

"Do You Know" Series



# Choice of Law and Choice of Forum Clauses for Contracts under Indian Law

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In this collection, the Asian Business Law Institute ("ABLI") briefly discusses the choice-of-law and choice-of-forum clauses of a general commercial contract in select civil, common and hybrid jurisdictions. Earlier collections under the same series have examined indemnity and liquidated damages clauses, contractual breach and remedy, interpretation of contracts, and the administrative and tax requirements of contracts in those same jurisdictions.

The short article below provides a brief overview of selected requirements and practices under Indian law.

## Choice of Law

Under the Indian legal framework, parties are free to choose the governing law of their contract, irrespective of the connection between the chosen law and the underlying contract. The limitations to this choice are that the intention of the parties must be expressed *bona fide* and legal and that the choice should not derogate from the mandatory provisions of Indian law and should not be opposed to public policy of India. The Indian Arbitration and Conciliation Act, 1996 also mandates the application of substantive Indian law when two Indian parties have contractually designated their seat of arbitration to India.

Mostly, parties contractually agree to provide for the matters covered by their choice-of-law clause. Such matters may include pre-contractual negotiations and non-contractual obligations arising out of or in connection with the contract, subject to the application of specific rules and principles, such as the "double actionability" rule for the litigation of any foreign tort in an Indian court. However, in a situation where the contract does not expressly specify whether pre-contractual negotiations are covered within the governing law clause, the position under Indian law is unclear. Indian courts have interpreted the choice of governing law by parties to an international commercial contract to imply the substantive rights and obligations of the parties in the underlying contract.

Indian courts typically respect parties' selection of a foreign law as the governing law of their contract, provided that the selection does not fall within the limitations outlined above. To ensure their choice of a foreign law as governing law is upheld, parties may demonstrate that the choice is not hit by any of the above-mentioned restrictions and that the choice is in line with sound business ideas and convenience and has closer proximity to where the parties are based or where the contract is to be performed.

In the absence of an express choice of governing law in a contract, the Indian judiciary has relied on sub-rule (2) of Rule 180 in Dicey, Morris & Collins on the Conflict of Laws ("Dicey") to infer the intention of the parties from the surrounding circumstances to determine the governing law. Where the intention of the parties is not expressly stated and no inference can be drawn, Dicey's sub-rule (3) of Rule 180 has been relied upon and the Indian courts endeavour to impute an intention by identifying the legal system with which the transaction has its closest and most real connection.

## Choice of Forum

Indian courts respect the choice of parties to provide for dispute resolution before a “neutral forum” or a “forum of choice” through exclusive or non-exclusive jurisdiction clauses incorporated in their contracts. Nevertheless, such clauses are not regarded as determinative of the jurisdiction of Indian courts. If the court which ordinarily does not have jurisdiction under the Code of Civil Procedure, 1908 has been conferred with such jurisdiction pursuant to a contract, then such choice-of-forum clause will not be upheld by Indian courts. Parties also cannot through a contract oust the jurisdiction of a court that has exclusive jurisdiction. To avoid injustice and in exceptional facts and circumstances of a matter, Indian courts may also assume jurisdiction over a dispute.

The status of asymmetric jurisdiction clauses is unclear in India due to contrary judicial pronouncements. However, Indian courts may not enforce such a clause to avoid injustice and in cases where foreign proceedings have been construed unjust and unfair due to exceptional facts and unforeseen circumstances of a matter, which would cause manifest injustice to the party if the consensually agreed asymmetric jurisdiction clause is enforced. Therefore, it is advisable for parties and lawyers to approach asymmetric jurisdiction clauses with caution.

Indian courts firmly recognise the concept of “*forum non conveniens*” and may refuse to hear a cross-border matter where it is found that they are not the appropriate forum to hear the dispute. While there have not yet been occasions where the Indian courts have relied upon a “waiver of inconvenient forum” clause to suggest that the parties intended a particular court to exercise exclusive jurisdiction, it is advisable to stipulate such a term in the contract for abundant clarity as to the intention of the parties to bestow exclusive jurisdiction to a particular court. This should be done even where the contract includes an “exclusive jurisdiction” clause.

The response of an Indian court will vary if a party commences litigation before it contrary to the choice-of-forum clause that selects a foreign court. If the party can prove extraordinary and unforeseen circumstances, which would cause great injustice to the concerned party if the chosen forum were to be respected, the Indian court may assume jurisdiction to try the suit. Similarly, a contractual choice-of-forum clause can be ousted by the Indian courts if it is found to be unjust, unfair, and oppressive. On the other hand, if the Indian court concludes that the proceedings or litigation in India is oppressive or vexatious and/or simply an attempt to frustrate the choice of forum clause, or that the forum designated by the parties is the appropriate forum having regard to the convenience of the parties, then the Indian court may stay or terminate the proceedings before it.

If a party commences litigation in a foreign court contrary to the choice-of-forum clause that selects a court of India, the Indian court, in exercise of its discretion to grant an anti-suit injunction, will examine as to which court is the appropriate forum having regard to the convenience of the parties and may grant an anti-suit injunction against proceedings which are oppressive or vexatious or in a forum non-conveniens. This remains the case even if the choice-of-forum clause confers exclusive jurisdiction on the Indian court. This is because the recitals therein with regard to the “exclusive jurisdiction” will not be regarded as “determinative” but only as a “relevant factor”. When a question arises as to the nature of jurisdiction agreed to between the parties, the Indian court will make a decision based on a true interpretation of the contract on the facts and in the

circumstances of each case. If the Indian court finds that the true intention of the parties was to enable India to be the most likely forum for resolution of the dispute, the court may issue an anti-suit injunction.

Where parties to a contract neglect or fail to select a forum for resolving any dispute arising from their contract, the Indian courts shall apply relevant principles of Indian private international law to either assume jurisdiction or stay or dismiss the proceedings before them.

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The experts are contributors to ABLI's latest project that aims at harmonising contractual clauses in Asia, covering 12 key contracting jurisdictions that include Australia, China, England, India, Indonesia, Japan, Malaysia, New York State, the Philippines, Singapore, Thailand and Vietnam.

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