

CROSS-BORDER DISPUTES AND NEUTRAL COURTS

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It is common practice for foreign companies entering into contracts with Indian companies to stipulate that the agreement be governed by a foreign law and be enforceable in a foreign court. When relationships run into rough weather, many a times, the Indian companies approach Indian courts on the ground that inspite of such agreement, Indian courts have natural jurisdiction over the subject matter. As a result, parties end up litigating in Indian courts, as opposed to what they agreed. The situation gets even worse, if the agreement is governed by a foreign law, because in India, the foreign law needs to be proved as a fact, by leading evidence.

In a recent judgment, the Supreme Court of India has held that the parties to a contract can agree to submit to the exclusive or non-exclusive jurisdiction of a foreign “neutral” court, i.e., a court in a country to which none of the parties or the transaction under the agreement is in any way connected. The court clarified that such contracts are an exception to the well settled principle under section 20 of India’s Code of Civil Procedure, 1908 (“CPC”), which stipulates that parties cannot by agreement confer jurisdiction upon a court, to which the CPC applies, if such court does not have jurisdiction otherwise. (*Modi Entertainment Network v. W.S.G. Cricket Pte. Ltd.*, 2003 AIR SCW 733)

While deciding the case, the Supreme Court considered two issues. The first issue was whether the parties to a contract can agree to have their disputes resolved by a foreign court (either a “neutral court” or a “court of choice”) by creating exclusive or non-exclusive jurisdiction on such court. The second one was whether the Indian party to a contract can seek an anti-suit injunction from an Indian court against the proceedings in a foreign court (the forum of choice agreed under the contract) on the ground that the Indian court has natural jurisdiction over the subject matter.

In *Modi (id.)*, Modi Entertainment Network (“Modi”) entered into an agreement with W.S.G. Cricket Pte. Ltd. (“WSG”) (the “Agreement”) under which it got the exclusive right to sell the commercial rights of the international cricket series held in Kenya in October 2000 (“Event”). Under the Agreement, WSG granted an exclusive license to Modi to telecast the Event on Doordarshan (Indian Channel) and to sell the advertisement slots, for which Modi agreed to pay a minimum guaranteed amount of Rs. 15 crores (US\$ 3,125,000) to WSG. The license was

restricted to terrestrial free to air telecast on Doordarshan, as the satellite broadcast rights had been granted to ESPN.

The Agreement's natural forums of jurisdiction were Indian and Singapore courts, because Modi was based in India and WSG in Singapore. However, the jurisdiction clause in the Agreement provided that "this Agreement shall be governed by and construed in accordance with English law and the parties hereby submit to the non-exclusive jurisdiction of the English Courts (without reference to English conflict of law rules)."

As soon as the telecast commenced, WSG alleged breach of the Agreement by Modi on the ground that Doordarshan's signal was being received in the Middle East in violation of the license. WSG also threatened to discontinue the feed given to Doordarshan. Pursuant to this, Modi filed a suit in Bombay High Court, *inter alia*, for damages, alleging that WSG's threats prevented advertisers from advertising on Doordarshan. WSG, on the other hand, filed an action against Modi in the High Court of Justice Queen's Bench Division (the "English Court") for a money decree to recover the minimum amount of Rs. 15 crores (US\$ 3,125,000) and got a writ of summons issued. The writ of summons called upon Modi to notify the English Court of its intention to contest jurisdiction and also stated that failure to do so would amount to submitting to the English Court's jurisdiction. Modi entered appearance in the English Court and sought three weeks' time.

In the meantime, Modi took out proceedings in the suit filed in the Bombay High Court, seeking an anti-suit injunction against WSG's suit in the English Court, on the grounds that the Indian court was the natural forum in respect of disputes between Modi and WSG and that the proceedings in the English Court would be oppressive and vexatious. A single bench of the Bombay High Court granted the anti-suit injunction, which, however, was vacated by a division bench of the Bombay High Court.

In appeal in the Supreme Court of India, Modi raised two contentions in support of its prayer for anti-suit injunction. The first contention was that the English Court was a forum non-conveniens in view of the allegation of breach of Agreement by WSG in an unforeseen manner. The second contention was that the English Court had no connection with either the parties or the subject matter, and that it was not a court of natural jurisdiction.

The Supreme Court observed that the parties had foreseen a possible breach of the Agreement and had agreed to resolve the issues arising from the Agreement through the forum of choice. Thus, the foreseeability test could not be applied. The court held that the foreseeability test could be applied only in circumstances where the forum of choice got merged with another court, etc., making it impossible for the parties to approach the forum of choice. The Supreme Court also observed that the second contention could be considered only when evidence was adduced that contractual obligations had been disregarded. The Supreme Court held that it was not a sufficient reason to justify the interdiction of an action in a foreign court of choice (agreed by the parties) by a court of natural jurisdiction.

After detailed consideration of the facts that (a) Modi had filed the suit in the court of natural jurisdiction; (b) the English Court had no nexus with the parties or the subject matter and was not a natural forum; and (c) Modi and WSG had agreed to submit to the non-exclusive jurisdiction of the English Court to resolve the disputes arising under the Agreement in accordance with English law, the court held that in the absence of sufficient reasons to the contrary provided by Modi, the intention of the parties evidenced by the Agreement should prevail.

Therefore, while contracting with an Indian party, the foreign parties to the contract may choose to submit to the exclusive or non-exclusive jurisdiction of a foreign court, notwithstanding that none of the parties or the transaction under the agreement is not connected with such foreign court.