

## Use Of The Word "Can" In A Dispute Resolution Clause Does Not Create A Binding Arbitration Agreement: Supreme Court

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### Introduction

In *Nagreeka Indcon Products Pvt. Ltd. v. Cargocare Logistics (India) Pvt. Ltd.* [2026 INSC 384], the Supreme Court considered whether a dispute resolution clause stating that disputes "can be settled by arbitration" constituted a binding arbitration agreement under the Arbitration and Conciliation Act, 1996.

The Supreme Court held that such language does not create a mandatory obligation to refer disputes to arbitration. The word "can" indicates possibility or choice, and not a binding commitment to arbitrate. Therefore, where the clause requires further consensus between the parties before arbitration can take place, it cannot be treated as a valid arbitration agreement.

The judgment reiterates that arbitration is founded on consent. A court cannot compel parties to arbitrate unless the dispute resolution clause discloses a clear and present intention to submit disputes to arbitration.

In this article, we navigate through the facts of the case and the findings rendered by the Supreme Court.

### Brief Facts

Nagreeka Indcon Products Pvt. Ltd. engaged Cargocare Logistics (India) Pvt. Ltd. for transportation of goods to the United States. A dispute arose when one consignment was allegedly delivered without payment being made by the consignee and without production of the original bill of lading.

The bills of lading contained Clause 25, titled "Arbitration". The clause provided that the contract would be governed by Indian law and 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".

Nagreeka invoked arbitration under Clause 25. Cargocare opposed the invocation, contending that Clause 25 did not mandate arbitration and merely left open the option of arbitration if both parties agreed.

Nagreeka filed an application before the Bombay High Court under Section 11 of the Arbitration Act seeking appointment of an arbitrator. The High Court dismissed the application, holding that the use of the word "can" did not make arbitration compulsory and that, in the absence of consent from Cargocare, the clause could not be treated as a binding arbitration agreement.

Nagreeka challenged the order of the High Court before the Supreme Court.

## Arguments from Both Sides

Nagreeka contended that Section 7 of the Arbitration Act does not prescribe any particular form for an arbitration agreement. It was submitted that the clause was specifically titled "Arbitration", and that the intention to resolve disputes through arbitration was evident from the wording of the clause.

Nagreeka relied on ***Eastern Coalfields v. Sanjay Transport Agency and Another* [2009 (7) SCC 345]**, ***Babanrao Rajaram Pund v. M/s Samarth Builders and Developers* [2022 (9) SCC 691]**, ***Enercon (India) Ltd. v. Enercon GmbH* [2014 (5) SCC 1]**, and ***Visa International Ltd. v. Continental Resources USA Limited* [2009 (2) SCC 55]** to submit that arbitration clauses should be interpreted pragmatically and not defeated by imperfect drafting.

Nagreeka also relied on ***Vidya Drolia v. Durga Trading Corporation* [2021 (2) SCC 1]** to submit that at the Section 11 stage, courts should ordinarily take a prima facie view and lean in favour of reference to arbitration where there is doubt.

Cargocare opposed the appeal and submitted that Clause 25 did not disclose any definitive agreement to arbitrate. It was argued that the clause merely stated that disputes "can" be settled by arbitration, which indicated only a future possibility and not a binding obligation.

Cargocare relied on ***K.K. Modi v. K.N. Modi* [1998 (3) SCC 573]**, ***Bihar State Mineral Development Corporation v. Encon Builders (I) (P) Ltd.* [2003 (7) SCC 418]**, ***Jagdish Chander v. Ramesh Chander* [2007 (5) SCC 719]**, and ***BGM and M-RPL-JMCT(JV) v. Eastern Coalfields Ltd.* [2025 SCC OnLine SC 1471]** to submit that a valid arbitration agreement must show a clear and enforceable obligation to arbitrate.

## Findings of the Supreme Court

The Supreme Court dismissed the appeal and upheld the order of the High Court. The Supreme Court began by reiterating that arbitration is inherently consensual. Party autonomy is central to arbitration, and the jurisdiction of an arbitral tribunal flows from the mutual intention of parties to refer their disputes to arbitration.

The Supreme Court then considered the limited role of a referral court under Section 11 of the Arbitration Act. Referring to ***SBI General Insurance Co. Ltd. v. Krish Spg.* [(2024) 12 SCC 1]** and ***Goqii Technologies (P) Ltd. v. Sokrati Technologies (P) Ltd.* [(2025) 2 SCC 192]**, the Supreme Court reiterated that the enquiry at the Section 11 stage is limited to examining the prima facie existence of an arbitration agreement. However, this limited jurisdiction cannot be used to force a party into arbitration where no binding arbitration agreement exists.

The Supreme Court then analysed the word "can". The Supreme Court held that the ordinary meaning of "can" denotes possibility, capacity or capability. It does not ordinarily indicate a mandate or obligation. If parties intend to make arbitration compulsory, language such as "shall" is generally used.

The Supreme Court rejected the submission that the heading "Arbitration" was sufficient to make Clause 25 a binding arbitration agreement. The Supreme Court held that while headings may sometimes assist interpretation, the operative words of the clause must disclose a binding intention to arbitrate. In the present case, the use of the word "can" indicated choice and not compulsion.

The Supreme Court distinguished ***Eastern Coalfields (supra)*** on the ground that the issue in that case concerned the scope of a mandatory arbitration clause, whereas the present case concerned whether the clause itself created a mandatory obligation to arbitrate.

The Supreme Court also distinguished ***Babanrao Rajaram Pund (supra)***, ***Visa International (supra)*** and ***Enercon (supra)***. In those cases, the intention to arbitrate was either clear or could be gathered from the clause as a whole. In the present case, the Supreme Court held that Clause 25 did not show a clear intention to arbitrate, particularly because it used the word "can" and also contained an incomplete appointment mechanism.

The Supreme Court further held that the reliance on ***Vidya Drolia (supra)*** was misplaced. The principle that courts should lean towards arbitration applies where the parties are ad idem on arbitration and the clause merely requires interpretation. It does not apply where the very existence of a binding arbitration agreement is in dispute.

The Supreme Court also considered the principles of contractual interpretation. The Supreme Court held that the words chosen by parties are the most reliable manifestation of their intention. To disregard the actual words used or to impose an obligation not intended by the parties would compromise party autonomy.

The Supreme Court then referred to ***K.K. Modi (supra)***, where the essential attributes of an arbitration agreement were set out. A valid arbitration agreement must contemplate that the decision of the tribunal will bind the parties, that the tribunal will determine substantive rights, and that the agreement to refer disputes to the tribunal is intended to be enforceable in law.

The Supreme Court also relied on ***Jagdish Chander (supra)***, where it was held that the mere use of the words "arbitration" or "arbitrator" does not create an arbitration agreement if the clause contemplates further consent before reference to arbitration. A clause which merely states that parties "can" or "may" refer disputes to arbitration reflects a possibility or future arrangement, and not a present binding obligation.

Applying these principles, the Supreme Court held that Clause 25 merely indicated the future possibility of resolving disputes through arbitration. It did not create a present and enforceable obligation to arbitrate. For arbitration to take place, further agreement between the parties would be required.

Accordingly, the Supreme Court held that Clause 25 did not constitute a binding arbitration agreement and dismissed the appeal.

## Comment

The judgment in ***Nagreeka Indcon Products (supra)*** is an important clarification on the language required to create a binding arbitration agreement.

The Supreme Court has reaffirmed that the mere presence of the word "arbitration" in a clause is not sufficient. What matters is whether the clause reflects a clear obligation to arbitrate. If the clause merely states that disputes "can" be settled by arbitration, it may only indicate a possibility of arbitration and not a mandatory reference.

The decision also clarifies the limits of the pro-arbitration approach at the Section 11 stage. While courts ordinarily lean in favour of arbitration where a valid arbitration agreement exists, that principle cannot be used to manufacture consent where the clause itself does not disclose a binding commitment to arbitrate.

The judgment is particularly relevant for commercial contracts where dispute resolution clauses are often loosely drafted. If parties intend arbitration to be mandatory, the clause must use clear language such as "shall be referred to arbitration" or "shall be resolved by arbitration". Ambiguous language such as "can be settled by arbitration" may require fresh consent at the time of dispute.

The decision therefore reinforces the centrality of party autonomy. Arbitration cannot be imposed merely because it was mentioned as an option. It must be chosen by the parties through a clear and binding agreement.

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