The 'may' v. 'shall' conundrum: Syntax over substance to determine the existence of an arbitration agreement?

In its judgment dated 18 July 2025, titled as ***BGM and M-RPL-JMCT v. Eastern Coalfields Limited (SLP(C) Diary No. 21451/2024)*** (*'**BGM**'*), the Hon'ble Supreme Court has definitively resolved the legal ambiguity surrounding the use of the word **"may"** in arbitration agreements. The Court has also gone further to clarify the scope of inquiry permissible under Section 11 of the Arbitration and Conciliation Act, 1996 ('**Act**'), particularly regarding the extent to which the court may assess the existence of a valid arbitration agreement at the pre-reference stage.

The Hon'ble Supreme Court in BGM (*Supra),* while deciding an appeal arising from an order of the Calcutta High Court and examining the existence of an arbitration agreement in the facts of the case, also addressed a broader legal question, namely, whether the issue of the existence of an arbitration agreement should be determined by the arbitral tribunal itself or can be examined by the Court seized of a Section 11 application under the Act. The appeal was filed against the order of the Hon'ble Calcutta High Court dismissing an application filed under Section 11 of the Act on the ground that there was no arbitration agreement between the parties.

The facts of the case show that certain disputes arose between the parties during the existence of a contract for transportation and handling of goods. In seeking to invoke arbitration, the appellant relied on Clause 13 of the General Terms and Conditions ('**GTC**') attached to the e-tender notice, claiming it to be a valid arbitration agreement. This clause became the main point of interpretation before the Hon'ble Court, which was asked to decide whether it met the statutory requirements under the Act to be considered an enforceable arbitration agreement.

Clause 13 of the GTC outlined a multi-tiered dispute resolution mechanism aimed at avoiding litigation during the execution of the contract. It required the contractor to first attempt internal settlement at the company level by submitting a written request to the Engineer-in-charge within 30 days of the dispute arising. Disputes are then to be resolved in two stages: first by the Area CGM/GM, and if unresolved, by a committee constituted by the Owner. If the dispute remains unresolved and involves a government entity or a Central Public Sector Enterprise ('**CPSE**'), it must be referred to the Administrative Mechanism for Resolution of CPSEs Disputes **('AMRCD'),** in accordance with the Department of Public Enterprises ('**DPE**') guidelines. The final part of the Clause (*which was under contention*) stipulated that in the case of parties other than

government agencies, '*the redressal of the dispute may be sought through Arbitration and Conciliation Act, 1996 as amended by Amendment Act of 2015*'.

The Section 11 Application was filed by the appellant, a non-governmental organisation, before the Hon'ble Calcutta High Court, which treated the latter part of Clause 13 as an arbitration agreement. The Respondent's objection was accepted by the Hon'ble High Court, and the application for the appointment of an arbitrator was dismissed. While dismissing the application, the Hon'ble High Court emphasised the use of the word 'may' before 'be sought' in the final part of Clause 13 and noted that there can be no equivocation or indecision; the parties must deliver a clear "Yes" to arbitration.

Observations of the Hon'ble Supreme Court

- *Whether the question of existence of an arbitration agreement should be left for the arbitral tribunal to decide?*

  Relying upon its judgment of *Interplay between Arbitration Agreements under the Arbitration, 1996 & Stamp Act, 1899, In re (2024) 6 SCC 1*, the Apex Court observed that the Referral Court, before appointing an arbitral tribunal, will have to be *prima-facie* satisfied that an arbitration agreement as contemplated in Section 7 of the Act exists. However, the Court, while exercising power under Section 11 of the Act, would not hold a mini-trial or an enquiry into its existence; rather, a plain reading of the clause should indicate whether it is, or it is not, an arbitration agreement, *prima facie* satisfying the necessary ingredients as required under Section 7 of the Act.

- *Whether Clause 13 constitutes an arbitration agreement as contemplated under Section 7 of the Act*

  The Court, while answering the issue, reiterated the essential ingredients of an arbitration agreement as laid down in *Bihar State Mineral Development Corporation v. Encon Builders (2003) 7 SCC 418,* as follows:

  (a) there must be a present or future difference in connection with some contemplated affair;
  (b) the parties must intend to settle such difference by a private tribunal;
  (c) the parties must agree in writing to be bound by the decision of such tribunal and,
  (d) the parties must be *ad idem.*

  Applying the above principles to the facts of the present case, the Hon'ble Supreme Court observed that the use of the words '*may be sought*' implies that there is no subsisting agreement between the parties. It is just an enabling clause whereunder, if parties agree, they could resolve

their dispute(s) through arbitration. The Hon'ble Court, while upholding the High Court's rejection of the appellant's Section 11 application, held that the phraseology of Clause 13 is not indicative of a binding agreement that any of the parties on its own could seek redressal of *inter se* dispute(s) through arbitration and accordingly, the parties do not appear to be *ad idem*. In light of these observations, the Hon'ble Supreme Court dismissed the appeal and held that Clause 13 of the GTC does not constitute a valid arbitration agreement.

Analysis

While the Supreme Court's judgment in *BGM and M-RPL-JMCT (JV) v. Eastern Coalfields Ltd.* reflects a strict textual interpretation of Clause 13 and reiterates the well-settled principle that an arbitration clause must mandatorily express the parties' intention to arbitrate, one may argue that the Court has adopted an overly rigid approach in this instance, potentially at the cost of party autonomy and commercial sensibility.

Clause 13 clearly stated that in cases involving non-government entities, disputes '*may be sought through Arbitration and Conciliation Act, 1996'*. The inclusion of this mechanism specifically for non-government parties juxtaposed with the AMRCD mechanism prescribed for CPSEs, strongly suggested a pre-determined structure where arbitration was envisaged as the default remedy in non-CPSE disputes. The use of the word *"may"*, though permissive in grammar, should not have been mechanically interpreted to negate the existence of an arbitration agreement, especially when the clause in question is embedded within a comprehensive dispute resolution framework and when no further consensus or agreement is stipulated to invoke arbitration.

The above understanding also finds support in various international jurisdictions where arbitration agreements are sought to be construed like any other commercial agreement, with a view to giving effect to the intention of the parties as objectively expressed in it. Reliance has been placed by international courts time and again on the *'principle of consensualism', 'contra proferentem'* and the '*principle of effective interpretation*' basis which when there is a clear intention to settle any dispute by arbitration, the court is ought to give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars (*Insigma Technology Co. Ltd. v. Alstom Technology Ltd. [2009] SGCA 24; Shanghai Xinan Screenwall Building & Decoration Co. Ltd. [2022] SGHC 58*].

A similar approach has been adopted by French courts, where a liberal interpretation of arbitration agreements is preferred over a rigid or literal construction. French jurisprudence classifies '*pathological clauses*' into curable and incurable sections, the former being capable of judicial interpretation to preserve the parties' intention to arbitrate, and the latter rendering arbitration unworkable due to fundamental defects. Notably, courts have gone so far as to uphold arbitration agreements merely based on the inclusion of the term 'arbitration' within the contract, treating it as indicative of the parties' intent to opt for arbitration over litigation, even in the absence of an explicit exclusion of court jurisdiction (*Korean Supreme Court Decision 2024* Da*243172, January 23, 2025*). It has also been clarified that the existence of multiple jurisdiction options in a clause will not negate the enforceability of the arbitration agreement; in such cases, courts have accorded primacy to arbitration in line with the principle of party autonomy and the pro-arbitration policy followed internationally.

A conspectus of the above makes it clear that courts across jurisdictions have consistently upheld arbitration agreements by prioritising the parties' intention to arbitrate, even in the face of imperfect drafting. As such, minor defects or ambiguities in an arbitration clause are not sufficient to defeat the underlying agreement to arbitrate. The Courts are thus expected to play a supportive role in encouraging arbitration to proceed rather than letting it come to a *grinding halt* and should be also mindful of the principle of minimal judicial interpretation (*Enercon (India) Ltd. v. Enercon Gmbh, (2014) 5 SCC 1*).

While doctrinal clarity is essential, the Supreme Court's decision in BGM risks setting a precedent where arbitration clauses in government-drafted or tender-based contracts are invalidated based on semantic grounds rather than the substantive intent of the parties. This could open floodgates for objections at the Section 11 stage and undermine the pro-arbitration stance that Indian jurisprudence has been attempting to solidify. In conclusion, although the judgment aligns with the letter of earlier precedents, it arguably departs from their spirit by not affording adequate weight to commercial intent, contextual interpretation, and the presumption in favour of arbitration, especially in long-term public contracts where dispute resolution certainty is paramount.

Conclusion

This judgment has significant ramifications for commercial parties who wish to resolve their contractual disputes through arbitration. Parties using standard forms must clearly state if

arbitration is mandatory or optional to avoid ambiguity. Legal advice is essential to navigate complex wording like distinguishing "may" from "shall." For multi-tiered dispute resolutions, they must specify steps and when arbitration becomes binding. For example, a clause stating "first attempt negotiation, then arbitration within 30 days" provides clarity and reduces the risk of rejection. The ruling reaffirms that arbitration agreements must be clear and precise. It warns that ambiguity can render clauses unenforceable, affecting the entire arbitration process, from the appointment of arbitrators to procedural rules. Parties' intent should be expressed unequivocally to avoid rejection and delays. The decision highlights how language issues in arbitration agreements can be addressed through legal intervention and careful drafting, emphasising that dispute resolution clauses deserve as much care as commercial terms. Clarity in arbitration clauses is crucial to prevent high costs, delays, and loss of trust, aligning with international and domestic standards.