ASIA/PACIFIC

India

When "May" Falls Short: Permissive Arbitration Clauses After *BGM v. Eastern Coalfields*

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This year, the Supreme Court's decision in *BGM v. Eastern Coalfields Ltd* ("*BGM*") has sparked renewed interest in the enforceability of permissive arbitration clauses, i.e. those using the word "may" rather than "shall". This article examines the Supreme Court's reasoning in *BGM*, its interpretation of earlier precedents, and evaluates the decision from an international comparative framework.

Introduction

The Supreme Court's ruling in *BGM v. Eastern Coalfields Ltd* ("*BGM*")[1] brings into focus how Indian courts approach jurisdictional consent when arbitration clauses use ostensibly non-mandatory language (**1.**), and arguably marks a departure from the prevailing interpretation adopted in leading arbitral jurisdictions such as England, Canada, Singapore, and Hong Kong (**2.**).

1. The Indian Position: *BGM v. Eastern Coalfields Ltd*

In *BGM*, the Indian Supreme Court interpreted Clause 13 of the governing contract, which read:

> "It is incumbent upon the contractor to avoid litigation … In case of parties other than Govt. Agencies, the redressal of the dispute may be sought through Arbitration and Conciliation Act, 1996 as amended by Amendment Act of 2015."

The full grievance procedure envisaged three steps.

(i) Parties would engage senior management of the coalfields company.

(ii) An internal committee would attempt resolution.

(iii) Only after these preceding steps, and only for non-government parties, "may be sought" redressal of the dispute via arbitration under India's arbitration statute.

The Supreme Court held that this clause did not constitute a binding arbitration agreement under Section 7 of the Arbitration and Conciliation Act, 1996. By hinging arbitration on the permissive "may", the Court concluded that the clause amounted to nothing more than a future "agreement to agree", and was not a present consensus to arbitrate. The Supreme Court explained:

> "Use of the words 'may be sought', imply that there is no subsisting agreement between parties that they, or any one of them, would have to seek settlement of dispute(s) through arbitration. It is just an enabling clause whereunder, if parties agree, they could resolve their dispute(s) through arbitration."[2]

The Court declined to refer the dispute to arbitration, citing *Jagdish Chander v. Ramesh Chander*[3] ("*Jagdish Chander*") and *Mahanadi Coalfields Ltd. v. IVRCL AMR Joint Venture*[4] ("*Mahanadi Coalfields*") to support its conclusion that mandatory language is necessary to constitute an arbitration agreement.

1 *BGM* and *M-RPL-JMCT (JV) v. Eastern Coalfields Ltd* [2025] INSC 874.
2 Id. at para 31.
3 (2007) 5 SCC 719.
4 *Mahanadi Coalfields Ltd v. IVRCL AMR Joint Venture* (2022) 20 SCC 636.

Reliance on *Jagdish Chander* and *Mahanadi Coalfields* misplaced?

The Court's reliance on *Jagdish Chander* is open to question. The clause in that case stated:

> "All disputes … shall be referred for arbitration if the parties so determine."

This phrasing clearly contemplated a future agreement to arbitrate, explicitly making any reference to arbitration conditional on mutual post-dispute consent. In contrast, the clause in *BGM* granted either party an optional right to refer disputes to arbitration. Thus, the decision arguably conflates a clause where no determination to arbitrate had yet been made (*Jagdish Chander*) with one where the parties had already agreed that a party may elect to arbitrate (*BGM*).

The Court also drew support from its earlier ruling in *Mahanadi Coalfields*, but the reliance appears somewhat tenuous. In *Mahanadi Coalfields*, the arbitration clause provided that after certain internal steps, resolution of disputes "may be sought in the Court of Law". It is in this context that the Court in *Mahanadi Coalfields* held that the mere presence of the term "Arbitration" in the heading of the clause would not suffice, as the substantive formulation clearly excluded arbitration and affirmed court-based resolution. By contrast, in *BGM*, the clause at issue stated that disputes:

> "…may be sought through the Arbitration and Conciliation Act, 1996…"

Further, the reference is not to some unspecified procedure but to a complete statutory regime offering institutional support for arbitration. Instead of evaluating whether the clause created a workable arbitration pathway, the Court zeroed in on the phrase "may be sought" and summarily concluded "that there is no subsisting agreement".[5] This literal reading appears to somewhat neglect both the broader legislative context and the clause's commercial function, arguably weakening the force of the Court's reasoning.

Respectfully, the Court in *BGM* also appears to overlook the fact that an arbitration clause can validly grant a party the discretion to initiate arbitration proceedings, and that such discretion, once exercised, creates a binding obligation on both parties to arbitrate. The clause in *BGM* was not pathologically vague, but structured to give either party the option of invoking arbitration, which is a feature accepted in other jurisdictions as seen below.

This interpretation is strengthened by the broader contractual context in *BGM*. Notably, the arbitration clause was prefaced by the language:

> "It is incumbent upon the contractor to avoid litigation."

While this point appears not to have been pressed before the Court, it clearly articulates a shared intent to resolve disputes outside the court system. Against this backdrop, the use of the phrase "the redressal of the dispute may be sought through Arbitration and Conciliation Act" takes on a very different hue. It conveys a clear mandate that disputes should, where possible, be resolved by arbitration, and that either party is empowered to initiate that process. Far from signaling an incomplete or inconclusive agreement, the clause reads as a present and operative commitment to arbitrate at the election of a party.

2. Comparative perspectives

England

In *Anzen Ltd v. Hermes One Ltd*[6] ("*Anzen*") an appeal from the Court of Appeal of the British Virgin Islands (BVI), the Privy Council construed an arbitration clause which stated:

> "If a dispute arises out of or relates to this Agreement or its breach (whether contractual or otherwise) and the dispute cannot be settled within twenty (20) business days through negotiation, any Party may submit the dispute to binding arbitration …"

The key issue was whether such permissive language ("may submit") constituted a binding arbitration agreement under the BVI Arbitration Ordinance (based on UNCITRAL Model Law[7]), and whether it could be invoked to stay court proceedings.

5 *BGM*, supra note 1, at para 31.

6 [2016] UKPC 1.

7 It is worth noting that India, akin to Canada, Singapore, and Hong Kong, is also regarded as a Model Law jurisdiction, its arbitration legislation being substantially founded on the UNCITRAL Model Law, albeit with certain modifications and departures reflecting local policy choices

It was held that:

- The clause gave each party a unilateral right to arbitration as the dispute resolution mechanism. Once one party exercised that right, for example, by filing for arbitration or applying for a stay of court proceedings, arbitration became binding on both parties.
- The word "may" did not indicate a need for further agreement. Rather, it reflected an option that, once exercised, became obligatory.
- Thus, the clause amounted to a completed consensus to arbitrate, contingent only upon a party's election to do so.

The Privy Council illustrated this by drawing an analogy to optional dispute resolution clauses upheld in other jurisdictions (including Canada, the United States and Singapore), where once notice of election is given, arbitration becomes binding.

Canada

The decision in Anzen drew from *Canadian National Railway Co v. Lovat Tunnel Equipment Inc*,[8] where the Ontario Court of Appeal interpreted the following clause as empowering either party to compel arbitration:

> "The parties may refer any dispute under this Agreement to arbitration"

Rejecting the "agreement to agree" argument, and by focusing on the effect of a party's election rather than the literal meaning of "may", that court, treated unilateral election as satisfying the requirement for consensus.

English courts have since consistently upheld this principle.[9] This purposive interpretation balances party autonomy with commercial efficiency, ensuring that optional arbitration clauses are neither toothless nor subject to fresh negotiation.

Singapore

Singapore's Courts have similarly focused on the parties' intention and autonomy of the parties over strict textual formality. They recognise that even permissive wording, such as clauses stating that either party "may" submit a dispute to arbitration, can amount to a binding and enforceable arbitration agreement if the clause unambiguously vests a party with the right to elect arbitration.

In *WSG Nimbus v. Board of Control for Cricket* in Sri Lanka[10] (which was also quoted with approval in *Anzen*) the matter involved a clause that stated:

> "...either party may elect to submit such matter to arbitration in Singapore..."

The High Court held that this language did not undermine the clause's enforceability. Once a party elected to arbitrate, the other party was bound. The permissive "may" was interpreted as granting a contractual right of election, with the binding effect triggered upon election. The focus was on the parties' clear intention to provide for arbitration. Even if it was not compulsory until an election was made, it became binding once initiated by one party.

In *Wilson Taylor Asia Pacific Pte Ltd v. Dyna-Jet Pte Ltd*,[11] the Court of Appeal reinforced this stance. The Court clarified that:

> "It was immaterial for this purpose that the Clause: (a) entitled only the Respondent (but not the Appellant) to compel its counterparty to arbitrate a dispute (the "lack of mutuality" characteristic); and (b) made arbitration of a future dispute entirely optional instead of placing parties under an immediate obligation to arbitrate their disputes (the "optionality" characteristic)."[12]

The emphasis is on the practical effect of the clause i.e. does it give a party the unequivocal right, upon election, to require arbitration? If so, the clause constitutes a valid arbitration agreement. Singapore courts have indicated that so long as an agreement demonstrates an intention to arbitrate and provides a sufficiently certain mechanism to do so, the use of "may" will not in itself defeat its validity.

8 *Canadian National Railway Co v. Lovat Tunnel Equipment Inc* (1999) 174 DLR (4th) 385.

9 See *Aiteo v. Shell* [2022] EWHC 2912 (Comm), *JSC CB Privatbank v. Kolomoisky* [2018] EWCA Civ 1708, and The "Xiamen Xinda" [2022] EWHC 988 (Comm). These affirm that permissive or optional arbitration clauses are enforceable. Once a party elects to arbitrate (usually by notice or stay application), the right becomes binding, and litigation is stayed.

10 [2002] SGHC 104.

11 [2017] SGCA 32.

12 Id. at para 13.

Hong Kong

Hong Kong's courts have gradually refined their approach to permissive arbitration clauses, moving towards a more nuanced, pro-arbitration stance while emphasising the importance of clear drafting.

In *The Incorporated Owners of Wing Fai Building, Shui Wo Street v. Golden Rise (HK) Project Company Limited*[13] ("*Wing Fai*"), the Court confronted a clause stating that disputes "may" be referred to arbitration. The defendant sought a stay of proceedings, arguing that the clause either created a binding arbitration agreement or conferred a right to compel arbitration. The Court rejected both arguments, holding that the word "may" alone was insufficient to create a binding obligation. It distinguished this clause from those in cases like *Anzen*, noting that the enforceability of permissive clauses depends on the parties' intention and the precise wording of the agreement.

More recently, in *Kinli Civil Engineering Ltd v. Geotech Engineering Ltd*[14] ("*Kinli*"), the Court of First Instance adopted a more arbitration-friendly reading of permissive language. The clause in question similarly used "may" to describe a party's right to refer disputes to arbitration. The clause (as translated) read:

> "If in the course of executing the Contract, any disputes or controversies arise between (G) and (K) on any question and the parties are unable to reach agreement, both parties may in accordance with the relevant arbitration laws of Hong Kong submit the dispute or controversy to the relevant arbitral institution for resolution, and the arbitral award resulting from arbitration in the HKSAR shall be final and binding on both parties, and unless otherwise agreed by both parties, the aforesaid arbitration shall not be conducted before either the completion of the main contract or the determination of the subcontract."

The Court held that the clause conferred a unilateral option to elect arbitration, and once exercised, arbitration became binding on both parties. In doing so, the Court reaffirmed the presumption in favour of arbitration and underscored that optional clauses could be enforceable when structured to give one party a clear right to initiate arbitration. The Court clarified that the *Wing Fai* decision is distinguishable on facts, and cannot be applied as a general rule to all cases where the arbitration clause in question adopts the word "may".

Taken together, these decisions illustrate how Hong Kong has moved towards a pragmatic approach. While *Wing Fai* cautioned that permissive language alone does not automatically impose an obligation, *Kinli* demonstrates that carefully drafted "may" clauses can create enforceable arbitration rights. This approach is akin to other leading arbitration jurisdictions examined previously, where permissive clauses granting a party the right to elect arbitration are recognised as binding once exercised. The needle has therefore shifted in Hong Kong in favour of giving effect to parties' commercial intentions and preserving arbitration as a viable dispute resolution option, provided the mechanism for election is sufficiently certain.

Concluding remarks

The Supreme Court's decision in *BGM* sacrifices purpose at the altar of form by treating the word "may" as a deal-breaker rather than the flexible drafting tool it often is. By design, permissive clauses give businesses the freedom to switch to arbitration when it suits them, rather than forcing arbitration as the only path. By demanding unequivocal "shall" language, the Court risks driving parties toward litigation when they intended to preserve arbitration as an optional pathway.

BGM marks a clear divergence between India's approach and the relatively pro-arbitration philosophies embraced in England, Canada, Singapore and more recently, Hong Kong. While Indian courts will require explicit, mandatory commitments to arbitrate, their counterparts in other common-law jurisdictions routinely enforce clauses that empower a party to elect arbitration, regardless of whether the language is framed as permissive.

13 [2016] DCCJ 225/2016
14 [2021] HKCFI 2503

All this results in a heightened drafting burden on practitioners operating in India, who must now guard against any hint of permissiveness or risk unenforceability. Arbitration clauses should employ unambiguous "shall" provisions and avoid any suggestion of future or contingent consent. In relatively more arbitration-friendly jurisdictions, drafters can preserve flexibility by using "may" to confer an optional right, confident that courts will uphold the clause when a party chooses to invoke it. Tailoring dispute resolution language to local jurisprudence is essential to ensure that an arbitration clause fulfils its promise of efficiency and enforceability.

Before concluding, it is important to situate *BGM* within the broader trajectory of Indian arbitration law. Over the past decade, India has steadily moved toward a more pragmatic and arbitration-supportive regime, aligning its practices with international standards and addressing long-standing criticisms. Occasional setbacks such as *BGM* serve as reminders that doctrinal rigidity can persist, but they do not negate the overall trend. Rather, they highlight the areas where jurisprudence still needs refinement. In that sense, the decision is less a retreat and more a reflection of the uneven process by which India continues to reconcile its legal traditions with the commercial realities of modern arbitration.