JETIR.ORG ISSN: 2349-5162 | ESTD Year : 2014 | Monthly Issue
JOURNAL OF EMERGING TECHNOLOGIES AND INNOVATIVE RESEARCH (JETIR)
An International Scholarly Open Access, Peer-reviewed, Refereed Journal

FIXING THE ERRORS IN THE CHOICE OF LAW CLAUSE IN INTERNATIONAL COMMERCIAL ARBITRATION

Utkarsh Srivastava, B.A.LL.B.(H), mity Law School, Amity University Uttar Pradesh, Lucknow

Dr. Rajeev Kumar Singh, Assistant Professor of Law , Amity University Uttar Pradesh , Lucknow

ABSTRACT

The selection by the parties of the place of arbitration in international commercial arbitration will have a fundamental impact on the determination of rights of the parties under the contracts. Equally fundamental is the parties' selection of the law, both substantive and procedural, which will apply to the determination of those rights. Accordingly, the challenge with respect to the choice of law and choice of forum for international commercial arbitrations is to resolve the tension between these three sources of law: the statute/Model Law; the common law; and the parties' agreement. These three sources will not always be consistent with one with the other, and may not obviously lead to the same conclusions. And even with respect to the arbitrations which are seated in a particular country, the varying dimensions of reconciling the threads of governing law, law of arbitration agreement and curial law has a significant effect in the way the rights and obligations of the parties are dealt with and justice rendered. Also within the seamless legal domestic and international code on the above three laws in an arbitration agreement, there exists varying jurisprudence and legal opinion which poses difficulty in anticipating the consequences of including a choice of law in the contract which may give rise to subsequent differences between the parties. The sphere of International Commercial Arbitration is shrouded with technicalities of law, jurisprudence, rules and codes not to forget the varying contradictions that the presence of different jurisdictions and their set of laws pose. Thus, in the contemporary scheme of things, it is essential to crystallize the basic principles while dealing with choice of law clauses in the contract with the sole of purpose of avoiding unforeseen consequences later.

The understanding of principles of party autonomy, conflict of laws and public policy and contractual implications is essential for the parties to have informed consent while including a choice of law clause in the contract.

Introduction

The objective of the study is to outline all the basic norms, rules, legislations specific to India which enlist about the substantive and procedural issues in International Commercial Arbitration and to understand what rules of private international law will govern various concepts like the choice of law clause, striking down the choice of law clause, implied choice and subsequent conduct, meaningless choice of law clause, limits on freedom of choice, incorporation of foreign laws terms by reference, changing the applicable law, bilateral, unilateral, floating choices of law, formal and essential validity of the clause and its effect on third parties, applicable law in absence of choice of law clause i.e. The law of closest connection, company's incorporation right of immovable property, renvoi, validity of choice of law clause, scope of applicable law, mandatory rules and public policy.

RATIONALE OF THE STUDY

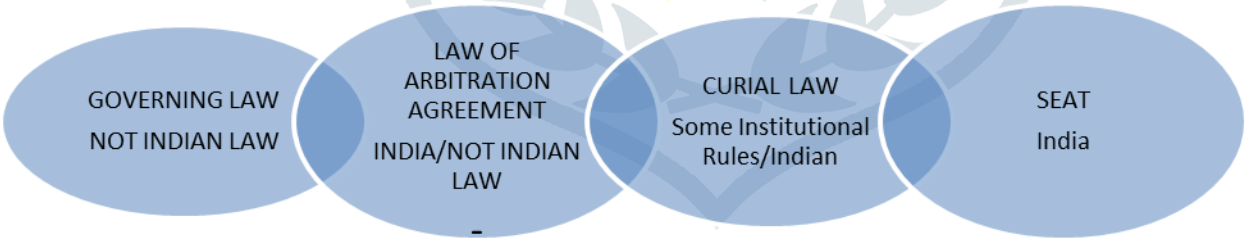
The rights and obligations in a contract flow from the choice of law clause and hence it is important to invest time to consolidate understanding of the significant legal norms codified across jurisdictions and conflict of law principles, the juxtapositions of interim relief claims, party autonomy and needs posed by international commerce, in order to have an informed consent of the choice of law clauses that the parties enter into. Varying implications of this choice of law clause, its validity, interpretation has lead to a lot of uncertainty in the arbitral process. Uncertainty, lack of clarity and inconsistency in execution of this clause defeats the certainty and absolution that arbitration as a choice of dispute resolution promises.

SIGIFICANCE AND UTILITY OF THE STUDY

The hypothesis of the study presents the biggest justification of its utility. Identifying the law that governs an international contract along with an arbitration agreement has proved to be a complex and confusing process. This confusion can be further exacerbated by the possibility that different issues relating to an international commercial arbitration agreement are governed by different set of applicable laws i.e. different laws may apply to issues of formal validity, capacity, substantive validity, assignment and waiver. Thus a study that undertakes to resolve the underlying contradictions, iron out the creases and re identify with the operative part of the various legal precedents, practices and develop a comprehensive legal analysis of the various drafting principles that need to be considered while drafting such a clause, would considerably rule out this sphere of confusion and allow for a more informed entry into such choice of law clauses which does not result in subsequent litigation.

METHODOLOGY

The research methodology is Doctrinal. The research has been limited to Primary and Secondary Sources. The internet has also been used to research for other materials. Also research methodology would include a comprehensive Venn diagram based analysis of all the possible scenario's when the choice of law clause in the contract is missing.



SCOPE IN INDIAN DIASPORA

International Commercial Arbitration is defined in proviso F of section 2 of the Arbitration and Conciliation Act, 1966. It is an arbitration relating to disputes arising out of a legal relationship, whether contractual or not, considered as commercial under law of force in India and where one of the parties is

- An individual who is a national of or habitually resident in any country other than India
- A body corporate which is incorporated in any country other than India
- A company or association or body of individuals whose central management and control is exercised in any other country
- The government of foreign country

Or an arbitration is to be considered as international arbitration such that the

- the dispute must arise out of a legal relationship which is commercial, irrespective of the fact whether such relationship is contractual or not;
- At least one of the parties to the dispute is a foreign national or a company registered in a foreign country or a company, management and control of which is exercised from a foreign country or the government of foreign country.

An international commercial arbitration clause may have its seat in India, such that it would be domestic arbitration or it may have a seat outside India, making it foreign seated arbitration.

CHOICE OF LAW CLAUSE

An arbitration agreement provides a choice of law provision outlining the substantive law applicable to the parties and also enlisting the forum specifications. A choice-of-law clause enhances the predictability with respect to the interpretation and enforcement of the parties' contractual obligations, and is ordinarily a critical aspect of any international transaction.

International commercial arbitration operates on three planes: the private agreement of the parties, the law of the jurisdiction where the arbitration occurs, and the international regime. As to the first plane, arbitration is a matter of contract: an arbitration occurs because the parties involved have agreed, as part of their original contract or after a dispute arises, that they will resolve their disputes by the arbitral procedures they have designated.

The second plane on which international commercial arbitration operates is the law of the jurisdiction in which the arbitration takes place. Since the arbitration must be conducted somewhere, the parties will not be able to completely exclude themselves from the application of municipal law. That law will generally include mandatory norms, and it may authorize supplemental procedures that the parties may use in addition to those they have expressly chosen. Of course, those mandatory norms are a limitation on party autonomy. Thus, in international arbitration, the second plane that must be considered is the municipal law of the arbitration site. For arbitration to be effective, the relevant arbitration statute must generally prohibit judicial interference in the arbitration and must permit prompt, unburden some, and reliable enforcement of arbitration agreements. The third plane on which international commercial arbitration functions is the international regime. While arbitration is in the first instance a matter of consent, the consent matters little unless the arbitration agreement and any award resulting from that agreement can be enforced. In other words, a party must be able to move an opposing party out of court quickly if the party breaches an arbitration clause by filing suit. And in the event that a party refuses to comply with any award, there must be a readily available process by which to reduce the award to judgment and enforce it as a judgment in jurisdictions where the non-complying party may have assets.

LAW OF ARBITRATION AGREEMENT

International Commercial Arbitrations have standard arbitration clauses which usually refer to an institution for arbitration proceedings like the ICC, LCIA or by UNCITRAL or they could be in the form of an ad hoc procedure. Arbitration clauses are generally widely worded to encompass all sorts of possibilities flowing from the main contract. A model clause of arbitration will encompass references to place of arbitration, law of the arbitration agreement, seat of arbitration and number of arbitrators to be appointed. Seat of arbitration in a contract usually has a causal link with the law of the arbitration agreement. Brevity of arbitration clauses does not taint their validity.

Law applicable to that agreement is "certainly a more complex task than determining the law governing the [main] contract"

The proper law of the arbitration agreement governs, in general, the validity, effect and interpretation of the arbitration agreement. Thus, the question whether or not a particular dispute falls within the scope of the arbitration agreement and whether or not the arbitrators have jurisdiction to settle that dispute, is a question of the interpretation of the agreement and a substantive issue, and is governed by the proper law of the agreement.

The Choice of law in an arbitration clause ranges in myriads ever confusing the arbitrators. It may range from the law applicable to arbitration procedure (lex loci arbitri), the law applicable to the arbitrator's contract (receptum arbitri) law applicable to the parties' capacity to conclude the arbitration agreement, the parties' capacity to arbitrate i.e. "subject arbitrability". Subject arbitrability now seems to include under the American Jurisprudence the scrutiny over scope and ambit of validity of an arbitration agreement.

CURIAL LAW

In some arbitration laws the contractual element, and with it the concept of party autonomy, is accentuated so that, for example, the supervisory jurisdiction of the courts is very circumscribed. In others, again, the judicial element is much stronger and cannot be ousted by the parties.

Practically, two methods of arbitration may be distinguished. In the case of ad-hoc arbitration, the proceedings are conducted under rules adopted or agreed upon by the parties and by a tribunal directly or indirectly established by them; an institutional arbitration is administered by and its proceedings conducted under the rules of one of the many specialized institutions established to facilitate the settlement of international commercial disputes.

The curial law of the arbitration governs the validity and effect of the arbitral process. Thus, questions as to the manner in which the procedural rules according to which the reference is to be conducted and the procedural powers of the arbitrators, and questions as to the powers of the courts to supervise and control the arbitration process and the right of the parties to invoke such judicial intervention, fall to be decided by the curial law. Of course, certain issues stand on the borderline between substance and procedure, and may be characterized only with some difficulty. One such case was International Tank & Pipe SAK v Kuwait Aviation Fuelling Co KSC. An application was brought in terms of s 27 of the English Arbitration Act 1950 for the extension by the court of the time fixed in the arbitration agreement between the parties for the commencement of arbitration proceedings. The question arose whether the right to demand arbitration and to apply for such extension, and the court's power in this regard, were to be determined by the proper law or the procedural law. The Court of Appeal held that the issue was not one of procedure - arbitration had not actually started - but rather one of substance arising out of the arbitration agreement itself, and was therefore governed by the proper law of the (arbitration) contract. But, it is at least arguable that a provision such as s 27 has both substantive and procedural elements.

CONCLUSION

Choice of law clause is a critical aspect of an international transaction. The mandatory rules of the forum limit the party autonomy. Usually the choice of law rules and majorly the test of real and closest connection are used by the arbitrator to ascertain the proper law of the contract. Sometimes the situs of arbitration also governs the proper law of the contract. The law of arbitration agreement governs the validity, effect and interpretation of the arbitration agreement. Thus, the question whether or not a particular dispute falls within the scope of the arbitration agreement and whether or not the arbitrators have jurisdiction to settle that dispute, is a question of the interpretation of the agreement and a substantive issue, and is governed by the proper law of the agreement. The country's jurisdiction also effects on whether the law of arbitration agreement will be influenced by the domestic law.

References

- Julian Lew's Report , "The Law Applicable to the Form and Substance of the Arbitration Clause", ICCA Congress in May 1998 in Paris
- (1975) 1 All ER 242 (CA) 9