SCC 338 (India) (applying Article 137 to applications under the earlier arbitration statute); *Bharat Sanchar Nigam*, (2021) 5 SCC 738.

where the claim is plainly dead.⁶²

A claim may be time-barred even though the Section 11 application is filed promptly, and the reverse is also possible. A claimant with a good claim may file an application years after the right to apply accrued. A claimant whose claim is stale may nonetheless apply the day after the respondent fails to appoint. Treating the two as one question was a regular source of confusion in earlier practice.

Arif Azim and the Two-Pronged Test

The framework now in use comes from *Arif Azim*, decided by a three-judge bench in 2024 in a dispute arising out of franchise agreements. The respondent resisted the application under Section 11(6) on grounds of limitation.⁶³ The Court addressed both questions. On the first, it confirmed that Article 137 governs Section 11 applications and held that the three years run from the point at which the right to apply accrues, which in the ordinary case is the expiry of the thirty days given to the other side to make the appointment after the notice invoking arbitration.⁶⁴ It also stressed that the period is not counted from the original cause of action, so the question is not when the dispute arose but when the claimant became entitled to come to court.⁶⁵

On the second question the Court set out a test with two limbs. The referral court should ask whether the Section 11 application is barred by limitation. It should then ask whether the claims sought to be arbitrated are ex facie dead, so that they are plainly time-barred on the date arbitration was invoked and there is no live dispute to refer.⁶⁶ The Court explained that limitation is generally a mixed question of law and fact. Evidence about acknowledgments, part payment, fraud, continuing causes of action and the exclusion of time under the Limitation Act is for the tribunal.⁶⁷ The referral court should decline only where the position is clear without a detailed factual inquiry, and where there is doubt it should refer.⁶⁸

On its facts the Court found that the application was within time and that the claims were not shown to be dead on their face, and an arbitrator was appointed.⁶⁹ The value of the decision lies in the standard it fixes for later cases more than in its result. The Court added that

⁶²*Bharat Sanchar Nigam*, (2021) 5 SCC 738.

⁶³*Arif Azim Co. Ltd. v. Aptech Ltd.*, (2024) 5 SCC 313 (India).

⁶⁴*Arif Azim*, (2024) 5 SCC 313; Arbitration Act § 11(4).

⁶⁵*Arif Azim*, (2024) 5 SCC 313.

⁶⁶*Id.*.

⁶⁷Limitation Act §§ 5, 14, 17–19.

⁶⁸*Arif Azim*, (2024) 5 SCC 313; *Vidya Drolia*, (2021) 2 SCC 1.

⁶⁹*Arif Azim*, (2024) 5 SCC 313.

the three-year period allowed by Article 137 is long for an application of this kind and sits uneasily with the Act's aim of expeditious resolution, and it asked Parliament to consider prescribing a specific period.⁷⁰

The Later Clarification in *Krish Spinning*

The decision in *Krish Spinning* in July 2024 came from a bench of three judges, with Justice Pardiwala again writing the judgment. The question there was whether a referral court may examine a plea that the contract has been discharged by accord and satisfaction, after the insured had signed a discharge voucher for a claim. The Court held that the plea does not attack the existence of the arbitration agreement and is a mixed question for the tribunal.⁷¹ The bench also addressed limitation. It said that the referral court should limit its inquiry to whether the Section 11 application was filed within three years, calculated as in *Arif Azim*, and that it should not conduct an intricate evidentiary inquiry into whether the claims are time-barred.⁷² The Court also reviewed the “eye of the needle” formulation in light of the seven-judge decision on stamping, and observed that tests which oblige a court to examine contested facts sit uneasily with the approach of modern arbitration law.⁷³

The effect of *Krish Spinning* is to move the position further toward the tribunal. The ex-facie limb of the *Arif Azim* test remains available in principle, but the second decision makes it harder to use. A respondent who argues that the claim is dead will be asked to show that the point can be decided on the face of the record without evidence, and a respondent who needs documents or witnesses will be told to make the argument to the arbitrator.

Admissibility and Jurisdiction

The conceptual core of these rulings is a distinction between jurisdiction and admissibility. Jurisdiction concerns the tribunal's power to hear the dispute at all: whether a valid arbitration agreement exists, whether it covers the dispute, and whether the dispute is arbitrable. Admissibility concerns whether a claim that is within the tribunal's jurisdiction can be entertained or succeeds, for example because it is premature or out of time.⁷⁴ The distinction has been developed in international arbitration and is not free from difficulty, but the courts of

⁷⁰*Id.*

⁷¹*SBI Gen. Ins. Co. v. Krish Spinning*, (2024) 12 SCC 1 (India).

⁷²*Krish Spinning*, (2024) 12 SCC 1; *Arif Azim*, (2024) 5 SCC 313.

⁷³*Krish Spinning*, (2024) 12 SCC 1; *NTPC*, (2023) 9 SCC 385; *In re Interplay*, (2024) 6 SCC 1.

⁷⁴Jan Paulsson, *Jurisdiction and Admissibility*, in GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER 601 (Gerald Aksen et al. eds., 2005).

several systems use it, and Singapore's Court of Appeal has given it a clear working test that asks whether the objection is directed at the tribunal or at the claim.⁷⁵

Limitation is generally a matter of admissibility. A time-barred claim does not remove the tribunal's jurisdiction. It goes to whether the claim can succeed. That is why a court that looks only at the existence of the agreement has no general power to decide limitation, and why the exception for ex facie dead claims has to be kept narrow. The exception is best understood as a screening device in the manner of the rejection of a plaint at the outset of a civil suit, where the bar must appear from the face of the pleading.⁷⁶ It is a rough analogy, because the referral court has no pleading before it that corresponds to a plaint, but it explains the "on its face" requirement.

A SINGLE JUDICIAL PHILOSOPHY

The Common Thread

Read together, the stamping and limitation decisions share an approach. In each, an objection that earlier cases required the referral court to resolve in full is now treated as going to the tribunal's process or to the admissibility of the claim, and not to the existence of the arbitration agreement. The unstamped agreement was once a bar to appointment and is now a matter of curable inadmissibility for the tribunal. The time-barred claim was once examined in depth by the appointing court and is now examined by it only if the bar is evident. The referral court was once a substantive gatekeeper and is now a checkpoint for existence.⁷⁷

What links these shifts is the negative effect of competence-competence. The courts have accepted that the tribunal should rule first on its own jurisdiction and on related questions, and that judicial review should follow on a fuller record. The Supreme Court has said as much in terms in recent decisions on Section 11, linking its narrow reading of Section 11(6A) to the need for expedition.⁷⁸

The Place of Section 16 and Section 34

The approach works only if Section 16 and Section 34 carry the load the courts have placed on them. On stamping, the tribunal can examine whether the instrument is duly stamped, direct payment of duty and penalty, and continue once the defect is cured. A fiscal question

⁷⁵*Tomolugen Holdings Ltd. v. Silica Invs. Ltd.*, [2016] 1 S.L.R. 373 (Sing.); BORN, *supra* note 27, ch. 7.

⁷⁶Code of Civil Procedure, 1908, No. 5 of 1908, Order VII, r. 11, India Code (1908).

⁷⁷*In re Interplay*, (2024) 6 SCC 1; *Arif Azim*, (2024) 5 SCC 313; *Krish Spinning*, (2024) 12 SCC 1.

⁷⁸*Krish Spinning*, (2024) 12 SCC 1; *In re Interplay*, (2024) 6 SCC 1.

becomes a step in case management. On limitation, the tribunal can take evidence, decide the mixed questions of fact and law, and dismiss a claim in whole or in part if it is barred.⁷⁹ Its ruling is reviewable under Section 34, though only on the narrow grounds the Act and the courts allow.⁸⁰

The courts are not shut out. Their role is deferred. Review continues after the award, when the court has a complete record, and not before the proceedings begin, when it has an incomplete one. The Act reinforces this by setting strict periods for challenges, which the Supreme Court has read as absolute and not open to extension through general provisions on condonation of delay.⁸¹ It also requires the tribunal to make its award within twelve months of completing the pleadings, extendable by consent for a further six months and thereafter only by the court, which gives tribunals a reason to dispose of preliminary objections early.⁸²

Practical Consequences

The commercial benefits are plain. A respondent can no longer suspend the reference by raising a stamp deficiency or filing a detailed limitation objection, and the Section 11 hearing becomes shorter. A party who objects on those grounds in the hope of exhausting the claimant now faces a tribunal that can deal with the objection together with the merits. The State's interest in stamp duty is protected, since the tribunal can make sure duty is paid before it relies on the instrument. Domestic and foreign parties can contract knowing that a technical defect will seldom prevent the dispute from being heard.⁸³

There are costs as well. A claimant with an obviously stale claim may be put to the expense of an arbitration, and the tribunal's time and fees may be spent before limitation is decided. Whether the efficiency gains are realised will depend on whether tribunals use Section 16 to take limitation as a preliminary issue where the answer is clear, and on whether the courts will support them in doing so.

COMPARATIVE PERSPECTIVES

The Model Law and England

The Indian position is close to the model that the drafters of the UNCITRAL Model

⁷⁹Arbitration Act § 16; Stamp Act § 33.

⁸⁰Arbitration Act § 34; *Ssangyong Eng'g & Constr. Co. v. Nat'l Highways Auth. of India*, (2019) 15 SCC 131 (India) (discussing the scope of review after the 2015 amendment).

⁸¹*Union of India v. Popular Constr. Co.*, (2001) 8 SCC 470 (India).

⁸²Arbitration Act § 29A.

⁸³High Level Comm. to Rev. the Institutionalisation of Arb. Mech. in India, Report of the High Level Committee (2017) (recording concern about delay and cost in arbitration practice).

Law had in mind. Article 8 requires a court before which an action is brought in a matter that is the subject of an arbitration agreement to refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed, and Article 16 gives the tribunal power to rule on its own jurisdiction.⁸⁴ The UNCITRAL digest of case law shows that courts in Model Law states differ about how deep the court's review under Article 8 should go, with some applying a prima facie standard and others examining the question fully.⁸⁵

English law reaches a similar result by giving the tribunal power to rule on its substantive jurisdiction, while allowing a court to decide a preliminary point of jurisdiction on application and only in limited circumstances.⁸⁶ The House of Lords has read arbitration clauses broadly and treated them as separable from the main contract, so that a challenge to the contract does not by itself remove the tribunal's power.⁸⁷ In enforcement proceedings, however, English courts will examine the existence of the agreement afresh, as the Supreme Court did in a well-known case concerning a state that denied being bound.⁸⁸ Limitation in England is governed by the general limitation statutes, which apply to arbitrations through the 1996 Act, so limitation is something the tribunal applies as a court would.⁸⁹

The United States

American law reaches a similar place by a different route. Under the Federal Arbitration Act, a written arbitration agreement is valid and enforceable save on grounds that exist at law or in equity for the revocation of any contract, and a court asked to stay litigation or compel arbitration decides whether an agreement exists.⁹⁰ The Supreme Court has held that a challenge to the contract as a whole, as opposed to the arbitration clause, is for the arbitrator, and the same applies to challenges to the validity of the contract that contains the clause.⁹¹ Where the parties have clearly and unmistakably delegated questions of arbitrability to the arbitrator, the court enforces the delegation, and in a recent decision the Court refused to recognise an exception for cases in which the argument for arbitration is "wholly groundless."⁹²

⁸⁴UNCITRAL Model Law arts. 8, 16.

⁸⁵U.N. Comm'n on Int'l Trade L., UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration (2012).

⁸⁶Arbitration Act 1996, c. 23, §§ 30, 32 (UK).

⁸⁷*Fiona Trust*, [2007] UKHL 40.

⁸⁸*Dallah Real Est. & Tourism Holding Co. v. Ministry of Religious Affs., Gov't of Pak.*, [2010] UKSC 46 (appeal taken from Eng.).

⁸⁹Arbitration Act 1996 § 13.

⁹⁰9 U.S.C. §§ 2–4.

⁹¹*Prima Paint*, 388 U.S. 395; *Buckeye*, 546 U.S. 440.

⁹²*First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63

Two further American decisions bear directly on the subjects of this paper. Procedural preconditions such as time limits and notice requirements are presumptively for the arbitrator, not the court.⁹³ The refusal in *Henry Schein* to recognise a wholly groundless exception can be compared to the Indian ex facie dead claim exception. The American Court rejected any such exception for reasons of statutory text and party autonomy, while the Indian Supreme Court has retained a narrow one. The Indian courts can be said to have preserved a small safety valve that the American Court was unwilling to read into the statute.⁹⁴

Singapore and the Stamping Problem

Singapore's Court of Appeal has given a workable test for distinguishing jurisdiction from admissibility, which Indian courts could usefully adopt when deciding whether an objection should be heard by the referral court at all.⁹⁵ The comparison stops, however, at stamping. The problem of an arbitration agreement caught in an instrument that is unstamped is closely tied to the structure of Indian revenue law and has few direct counterparts in the leading seats. That is one reason the Indian courts worked it out largely from the text of the Stamp Act and of Section 11(6A), and why comparative authorities offer more help on limitation than on duty.⁹⁶

UNSETTLED POINTS AND CRITICISMS

The Elasticity of the Ex-Facie Standard

The ex-facie test leaves room for discretion. What counts as “hopelessly” barred, or when an inquiry becomes “detailed,” will differ from bench to bench, and the risk is that referral courts will disagree in practice. The test is workable largely because it directs courts to refer in doubtful cases.⁹⁷ The tension between *Arif Azim* and *Krish Spinning* shows the difficulty. The first decision names two limbs and the second effectively reduces the inquiry to one. A bench that wishes to follow both will find it hard to say how much of the second limb is left.⁹⁸

There is also the question of how the standard interacts with the exception for non-arbitrable disputes. The Court has said that serious allegations of fraud, and certain other

(2010); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019).

⁹³*Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *BG Grp. PLC v. Republic of Arg.*, 572 U.S. 25 (2014).

⁹⁴*Henry Schein*, 139 S. Ct. 524; *Arif Azim*, (2024) 5 SCC 313.

⁹⁵*Tomolugen*, [2016] 1 S.L.R. 373.

⁹⁶LEW ET AL., *supra* note 29 (comparing national approaches to judicial control of the arbitration agreement).

⁹⁷*Arif Azim*, (2024) 5 SCC 313; *Vidya Drolia*, (2021) 2 SCC 1.

⁹⁸*Arif Azim*, (2024) 5 SCC 313; *Krish Spinning*, (2024) 12 SCC 1.

categories of dispute, may fall outside arbitration, and that the referral court may screen for non-arbitrability on a prima facie basis.⁹⁹ If the court is permitted that screening for one reason, the argument for permitting it for dead claims is not easy to resist. The Supreme Court has so far dealt with that argument by treating limitation as an admissibility question, but the line between the two can be hard to draw in a case where the facts relevant to both overlaps.

The Cost of Arbitrating Dead Claims

A further criticism is that the new approach makes a respondent arbitrate claims that a court could dispose of cheaply. The answer given in the cases is that the tribunal is as able as the court to decide limitation, and in most cases the quickest way to resolve the question is to let the tribunal decide it. That answer is persuasive where the facts are contested. It is less persuasive where the dates are undisputed and the claim is obviously late, which is why the exception remains in the law at all.¹⁰⁰ Tribunals could reduce the force of the criticism by treating clear limitation points as preliminary issues and deciding them within weeks of constitution.¹⁰¹

Revenue and the State Stamp Laws

The seven-judge decision protects the State's interest in stamp duty by sending the question to the tribunal, but that protection is only as good as the tribunal's practice. A tribunal that does not impound the instrument may deliver an award based on a document that the Stamp Act treats as inadmissible. Many instruments are also governed by state amendments to the central Act, which raises questions about the duty payable and the authority to collect it.¹⁰² The Court did not lay down a procedure for these cases, and it may fall to later decisions or to legislation to do so.

The Status of Earlier Authority

The overruling of *SMS Tea Estates*, *Garware Wall Ropes* and the second *N.N. Global* decision remove the strict stamping rule, but it does not mean that every observation in those cases has gone. Courts will need to separate the holding on the effect of non-stamping from the statements on other points. The seven-judge bench itself corrected the passages in *Vidya Drolia* that endorsed the strict rule and left the remainder of that decision in place, which suggests that

⁹⁹*Ayyasamy*, (2016) 10 SCC 386; *Vidya Drolia*, (2021) 2 SCC 1.

¹⁰⁰*Arif Azim*, (2024) 5 SCC 313; *Krish Spinning*, (2024) 12 SCC 1.

¹⁰¹Arbitration Act § 29A.

¹⁰²Stamp Act §§ 33, 35, 40; *In re Interplay*, (2024) 6 SCC 1.

the same selective approach will be applied to the others.¹⁰³ Binding effect under the Constitution also attaches to the law declared by the Supreme Court, and subordinate courts and tribunals are expected to apply the current statement of the law.¹⁰⁴

LEGISLATIVE GAPS AND THE CASE FOR REFORM

A Period for Section 11 Applications

The most visible gap is the lack of a limitation period for Section 11 applications. The Supreme Court noted in *Arif Azim* that the Act contains no such period and that the courts rely on the general three-year period only because of a legislative vacuum. It observed that the period is long for an application whose purpose is to start an arbitration quickly, and that a party can leave the other side exposed to liability for years by choosing when to send the notice.¹⁰⁵ The draft Arbitration and Conciliation (Amendment) Bill, 2024, released for public comment, is reported to contain a shorter period for Section 11 applications, although whether it will be enacted in that form is not clear.¹⁰⁶

A period fixed in the statute would bring certainty. It could be linked to the notice invoking arbitration or to the expiry of the thirty days under Section 11, so that a claimant cannot enlarge the time by delaying the notice. It should also deal expressly with the exclusion of time spent in bona fide proceedings in the wrong forum, which the Limitation Act currently allows in appropriate cases and which would otherwise be lost if a short period were enacted.¹⁰⁷

Clarifying Section 11(6A)

The Court has read “existence” in a narrow way, and rightly so, but the text of Section 11(6A) does not say expressly that stamping and limitation are for the tribunal. An amendment could say so. It could also address the difference between “valid” in Section 8 and “existence” in Section 11(6A), which has produced litigation without any evident purpose.¹⁰⁸ The Law Commission had examined the working of the Act at length in 2001 and again in 2014, and the proposals of 2001 were not enacted in the form recommended. Because Parliament has been slow to act on such proposals in the past, the courts have had to fill the space themselves.¹⁰⁹

¹⁰³*In re Interplay*, (2024) 6 SCC 1; *Vidya Drolia*, (2021) 2 SCC 1.

¹⁰⁴India Const. art. 141.

¹⁰⁵*Arif Azim*, (2024) 5 SCC 313.

¹⁰⁶Dep’t of Legal Affs., Ministry of L. & Just., Gov’t of India, Draft Arbitration and Conciliation (Amendment) Bill, 2024 (2024).

¹⁰⁷Arbitration Act § 11; Limitation Act § 14.

¹⁰⁸Arbitration Act §§ 8, 11(6A); Law Comm’n of India, Report No. 246, *supra* note 6.

¹⁰⁹Law Comm’n of India, Report No. 176: The Arbitration and Conciliation (Amendment) Bill, 2001 (2001); Law Comm’n of India, Report No. 246, *supra* note 6.

Alignment with the Stamp Act

The relationship between the central Stamp Act, the state stamp laws and the Arbitration Act could be set out in a short provision. It would be useful to say who may impound an instrument in the course of an arbitration, who assesses the duty, and what time limits apply. A provision of that kind would remove doubt about whether a tribunal can act alone or must refer the matter to the Collector, and about the effect of unpaid duty on enforcement of the award.¹¹⁰

Early Disposal and Institutional Arbitration

The Act could encourage tribunals to treat limitation and stamping as preliminary issues, consistent with the timelines in Section 29A. It could also push parties toward institutional arbitration, where the institution handles appointments and removes the occasion for court applications. The High-Level Committee chaired by Justice Srikrishna recommended steps in that direction, including the grading of arbitral institutions and appointments by institutions designated by the courts.¹¹¹ A system in which most appointments are made by institutions would reduce the number of Section 11 applications and with them the opportunities for the objections discussed in this paper.¹¹²

CONCLUSION

The decisions examined in this paper mark a change from judicial gatekeeping to reliance on arbitral tribunals. The earlier regime treated the court asked to appoint an arbitrator as the first adjudicator of whether the agreement could be enforced and whether the claims were viable. The seven-judge bench's treatment of stamping as a curable evidentiary defect, together with the confinement of limitation review in *Arif Azim* and *Krish Spinning* to the Section 11 application itself and to claims that are plainly dead, restores the referral court to the role Parliament gave it in 2015, which is a check on existence.¹¹³

This direction improves India's standing as a seat. It reduces the room for procedural obstruction, brings domestic practice closer to the Model Law and to the practice of leading arbitral jurisdictions, and gives parties a more predictable path from agreement to award. It also

¹¹⁰Stamp Act §§ 33, 40, 42.

¹¹¹High Level Comm., *supra* note 83; Arbitration Act § 29A.

¹¹²BLACKABY ET AL., *supra* note 29; INDU MALHOTRA, COMMENTARY ON THE LAW OF ARBITRATION (4th ed. 2020).

¹¹³*In re Interplay*, (2024) 6 SCC 1; *Arif Azim*, (2024) 5 SCC 313; *Krish Spinning*, (2024) 12 SCC 1; Amendment Act 2015 § 6.

asks more of tribunals, who now carry questions that courts used to decide, and it asks more of the Supreme Court, since the stability of the new position depends on consistency in later decisions.

The work is not finished. A statutory period for Section 11 applications, clearer drafting on the scope of pre-referral scrutiny, a defined procedure for impounding by tribunals, and a settled practice of early determination of clear limitation points would consolidate the gains. Until those steps are taken, the position rests on judicial decisions that rest in turn on an assumption that tribunals will use the powers entrusted to them with care and speed.

