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THE IMPORTANCE OF CHOOSING THE RIGHT APPLICABLE LAW IN CROSS BORDER TRANSACTIONS

In recent times, cross border business has become the new normal. With globalization and digitalization, business has now expanded to cross borders and we see a surge in cross border businesses. Essentially, cross border transactions would include transfer of goods or services between individuals or business entities who reside in different parts of the world.

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It is advisable that all terms fixed between parties in cross border transactions should be finalized in the form of a contract. The safety net of having a contract is that the contracting parties are fully aware of their rights and obligations and can conduct their business based on the crystalized terms. Entering into a contract also ensures that the performing party knows its obligations and timelines for performance of the contract, while the receiving party is apprised of its obligations of accepting the goods or services and fulfilling its financial obligations. While all clauses in a contract have their own importance and are binding upon the contracting parties, there are some clauses which are extremely crucial in the business. One such clause would be the dispute resolution mechanism that parties agree to follow in the event that a dispute arises.

While in most cases and understandably so, each party wants to be bound by the law prevailing in its country, the same may not be very advisable in case of cross border business for various reasons. Essentially, all contracting parties should agree to accept the laws of the place where the contract is being performed to avoid unnecessary entanglement in multiple laws and multiple courts and forums. International partners must understand that they will have to adhere to the governing laws of the country where they are performing their contractual obligations or doing business. It is reasonable to expect that if a party is doing business in a particular country, the party will have to agree to accept the laws of that country. In most cases, parties accept this position when it comes to the performance of the contracts as they invariably do not have a choice otherwise.

However, it often happens, that parties choose to be governed by a law that is closer to their home or is the law of the country where they reside. While choice of law may offer a certain solace to the party who subjects itself to a particular law, it may not necessarily be a right choice. This is because while the going is good, it is fine, but when disputes arise, settlement of such disputes is a major issue that has to be handled extremely carefully to be productive. Take for example that there is a cross border transaction in which one party is English and the other Indian and the parties agree that contractual obligations will be performed in India, in such a case dependence on the Indian law will be very practical as parties are already governed by the laws in India while performing their contractual obligations.

But if these parties decide that they want their disputes to be settled by the laws of a third country, say France, they would have the choice to do so. However, in the actual implementation, they would still need to come back to India for enforcement of their contractual rights. This in turn would mean that even though their dispute has been settled under the French laws, they will still have to come to India for recognition and enforcement of the foreign decree i.e. recovering what is their lawful dues.

Under the Indian laws, foreign courts have jurisdiction under the following circumstances-

- 1) Where the person/entity is a subject of the foreign country in which the judgment has been obtained
- 2) Where the party was a resident in the foreign country when the action was commenced and the summons was served on him
- 3) Where the party selects a foreign country as the choice of forum for taking action.
- 4) Where the party, on summons, voluntarily appeared and
- 5) Where by an agreement the party has contracted to submit himself to the forum.

It is in such cases that issues like conflict of laws would come into play. More so, if the Law of France was to give them certain reliefs which are not accepted under the Indian laws. Hence at the time of the execution of the foreign judgment in India, certain questions would arise regarding the binding nature of the foreign judgment on the parties to the contract. For instance, under the Indian laws, a foreign judgment can be set aside if the judgment is not decided on merits; not decided by a competent court; the judgment is based upon an incorrect view of the International Law or a refusal to recognise Indian laws; or is against the principles of natural justice.

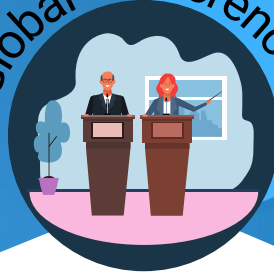
In cases pertaining to execution of judgments passed by a foreign competent court of law that has to be enforced in India, the court would generally look at whether the judgment was passed by a competent court on the merits of the case and whether such a judgment is in keeping with the principles of International and Indian laws.

Another crucial factor that has to be considered in the enforcement of a foreign judgment, is whether or not, there is reciprocity between India and the foreign country. Reciprocity would mean whether or not the two countries recognize each other's Laws and will honour their respective judgments. In the event that there is reciprocity, a judgment can be enforced in India provided it meets all the requirements of a judgment delivered by a foreign court having competent jurisdiction. Essentially, it means that the judgment has to meet the requirements laid down in the relevant statute.

In the event that there is no reciprocity between India and the country that has passed the judgment, then in such a case, the Indian Court will re-hear the matter on merits and in accordance with the Indian laws. This would necessarily imply that the subject matter will undergo two trials.

It is, therefore, always advisable that in cross-border transactions where a foreign party is entering into a commercial contract with an Indian party, the said contract should have a clause in which parties recognise that dispute resolution shall be done in accordance with the Indian laws. This would facilitate easy execution of the decree in India for the successful party.

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