

VALIDITY OF CHOICE OF LAW AND FORUM SELECTION CLAUSES

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.

In a recent decision, the Bombay High Court upheld the validity of a contract wherein the parties had expressly agreed that the disputes would be settled under English law in English courts. The court held that, even when the agreement was signed by some of the parties in France, a country to which none of the parties belonged, the parties would be governed by the law which they chose under the agreement. (*Rhodia Ltd. v. Neon Laboratories Ltd.*, AIR 2002 Bombay 502)

In this case, an English company and an Indian company entered into an agreement under which the Indian company had the exclusive right to market and distribute the English company's products manufactured in India, in India and Sri Lanka. The governing law of the agreement was English law. The agreement also provided that all disputes between the parties on the interpretation or performance of the agreement would be settled by English courts.

Thereafter, certain disputes arose with respect to the distribution arrangement and the Indian company filed suit in an Indian trial court seeking various reliefs against the English company. The English company filed a reply to the Indian company's interim application *inter alia* stating that the trial court had no territorial jurisdiction to entertain the suit for the reason that the parties to the agreement had agreed by choice to be governed by English law and had submitted themselves to the jurisdiction of English courts alone. The trial court held that as the Indian company's plant was situated within its jurisdiction, under section 20(c) of the Code of Civil Procedure, 1908 ("CPC"), the suit could be filed in that court.

On appeal, the Bombay High Court addressed the following main issues:

- (i) Whether contracts with a foreign choice of law clause are valid under Indian law, and whether foreign law can be relied upon to assess whether an Indian court has jurisdiction in the matter?
- (ii) Whether an Indian court has jurisdiction to entertain a suit arising out of an agreement specifying a foreign court as having exclusive jurisdiction, if the cause of action has arisen in India?

While addressing the foregoing issues, the court referred to the Indian Supreme Court's judgment in which it has been held that the expressed intention of the parties is generally decisive in determining the "proper law of the contract." The only limitation to this rule is that the intention of the parties must be expressed *bona fide* and should not be opposed to public policy. Proper law is, thus, the law which the parties expressly or impliedly choose or which is imputed to them by reason of its closest and most intimate connection with the contract. (*National Thermal Power Corporation v. Singer Company*, AIR 1993 SC 998)

In this regard, the Indian Evidence Act, 1872 provides that if a court does not take judicial notice of a fact, such fact should be proved. (Section 56 of the Indian Evidence Act) As an Indian court will take judicial notice only of laws in force in India, foreign law must be proved like any other fact. (Section 57 of the Indian Evidence Act) Therefore, if a party wants to rely on 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 in *Harishankar Jain v. Sonia Gandhi*, AIR 2001 SC 3689, where the court held that it would be able to interpret the agreement's choice of law provisions only if the parties adduced evidence thereof. This ratio forms the basis of the Bombay High Court's ruling in *Rhodia (supra)*.

Further, the Indian Supreme Court has held that foreign law can be relied upon to assess whether an Indian court has jurisdiction in a particular case. (*British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Industries*, 1990(3) SCC 481)

On the issue of jurisdiction of Indian courts in respect of an agreement specifying a foreign court as having exclusive jurisdiction, an Indian court has jurisdiction to entertain a suit if the cause of action arises wholly or in part within its local limits of jurisdiction. (Section 20(c) of the CPC) Additionally, an Indian court has jurisdiction to try all cases of a civil nature, unless expressly or impliedly barred from doing so. (Section 9 of the CPC) Moreover, under Indian law, an agreement, which absolutely restricts any party from enforcing its rights by recourse to the usual legal proceedings in the ordinary tribunals, is void. (Section 28 of the Indian Contract Act, 1872) However, if two or more courts have jurisdiction over the subject matter, an agreement by the parties that the disputes between them will be subject to one of such courts is valid for the reason that it does not amount to an

absolute ouster of jurisdiction. (*ABC Laminart Pvt. Ltd. v. A.P. Agencies, Salem*, AIR 1989 SC 1239; *Globe Transport Corporation v. Triveni Engineering Works*, 1983 (4)SCC 707; and *Hakam Singh v. Gammon India Ltd.*, AIR 1971 SC 740) In the same vein, the Indian Supreme Court has held that in the event jurisdiction has been conferred on a foreign court alone, the application of Indian statutes and the jurisdiction of the Indian court will, to that extent, be inapplicable. (*See British India supra.*)

Based on the foregoing decisions, the Bombay High Court held that the distribution agreement between the English company and the Indian company was valid and binding and set aside the trial court's order. Additionally, it remanded the suit back to the trial court to enable the parties to adduce evidence with respect to the interpretation of the governing law clause in the agreement under English law.

In the circumstances, parties entering into contracts with Indian companies enforceable under a foreign law must note that if an action is brought under such contract in an Indian court, foreign law will have to be pleaded like an ordinary fact and proved by experts. Further, parties cannot, by agreement, confer jurisdiction on a court which does not have any jurisdiction over the subject matter. (*Patel Roadways v. Prasad Trading Company*, AIR 1992 SC 1514) Moreover, in order to select one out of two courts by an agreement, both the courts must have jurisdiction, and the agreement should be clear and unambiguous as regards the forum selection clause.