Introduction

A commercial contract provides for the terms on which the contracting parties conduct their business. At times, commercial parties do not agree to a governing law clause. In those situations where the governing law clause is intentionally omitted, some rules exist to determine where the governing law of the contract should be. The rules include - determining the location of the parties, the obligations that are to be performed in different jurisdictions, and other factors. The complexity of the rules makes the determining of the governing law of the contract difficult. The purpose of a governing law clause is to express the parties' mutually agreed choice as to what that law should be.

Governing law or choice of law is different from the choice of jurisdiction. The selection of choice of law and choice of jurisdiction clauses (in contracts) is more important than an afterthought, proforma usage, or cut and paste, as the subject matter of commercial contracts regularly expands beyond domestic intra-state activities and into inter-state and international trade and commerce.

This article aims to provide insight to its readers of the views taken by Indian courts in situations where the commercial parties have simply omitted the governing law clause. Further, this article also explains the view of Indian courts where the contract does not expressly provide for the jurisdiction clause.

Historical Transition of the Courts: Governing Law

Contracting parties have a right to choose the governing law of a contract- one of the most significant principles of private international law. However, in a situation where the contracting parties do not stipulate the governing law provisions, Indian courts have taken different views when dealing with this issue.

One of the courts' views: infer from the contracts' terms and circumstances as to what the common intention of the contracting parties would have been at the time the contract was executed by them.

Another view indicates that it is for the court to determine on behalf of the parties what they ought to have intended, had they considered the issue. In other words, the court has to either imply a [term] within the contract or apply the extraneous standard of a reasonable man. There has been a transition towards this view over a period of time.

During the course of conflict of laws, the courts had widely believed that if there was no expressed intention, then they were bound to infer the parties’ intention from the terms and nature of the contract, and further from the general circumstances of a particular case (theory of intention). Disregarding the theory of intention, Cheshire had taken an objective stance, stating that the proper law depended on the localization of the contract. Reasoning out his objective theory, he stated that the proper law should be defined as the one having “most substantial connection”.
As Cheshire explained:
“...where [the intention] has not been expressly chosen, the proper law depends upon the localization of the contract. The Court imputes to the parties an intention to stand by the legal system which, having regard to the incidence of the connecting factors and all the circumstances, generally the contract appears most properly to belong. In short, the proper law is the system with which the contract has the most substantial connection.”

Cheshire’s view gained widespread acceptance. The United States of America was first to credit due recognition by the virtue of Section 188 of the Restatement (second). Chitty opines in such scenarios that the most satisfactory formulation is the law of the country with which the transaction has its “closest and most real connection” on objective grounds.

**View: Indian Context**
In the Indian context, the view was confirmed by the Supreme Court in case of National Thermal Power Corporation v. Singer Company, [AIR 1993 SC 998; also refer to Delhi Cloth and General Mills Co v. Harnam Singh, AIR 1955 SC 590], where it held that the “court would endeavor to impute an intention by identifying the legal system with which the transaction has its closest and most real connection”. In the landmark case of Rabindra N. Maitra v. Life Insurance Corporation of India, [AIR 1964 Cal 1 141], the Supreme Court further explained the localization theory. In this theory, various factors need to be looked into - the place where the contract was made; place of performance; place of domicile; residence or business of the parties; national character of corporation; subject matter of contract; and all other facts that help to localize the contract.

It is worth mentioning that the law of place of performance assumes greatest importance, especially when the contract is to be wholly performed at that place, or where there are several places of performance that the court finds to be the ‘primary’ place’. This is because the contract is most closely connected with such a law than any other.

**Next Step: Deciding Jurisdiction**

**Inbound Jurisdiction**
All civil courts in India below the High Court derive their authority to try all kinds of civil suits from Section 9 of the Code of Civil Procedure, 1908 (the Code). Unlike courts in the United States of America, the jurisdiction of the Indian courts is purely attained from the Code. This jurisdiction is normally subject to territorial and pecuniary limitations further set out in the Code and the concerned state law creating the civil court.

In Hakam Singh v. Gammon (India) Ltd, [AIR 1971 SC 740; also refer to ABC Laminart Pvt. Ltd. v. A.P. Agencies, Salem, AIR 1989 SC 1239; Globe Transport Corporation v. Triveni Engineering Works, 1983 (4)SCC 707], the Supreme Court of India added legal clarity to the jurisdiction of courts. It held that it is not open to the parties by agreement to confer jurisdiction on a court which it does not possess under the Code. However, it clarified that in a scenario where two courts or more have jurisdiction under the Code to try a suit or proceeding, an agreement between the parties that the dispute between them shall be tried in one of such courts is not contrary to public policy. Such an agreement does not contravene Section 28 of the Indian Contract Act, 1872 (the Act). The relevant para is stated below:

“By Clause 13 of the agreement it was expressly stipulated between the parties that the contract shall be deemed to have been entered into by the parties concerned in the city of Bombay. In any event the respondent have their principal office in Bombay and they were liable in respect of a cause of action arising under the terms of the tender to be sued in the Courts at Bombay. It is not open to the parties by agreement to confer by their agreement jurisdiction on a Court which it does not possess under the Code. But where two courts or more have under the CPC jurisdiction to try a suit or proceeding an agreement between the parties that the dispute between them shall be tried in one of such Courts is not contrary to public policy. Such an agreement does not contravene Section 28 of the Contract Act.”
Further, in accordance with Section 20 of the Code, a suit shall be instituted in a court where the defendant, at the time of commencement of the suit, actually and voluntary resides, or carries on business, or personally works for gain.

Further, it may be instituted in a court within the local limits of whose jurisdiction the cause of action, wholly or in part, arises. The expression ‘cause of action’ has acquired a judicially settled meaning. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but the infraction coupled with right itself. As extrapolated from *Rajasthan High Court Advocates Association v. Union of India*, [AIR 2001 SC 416], cause of action consists of a bundle of facts that give cause to enforce the legal injury for redressal in a court of law. The cause of action means every fact, which if traversed, would be necessary for the plaintiff to prove in order to support his right to a judgment of the court.

**Cross Border Transactions**

The Supreme Court of India in *British Steam Navigation*, [1990 2 Comp LJ1 SC], had further interpreted Section 28 of the Act as applied to cross border transactions. It held that the term “absolutely” in Section 28 is critical. The apex court considered that clauses which are in restraint of judicial/legal proceedings are void only if the restraint is absolute in nature. However, in such a case the specific court referred to in the contract should have jurisdiction (under the Code) i.e., “competent to try the suit”. Since partial restraint of the party to limit its legal relief to one court is not against public policy (waiver of private rights under a contract is lawful as long as such waiver is not against public policy), the clause will be enforceable.

In a proceeding before an Indian court, if it is proved as a matter of fact that the other party to the contract has legal remedy in a foreign jurisdiction, then the Indian court would not further interfere in the matter since the plaintiff still has legal remedy albeit in foreign jurisdiction. The balance of convenience needs to be looked into by the courts in terms of cross border transactions and foreign jurisdictions.

**Conclusion**

If the governing law is not specified in a contract, it may be safely concluded that Cheshire’s objective theory has gained legal recognition in the common law. That is, the governing law should be the one with which the legal framework for a transaction in question has the closest connection. Further, the law of place of performance is given utmost importance when applying the ‘closest connection test’. With regards to deciding jurisdiction of the court, Section 9 read with Section 20 of the Code mandates that a suit shall be instituted depending upon the residence or place of business of the defendant or any court within whose territorial jurisdiction the cause of action would have arisen. In matters involving cross border transactions, the principle of jurisdiction has evolved over a period of time. The courts have realized that balance of convenience has to be given its due importance, for it may allow the matter to be permitted in a foreign court provided it is convinced that the party has legal remedy in the concerned foreign jurisdiction.

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