## Corporate Finance/M&A - India

# Resolving disputes in cross-border M&A transactions

Contributed by PSA, Legal Counsellors

May 11 2011



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### Introduction

Every successfully negotiated multi-jurisdictional transaction should have a backbone of legally enforceable contracts. It is not sufficient merely to spell out the rights, duties and obligations of the parties, but also crucial to lay down the process to be followed in case of a dispute. Therefore, a dispute resolution clause in any contract assumes tremendous significance, especially when multi-parties and multi-jurisdictional activities are contemplated, as is often the case in cross-border M&A transactions.

Typically, a good dispute resolution clause includes reference to:

- the law governing the contract and dispute;
- the procedure to be followed;
- the method of resolution (ie, arbitration or litigation);
- for arbitration, the complete process, including constitution of the tribunal, applicable procedure, venue and language; and
- for litigation, the jurisdiction of the courts.

Using a simple case study, this update assesses the significance of the governing law of a contract and its practical impact on cross-border transactions, especially when the transaction involves the execution of multiple contracts per jurisdiction and, therefore, a potentially high possibility of a conflict while seeking relief.

### Case study

ABC, a company incorporated under Spanish law, intends to acquire a majority stake in two companies in two different jurisdictions - the United States and India. The US element involves the purchase of equity in XYZ Inc, a corporation formed under the laws of the state of New York, while the Indian aspect involves subscription to shares of an Indian group company, AAA, formed in the state of Maharashtra. The deal structure involves the sale of shares, with ABC purchasing a majority stake in both XYZ and AAA. Pursuant to negotiations, the parties may apply different laws across the multiple transaction documents, but eventually agree to have an umbrella agreement in which they govern the US documents by New York law and govern the Indian transaction documents by Indian law, with the Mumbai courts having jurisdiction in the event of a dispute.

Due to the complexity of manifold transaction documents, it is necessary to assess and determine the most efficacious way of seeking speedy remedy when a dispute arises. While consistency in drafting multiple and multi-jurisdictional agreements is crucial, there is always the possibility that certain provisions of one agreement might overlap with those of another, due to the sheer number of documents per jurisdiction, thus opening the doors to different and possibly conflicting interpretations. Such a situation will arise when parties try to curtail their risk in each jurisdiction. Furthermore, a governing law clause may be construed as the choice for:

- applicable substantive and procedural law;
- conflict of laws; or
- in some situations, determining the substantive law for the arbitration clause, particularly when the arbitration provision is silent on the applicable law.

**Advising ABC**

***Recourse in two different governing jurisdictions on same subject matter***
Well-constructed, enforceable contractual mechanisms are critical. In the above case study, ABC, XYZ and AAA are each encouraged to draft and negotiate contracts only after fully understanding the impact that two different governing laws can have on the entire transaction. For instance, a breach of one of the India-specific documents could also be a breach under the umbrella agreement, thus granting the non-defaulting contracting party recourse under two different jurisdictions.

To illustrate, if the seller of shares in India is in breach, ABC will have recourse to the courts of Mumbai. The seller is likely attempt to persuade the court that the subject matter of the dispute is actually covered under the umbrella agreement and, hence, jurisdiction would be vested only with the New York court. However, as noted in the case study, since the governing law of the Indian share purchase contract breached specifically places jurisdiction in Mumbai and provides for disputes to be adjudicated under Indian law, the seller will not have a real defence. It is imperative to anticipate such situations while negotiating contracts, in order to provide an effective remedy that ensures that no doors are closed. In addition, at the time of a dispute, the affected party should seek the least painful remedy. It is the plaintiff's prerogative to determine the optimal jurisdiction for seeking relief. While this will inevitably be hard to predict, it will often be the location where execution of a judgment will be easiest and where the assets (liquid or otherwise) of the defendant are located.

***Absence of a governing law and principles of conflict of laws***
When the parties specify their choice of governing law, the general principles do not apply. However, when there is no governing law or the contracts are ambiguous and capable of more than one interpretation, and the disputes can be subjected to laws of two or more countries, then reliance is placed on conflict of law principles or rules of private international law. These rules typically apply when a contract has a 'foreign' element, such as foreign parties or assets in a foreign location. Conflict of laws principles are not codified and are therefore extremely subjective. They are applied through three branches:

- jurisdiction - determines whether the court has the power to resolve the referred dispute;
- choice of law - determines the most 'proper' law to be applied to resolve the dispute; and
- foreign judgments - determine the ability of the courts to recognise and enforce judgments of a foreign court by applying the rules of private international law.

If these principles were applied to the case study under discussion, the Mumbai courts would be granted jurisdiction due to the specific contractual provision conferring jurisdiction. In addition, the court would have to determine the choice of governing law that would determine the dispute, by following a two-stage process.

First, the court must apply the principles of *lex fori* (ie, law of the forum) - its own law - to all procedural matters, including the procedures to file pleadings, hear arguments, present evidence and determine the process of choosing the proper law for the contract from which the dispute arose. Second, the court must consider all relevant facts that would link the legal issues or questions to the laws of different states. The law that has the strongest connection to a particular state will then be determined and applied to the dispute. For example, if the court is of the opinion that the nationality of the parties is the most important aspect of adjudicating upon the dispute, it will apply principles of *lex patriae* (law of nationality). Similarly, *lex situs* (law of location) will be applied to determine the title of any property. However, the Indian courts have increasingly started applying the 'proper law' of the agreement - namely, the law that the parties have expressly or impliedly chosen, or which is imputed to them by reason of its closest and most prominent connection and nexus with the agreement and the subject matter of the dispute.(1) Such proper law relies on the substantive law of a state and not its conflict of law principles.

In this case study, if there were no governing law, the courts in Mumbai would apply the aforementioned principles to assess whether the subject matter of the contract under dispute had a direct nexus to the laws of the state of New York or to Indian law. While there may be a high element of subjectivity prevalent, upon applying the foregoing principles (and in view of the fact that the subject matter of the dispute pertains to a contract of an Indian company and whose assets are located in India), the Mumbai courts should conclude Indian law will be the proper law and, accordingly, the governing law of the contract.

**Comment**

When negotiating transaction documents involving multiple jurisdictions, it is crucial that the clauses be specific, precise and unambiguous. Where an Indian entity is involved, the contracts must specifically state the governing law as that of India,

particularly if assets are located within the territorial jurisdiction of Indian courts. This often results in a more effective remedy than when the governing law is that of a foreign country and must be interpreted by Indian courts, or if an order of a foreign court must be enforced in India.

Conflict of laws principles can generate substantial subjectivity that could become an obstacle for a party legitimately seeking relief for a breach. Therefore, the clause stating the governing law of the agreement should specifically exclude the applicability of the conflict of laws principles. This will ensure that even if the subject matter of a dispute is capable of being covered under different agreements and subject to different governing laws, Indian courts will uphold the terms of the contract specifically subjected to Indian law.

Conflicting clauses in multi-jurisdiction transactions are often commercially agreed and any disagreement can result in the deal being broken. In such cases the lawyers must negotiate a system of balancing and checking the conflict by providing some relief in the jurisdiction where it can be most effective. As mentioned above, the purpose of executing contracts is to safeguard and protect rights in case of any dispute. Accordingly, the dispute resolution and governing law clauses in transaction documents are of substantial significance and should not be overlooked in the enthusiasm to close a deal.

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**Endnotes**

(1) *National Thermal Power Corporation v Singer Company* (1992) 3 SCC 51.