

ENFORCEABILITY OF FORUM SELECTION CLAUSES IN INTERNATIONAL CONTRACTS

With the advent of World Trade Organization, international business transactions have become the way of sustained economy globally. This essentially demands a carefully carved contract to mitigate the nightmare of litigating with the counter party in a country where the laws and their implementation is not developed to the international standards. Incorporation of forum selection clauses in the international commercial contracts to confer jurisdiction on foreign courts has become a common practice. Forum selection clauses offer flexibility of choice of laws under which, and the courts by which the dispute arising out of the contracts be tried. This goes a long way in easing the minds of prospective foreign investors, which in turn boosts the economic and technical participation by way of cross border joint ventures.

Although, once disfavored by the courts in the US, it is now recognized that the parties to a contract may freely select a forum, which will resolve any disputes over the interpretation or performance of the contract. Such clauses are *prima facie* valid and enforceable unless shown by the resisting party to be unreasonable and unjust. It was held by the US Supreme Court¹ that it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain. Forum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes, particularly those involving international business agreements.²

In India, the Code of Civil Procedure, 1908 (“CPC”), the Indian Contract Act, 1872 (“ICA”) and the Indian Evidence Act, 1872 (“IEA”) will have bearing on the enforceability of forum selection clauses. CPC provides for the jurisdiction of the courts to try an action arising out of a breach of contract.³ ICA declares any contract in restraint of legal proceedings void, if it absolutely restrains usual legal proceedings in the ordinary tribunals.⁴ IEA provides that every fact, of which the

1 See *M/S Bremen v. Zapata Off-Shore Co.*, 407 US 1 (1972). The full text of this decision can be found on the Findlaw web site (visited August 18, 2003) <<http://www.findlaw.com>>.

2 See *M/S Bremen*, *supra*.

3 See s. 20 of CPC

4 See s. 28 of ICA

court does not take judicial notice, has to be proved. Accordingly, in India, foreign laws are to be proved like any other fact by leading evidence.⁵ Now, let us discuss the implications of these statutes on the validity and enforceability of forum selection clauses.

Under CPC, every suit arising out of a breach of contract is instituted in a court within the local limits of whose jurisdiction the cause of action arises. The Supreme Court has laid down the following propositions regarding the venue for the suits on contract:⁶

- (i) In a court within whose jurisdiction the acceptance was communicated; The place where the contract should have been performed or its performance completed;
- (ii) In the suits for agency actions, the cause of action arises at the place where the contract of agency was made or the place where the actions are to be rendered and the payment is to be made by the agent;
- (iv) Part of the cause of action arises where the money is expressly or impliedly payable under a contract;
- (v) In a case of repudiation of a contract, the place where the repudiation is received; and
- (v) If a contract is pleaded as part of cause of action giving jurisdiction to the court where the suit is filed and that contract is found to be invalid, such part of the cause of action disappears.

It was held that an Indian court does not have jurisdiction to try a suit on a cause of action, which arose wholly outside the Indian territory.⁷ Further, where two or more courts have jurisdiction to try a suit or proceeding, an agreement between the parties that the dispute between them shall be tried in one of such courts is valid and not contrary to public policy⁸.

5 See s. 57 and s. 58 of IEA

6 See *A.B.C. Laminart Pvt. Ltd. v. A.P. Agencies, Salem*, A.I.R. 1989 S.C. 1239. For discussion, see P. M. Bakshi on *Mulla on The Code of Civil Procedure*, Vol. 1, 15th edition, 252 (253).

7 See *Bhamboo v. Ram Narain*, 1928, 9 Lah. 455, (28) A.L. 297. For discussion, see P. M. Bakshi on *Mulla on The Code of Civil Procedure*, Vol. 1, 15th edition, 271.

8 See *Hakam Singh v. M/s Gammon (India) Ltd.* 1971 S.C. 740. For discussion, see P. M. Bakshi on *Mulla on The Code of Civil Procedure*, Vol. 1, 15th edition, 272.

9 See *Modi Entertainment Network v. WSG Cricket Pte. Ltd.*, 2003 A.I.R. SCW 733. The full text of this decision can be found on the Manupatra web site (visited August 18, 2003) <<http://www.manupatra.com>>.

In a recent decision,⁹ the Supreme Court of India has held that where the parties to a contract chose the neutral forum in preference to the natural forum, they would be bound by the jurisdiction of the neutral forum unless extraordinary and unforeseen circumstances exist, which would justify a party to claim relief from its bargain of non-exclusive jurisdiction clause, but certainly not on the ground of inconvenience such as expenses and hardship of getting witness to the agreed forum. It is a well-settled principle that by agreement the parties cannot confer jurisdiction, where none exists, on a court to which CPC applies, but this principle does not apply when the parties agree to submit to the exclusive or non-exclusive jurisdiction of a foreign court. Thus, under Indian law, the parties to a contract may agree to have their disputes resolved by a foreign court which is a “neutral court” or “court of choice”, creating an exclusive or non-exclusive jurisdiction on it.

The agreement to bind the parties with forum selection clauses is not violative of section 28 of the ICA, which invalidates the agreements in restraint of legal proceedings.¹⁰ However, where one of the parties to the contract commits a criminal offence, filing of complaint can not be restricted to the court upon which jurisdiction is conferred under the contract.¹¹

When the party aggrieved has an alternative cause of action in tort, he is not obliged to sue on the basis of the contract and if he brings a suit in tort, a term embodied in the contract relating to institution of suit arising out of the contract in a particular court does not apply.¹² However, when the parties to the contract expressly agree to submit the claim in tort to the forum mentioned in the contract, the contract cannot be avoided by pleading that the forum agreed upon has no jurisdiction to try the claim based on tort.¹³

10 See *Hakam Singh v. Gammon India Ltd.*, *supra*

11 See 1984 Cri LR (Mah) 1 (10) (Bom). For details, see V. R. Manohar and W. W. Chitaley on *The A.I.R. Manual, Civil & Criminal*, 5th edition, 1989, the Code of Civil Procedure, 1908, 542 [S 20 N 24], paragraph (5).

12 See 1971 MPLJ 1052. For details, see V. R. Manohar and W. W. Chitaley on *The A.I.R. Manual, Civil & Criminal*, 5th edition, 1989, the Indian Contract Act, 1872, 552 [S 28 N 2], paragraph (31).

13 See (1981) 1 Cal HN 101 (105) (DB). For details, see V. R. Manohar and W. W. Chitaley on *The A.I.R. Manual, Civil & Criminal*, 5th edition, 1989, the Indian Contract Act, 1872, 552 [S 28 N 2], paragraph (31).

Under the provisions of IEA, if a court does not take judicial notice of a fact, such fact should be proved.¹⁴ As an Indian court will take judicial notice only of laws in force in India, foreign law must be proved like any other fact.¹⁵ Therefore, if a party wants to rely on a foreign law, it should be pleaded like any other fact and be proved by evidence of experts in that law. The requirement to prove foreign law under rules of evidence has been upheld by the Indian Supreme Court by holding that it would be able to interpret the agreement's choice of foreign law provisions only if the parties adduced evidence thereof.¹⁶

Courts in India have carved out the broad principles for enforceability of the forum selection clauses in contracts as follows:

- (i) The ouster clause does not *ipso facto* take away the jurisdiction of the other courts. For exclusion of jurisdiction of courts having concurrent jurisdiction, there has to be a clear, unambiguous and specific ouster of jurisdiction of other courts. Unless absence of *ad idem* can be shown, the other courts should avoid exercising jurisdiction.¹⁷
- (ii) It is essential that it must be specifically brought to the notice of the other contracting party. All the parties to the agreement must have consented.¹⁸ It can not bind a third party, unless it is shown that he had been made aware of the trial and its implications.¹⁹

The parties cannot confer jurisdiction, where none exists, on a court to which CPC applies, but this principle does not apply when the parties agree to submit to the exclusive or non-exclusive jurisdiction of a foreign court which is a “neutral court” or a “court of choice.”²⁰

14 See s. 56 of IEA

15 See s. 57 of IEA

16 See *Harishankar Jain v. Sonia Gandhi*, A.I.R. 2001 SC 3689

17 See AIR 1989 SC 1239 (1246). For details, see V. R. Manohar and W. W. Chitaley on *The A.I.R. Manual, Civil & Criminal*, 5th edition, 1989, the Code of Civil Procedure, 1908, 542 [S 20 N 24], paragraph (12).

18 See (1987) 2 Mad LJ 174. For details, see V. R. Manohar and W. W. Chitaley on *The A.I.R. Manual, Civil & Criminal*, 5th edition, 1989, the Code of Civil Procedure, 1908, 542 [S 20 N 24], paragraph (7).

19 See *M/s. Patel Roadways Pvt. Ltd., Hyderabad v. The Republic Forge Co. Ltd., Hyderabad*, A.I.R. 1985, Andhra Pradesh 387 (389).

20 See *Modi Entertainment Network, supra*

When parties enter into a forum selection contract with free consent, such contract can not be avoided by either party only because it contains stringent terms. The court has no jurisdiction to ignore such contracts unless such contracts are found to be voidable or void under the law.²¹

From the foregoing discussion, it is evident that, in India, while the parties to a contract can confer jurisdiction on a foreign court which is a “neutral court” or a “court of choice”, they cannot confer jurisdiction on an Indian court which is not a court of natural or concurrent jurisdiction under the provisions of CPC. This implies that in the case of the Indian courts, selection of forum is possible only among the courts of natural or concurrent jurisdiction.

A party to a contract may request a court of natural jurisdiction to restrain the defendant from instituting the proceedings in the forum of choice agreed upon under the terms of the contract. When a court restrains a party to a suit/proceeding from instituting or prosecuting a case in another court including a foreign court, it is called an anti-suit injunction. The Supreme Court of India²² has laid down the broad principles to be followed by a court of natural jurisdiction, while exercising the discretion to grant an anti-suit injunction to an aggrieved party. Accordingly, the discretion of a court to grant an anti-suit injunction would be based on the fact that, whether the parties to the contract have agreed to submit to the exclusive or non-exclusive jurisdiction of a court, including a foreign court, a forum of their choice.

A court of natural jurisdiction will not ignore the forum selection clause where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court, a forum of their choice. However, in an exceptional case for good and sufficient reasons, with a view to prevent injustice, which permit a contracting party to be relieved of the burden of the contract; or since the date of the contract, the circumstances or subsequent events have made it impossible for the party to prosecute the case in the court of choice because the essence of the jurisdiction of the court does not exist or because of a *force majeure* and the like, the court of natural jurisdiction may grant relief to the contracting party by granting anti-suit

21 See *Ganpatrai Agarwal v. Fertiliser Corporation of India*, A.I. R. 1984 Cal I. 35. For discussion, see P. M. Bkshi on *Mulla on the Code of Civil Procedure*, Vol. 1, 15th edition, 274.

22 See *Modi Entertainment Network*, *supra*

injunction to stop the other party from initiating an action in the forum agreed under the contract.

Further, where the parties have agreed under a non-exclusive jurisdiction clause in a contract to approach a neutral foreign forum and be governed by the law applicable to it, ordinarily no anti-suit injunction will be granted in regard to proceedings in such a forum of choice. It shall be presumed that the parties had thought over their convenience and all other relevant factors before submitting to the non-exclusive jurisdiction of the court of their choice.

In India, location of courts is one of the most important variables in a successful litigation. As Indian laws confer concurrent jurisdiction on more than one courts, which may be located in the interiors of the country, a foreign party may end up expending large amount of time and money defending an action brought under a contract by an Indian counter party. Moreover, as there is a huge backlog of pending cases in the Indian courts, resolution of disputes may take an unreasonably long time. To avoid this, it is advisable that both the parties to the contract mutually decide upon the laws under which and the forum by which the action arising out of the contract may be tried by incorporating the forum selection clauses. The parties to the contract may choose to submit to the exclusive or non-exclusive jurisdiction of a foreign court which is a “neutral court” or a “court of choice” by creating an exclusive or non-exclusive jurisdiction on it, even if such foreign court has no nexus with the parties or the subject matter and is not the natural forum.

While construing the ouster clause the words like ‘alone’, ‘only’, ‘exclusive’ and like must be used. In appropriate cases the maxim ‘*expressio unius est exclusion alterius*’ may be applied. The clause has to be clear and unequivocal. The foreign parties entering into contracts with Indian parties, enforceable under a foreign law must note that although such a contract is valid, stipulation ousting jurisdiction can be ignored by the excluded court which otherwise possesses jurisdiction, if it is otherwise considered to be oppressive, unjust or unfair based upon the facts and circumstances of the case. In such circumstances, the foreign party may end up litigating in India.