

Jurisdiction Clauses in Cross Border Commercial Contracts: Indian Perspective

Globalization has facilitated international trade and cross-border commercial contracts between corporations in different countries. However, these corporations often face challenges in selecting the appropriate jurisdiction for resolving disputes that arise from such contracts. This article aims to provide a brief overview of the considerations that must be taken into account when choosing a suitable jurisdiction for dispute resolution, especially if one of the parties involved in the cross-border commercial contract is from India.

Indian Law recognizes the right of parties to an international commercial contract to mutually choose a forum (Indian or foreign court) for resolving disputes through incorporation of a jurisdiction clause in such a contract. However, when a foreign court's jurisdiction is chosen, the judgment/order passed by such a court needs to be enforced in India and hence the aspect of enforceability is crucial for both parties. In this respect, the Code of Civil Procedure, 1908 ("CPC") prescribes the requisite procedure for enforcement of a foreign court's order/judgment in India which shall be complied with/fulfilled by a party seeking to enforce it. Thus, before choosing a foreign court's jurisdiction, it is pertinent for parties to consider the following conditions for recognition and enforcement of foreign judgments/orders in India:

- (i) **Conceptual understanding of "Foreign Court", "Foreign Judgment" and "Foreign decree"**: For enforceability purposes, the order/judgment should be a foreign judgment or a foreign decree passed by a foreign court as defined below:-

"Foreign Judgment is a judgment of a foreign court" .

"Foreign Court is a court situated outside India and not established or continued by the authority of the Central Government" .

"Foreign Decree refers to a decree/judgment by a foreign court that relates to a sum of money payable from one party to the other but excludes sum payable in respect of tax/charge, penalty, and the arbitral award" .

- (ii) **Enforceability of Foreign Judgment or Decree in India**: For a foreign judgment/decree to be enforceable in India, it shall satisfy the test of conclusiveness i.e. a foreign judgment shall be conclusive and not be covered under the following disqualifications/exceptions:



Rudra Srivastava
Partner
E: rsrivastava@singhania.in



Neha Meena
Senior Associate
E: neha@singhania.in

- Not pronounced by a court of competent jurisdiction.
- Not Given on merits of the case.
- Founded on an incorrect view of international law or refusal to recognize Indian law, if applicable.
- Principles of Natural Justice were not followed in proceedings.
- Obtained by fraud.
- Sustained a claim founded on breach of any law in force in India.

(iii) Execution of foreign decree of a reciprocating territory as an Indian decree in India:

If a party seeking execution of a foreign decree passed by a court of reciprocating territory, files an execution application with the decree's certified copy (along with certificate stating the extent of satisfaction/adjustment of the sum decreed) in the district court, the said decree may be executed as an Indian decree passed by Indian district Court in terms of the prescribed procedure. In other words, the district court will only consider the conclusiveness of the foreign judgment/decreed and execute it without examining the merits of the case, thereby enabling direct execution, making the process easier and time-saving.

However, for this to apply, the said foreign decree should have been passed by any of the superior courts of any "reciprocating territory" i.e. any country/territory outside India which is notified to be so by the Central Government in the Official Gazette. In a general sense, it can be said that the list of Countries in the Official Gazette are those "with whom India has had good relationships and agreements for mutually enforcing the court orders of each other's territories". Thus, Parties may choose the jurisdiction of a foreign court of a reciprocating territory for resolving their disputes under the contract.

If the foreign decree has been passed by a court of a non-reciprocating territory, the party seeking enforcement, will have to institute a suit in an Indian court of competent jurisdiction, on that foreign decree/judgment or on the original cause of action or both. This position has also been upheld in the Marine Geotechnics LLC case. The time period for filing such suit is three years from the date of passing of foreign decree.

There are several risks involved if a decree is passed by a foreign court of a non-reciprocating territory. These are:

- Even though the foreign decree satisfies the test of conclusiveness under section 13, it cannot be directly/simplely executed as was in the case of a decree passed by the court of reciprocating Territory.
- The Indian Court has the power to reopen the case (by itself on filing of suit or on objection by any party) and examine the same on merits, hear the arguments and give a final order/decreed. This will result in parties re-litigating/re-arguing the same dispute in Indian Court despite an already existing decree of a foreign court.
- Only the final decree passed by the Indian court after adjudicating the suit on merits, will be executable. Thus, the entire process will prove to be time-consuming and costly due to double litigation processes in both jurisdictions.

Thus, parties should avoid incorporating the jurisdiction of a foreign court of a non-reciprocating territory due to the element of risks involved (as explained above).

In light of the above, the Parties to a cross border commercial contract may opt for any of the following options:

- Choose the jurisdiction of the Indian Court for resolving disputes under the Contract. Since the disputes concerning commercial transactions are civil in nature, the parties may incorporate the jurisdiction of Indian Civil Courts for resolving them in terms of the provisions relating to jurisdiction under Indian law. Accordingly, subject to territorial and pecuniary limits in the CPC, the Civil Courts in India have jurisdiction to try all suits of civil nature except where it is expressly or impliedly barred. The aforesaid territorial limit pertains to the place of suing which includes the place where the defendant resides/carries business/works for gain or where the cause of action arises (wholly or in part). Hence, a Corporation shall be deemed to carry on business at its sole/principal office in India or in respect of the cause of action arising at a place where it has its subordinate office . This scenario will be applicable if an Indian counterparty is situated and carrying on business in India wherein the cause of action may also arise and thus the Indian Court's jurisdiction may be chosen.

OR

- Incorporate the jurisdiction of a Foreign Court ONLY if it is a Court of reciprocating territory notified in the Official Gazette of India.

© 2024 All rights reserved. This article is for information purposes only. No part of the article may be reproduced or copied in any form or by any means [graphic, electronic or mechanical, including photocopying, recording, taping or information retrieval systems] or reproduced on any disc, tape, perforated media or other information storage device, etc., without the explicit written permission of Singhania & Partners LLP, Solicitors & Advocates ("The Firm").

Disclaimer: Though every effort has been made to avoid errors or omissions in this article, errors might creep in. Any mistake, error or discrepancy noted by the readers may be brought to the notice of the firm along with evidence of it being incorrect. All such errors shall be corrected at the earliest. It is notified that neither the firm nor any person related with the firm in any manner shall be responsible for any damage or loss of action to anyone, of any kind, in any manner, therefrom