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Jurisdiction and Choice of Law in International Commercial Contracts: A Doctrinal Analysis

Article History:

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How to cite this article:

Bindaiya H, *et, al*, Jurisdiction and Choice of Law in International Commercial Contracts: A Doctrinal Analysis. *J Int Commer Law Technol*. 2026;7(1):430-433.

Received: 18-12-2025

Revised: 02-01-2025

Accepted: 16-01-2026

Published: 04-02-2026

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Abstract: This paper offers a thorough discussion of the complexities involved in commercial litigation involving parties of different jurisdictions especially in the Indian jurisdiction. It explores the premises of the jurisdiction and choice of law, and distinguishes substantive and procedural laws necessary in resolving difficult international commercial cases. It also analyses how Indian private international law has developed and how it has long been in relation to English common-law traditions with respect to choice of law in an international business contract. In particular, it examines the ways in which Indian courts understand and enforce party autonomy in identifying the statute of law best suited to a contract and tend to make comparisons to well-established common law doctrine. Such recourse to judge based principles underscores the lack of a written system of private international law in India, akin to other common law systems such as South Africa. This methodology requires a thorough review of judicial precedents that could identify the series of principles that render the law to apply in specific situations; especially where the parties involved have not clearly selected one. In addition, the effects of the international conventions, including the Hague Convention of Choice of Court Agreements, on the application of the forum-selection clauses to the Indian legal system in terms of the current international legal instruments the country is taking will also be evaluated in this paper. The operation rules and principles that Indian courts use in cases where applicable laws are elusive will also be scrutinized particularly in case of concurrent contract and product liability claims. This will entail the substantive examination of tacit choice of law especially in cases where there was no formal agreement and the interpretation of the tacit agreements in international commercial contracts whose interpretation varies within the Indian legal system.

Keywords: Jurisdiction, Choice of Law, International Commercial Contracts, Indian Private International Law, Party Autonomy, Hague Convention, Forum-Selection Clauses, Tacit Choice of Law.

INTRODUCTION

The purpose of this paper is to engage in a detailed doctrinal inquiry of jurisdiction and choice of law in international commercial contract, namely looking at the twists and turns in Indian legal scene. It will discuss the development of the law of private international law in India and how it is now traced back to the principles of common law in England, and what the consequence has on the determination of

what law applies in an international commercial contract. It will also analysis criticatively the levels at which the Indian courts recognize and implement the party autonomy in ascription of the correct law of a contract both in explicit and tacit selections of the law. Further, the paper will explore the challenges that Indian courts face in the quest to tackle the nuances of the international uniform law, including the Convention on Contracts in International Sale of

Goods, especially where the applicable laws prove elusive in cases concerning simultaneous contract and products liability cases. Lastly, the paper shall evaluate how international instruments like the Hague Convention on Choice of Court Agreements affect the application of the forum-selection clauses in Indian law system as a sign of increasing participation of India into the world legal instruments. This discussion will also fill the gap in academic literature regarding implied jurisdiction agreement by considering how valid and enforceable the valid jurisdiction is throughout the world and with regards to the Indian scenario.

Conceptual Framework of Jurisdiction in International Commercial Contracts

The jurisdictional exercise, over commercial disputes between states in international relations, is a complex matter and is mainly based on the norms of the Civil Procedure Code, 1908, and is applied with reference to a significant amount of case law. This system outlines the geographical and financial boundaries of judicial power, requiring attention to the issue of when a suit may be filed and what the area of a court may include in its jurisdiction. Moreover, much attention is usually given to such a concept as the forum non conveniens, when such an option is assigned the opportunity to avoid jurisdiction by the Indian courts in case of dispute because a different forum is considered to be more appropriate.¹ This judicial discretion highlights the role of judiciary in weighing between the considerations of justice and practicality, especially when transnational factors cause complications like access to evidence and ability to find witnesses. The growing globalization of business has added to the complications of jurisdictional matters in particular with regard to tacit or implied jurisdictional agreements in international contracts. These informal agreements, especially the issue of their global validity and enforceability in terms of the Indian context, is a very crucial point that needs to be studied. This paper shall therefore critically examine the current jurisprudence on implied jurisdiction agreements, examining the way Indian courts understand and apply those agreements in the face of no specific contractual clauses, especially when faced with the need to enforce a sense of international comity and

the autonomy of parties. In particular, it will examine how the provisions of Sections 16 to 20 of the Code of Civil Procedure, 1908 were applied to find territorial jurisdiction in determining contractual disputes not involving immovable property to provide a shaded insight into how they would be interpreted in an international context.²

Conceptual Framework of Choice of Law in International Commercial Contracts

This is because under the Indian legal system, uncodified principles of the law of international commercial contracts dominate the determination of which applicable law to apply to commercial transactions. Such dependence on judicial case law, as opposed to codification by statute, implies a detailed analysis of the case law in order to interpret how an Indian court can determine the correct law of a contract, particularly where there is no express declaration of the choice of the contracting parties. This involves examination of how courts deduce about a tacit choice involving issues such as language of the contract, payment currency, the place of performance and the nationality of the parties, and hence, that which is the objective proper law of the contract.³ Moreover, the hierarchical method embraced by Indian courts whereby an express law selection by the parties normally prevails, depending on considerations of public policy and the force of law requirement. Nevertheless, where parties have simply not chosen a governing law, the Indian courts then turn to the objective approach in which the intention to a governing law is taken by considering other connecting factors and identifying what the intention is.⁴ Such a method can take the form of a complicated balancing on various factors to ascertain the legal system to the nearest and most actual contact with the contract, or to promote the principle of party autonomy even in its latent manifestation. Party autonomy, as the doctrine is also referred to, is the power to draw the law, which will regulate rights and duties of the contract, in the case of an international contract, the parties have, a principle embraced in many legal regimes all over the world.

Jurisdiction in Indian Law

This freedom, despite that, is not absolute as it is

¹ Chetan Anand, “Commercial Disputes and Conflicts of Laws” SSRN Electronic Journal (2024).

² Megha Nagpal, “Territorial Jurisdiction in Contractual Breach Matters under the Code of Civil Procedure in India” SSRN Electronic Journal (2020).

³ Chetan Anand, “Commercial Disputes and Conflicts of Laws” SSRN Electronic Journal (2024).

⁴ Amin Dawwas, “Tacit Choice of Law Applicable to International Commercial Contracts: The Hague Principles and Arab Laws Compared,” 39 Arab Law Quarterly 89 (2023).

often bounded by binding regulations and communal policy views of the forum state so that basic rules of law are not bypassed. This doctrine has been strongly embraced in India, which gives contracting parties a wide discretion in the choice of legal framework to which their contractual agreements would be subordinated. This is a realistic outlook which is in tandem with global business practices and makes cross border transactions predictable and certain.⁵ Although there is no direct set of rules to direct choice of law in international commercial contracts, the Indian courts tend to follow the traditional English common customary law on the correct law of a contract, and as a guide, they turn towards English cases. Such an obedience underscores the subtle difference between an expressed decision of the law, and an implied or unspoken decision whereby the courts have to painstakingly derive the actual intentions of the parties based upon the contractual terms and the facts of the case. This is due to the principle of party autonomy, which is one of the foundations of international commerce that gives the freedom to the parties making an international contract to choose the law under which their dispute will be resolved. This principle doctrine facilitates respect of the intentions of parties, thus bringing predictability and stability in inter-country dealings. This principle is well accepted in the most legal systems including the European Union and in China, Russia, Turkey, Japan, the United Kingdom, Canada and South Africa, which testifies to its universal inheritance. In fact, the usefulness of such choice-of-law clauses in contractual affairs seems to be hardly contestable, although the non-formal condition of such agreements can also contribute to their implication, which requires the prudent judicial scrutiny of the situations that can result in such tacit assumption.⁶ Although the principle of party autonomy is well understood in the legal systems of many countries, Australia, Canada, India, Israel and New Zealand, there are often variations in the degree to which such an autonomy is appreciated, as well as the restrictions placed on it. As an example, there are inconsistencies in figuring out which contracts or given contractual matters allow parties to choose the applicable law, or whether they can choose rules that obscure the distinction between substantive and

procedural in nature or even rules promulgated by non-state bodies. These differences serve as a reminder of the intricacies of the case of aligning international private law and special attention is paid to the need to study the particular approach of India towards these more discrete elements of party autonomy. This paper attempts to fill this gap by giving a detailed doctrinal overview of the jurisdiction and choice of law in international business contracts under the Indian legal framework by analyzing both express and implied choice of governing law and its limitations.⁷ It will also analyze the interaction between party autonomy and obligatory rules of the Indian law and other considerations of public policy that can restrain the freedom of choice of parties to foreign law.

Choice of Law in Indian Law

The Indian legal system, based on the tradition of common law, substantively acquiesces in choice of law party autonomy in international commercial contracts nevertheless acknowledging the need to achieve predictability and certainty in international business. This deference is not all inclusive and is usually offset with the concerns of policy to the populace and obligating legal stipulations. Even more dominant in an international commercial transaction, the principle of party autonomy which is a leading principle of contract law in most domestic contract law jurisdictions, gives greater freedom to parties in the substantive law they choose to govern their transactions. This wide discretion is generally maintained unless the law selected is in conflict with the underlying policy of India and wrongly bypasses the compulsory Indian legal requirements.⁸ The party autonomy in Indian private international law has its roots in English common law where the parties are given ample freedom to decide on the law to apply in their contractual process. This enables the consumers to use a loose structure in which the intent of the parties becomes the most powerful tool, creating an atmosphere in favor of international trade and investments. In cases like the *National Thermal Power Corporation v. the Supreme Court of India*, the court has ruled against the defendant because of inadequate maintenance procedures of their machinery. In other cases like *National Thermal*

⁵ Mo Zhang, “Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law” *SSRN Electronic Journal* (2008).

⁶ Alex Mills, “Choice of Law in Contract” *Cambridge University Press eBooks* 313 (Cambridge University Press, 2018).

⁷ Symeon C. Symeonides, “The Scope and Limits of Party Autonomy in International

Contracts: A Comparative Analysis” SSRN Electronic Journal (2019).

⁸ Pefela Gildas Nyugha, “Jettisoning the Principle of Party Autonomy in Modern International Commercial Arbitration: Menace to an Unprecedented Precept” *SSRN Electronic Journal* (2023).

Power Corporation v the Supreme Court of India, the court has decided against the defendant due to poor maintenance methods of their machinery. Company, has recognized the fact that it requires an analysis of either express or tacit choice with the aim of establishing the appropriate law and in this regard it has affirmed the contractual freedom granted to entities to decide on what legal system to apply. But, the mere agreement between parties to submit jurisdiction to a court or an arbitral tribunal is not, per se, a choice of law and requires additional investigation into the real intention of the parties. On the other hand, the manifestation of a valid law in a contract implies the party which intends the legal system to be used in their contract. This difference shows the emphasis of the judiciary in identifying the exact extent of party autonomy, the distinction between jurisdictional clauses and the reality of choice-of-law provisions. This difference is paramount, as the law adopted outlines the parties duty and rights in the contractual agreement and thus determining the legal principles applied to solve a conflict. The measure of the extent of freedom between the parties to select a law that is completely unrelated to their deal, or the division of the application of law, is, nevertheless, a matter of court discussion, which shows the subtlety of contractual freedom. The conflict In the situation of arbitration agreements, since the parties may select alternate laws to apply to the main contract, and the arbitration agreement itself, in the event that either the parties did not make a specific selection to apply the arbitration agreement, the law to be applied to the main contract frequently spills over to the law of the arbitration agreement. This complex combination of party autonomy and public policy is especially apparent in judicial rulings as the selected foreign law could be incompatible with the Indian public policy and therefore, be a critical constraint on the autonomy of contracting parties.⁹

Conclusion

This subtlety highlights the importance of the judiciary in terms of freedom of contract with the necessity to uphold base legal principles and national interest especially within a globalized business environment. In addition, the Indian courts, though undertaking to largely defer to the options of law to the choice of the parties, have the power to question such options to avoid unnecessary avoidance of the required stipulations of Indian law, or the essential concept of justice. Such judicial control makes sure that the practice of the foreign law will not give rise

to the effect that is inconsistent with the core values and the law order of India. Such a delicate balancing act shows an interest of the judiciary in ensuring the development of international business relationship and protection of its domestic legal integrity and its people. To give an example, the Indian courts can examine whether a particular foreign law can be utilized when there is a dispute concerning the public policy consideration, e.g., whether specific terms of a contract are enforceable. This review is often accompanied by a review of the compatibility to the ordre public principle and the lex fori principle of the adopted foreign law with the principles of india as a state and as a jurisdiction thus serving as a deterrent of the importation of laws regarded as hostile to the principled foundations of Indian jurisprudence. Such protective approach is also upheld by readiness of the courts to apply mandatory provisions of Indian law, which, by their very definition, cannot be derogated by a party in favor of an express choice of foreign law. In fact, the use of the concept of the international arbitration of public policy norms in the Indian context, especially, becomes extremely challenging due to its inherently obligatory nature, which in effect may prevail over the legally stipulated legal frameworks of particular parties. As an example, the Supreme Court of India in *Renusagar Power Co. Ltd. v. General Electric Co.* and subsequently on *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* discussed in great detail the public policy exception in the Arbitration and Conciliation Act, 1996 suggesting a wider interpretation of the concept where fundamental policy of Indian law, justice, and morality is taken into consideration and could lead to a reason as to why a foreign award or chosen option of law could be not upheld. Although this interpretation is directed towards protecting national interests, reduction of this interpretation over the years has resulted in it corresponding with international norms, where only a serious violation of basic policy can stimulate intervention, thus striking a balance between national and facilitation of international commerce.

⁹ Julio César Betancourt, “State Liability for Breach of Article II.3 of the 1958 New York Convention,” 33 *Arbitration International* 203 (2017); MC Marvel, “The Shape of Public

Policy as a Limitation to Party Autonomy in International Arbitration — the Philippines and Singapore Experience as Model Law Jurisdictions” *SSRN Electronic Journal* (2018).