
ARBITRATION “CAN”, ARBITRATION CAN’T!

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ABSTRACT

Recently the Hon’ble Supreme Court of India (“**Supreme Court**”) has considered and interpreted the use of word “can” in an arbitration clause. In law, words like “can”, “may” are considered to be permissive while “shall” mandatorily binds the parties. The Courts have time and again held that the intention of the parties to refer a dispute to arbitration must be clearly spelt out.

The judgement in Nagreeka Indcon Products Private Limited vs. Cargocare Logistics (India) Private Limited, is one such judgement, where the Supreme Court has recently held that the intention to arbitrate must be clear and not merely a possibility. However, the arbitration clause in the judgement of Nagreeka Indcon Products Private Limited vs. Cargocare Logistics (India) Private Limited has an alternative interpretation. The arbitration clause in Nagreeka Indcon Products Private Limited vs. Cargocare Logistics (India) Private Limited makes arbitration mandatory only leaving the option of place of arbitration with the parties. Even when the arbitration clause fails to provide for clear procedure for appointment of arbitrator/(s), the appointment can be done in terms of the Arbitration and Conciliation Act 1996¹.

¹ Arbitration and Conciliation Act, No. 26 of 1996 (India); (“**A&C Act**”)

INTRODUCTION

The Hon'ble Supreme Court, in *Nagreeka Indcon*² has considered arbitration clause containing “*can*” in the arbitration clause to hold that the arbitration clause must clearly spell out the intention of the parties to arbitrate and not merely a possibility to arbitrate.

The document in which the arbitration clause was contained in, was bill of lading. The Appellant, *Nagreeka Indcon Products Private Limited*, alleged that Respondent, *Cargocare Logistics (India) Private Limited*, released one of the containers to the Consignee *inter alia* without original bill of lading being produced. Thus, the entire transaction from which the dispute arose was a commercial transaction.

Although the Supreme Court held the arbitration clause in *Nagreeka Indcon* to be a mere possibility to arbitrate, the arbitration clause has an alternative interpretation that makes the arbitration binding between the parties.

GIST OF NAGREEKA INDCON

The Supreme Court in *Nagreeka Indcon* was interpreting an arbitration clause found in bill of lading. The arbitration clause in the bill of lading stated that ‘*Any difference of opinion or dispute thereunder can be settled by arbitration in India or a place mutually agreed with each party appointing an arbitrator.*’.

The Supreme Court has considered various judgements and has *inter alia* concluded that the use of the word “*can*” denotes that there was a further requirement of consent for invocation of arbitration.

The Supreme Court, in *Eastern Coalfields*³, considering the heading of the section in the agreement therein, i.e. “Arbitration with regard to the Commercial Disputes between the Public Sector Enterprises *inter se* and between the Public Sector Enterprises and Government Departments” it was held that only disputes between these parties was covered under the agreement therein. In the matter of *Nagreeka Indcon*, the Supreme Court has held that the heading only contains a single word “Arbitration” compared to *Eastern Coalfields*. The

² *Nagreeka Indcon Products Private Limited vs. Cargocare Logistics (India)* 2026 INSC 384; (“**Nagreeka Indcon**”)

³ *Eastern Coalfields vs. Sanjay Transport Agency and Anr.* (2009) 7 SCC 345; (“**Eastern Coalfields**”)

consideration is the word “*can*” in the arbitration clause which denotes merely the possibility of referring the dispute to arbitration.

The judgements of the Supreme Court in Samarth Builders⁴ and Visa International⁵ state that the intention of the parties to arbitrate was clearly spelt out by the word “*shall*” in the arbitration clause therein and therefore missing of a few words or terminologies from the arbitration clause was not fatal to the arbitration clause.

The Supreme Court distinguished the judgement of Panasonic India⁶ passed by the High Court of Delhi, stating that the use of word “*can*” in the clause therein was *qua* the appointment of a sole arbitrator by either of the parties.

The judgement in Jagdish Chander⁷, certain examples which were used to explain the possibility of referring the dispute to arbitration and not to arbitrate were discussed. The examples are reproduced herein for reference, “*parties can, if they so desire, refer their disputes to arbitration*” or “*in the event of any dispute, the parties may also agree to refer the same to arbitration*” or “*if any disputes arise between the parties, they should consider settlement by arbitration*”.

The observation by the Supreme Court in Vidya Drolia⁸ has been held against Nagreeka Indcon that in commercial matters the Courts ought to adopt a liberal approach. Further, Vidya Drolia also states that ‘*arbitration should be a one-stop dispute resolution process*’.

The judgement in Nagreeka Indcon refers to the judgement in BGM and M-RPL-JMCT(JV)⁹ wherein the words used in the arbitration clause therein was “*may be sought*”. In this context, the Supreme Court in BGM and M-RPL-JMCT(JV) held that *inter alia* there is no binding and existing agreement between parties to seek arbitration.

In view thereof, the Supreme Court *inter alia* held that the use of word “*can*” in the arbitration clause in Nagreeka Indcon denotes mere possibility of referring disputes to arbitration in future

⁴ Babanrao Rajaram Pund vs. M/s Samarth Builders And Developers (2022) 9 SCC 691; (“**Samarth Builders**”)

⁵ Visa International Ltd. vs. Continental Resources USA Limited 2009 (2) SCC 55; (“**Visa International**”)

⁶ Panasonic India (P) Ltd. vs. Shah Aircon 2022 SCCOnline Del 3288; (“**Panasonic India**”)

⁷ Jagdish Chander v. Ramesh Chander 2007 (5) SCC 719; (“**Jagdish Chander**”)

⁸ Vidya Drolia vs. Durga Trading Corporation (2021) 2 SCC 1; (“**Vidya Drolia**”)

⁹ BGM and M-RPL-JMCT(JV) vs. Eastern Coalfields Ltd. 2025 SCCOnline SC 1471; (“**BGM and M-RPL-JMCT**”)

by way of another agreement and does not constitute a binding arbitration clause.

ALTERNATE VIEW

In an alternate view to the judgement delivered in Nagreeka Indcon, the arbitration clause in Nagreeka Indcon clearly sets out the intention of the parties to refer any difference of opinion or dispute to arbitration.

The arbitration clause cannot be read in isolation and the intention to incorporate an arbitration clause in an important document such as bill of lading becomes considerable. The entire transaction from which the dispute arose was a commercial transaction. It is unfathomable that an aggrieved party would want to leave the scope of seeking consent of the other party to invoke arbitration in an event of difference of opinion or dispute.

Therefore, it cannot be comprehended that parties to the bill of lading would want to leave an arbitration clause as optional and requiring further consent to refer a dispute to arbitration. Only discretion left to parties is to choose whether arbitration will take place in India or at such place mutually agreed between the parties.

Thus, the parties had the intention to refer difference of opinion or dispute to arbitration. The clause has to be read together as “*can be settled by arbitration in India or a place mutually agreed*” as a whole which then implies that the parties have agreed upon arbitration, but the place of arbitration i.e., in India or any other place as mutually agreed is left to the discretion of the parties. There is no further need for the parties to agree to refer a dispute to arbitration in Nagreeka Indcon. The can is permissive only *qua* the place of arbitration and not the arbitration itself.

The reliance on Easter Coalfield can be applied to Nagreeka Indcon to gather the intention of the parties from the heading of the section in bill of lading, i.e., “*Arbitration*”, irrespective of the fact that it is a single word. The parties were aware and had bound themselves by arbitration, and therefore, when the heading read together with the bill of lading and the arbitration clause, the parties *consensus ad idem* vis-à-vis arbitration.

Taking the example from the judgement in Jagdish Chander, if the parties at all wanted to make the arbitration subject to further consent, the language of the clause could have been, “*Any difference of opinion or dispute thereunder can be agreed to be settled by (or referred to)*

arbitration, in India or a place mutually agreed with each party appointing an arbitrator.”.

It is noteworthy that, the clause also does not have a comma after arbitration, “.... ***can be settled by arbitration***, in India or a place mutually agreed.....”. If there would have been a comma as mentioned, the interpretation of the Supreme Court would have been absolute. As held by the Supreme Court, “*every word, even a single comma can make a difference*”.¹⁰

Also, the principle enunciated in Vidya Drolia and discussed in Nagreeka Indcon clearly stipulate that in purely commercial disputes, the Court ought to take a liberal approach in interpretation of arbitration clause as “*there is a presumption in favor of one-stop adjudication*”.¹¹

In view thereof, the Court could have appointed arbitrator/(s) as the arbitration clause in Nagreeka Indcon is based on same issue as Enercon¹². Even if the parties had mentioned that each party shall appoint one arbitrator and the arbitration clause did not provide for the appointment of third arbitrator, then in view of sub-section (3) of section 11 of the A&C Act, the two appointed arbitrators could have appointed a third arbitrator.¹³ In any event, once it is established that there exists an arbitration clause between the parties, even though such arbitration clause does not provide for the correct or ineffective mechanism of appointment of arbitrator/(s), appointment shall be made in terms of section 11 of the A&C Act.¹⁴

Reconsidering the arbitration clause in Nagreeka Indcon in view of the above-mentioned discussion, the arbitration clause clearly sets out the intention, determination and obligation of the parties to refer the matter to arbitration.

CONCLUSION

In view of thereof, the judgement in Nagreeka Indcon somewhere lacks to consider the intention of the parties. The Supreme Court in Nagreeka Indcon considers the intention in isolation to the arbitration clause discounting the need to consider the intention of the document executed between the parties.

¹⁰ Zoharbee and Anr. vs. Iman Khan and Ors. CIVIL APPEAL NOS. 4516-4517 OF 2023; (“**Zoharbee**”)

¹¹ Vidya Drolia; supra (8)

¹² Enercon (India) Ltd. v. Enercon GmbH 2014 (5) SCC 1; (“**Enercon**”)

¹³ M.M.T.C. Limited vs Sterlite Industries (India) Ltd. (1996) 6 SCC 716; (“**MMTC Limited**”)

¹⁴ TRF Ltd. vs. Energo Engineering Projects Ltd., (2017) 8 SCC 377; (“**TRF Limited**”)

The arbitration clause in Nagreeka Indcon simply gives the discretion to decide whether the arbitration will take place in India or elsewhere and does not make arbitration optional between the parties. Being a commercial dispute, the Court ought to have taken a liberal approach and ordered in favor of one-stop adjudication.

The Supreme Court ought to have looked at the alternative interpretation as the dispute being a commercial dispute and one arising from bill of lading, the Court must have considered the arbitration clause as a whole.

As mentioned herein above, if comma would have been placed appropriately, then the arbitration clause would merely be a possibility of referring the dispute to arbitration. However, the use of word “*can*” in the arbitration clause is only vis-à-vis the place of arbitration, i.e., India or any other place but not with regards to reference of difference of opinion and dispute to arbitration.

However, as the law stands today the Supreme Court has held in the judgement of Nagreeka Indcon, that “*can*” merely denotes possibility to arbitrate disputes in future by way of further agreement to arbitrate.

Hence, where *Arbitration “can”*, *Arbitration can’t*.