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## CHOOSING JURISDICTION AND APPLICABLE LAW IN DISTRIBUTION CONTRACTS:

## STRATEGIES AND RECENT TRENDS

# Litigating in "Critical" Countries:

# Russia, China and India

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# INDIA

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## A. Introduction

English lawyers are usually the most surprised by the Indian system, because the myth of the common law similarity between Indian and English law is most misleading for them. While the most basic form of Indian law, and many of its legal concepts are derived from the English system, India has important inputs from civil law (codifications, private parties in criminal matters, etc.) and local custom and adaptations to render it entirely confusing to a common law lawyer.

The Indian judicial system also defies most attempts at systematic definition. Although it is rightfully criticised for its slowness (for instance, it currently has 600,000 pending cases according to one source), there is the possibility of a hearing within 24 hours of filing an application for any relief, including interim relief, which are an extremely important vehicle for preserving one's rights, property, etc. during delay (of course this favours the status quo). Also, the speed of justice has been improving, but admittedly not fast enough.

A small note may be necessary here. A contract has enforceability in India if intelligently drafted, accompanied by accompanying bank guarantees, and other innovations to ensure speedy implementations. To rank India 184, Italy 160 and Afghanistan 164, as the World Bank study does, is simply ridiculous, and demonstrates the lack of understanding and the poor methodologies. There is substantive rule of law in India, albeit delayed, and subject to oversight by the courts, irrespective of legislative attempts to exclude judicial oversight.

India also has a vast array of administrative law and quasi-judicial authorities whose role is very important to understand when doing business in India. For instance, consumer law, which has developed into an important forum for product liability, is entirely handled by quasi-judicial consumer "commissions" in which a combination of former judges and bureaucrats (usually) dispense with the rules of evidence to deliver decisions in a relatively faster manner.

After a period of different courts for British and Indians, with the former being ruled by British judges on the basis purely of common law, the important codes were introduced into India, including the seminal Indian Contract Act, 1872, the Indian Evidence Act, 1872, the Indian Penal Code, 1860, and the Transfer of Property Act, 1882. The Code of Civil Procedure was introduced in 1908. It is also important to recall that administrative and judicial separation of powers in most parts of India was initiated only later, and the lower judiciary (district judges) are in administrative hierarchy somewhat subordinate to the chief district bureaucrats.

## B. Arbitration India

India, without much deliberation, enacted a new arbitration law in 1996, which was taken almost directly from the UNCITRAL model law. Due to the haste of this adoption, many things about

the law were not fully thought out, and certainly the stakeholders either resisted the formulations of the new law, or lacked clarity with regard to it.

Whether awards are foreign or Indian, and thus in the latter instance, subject to challenge in Indian court have led to some judicial oscillation. The Supreme Court of India in *Bhatia International v. Bulk Trading SA,* (2002) 4 SCC 105, had held that unless Indian jurisdiction was explicitly excluded, Part I of the Arbitration Act would be applicable. Part II of the Arbitration Act deals with enforcement of awards delivered in foreign seated arbitrations pursuant to either the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the "New York Convention") or the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 (the "Geneva Convention"). *Bhatia International* was a well-intentioned attempt to allow Indian court's interventions through interim orders for foreign arbitrations. It allowed Indian courts to award interim relief in support of the arbitration, appoint arbitrators when required, and set aside arbitral awards. However, last year, on 6th September 2012 (and the date is significant), a constitutional bench of the Supreme Court of India overruled *Bhatia International* in *Bharat Aluminium v. Kaiser Aluminium,* and held that where the seat is foreign, irrespective of the parties, there is no supervisory role for Indian courts, even if Indian law was involved. Thus, arbitral awards could not be set aside, nor could interim orders be provided (this is a significant downside to the *Bharat Aluminium* judgement). However, as will seen above, the role of Indian courts would remain if enforcement were sought in India. This judgement was considered prospective, and applicable only to arbitration agreements executed post 6th September 2012. It thus puts an end to the practice of drafting India related contracts explicitly excluding Part I of the Act, except for Section 9 and 11 of the Arbitration Act.

Grounds for Setting Aside Judgements

For the purposes of this paper, there is no reason to look into the grounds for setting aside domestic arbitral awards, but in brief, section 13 of the Arbitration Act provides for a challenge to an arbitrator on the ground of lack of independence or impartiality or lack of qualification, but post award. Likewise, an arbitral ruling on jurisdiction under section 16 of the Arbitration Act may only be appealed post award. Thus, there are two additional challenges to an arbitral award at the stage when the arbitral award is challenged.

Section 34 of the Act, at least for the domestic context, provides the "only" grounds for setting aside the arbitral awards (in addition to the two additional grounds set out above). Also, in the explanation to "public policy" in Section 34, it is states that:

> *It is hereby declared, for avoidance of doubt, that an award is in conflict with the public policy of India if the making of the award is induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.*

However, the limited scope of judicial review for arbitral awards has not found favour with Indian judges. In *Oil and Natural Gas Corp. vs. Saw Pipes Ltd.,* 2003 (5) SCC 705 ("Saw

Pipes"), where an arbitral award had been challenged for misapplying the law of liquidated damages to the case, the Supreme Court of India found that the law applied had been incorrect and held that an award can be challenged on the ground that it contravenes" the provisions of the [Arbitration Act] or any other substantive law governing the parties or is against the terms of the contract." Saw Pipes also expanded the scope of public policy to exclude awards that are "patently illegal".

There has been confusion in following *Saw Pipes,* as although it installs the courts as *de facto* courts of appeal, and consequent delays, it is in seeming conflict with the Arbitration Act. In *McDermott International Inc. v. Burn Standard Co. Ltd.,* 2006 (11) SCC 181 at 208, the Supreme Court of India recognised this anomaly, holding that:

> "…*The 1996 Act makes provision for the supervisory role of the Courts, for the review of the arbitral award only to ensure fairness. Intervention of the court in envisaged in few circumstances only. The court cannot correct the errors of arbitrators. It can only quash the award leaving the parties free to begin the arbitration again it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court to the minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expedience and finality offered by it."*

Steps for Enforcement

One of the declared objectives of the Arbitration Act is that every final award "is enforced in the same manner as it were a decree of the Court." Hence the scheme of the Act is that it is up to the losing party to object to the award and petition the court for setting it aside. The winning party may move an execution petition if a party refuses to comply with the award.

Foreign arbitral awards are covered by Part II of the Arbitration Act. They give effect to the New York Convention and the Geneva Convention. A foreign award under the Act has been reinterpreted by *Bharat Aluminium v. Kaiser Aluminium* as one where the seat is foreign, irrespective of whether it involved Indian parties or foreign ones. Further, it must deal with differences arising out of a legal relationship (whether contractual or not) considered as commercial under the laws in force in India. It also must be country notified by the Indian government to be a country to which the New York Convention applied (Ukraine was considered notified even though only the USSR had been in *Transocean Shipping Agency Pvt. Ltd. vs. Black Sea Shipping & Ors.,* 1998 (2) SCC 281).

The enforcement of the award is still subject to a public policy challenge, and may take a long time to resolve. In *Phulchand Exports Ltd. v. OOO Patriot,* (2011) 10 SCC 300, a dispute involving a Russian contract for supply of rice, where the arbitral seat was in Russia, the Supreme Court of India held an award may not be enforced if (1) it was against a fundamental policy of Indian law; or (2) contrary to the interest of India; or (3) contrary to justice or morality;

or (4) patently illegal. The award was upheld, but 11 years after enforcement of the foreign arbitral award was sought.

The unruly horse of public policy in enforcement proceedings is of course in addition to the standards defences against enforces enumerated in section 48 of the Arbitration Act. Enforcement may be refused if (a) the parties to the agreement were, under the law applicable, under some incapacity, or the said agreement is not valid under the law to which the parties have subject it or, failing any indication thereon, under the law of the country where the award was made; or (b) the party against whom the award is invoked did not have proper notice of the appointment of the arbitrator or the arbitral proceedings or was otherwise unable to present his case; or (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; or (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Although in the final reckoning, Indian courts uphold foreign awards, it takes too long, and will likely do so even after *Bharat Aluminium.* Indian appellate courts are comfortable conducting *de novo* reviews, and there is unlikely to be a large exception carved out for foreign arbitral awards.

A party applying for enforcement of a foreign award is required to produce before the court of competent jurisdiction:

(a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made (there are also issues of legalisation for filing of documents in India);
(b) the original agreement for arbitration or a duly certified copy thereof; and
(c) such evidence as may be necessary to prove that award is a foreign award.

The Arbitration Act does not prescribe any time limit within which a foreign award must be applied to be enforced. However, various High Courts (provincial high courts) have held that the period of limitation would be pursuant to the residual provisions of the Limitation Act, 1963, i.e. the period would be three years from the date when the right to apply for enforcement accrues

(which according to the High Court of Bombay accrues when the award is received by the applicant).

Once the court determines that a foreign award is enforceable, it is executed as a decree. No other application is required to convert the arbitral award into a decree. However, it should be noted that no statutory appeal lies if award is held to be non-enforceable, though a High Court or Supreme Court, at their discretion, may hear appeals under Articles 226 or 136, respectively, of the Constitution of India.

There is an interesting development in the use of Bilateral Investment Treaties (BITs) as a remedy against delays in enforcement. The 1999 BITS agreement between Australia and India was successfully used against delays in enforcement of an arbitral award against Coal India, a state owned mining company. The delay in question was a 10 year old delay in enforcement due to challenges by Coal India.

Jurisdiction

The Arbitration Act makes the court the principal civil court having original jurisdiction to decide the question forming the subject matter of the arbitration. Thus, a party can bring its application in any jurisdiction where the other party has an office, or where the cause of action in whole or in part arose. Usually, this means taking the action to a district court, or one designated for that purpose by the District Judge. In the cities of Mumbai, Chennai, Kolkatta and Delhi, the High Courts also have original jurisdiction based on a pecuniary threshold arising out of the claimed amount (currently in Delhi it is Rs. 20,00,000 or USD 34,600).

## C. Basic Structure

On the civil dispute resolution mechanism, the original court of first instance is the district court, which depending on the size of the jurisdiction, may in effect be a number of courts presided over by Additional District Judges and other subordinate judges. Magistrates work under district judges, and are usually involved, in civil disputes, with small claims. There are about 600 district courts. For such a vast country, there are only 13,962 district and subordinate judges.

The High Courts of Delhi, Bombay, Madras and Calcutta (the courts are still named after the original names of these cities) also have original jurisdiction based on a pecuniary threshold, as stated earlier. They are, of course, also statutory courts of appeal, and constitutional courts with territorial competence. There are 21 High Courts in India (slightly less than the number of states). The High Courts have writ jurisdiction, which is both supervisory over the lower judiciary (Article 227 of the Constitution of India) as well as the administration (Article 226 of the Constitution of India). High Courts use their writ (constitutional) powers to heavily regulate administrative decision-making, even in government procurement and other economic activities. High Court judges are usually appointed from both the lower judiciary (district courts) as well as

members of the bar on the recommendation of the Supreme Court collegium (see below). They retire at the age 62. While most judges serve in the state where they are first appointed, the Chief Justice of India usually transfers judges to other High Courts to serve as Chief Justices of the High Courts.

The Supreme Court of India is the final appellate and constitutional court. It has the power of judicial review, but the power to appeal is discretionary, and some 90% of special leave petitions to the Supreme Court are not entertained. It has 31 judges, who are appointed on the recommendation of the Supreme Court collegium (top five judges of the Supreme Court) from (usually) Chief Justices of High Courts. Supreme Court judges retire at 65. Judges site in benches of two or three, unless a five judge (or more) constitutional bench is constituted by the Chief Justice of India to resolve important questions of law.

Access to courts is assumed and Indians are a very litigious society (although this has been dispelled by Prof. Marc Gallanter's empirical research). There is no social stigma in going to courts, and seeking redress, and endless litigation. The judiciary is regarded as independent of the executive and legislature.

### D. **Applicable Laws**

In addition to the contract itself, the applicable laws for any contract for distribution will be, in addition to the obvious Indian Contract Act, 1872; the Sales of Good Act, 1930; the Competition Act, 2002; the Central Sales Tax Act, 1956 (for inter-state commerce). Section 182 of the Indian Contract Act defines an agent simply as a "person employed to do any act for another or to represent another in dealing with third persons[,]" and agency can be implied from a distribution agreement. Indian law also recognises oral agreement, but there is a difficult evidentiary burden to cross. As in any common law jurisdiction, even in the absence of formal contract, promissory estoppel would apply.

The Civil Procedure Code, 1908 (CPC) specifies the 'jurisdiction of a Court' with respect to 'territorial jurisdiction', 'pecuniary jurisdiction' and 'jurisdiction as to subject matter'. Section 20 of the CPC provides that suits can be instituted in a Court within the local limits of whose jurisdiction (i) the defendant (or any the defendants, where there are more than one) "actually and voluntarily resides, or carries on business, or personally works for gain" or (ii) "the cause of action, wholly or in part, arises". An Indian Court can entertain a suit if the cause of action arises within its jurisdiction, even if the defendant is a non-resident foreigner or is temporarily resident in India. A suit against a foreigner on a cause of action arising within the jurisdiction (of an Indian Court) would be maintainable against him if the cause of action also arose while he was so temporarily resident. A foreigner carrying on business through an agent within jurisdiction (of Indian Courts) will become amenable to the jurisdiction of the (Indian) Court.

A foreign judgement is enforceable in India under the provisions of the CPC and is conclusive and binding upon the parties in regard to any matter directly adjudicated upon by the foreign Court, unless *ex parte*. The binding nature of a foreign judgement may be disputed only be establishing that the case falls within one or more of the exceptions enumerated in sub-clauses (a) to (f) of Section 13 of the CPC, which are as follows:

(a) *where it has not been pronounced by a Court of competent jurisdiction;*

(b) *where it has not been given on the merits of the case;*

*(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;*

*(d) where the proceedings in which the judgement was obtained are opposed to natural justice;*

*(e) where it has been obtained by fraud;*

*(f) where it sustains a claim founded on a breach of any law in force in India.*

The judgement of the foreign Court must have been given on the merits of the case to be conclusive in India. The real test to decide whether the judgement is on the merits is to see whether it was merely formally given as a matter of course or by way of penalty or was based on a consideration of evidence. Under Section 44A(1) of the CPC a certified copy of a decree of a Court of a foreign country (declared to be a reciprocating territory by the Government of India) may be executed in India. A foreign judgement which is final and conclusive may be enforced (i) by the institution of a suit in a competent Court in India, or (ii) by the institution of execution proceedings.

The principles governing jurisdiction have been discussed by the Supreme Court of India in *Modi Entertainment Network vs. W.S.G. Cricket Pte. Ltd.*, (2003) 4 SCC 341, wherein the Court (while refusing to grant an anti-suit injunction in favour of the appellants) observed that:

> *"11. In regard to jurisdiction of Courts under the Code of Civil Procedure (CPC) over a subject – matter one or more Courts may have jurisdiction to deal with it having regard to the location of immovable property, place of residence or work of a defendant or place where cause of action has arisen. Where only one Court has jurisdiction it is said to have exclusive jurisdiction; where more Courts than one have jurisdiction over a subject-matter, they are called Courts of available or natural. The growing global commercial activities gave rise to the practice of the parties to a contract agreeing beforehand to approach for resolution of their disputes thereunder, to either any of the available Courts of natural jurisdiction and thereby create an exclusive or non-exclusive jurisdiction in one of the available forums or to have the disputes resolved by a foreign Court of their choice as a neutral forum according to the law applicable to that Court. It is a well-settled principle that by agreement the parties cannot confer jurisdiction, where none exists, on a Court to which CPC applies, but this principle does not apply when the parties agree to submit to the exclusive or non-exclusive jurisdiction of a foreign Court; indeed in such cases the English Courts do permit invoking their jurisdiction. Thus, it is clear that the parties to a contract may agree to have their disputes resolved by a Foreign Court termed as a 'neutral Court' or 'Court of choice' creating exclusive or non-exclusive jurisdiction in it."*

> *"24. ... the following principles emerge: ... (4) a Court of natural jurisdiction will not normally grant anti-suit injunction against a defendant before it where parties have agreed to submit to the exclusive jurisdiction of a Court including a foreign Court, a forum of their choice in regard to the commencement or continuance of proceedings in the Court of choice, save in an exceptional case for good and sufficient reasons, with a view to prevent injustice in circumstances such as which permit a contracting party to be relieved of the burden of the contract; or since the date of the contract the circumstances or*

*subsequent events have made it impossible for the party seeking injunction to prosecute the case in the Court of choice because the essence of the jurisdiction of the Court does not exist of because of a vis major or force majeure and the like; (5) where parties have agreed, under a non-exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, ordinarily no anti-suit injunction will be granted in regard to proceedings in such a forum conveniens and favoured forum as it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to non-exclusive jurisdiction of the Court of their choice which cannot be treated just an alternative forum; (6) a party to the contract containing jurisdiction clause cannot normally be prevented from approaching the Court of choice of the parties as it would amount to aiding breach of the contract: yet when one of the parties to the jurisdiction clause approaches the Court of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that Court cannot per se be treated as vexatious or oppressive nor can he Court be said to be forum non-conveniens;"*

While Indian Courts have generally upheld the validity of a clause conferring exclusive jurisdiction on a foreign Court (i.e. not void under Section 28 of the Indian Contract Act, 1872), it has been held that such a clause cannot *per se* preclude the jurisdiction of the Indian Court, which may keeping in view the facts and circumstances of the case, balance of convenience, etc. entertain the proceedings. However, certain High Courts have held a clause conferring exclusive jurisdiction on a foreign Court to be void as opposed to public policy, as Courts generally permit parties to choose the proper law of the contract. In this regard the Supreme Court has held that where the parties to a contract agreed to submit the disputes arising from it to a particular jurisdiction which would otherwise also be a proper jurisdiction under the law, their agreement to the extent they agreed not to submit to other jurisdiction cannot be said to be void as being against public policy. If the jurisdiction they agreed to submit to would not otherwise be proper jurisdiction to decide disputes arising out of the contract it would be against public policy.

The Indian Penal Code, 1860, may also be brought into action in distributor-principal disputes, particularly section 420, which concerns cheating, or section 405 / 406 (which concerns breach of criminal trust). This of course, depends on the facts, but the Code of Criminal Procedure, 1973, allows for private prosecutions. Thus, there have been some instances where distributors have sought to invoke the criminal jurisdiction of the courts citing cheating and/or criminal breach of trust. In these cases, they have to satisfy a preliminary threshold burden of filing evidence and giving a statement before the court, before the court would take cognisance of an offence, and summon the defendant. These cases, are, however, rare. A criminal summons may be quashed by the high court in a proceeding under section 482 of the Code of Criminal Procedure, 1973.

There is no formal law for distributors under Indian law. A non-compete contractual clause has to introduced, but will only be enforceable if it is only so wide as is necessary to protect the principal's legitimate business interests. Where a clause is excessive (in duration, territorial extent or product range), a Court may not enforce it at all. Section 27 of the Indian Contract Act, 1872, provides that every person by which a person is restrained from exercising a lawful business, trade or profession is void with the execution of agreements involving sale of goodwill.

The Section has been interpreted to be inapplicable to restrictive covenants in distribution, licensing and agency agreements as they confer a party with a right subject to terms and are not as such a restraint on the exercise of a lawful business, trade or profession. In *Superintendence Co. of India v. Krishna Murgai,* AIR 1980 SC 1717, the Supreme Court of India held that restrains whether general or partial may be lawful if they are reasonable.

Further, Section 38 of the Indian Contract Act, 1872, provides that every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce this rights, is void to that extent.

There are also common law tort remedies that have to be considered. For instance, if a new distributor is hired, and the old one is terminated, and there are dealings with the new distributor before the old one is terminated, the (uncommonly used) tort remedy of inducing a breach of contract is applicable.

The Consumer Protection Act, 1986, gives, as mentioned earlier, quasi-judicial consumer commissions' jurisdiction over defects in goods. A defect has been defined in Clause 2(f) of the CPA as "any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied or is claimed by the trader in any manner whatsoever in relation to the goods". This liability may not be entirely restricted by contract, though there may be an indemnity clausewhich would be enforceable in recovering damages from the distributorship. In addition to civil liability, the following legislations contain penal provisions which impose criminal liability in case of supply of defective or adulterated goods – the Food Adulteration Act, 1954, the Food Safety and Standards Act, 2006 the Drug & Cosmetics Act, 1940, the Standards of Weights and Measures, Act, 1956, the Indian Standards Institution (Certification Marks) Act, 1952; and the Bureau of Indian Standards Act, 1986.

### E. Good Faith in Dealings

Indian courts are, in the final determination, equally courts of law and courts of equity. They are often willing to correct perceived unfairness in contractual relations if unfairness is manifest. Thus, even if no notice is required, for instance, before termination of proceedings, it is best to give notice of the same, and give the other party a chance to cure their defects. In *Vijay Traders v. Bajaj Auto Ltd.,* (1995) 6 SCC 566, fifteen days notice was considered sufficient, but notice was required even though there was no contractual provision for it.

### F. Timing

There are true horror stories, but a foreign arbitral award has been enforced in about two years in one instance (with attachment for sale etc.) A foreign judgement, if well prosecuted, could result in enforcement within 1-3 years and a well defended enforcement procedure through erudite lawyers may result in a delay of up to 10 years or even no enforcement at all.

### G. Summary

In summary, India is a sophisticate legal jurisdiction with a much publicized problem with delay which can be mitigated by good drafting, use of certain innovations, and litigation strategies. The government is one player in a complex web of legal players and institutions, and this complexity has to be taken into account.