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INTERNATIONAL CONTRACT: A CHALLENGE

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Abstract

Contract is a backbone of the trading system without it trade can not sustain. Where there is a trade, there is a contract. It may be either expressed or implied. International trading is not a concept of modern times but its evidence can be seen from Indus Valley Civilization. Traders from the Indus valley began to explore foreign trade, established trade with Mesopotamia and the Gulf region. Import-export were well established between Oman peninsula and Indus Valley archaeologist evidence of goods can be found.[1] *Thus along with international trading concept of international contract is also old but in contemporary time, trade is much more complex which impacts the contract's efficacy. Confusion arises in the contract when it is between persons from two or more nations. Here question arises what will be the language of a contract, whose country's law will govern the contract or under whose jurisdiction it will be enforceable? In this article we will discuss the concept of international contract, challenges imposed by them like choice of law, choice of forum etc. Which law will govern in case of absence of exclusive choice of law, forum etc in contract. Indian concept or rules regarding the international contract, how it is implemented and the judiciary role in explaining the concept of international trade in Indian context.*

KEYWORDS: International contract, choice of law, UNIDROIT, choice of forum, private international law

[1] Dennys Frenez" The Indus Civilization Trade with the Oman Peninsula" available at https://www.Harappa.com

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I. Introduction

According to Salmond "*A contract is an agreement creating and defining obligation between two or more persons by which rights are acquired by one or more to act or forbearance on part of the others.*"[2]

In India Contracts are regulated as per the provisions of the Indian Contract Act 1872. But due to globalisation scope of contract is expanding beyond the jurisdiction of India for which this law is insufficient. Boom in international trade, Interdependency of countries on each other for survival brought the new concept of international contracts. An international contract is an agreement signed between residents of two or more nations to perform certain activities for a specific purpose. In simple words contract between persons of two or more nations. These agreements are usually written. Consultants and lawyers are used while preparing these agreements. An international contract must be clear and must include all dos and don'ts on behalf of parties as international contract contains lots of confusion regarding choice of law, forum, arbitration etc due to involvement of foreign parties.

The negotiation of an International Contract does not always appear smooth, free from ambiguity or complications. Contract parties must maintain the basic characteristics of the contract i.e., clarity, completeness, conciseness and fairness.

II. Essentials of International Contract

Involvement of parties from different nations can pose some serious and unique challenges that are not familiar with existing international laws. To avoid this issue some provisions can be included in contract at the time formation, this can prevent unnecessary misunderstanding and chaos among parties.

These essential provisions are-

a. ***Choice of language clause:*** it specifies the language that will be used to interpret the contract in case of differences. This problem mainly arises when contractual parties belong to different linguistic nations. It should be included to avoid misunderstanding. Even if there is only one language particularly to be used in contract, there must be a clause specifying the which version of contract is official one.
When there are two or more linguistic version of contract then there must be a clause specifying official version of the contract, that will prevail over others in case of disputes. If such clause is missing then the international regulation such as *UNIDROIT principles* should be applied. As *ARTICLE 4.7* of these principles deals with linguistic discrepancies where a contract is drawn up in two or more language versions which are equally authoritative there is, in case of discrepancy between the versions, a preference for the interpretation according to a version in which the contract was originally drawn up.

b. ***Choice of forum clause:*** it specifies the location of forum, in whose jurisdiction question of dispute will rise. By including the choice of forum clause, parties can in advance decide on the jurisdiction that will govern the contract and procedures to be followed by the court. It is necessary because different countries have different regulations which can affect the outcome of the dispute.
Example – different rules of interpretation followed by courts of different countries.

c. ***Choice of law clause:*** it specifies the legal system that will govern the contract. As there are multiple legal system due to parties being resident of different countries. This clause is of much importance as it can impact the

[2] Mohd Aqib Aslam 'Law of Contract' last visited on July 1,2023

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interpretation and outcome arises out of disputes.

For example- a contract may be void as per the law of one nation and maybe valid for another country. Thus, choice of law is very important to avoid unforeseen problems.

d. ***Force majeure / Act of God clause:*** force majeure means events occurred out of control of human but also include if such situation is occurred due to human action like strike, wars, riots or change in law. Act of God means natural disasters beyond control of human. By including this clause, parties can protect themselves from liability in case of events that are beyond their control.

Essentials of international contract may differ as per the nature of various contracts. By including above mentioned essential misunderstanding, disputes and unnecessary delays can be avoided.

III. Private International Law and International Civil Procedure Law

When parties to the contract does not mention choice of law, jurisdiction clause then it is decided as per the private international law and international civil procedure law.

When parties enter into an international contract, it is important for them to know which law will be applicable to their contractual relationship as the governing law can impact the outcome of a dispute. It is also important for a court or arbitral tribunal vested with power to settle disputes that may arise between parties in relation to contract. Private international law rules are procedural and not substantive. These are used to identify which national law will be applicable to a given international case rather than dictating the rules, governing the contractual relationship between parties. The word 'International' refers to the character of a case rather than to the international origin of the rules governing it.

International civil procedural law deals with what court has jurisdiction in such a matter and under what conditions may a court's decision can be recognised or enforced in another country? Both private international law and international civil procedural law relies on the *proximity rule* that means an international contract should be primarily governed by the legal system with which it has the closest connexion in absence of choice of applicable law made by the contracting parties. The question of closest connection is left on the court's discretion.

IV. Choice of Law

Whenever there arises any dispute regarding choice of law, then proper law of contract is applied to the contract. Proper law has been defined as "The law which is applied by English or other courts in determining the obligations under a contract".[3] Parties are free to choose proper law of any country with which contract has close nexus. It may be difficult to choose a single law of country as Proper law of contract because some of the aspects of a contract may allow to one country and some other aspects for another country. Thus, proper law is in itself a vague concept.

There has been conflicts always regarding the criteria to determine which law should be applied either the place of contract or the place of performance of parties. But under English and Indian Private International Law parties are given freedom to choose any law which can govern their contract. For international contracts, in the absence of written law the Indian judiciary has realised on traditional common law position as laid down in *Vita Food Products Inc. v. Unnus Shipping Co. Ltd*[4] Privy Council held that parties are free to choose governing law, irrespective of its connection with the contract, provided that the choice was bona fide, legal and not contrary to public policy.

This freedom of choice is not absolute but subject to certain restrictions so that this

[3] Mount Albert Borouch Council v. Australasian Temperance and General Mutual Life Assurance Society, (1938) AC 224 at 240.

[4] 1939 AC 277

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freedom cannot give power in the hands of parties to make an applicable law as inapplicable. Such choice may be expressed or implied.

Expressed choice- When contract contains a clause of choice of law.

It may not possible in every case to mention choice of law clause in a contract due to differences among parties regarding the same

Implied choice – when no explicit provision for proper law of contract has mentioned in the contract then principles laid down in the case *Bonython vs Commonwealth of Australia*[5] by Lord Simonds is referred.as per the case proper law is the system of law by reference to which contract was made or which has closest and real connection with the contract. It may be inferred by the courts from the terms or form of the contract or surrounding circumstances.

For example – clause of choice of forum in the contract can be referred.

When there is a conflict in the particular provision of a contract that is valid under one's country law and invalid in another country law then question to be decided by the court by referring the intentions of parties while forming the contract.

Restrictions on power to choose proper law i.e., mandatory domestic rules, close connection with contract and business convenience and efficiency.

V. Choice of Forum

The jurisdiction of governing the law and choice of forum need not be the same. Like choice of law clause, choice of forum clause can be both expressed and implied. If clause is explicitly mentioned in the contract, then it is expressed and if it is missing then English private international law is applied i.e., *elegit judicem elegit jus*. It Means the implied choice of law can be inferred from the express choice of the tribunal. The Latin term 'lex fori' Is applied here which means once parties have chosen a tribunal the law of that will be applicable.

In *Hemlyn and Co. v. Talisker Distillery*[6] The question arises in view of arbitration clause, Could An action can be brought under the contract in the Scotland. The House of Lords held that a contract was governed by the English law according to which arbitration clause is valid and Scotland had no jurisdiction to decide upon the merits of the case until unless the arbitration proved abortive. It was also observed by Lord England... Herschel, L.C. that the language of the arbitration clause very clearly indicated that the parties intended the rights under that clause should be determined according to the English law.

VI. Position in India

International business and trade involve traders from various countries having different cultures and legal system. As in case of India personal law is applied in these cases but in some countries uniform civil code applies to all the people residing there including Indian nationals also. India is also a member of Hague Conference on Private International Law so things become more complicated for India.

Certain rules under the Indian law are in directly conflict with choice of jurisdiction. These are specifically laid down in Civil Procedure Code, 1908, Section 19 and 20. Section 19 deals only with torts committed in India or when defendant is residing in India. But section 20 deals with foreign torts If a person to the court submits to the jurisdiction, then the court gets the jurisdiction to try the action and a decree or an order is passed if such action will be valid internationally. Mere appearance in the court is considered to be the submission. A person may submit to the court either impliedly or by way of express stipulation in the contract. If a person is outside the jurisdiction, the court will have the jurisdiction on him only if he submits to the jurisdiction of the court. In case, the foreign defendant does not submit to the jurisdiction of

[5] (1951) AC 201

[6] (1894) AC 202

the court, then the judgment delivered in his absence would be null and void.

Indian private international law is majorly governed by judicial decisions in concrete cases. In *NTPC vs Singer co.*[7] the Supreme Court abandoned the restrictive approach that confined the parties to make a choice of governing law that was unconnected to the contract. The parties were permitted to make a choice of low even if there was no geographical Nexus between the obligation in the contract and the chosen law. It is also observed that the only limitation on the parties is that choice of law must be bona fide and in Public Interest**.**

VII. Conclusion

There is an ideological difference among scholars or judges regarding the uniformity of rules related choice of law and choice of forum due to increase in human interdependency for survival, world is treated as a single unit and various applicability of private international law by the courts posts a threat in smooth enforceability of the international contracts. Does there should be some kind of uniformly Accepted international rules related to it**.**

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[7] (1992) 3 SCC 551