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CONFLICTUAL ASPECTS OF CONTRACTS LAW IN INDIA

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Most of the cases which occupy an Indian Court are in every respect of a purely Indian Character; when this is so, every act done or alleged to be done by either of the parties clearly depends for its legal character on the ordinary rules of Indian Law -- a contract will be regulated by the Indian Contracts Act.

Cases however occasionally come before our Courts which contain some foreign element. Conflict of laws (or Private International Law) comes into operation whenever the court is seised of a suit that contains a foreign element. 'The avowed object of conflict of laws is to help situations that have a foreign element'(Salmond; Jurisprudence, page 71). It functions only when this element is present and its objects are threefold:

1) To prescribe the conditions under which the court is competent to entertain such a suit (Jurisdiction of an Indian Court).

2) To determine for each class of case the particular municipal system of law by reference to which the rights of the parties must be ascertained (choice of law).

3) To specify the circumstances in which (a) a foreign judgment can be recognised as decisive of

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the question in dispute; and (b) the right vested in the creditor by a foreign judgment can be enforced by action here (Jurisdiction of a foreign Court).

(Cheshire: Private International Law: P.1)

Conflict of laws has developed because of the fact that there are a number of municipal systems of law - a number of separate legal units - that differ greatly from each other in the rules by which they regulate the various legal relations.

The recognition of foreign law in a case containing a foreign element may be necessary to avoid injustice and to determine the right of parties in respect of foreign claims.

So, 'conflictual aspects of Contract Law', relate to that part of law which comes into operation when the issue before the court affects a transaction that is so closely connected with a foreign system of law as to necessitate recourse to that system. As a part of the same topic the effect of foreign judgments and arbitral awards may be considered.

Certain general rules relating to contracts containing a foreign element are important such as the rules for the ascertainment of the proper law of contract, law relating to formation, capacity, formalities, essential validity, interpretation and discharge of contracts.

Dicey defines 'proper law of contract' as "the system of law by which the parties intended the contract to be governed, or where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection" (Dicey: Conflict of laws - Page 691).

Cheshire defines the 'proper law of contract' as "a convenient and succinct expression to describe the law that governs many of the matters affecting a contract - law which the English or other court is to apply in determining the obligations under the contract" (Private International law: P.185).

Our Supreme Court in Delhi Cloth & General Mills Company Vs. Harnam Singh speaking through Bose J. Defines the proper law of contract as "the law of the country in which its elements were most densely grouped and with which factually the contract was most closely connected." (A.I.R. 1955 S.C. 590)

According to Dicey, Proper law will be ascertained by the intention of the parties which will be conclusive. If no intention is expressed the intention will be presumed by the court from the terms and surrounding circumstances. But no court will give effect to the choice of law if the parties intended to apply it in order to evade the mandatory provisions of that legal system with which the contra has its most substantial connection and which, for this reason, the court would in the absence of an express or implied choice of law, have applied (Dicey: Conflict of laws - Page 699).

Dicey in his book on Conflict of laws lays down the following rules regarding the choice of law:

1) Where the intention of parties to a contract, as to law governing the contract is expressed in word this express intention, in general determines the proper law of the contract.

2) When the intention of parties to a contract with regard to the law governing the contract is not expressed in words this intention is to be inferred from the term and nature of the contract and from the general circumstances of the case, and such inferred intention determines the proper law of contract.

3) When the intention of the parties to a contract with regard to the law governing it is not expressed and cannot be inferred from the circumstances, the contract is governed by the systems of law with which the transaction has its closest and most real connection.

<u>I presumption:</u> If a contract is to be performed wholly in the country where it is made, it may sometimes be presumed to have its closest and most real connection with the law of the country where it was made (lex loci contractus). This presumption is strongest where all parties were present in that country when the contract was made.

<u>II presumption</u>: If a contract is made in one country and is to be performed either wholly or partly in another, it may sometimes be presumed to have its closest and most real connection with the law of the country or of one of the countries where performance is to take place (lex loci solutionis). This presumption is strongest where all parties have preform in one country. (Dicey: Conflict of laws - Pages 697-712).

According to Dicey, formation, capacity, essential validity, interpretation and effect and discharge of contract is governed by Proper law. A contract is formally valid if it is valid either by lex loci contractus or proper law of contract. An exception to essential validity of a contract is a contract is invalid so far as the performance of it unlawful by lex loci solutionis.

Cheshire critises the theory expounded by Dicey giving paramount consideration to the intention of the parties to ascertain the Proper law of contract. Quoting Singleton, L.J., in the Assunzione he states the rule in the following words:

"The court has to determine for the parties what is the proper law which, as just and reasonable persons they ought to have intended if they had thought about the question when they made the contract. That, I believe, is the duty upon us, and in seeking to determine the question we must have regard to the terms of the contract, the situation of the parties and generally all the surrounding facts." The Proper law depends upon the localization of the contract. The court will not necessarily regard the intention expressed by the parties "as being the governing consideration where a system of law is chosen which has no real or substantial connection with the contract looked upon as a hold."

Unlike Dicey (who commends a single system of law to govern all the aspects of a foreign contract), Cheshire advocates different systems of law to govern different aspects of contract containing a foreign element. According to Cheshire, capacity is to be governed by the Proper Law in the objective sense (in the determination of which the parties should not have a control); formation according to Proper Law of contract; formal validity compliance either with Proper Law or with lex loci contractus; essential validity by the Proper Law; Legality of purpose by a Proper Law but no action lies upon a contract that infringes the distinctive public policy of lex fori; essential validity and discharge by Proper law; interpretation of a contract according to the choice of parties (Cheshire: Private International Law - Pages 200 to 231).

In continent of Europe generally the doctrine of autonomy under which parties are free to choose the governing law is followed.

As far the law governing a contract containing a foreign element in India is concerned, the judgment

of the Supreme Court in Delhi Cloth & General Mills Company Ltd., V.S. Harnam Singh (A.I.R. 1955 Supreme Court Page 590) may be considered as the locus classicus on the subject. The issue raised in this case was whether a debt due from the defendant to the plaintiff which arose in Lyallpur in Pakistan stands discharged the payment of money to the custodian of Evacuee property in Pakistan as enjoined by a statute of Pakistan. Justice Bose held that the elements of the contract were most densely grouped at Lyallpur and hence the Pakistan law was the proper law of contract and a discharge according to Law of Pakistan constitutes a valid discharge. He states a 'Proper law intended as a whole to govern a contract is administered as a living and changing body of law and effect is given to any changes occurring in it before performance fallus due.' "The most usual way of expressing the law in that class of case is to say that an intention must be implied or imputed. In the - 'State Aided Bank of Travancore Ltd., V. Dhrit Ram.' A.I.R. 1942 PC 6 at pp. 7-8(C), Lord Atkin said that when no intention is expressed in the contract the Courts are left-to infer one by reference to considerations where the contract was made and how and where it was to be performed and by the nature of the business or transaction to which it refers." He also observes: "In our opinion, what the Courts really do when there is no express provision, is to apply an objective test, though they appear to regard the intention subjectively." But he also comes to the conclusion the result would have been the same even if the lex situs was applicable to the facts of the case.

The High Courts of Calcutta (in Brij Narain V. Anant: 1942 - 1 Calcutta 505 I.L.R.), Bombay (in Shanker V. Manekal: 42 Bom. L.R. 873) and Madras (in Raman Chettiar V. Raman Chettiar: A.I.R. 1954 Mad. 97), have applied the proper law of contract to govern a foreign contract. But there is no decision of the Indian Court which has considered the question as to the validity of a contract which is legal by the law selected by the parties but illegal according to the Proper law of contract objectively determined. As far as the capacity is concerned according to the Section 11 of the Indian Contracts Act "Every person is competent to contract which is the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by the law to which he is subject." Therefore, Lex domicilii governs the capacity of the parties and

the Indian Law as to capacity of parties is little different from English law which follows the Proper law of contract.

Thus the Indian Law relating to contracts in the domain of conflict of laws is not as developed as the English Law but it can be safely assumed that our Indian Courts will follow the English Law as expounded by Cheshire when the occasion arise.

Now coming to the effect of foreign judgments and arbitral awards in India, it is useful to consider the English law on the subject.

From the earliest days the successful suitor has been permitted to bring an action in England on the foreign judgment on the ground of comity which is supplemented by the doctrine of jurisdiction has adjudicated a certain sum..to be due from one person to another, the liability to pay that sum becomes a legal obligation that may be enforced by an action of debt. But such a judgment does not occasion a merger of the original cause of action and therefore a suitor has his option, either to resort to the original ground of action or to sue on the judgment recovered.

Cheshire after observing "There is little justification for differentiating between English and foreign judgments" as to non-merger of the cause of action in the judgment rendered concludes "The doctrine of non-merger has however, been too often repeated by Judges to justify any prospect of its abandonment." (Cheshire: Private International Law, Page 538).

At common law, a foreign judgment creditor has an alternative -. he can either sue upon the obligation created by the judgment or he may plead the judgment as res-judicata in any proceedings which raise the same issue. The pre-requisites of actionability are:

1) The foreign court should have been a court of competent jurisdiction in the international sense that is, according to principles of Private International Law as understood in England.

2) A foreign judgment does not create a valid cause of action in England unless it is resjudicate by the law of the country where it was given. It must be final and conclusive in the sense that it

must have determined all possible controversies between the parties.

3) A foreign judgment given by a court of compete jurisdiction is resjudicata in two senses: it furnishes the successful party with a separate cause of action enforceable in England and provides him with an effective defence if he is sued by the other party in England on the original cause of action. Both judgments in rem and judgments in personam are conclusive upon the point decided, but in the former 'the point' since it is the determination of status, is conclusive against the whole world, while in the latter is conclusive only between parties and privies.

Even though the foreign judgment is final and conclusive the defendant can escape liability by pleading any one of the three defences: (i) judgmen obtained by fraud (ii) contrary to natural justice (iii) repugnant to public policy of England.

The common law doctrine that a foreign judgment though creating an obligation that it is actionable in England cannot be enforced except by the institution of fresh legal proceedings is subject to statutory exceptions introduced by the judgments Extension Act, 1868, Administration of Justice Act, 1920 and Foreign Judgments (Reciprocal Enforcement) Act, 1933.

Now coming to the law in India on this aspect the subject is mostly codified. Hidayatullah, J. observes "The treatment of the subject in India is somewhat different from that in England --- The subjec of conclusiveness of foreign judgment is dealt with in India in the law of procedure while in England it is dealt with as part of Private International Law ----- But this much is evident that in dealing with the question of foreign judgments in India, we have to be guided by the law as codified in our country (Viswanathan V. Abdul Wajid: AIR 1963 Supreme Court Page 1). In the same judgment Shah J. observes "--- Private International Law is but a branch of the Municipal law of the State in which the Court which is called upon to give effect to a foreign judgment functions and by S.13 of the Civil Procedure Code (Act V of 1908) a foreign judgment is not regarded as conclusive if the proceeding in which the judgment was obtained is opposed to natural justice. Whatever

may be the content of the rule of private international law relating to "natural justice" in England or elsewhere (and we will for the purpose of this argument assume that the plea that a foreign judgment is oppsed to natural justice is now restricted in other jurisdictions only to two grounds - want of due notice and denial of opportunity to a party to present case) the peal has to be considered in the light of the Statute Law of India, and there is nothing in S.13 of the Code of Civil Procedure, 1908, which warrants the restriction of the nature suggested."

Section 13 of the Civil Procedure Code declares that a foreign judgment is conclusive as to any matter directly adjudicated upon except in the six cases mentioned. Section 14 declares that when a foreign judgment is relied upon the production of the copy of the judgment duly authenticated is presumptive evidence that the court which pronounced it had jurisdiction unless the contrary appears on the record but that presumption may be displaced by proving want of jurisdiction and onus of so doing lies on the defendant. A person who desires to enforce the judgment of a foreign court must satisfy that the requirements of S.13 have been fulfilled. A foreign judgment can be enforced by instituting a suit on such foreign judgment (subject to the exception provided by Section 44A).

The judgment of the Supreme Court in Vishwanathan Vs. Abdul Wajid (AIR 1963 Supreme Court - Page 1) may be considered as an important landmark on this aspect. Shah J. lays down the law in these words: "By Section 13 of the Civil Procedure Code a foreign judgment is made conclusive as to any matter thereby directly adjudicated upon between the same parties. But it is the essence of a judgment of a Court that it must be obtained after due observance of the judicial process, i.e., the Court rendering the judgment must observe the minimum requirements of natural justice - it must be composed impartial persons, acting fairly, without bias, and in good faith, it must give reasonable notice to the parties to the dispute and afford each party adequate opportunity of presenting his case. A foreign judgment of a competent Court is conclusive even if it proceeds on an erroneous view of the evidence or the law, if the minimum requirements of the judicial process are assured: correctness of the judgment in law or an evidence is not predicated as a condition for recognition of its conclusiveness by the Municipal

Court. Neither the foreign substantive law, nor even the procedural law of the trial be the same or similar as in the Municipal Court."

Similarly Kapur J. observes in Moloji Nar Singh Rao V. Shankar Saran (AIR 1962 Supreme Court 1737): "Under the Indian Code the judgment obtained by the appellant in Gwalior court would be governed by S.13 of that Code and its conclusiveness is governed by cl. (a) to Cl. (f) of that section. The rules laid down in that section are rules of substantive law and not merely of procedure."

Under Section 44A of the Code of Civil Procedure a decree of a Court in a reciprocating territory can be executed in India and no suit is necessary. The whole scheme of order 21 of C.P.C. is applicable in respect of execution of decrees of foreign Courts mentioned in sub-section (1). Under sub-section (3) the burden is upon the judgment debtor to establish that the decree falls within the exceptions to Section 13.

Even in India as observed by Mudholkar J. in Badat & Co. V. East India Trading Co. (AIR 1964 S.C. page 538) the doctrine of merger will not be applicable to a foreign judgment with the result that despite the fact that a plaintiff has obtained a foreign judgment he may nevertheless sue upon the original cause of action instead upon the judgment.

In England an action can be brought to recover the sum awarded by a foreign arbitral award. The essentials of success are proof that the parties submitted to arbitration; that the arbitration was conducted in accordance with the submission and the award is valid by the law of the country in which it has been made. Provision is made for the enforcement of foreign arbitral awards in England by the Arbitration Act, 1950 (which consolidates the previous statutes). This provision is based on Geneva Protocol of 1923 (which provides for the international validity of arbitration agreements) and Geneva convention of 1927 (which provides for the enforcement in one country of arbitral awards made in the other).

In India the law relating to enforcement of foreign awards has been considered by the Supreme Court in Badat & Co., V. East India Trading Co. (AIR 1964 S.C. 538) and the same has been summed up in these words "Apart from the provisions of the Arbitration, Protocol and Convention Act, 1937,

foreign awards and foreign judgments based upon those awards are enforceable in India on the same grounds and in the same circumstances in which they are enforceable in England under the common law on grounds of justice, equity and good conscience. --- ------- It will thus be seen that there is a conflict of opinion on a number of points concerning the enforcement of foreign awards or judgments based upon foreign awards. However, certain propositions appear to be clear. One is that where the award is followed by a judgment in a proceeding which is not merely formal but which permits of objections being taken to the validity of the award by the party against whom judgment is sought, the judgment will be enforceable in England. Even in that case, however, the plaintiff will have right to sue on the original cause of action. The second principle is that even a foreign award will be enforced in England provided it satisfies mutatis mutandis the tests applicable for the enforcement of foreign judgments on the grounds that it creates a contractual obligation arising out of submission to arbitration. On two matters connected with this there is difference of opinion. One is whether an award which is followed by a judgment can be enforced as an award in England or whether the judgment alone can be enforced. The other is whether an award which is not enforceable in the country in which it was made without obtaining an enforcement order or a judgment can be enforced in England or whether in such a case the only remedy is to sue on the original cause of action. The third principle is that a foreign judgment or a foreign award may be sued upon in England as giving good cause of action provided certain conditions are fulfilled one of which is that it has become final."

Apart from the enforcement of the foreign arbitral award as stated above there is the arbitration (Protocol and Convention Act, 1937 which provides for the direct enforcement of foreign awards if the conditions laid down under Sec. 7 of the Act are satisfied. This statute has been enacted to give effect to Geneva Protocol and Convention referred to above. The Supreme Court in Societe De Traction V. Kamini Engineering Co. (AIR 1964 S.C.558) has observed that this Act applies to arbitrations whether the parties to the submission are individuals or companies.

Thus the Indian Law relating to Conflictual aspects of Contract is substantially the same as the English Law on the subject.