



Rise in the Freedom of Contract: Development and Enforceability of Forum Selection Clauses

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Abstract

Corporations and business houses of the present day require sound redressal mechanisms to mitigate commercial disputes with ease and efficiency. 'Forum selection clauses' are an easy way out of the turmoil often faced by firms during contractual disputes. Traditionally, the United Kingdom and the United States of America have been very restrictive about enforcing forum selection clauses, however liberalizing it very recently. This article through doctrinal study shows the present situation for forum selection enforcement in India and United States. Courts in India generally have followed the trend as laid down in the United States. There have been diverse judicial interpretations regarding validity of forum selections clauses across the common law system. The article discusses the judicial interpretations which has led to the evolution and development of such contract clauses.

Keywords: Contract, Dispute, Enforceability, Forum, Jurisdiction.

Introduction

The vagaries of the judicial system have stymied the adjudicatory process to deplorable levels. Escalating costs and tragically

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elongated judicial proceedings have led corporate houses and individuals to the brink of desperation. Should there be a breakdown in the performance of the contract, parties are usually left at the mercy of courts of law, where decade long suits are the norm. Therefore, parties to a contract take proactive steps to formulate a framework for a faster and effective dispute settlement mechanism. Contracts are now customized to include arbitration clauses and forum selection clauses, as the choice of forum has had substantial effect on the outcome of a dispute settlement.¹

The object of this article is to discuss the validity, legality and viability of forum selection clauses. A discussion of the basic concept of forum selection and the types of forum selection clauses that are generally found in contractual agreements are made. The author deliberates upon the evolutionary growth of forum selection clauses in the United Kingdom, United States of America and India. Courts of law in major legal regimes have been erratic while determining the validity and enforceability of forum selection clauses. Therefore, a number of cases have been examined so as to have a broad understanding of the judicial dictum of the three major countries of the world. Further, the article analyses the permissibility of forum selection clauses in the light of the public policy doctrine. The last part of the article contains the author's opinions and reasons for the validity of forum selection clauses.

Concept of Forum Selection

A forum selection clause is an agreement which either permits or requires the parties to a contract to pursue their claims against other parties in a designated national court.² Forum selection clauses and arbitration clauses are very similar, however the latter is a non-governmental mechanism which is mostly private in

¹ Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1518-25 (1995); David W Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 L.Q.R. 398, 418-20 (1987).

² GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 2 (Kluwer Law International 3rded. 2010).

nature. While it may seem that such forum selection clauses would be interpreted in a straightforward manner, forum selection clauses have been subject to intense criticism, and have often been the bone of contention in major commercial disputes. Nevertheless, the legitimacy of forum selection clauses has usually been upheld in major legal regimes.

Drafting a forum selection clause is very crucial for efficient dispute resolution. Parties to an agreement must explicitly determine the court that shall have jurisdiction in case of a dispute. While such clauses are usually drafted in a general manner³ their scope is often restricted⁴ by the act of the parties. However, it is of utmost importance that such clauses do not have any ambiguity, so as to ensure that parties easily understand the terms and conditions of the contract.⁵ Thereafter the choice of forum is done upon mutual understanding of the parties during the drafting of the contract.

Classification of Forum Selection Clauses

Forum selection clauses can be classified on the basis of two grounds, exclusivity and the choice of the court. The two types are 'exclusive forum selection clause' and 'non-exclusive forum

³ *Id.* at 25. (“(i) all disputes arising under this Agreement”; (ii) “all disputes arising out of this Agreement”; (iii) “all disputes relating to this Agreement”; and (iv) “all disputes arising in connection with this Agreement.” Alternative formulations are also encountered, including: (v) “all disputes relating to this Agreement, including any question regarding its existence, validity, breach, or termination”; and (vi) “all disputes relating to this Agreement or the subject matter hereof.”).

⁴ *Id.* at 24. (the clause would be invoked in certain cases - breach of contract, defamation, unfair competition, breach of fiduciary duty).

⁵ *Id.* at 22. (“the courts of _____ shall have exclusive jurisdiction over all disputes relating to this Agreement. Or all disputes relating to this Agreement shall be resolved exclusively by the courts of _____, and no others. [Each of the parties irrevocably submits to the jurisdiction of the courts of _____ for the purpose of resolving such disputes.] or In relation to any legal action or proceedings arising out of or in connection with this Agreement (“Proceedings”), each of the parties irrevocably submits to the exclusive jurisdiction of the _____ courts with regard to such Proceedings and waives any objections to Proceedings on the grounds of venue or on the grounds that proceedings have been brought in an inappropriate forum.”).

selection clause'. Exclusive forum selection clauses specify that only a particular forum will have jurisdiction in matters of dispute.⁶ The clause is drafted in such a manner that it excludes the right to approach any court other than the one court which has been decided upon.⁷ In certain cases, 'exclusive forum selection clauses are also referred to as 'derogatory forum selection clauses' because they preclude litigation in courts which would otherwise have had jurisdiction and furthermore, they also force parties to waive their usual rights.⁸

A 'non-exclusive forum selection clause' or a 'prorogatory forum selection clause'⁹ permits parties to litigate their disputes on the basis of a contractual fora, but however does not compel them to resolve the disputes in that particular forum only.¹⁰ Thus it does not restrain the rights of the parties to move other courts which have jurisdiction under the rule of law. Such clauses have also been referred to as 'permissive clauses', 'submission to jurisdiction clauses'¹¹ or 'consent to jurisdiction clauses'¹².

Forum Selection Clauses: The Prevailing Scenario

Over the years, forum selection clauses have found their way into a large number of commercial and corporate agreements.¹³ Courts have complemented this by habitually upholding the validity of

⁶ *Id.* at 17-18.

⁷ *Id.* at 18. (the parties agree that any dispute relating to this Agreement shall be resolved exclusively by the courts of _____, and no others.).

⁸ *The Monrosa v. Carbon Black Export*, 359 U.S. 180 (1959); *Nashua River Paper Co. v. Hammermill Paper Co.* 223 Mass. 8, 111 N.E. 678 (1916); (at early common law, derogatory forum selection agreements were per se invalid).

⁹ *Engel v. Shubert Theatrical Co.*, 166 A.D. 394, 151 N.Y.S. 593 (1915); *Reavis v. Exxon*, 396 N.Y.S.2d 774 (1977).

¹⁰ *Born*, *supra* note 2, at 18.

¹¹ *Id.*

¹² *See Gruson*, *Forum Selection Clauses in International and Interstate Commercial Agreements*, U. ILL. L. REV. 133, 134-36 (1982); *Hunt Wesson Foods v. Supreme Oil Co.*, 817 F.2d 75, 77 (9th Cir. 1987).

¹³ *See Matthew D. Cain & Steven M. Davidoff*, *Delaware's Competitive Reach*, 9 J. EMPIRICAL LEGAL STUD. 92, 94 (2012).

such clauses. After the landmark judgment in the *Bremen Case*¹⁴, there has been a change in the judicial attitude towards forum selection clauses; the enforcement of such clauses has become a general practice. Forum selection clauses have also been upheld in India, however this is not a uniform practice. Public policy is a common ground due to which such clauses have failed to succeed.

Numerous judicial doctrines¹⁵ and principles have been enunciated in order to regulate the enforcement of forum selection clauses, and in order to fully understand the legal complexities of the enforcement of such clauses, this paper shall delve into the jurisprudence behind this concept.

Evolution of Forum Selection Clause

Historically, courts have been the only adjudicator of legal disputes. However the growth of trade and commerce¹⁶ due to globalization has made the formulation of contractual relations more complex; parties now use their private rights to oust the jurisdiction of the court under law. Such mechanisms have deeply affected the traditional norms of the legal system across various countries. In order to analyze the evolution of this concept, the history of this clause in common law will be examined, the various

¹⁴M/s. Bremen and Unterweser Reederei v. Zapata Off-Shore Company, 407 U.S. 1, 11 Int'l Legal Materials 832 (1972); Carnival Cruise Lines, Inc v. Shute, 499 U.S. 585, 111 S.Ct. 1522; High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493 (Mo. 1992); Shree Subhlaxmi Fabrics Pvt. Ltd. v. Chand Mal Baradia and Ors., (2005) 10 S.C.C. 704; Rajasthan State Electricity Board v. Hindustan Petrochem, (2009) 3 S.C.C. 107.

¹⁵James M. Davis, *Forum Selection: Selection Agreements Prima Facie Valid if Reasonable - Volkswagenwerk, A.G. v. Klippan, GmbH*, 611 P. 2d 498 10 UCLA ALASKA L. REV. 99 (1980-1981) (“the Reasonableness Test was a very dynamic method of regulating the grant of forum selection clauses. The factors which are to be considered in determining “reasonableness” are (1) Whether the agreement would effectively deny a remedy to any of the parties involved if the said clause was enforced, (2) Whether the concerned agreement had been achieved through unconscionable means, (3) Whether the particular forum concerned had some vested interest in hearing the case which was thereby vested in their jurisdiction.”).

¹⁶James T. Brittan Jr., *Practitioner's Guide to Forum Selection Clauses in Texas, A Comment*, 1 HOUSTON BUSINESS & TAX L.J. 79, 79-80 (2001).

judicial decisions and contradictions in the U.K., U.S.A. and India will be highlighted.

Historical Development of Forum Selection Clauses in Different Jurisdictions

United Kingdom

Judicial hostility towards the private agreements taking away jurisdiction can be traced back to England.¹⁷ Contract law principles originate from common law, and English courts have clearly elaborated rules in the precedents set by them. For civil suits, the civil court hierarchy is in the order of county courts, High Courts,¹⁸ Court of Appeal and finally House of Lords.¹⁹

Ouster of jurisdiction clauses found reliance with the exemption clauses after the English Government adopted the Unfair Trade Practices Act of 1977. The rule of being immediately apparent is applied so as to find whether such ouster clause was brought in the knowledge of the party agreeing to the contract. In the 1930s case of *Thompson v. L.M.S. Railway*,²⁰ a passenger was deemed to have sufficient knowledge of the ouster clause because it was stated on his ticket that the same was 'issued subject to the company's rules and regulations' and hence Thompson was left with only a limited remedy. In the same manner whenever a forum is provided in a standard form of contract it cannot be changed and the party agreeing has no remedy to approach a different court having jurisdiction.

¹⁷ Friedrich K. Juenger, *Supreme Court Validation of Forum Selection Clauses*, 19 WAYNE L. REV. 49, 51 (1972-1973).

¹⁸ See MICHAEL H. WHINCUP, CONTRACT LAW AND PRACTICE 6-11 (5th ed. 2006) ("the High Court has three divisions, "the Chancery Division consisting of the Chancellor of the High Court, who is its President", the Queen's Bench, and the Family Division. The Chancery and the Queen's Bench had jurisdiction to try civil disputes arising from contracts and such forum were inherently either to be one of them.").

¹⁹ *Id.*

²⁰ [1930] 1 K.B. 41 at ¶ 7.5.

United States of America

In the USA, courts were initially of the opinion that ouster clauses were illegal, as the judges felt individuals could not barter away their substantial rights by way of agreements, and oust the court of its inherent jurisdiction.²¹ The reasoning behind such a stance was that the jurisdiction of the courts was established by law, and the rule of law was to prevail over private rights of individuals.²²

Forum selection clauses or ouster clauses have been considered a natural violation of public policy²³. While it is an established principle that a forum selection clause would be struck down in cases where it was unconscionable or was contrary to public policy,²⁴ certain critics have gone on to say that as judges were paid for the number of cases they heard, forum selection clauses posed a threat to their livelihood.²⁵

However, the practice of holding forum selection clauses as illegal is slowly done away with in order to meet the growing needs of society. While the general notion towards forum selection clauses did not turn favorable overnight, it was for the first time²⁶ in 1972 that the courts recognized the needs of the growing industry and thereby made efforts to enforce the same in international trade and commerce.²⁷ In the *Bremen Case*, the Chief Justice urged for the revival of the ancient concepts of freedom of contract in which the

²¹ *Insurance Co. v. Morse*, 87 U.S. 445 (1874).

²² Annotation, *Validity of Contractual Provisions Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R.4th Cir. 404 (1984).

²³ *Id.* at § 3.

²⁴ Davis, *supra* note 15.

²⁵ Willis L. M. Reese, *The Contractual Forum: Situation in the United States*, 13 AM. J. COMP. L. 187, 188-189 (1964). (“Judge Learned Hand once [said] that it was his guess that this judicial aversion dates from the time when, according to him, judges were paid by the case and accordingly viewed arbitration and choice of forum provisions as devices that were likely to curtail their income.”).

²⁶ Kurt H. Nadelmann, *Choice-of-Court Clauses in the United States: The Road to Zapata*, 1 AM. J. COMP. L. 124, 127 (1973).

²⁷ *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (“the expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our law and in our courts.”).

concept of forum selection clauses was enshrined.²⁸ Forum selection clauses can be a very valuable tool for risk minimization and reducing of costs.²⁹ Presently, large public trading entities in the U.S.A. have incorporated such clauses in their agreements in order to bring in a degree of definiteness into their functioning and dispute resolution.³⁰

India

As early as in 1885, the Privy Council has been of the view that derogatory forum selection clauses are invalid. The *ratio decidendi* of *Rewa Mahton v. Ram Kishen*³¹ was based on the principle of *ex dolo malo non oritur actio*,³² i.e. if jurisdiction was provided to a non competent court, then the contract would be *ultra vires* as it was fraudulent in nature.³³ The decision emphasises that no one can make an agreement wherein a clause confers jurisdiction to a court which is otherwise not competent to try matters arising from such contract. Inherent jurisdiction is said to exist where any cause of action arises, as in where the contract has been entered into or where performance has been done.³⁴

Post independence, in 1971, the Supreme Court of India was confronted with the question regarding enforceability of a forum selection clause in *Hukkam Singh v. Gammon (India) Ltd.*³⁵ This case laid down the law for the enforceability of the forum selection

²⁸ *Id.* at 11.

²⁹ See Bryan Druzin, *Buying Commercial Law: Choice of Law, Choice of Forum, and Network Externalities*, 18 TUL. J. INT'L & COMP. L. 131, 144 (2009); 1 HOUSTON BUSINESS & TAX L.J. 79, 80 (2001).

³⁰ Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333 (2012); See Covey & Morris, *The Enforceability of Agreements Providing for Forum and Choice of Law Selection*, 61 DENVER L.J. 837, 837 (1984); Nadelmann, *supra* note 26.

³¹ (1886) I.L.R., 14 Cal.; See SUDIPTO SARKAR AND V. R. MANOHAR, SARKAR CODE OF CIVIL PROCEDURE 1 (Lexis Nexis Butterworths Wadhwa Nagpur 11thed. 2007).

³² *Holman et al. v. Johnson, alias Newland*, (1775) 98 E.R. 1120.

³³ See Indian Contract Act, § 17.

³⁴ 11 HALSBURY LAWS OF ENGLAND, *Civil Procedure*, 57 (5th ed. 2009).

³⁵ A.I.R. 1971 S.C. 740.

clause in a contractual dispute. Parties had entered into a construction work agreement, under which an arbitration clause stated that in case of any dispute there would be an arbitration proceeding under the Arbitration Act, 1940. On the other hand, the forum selection clause provided that only courts in the city of Bombay would have jurisdiction to adjudicate on any disputes arising from the contract.

When a dispute arose between the parties, a petition was filed before a subordinate court at Varanasi to which the respondents contented that only civil courts at Bombay had the sole jurisdiction to try such disputes arising from the performance of the contract. However, the subordinate court validated the petition and stated that, as the contract was not entered into in Bombay, courts located there would not have jurisdiction. The Allahabad High Court, exercising its revisional jurisdiction set aside the subordinate court's order and reasoned that due to the virtue of the covenant in the agreement as specified in the forum selection clause, it would be binding upon the parties. Since, the parties having agreed mutually to resort to courts in Bombay, the petition could not have been entertained by the courts at Varanasi. The appellant approached the Supreme Court by a special leave petition, wherein the apex judicial body dictated that the forum selection clause was valid and only the courts of Bombay would have jurisdiction to try the suit. The precedent established in the instant case was that where two or more courts have jurisdiction to hear a matter and a party was to choose between them, then such a forum selection clause was not to be construed as against public policy.

While courts in India usually ask the parties to honor the covenant,³⁶ they must objectively review the circumstances of a case in order to ensure justice and fairness to both the parties. The balance of convenience, nature of the contract, contractual relations between the parties, history of that particular case and the stakes involved must be seriously considered before pronouncing the validity of a forum selection clause.³⁷ However, an ouster clause

³⁶ *Id.*

³⁷ *Indian Woolen Textile Mills (Pvt.) Ltd v. Rajasthan State Road Transport Corporation* (1991) 99 P.L.R. 346.

cannot divest or take away the jurisdiction of a competent court and in such cases the ouster clause may be ignored by the excluded court if it has inherent jurisdiction.³⁸

Judicial Convictions and Contradictions Relating to Forum Selection Clauses

Jurisdiction of the court is determined as per the civil procedural laws of a common law system. The law has laid down that civil matters receive viable jurisdiction where such civil dispute has occurred. This has changed over the time³⁹ and therefore led to the utilization of forum selection clauses. *Unterweser v. Zapata*⁴⁰ was an ordinary admiralty suit in the Supreme Court of United States.⁴¹ The case not only settled the law in regard to validity of the forum selection clause, but ushered in the prospects of a dynamic growth of law and practice.

The case involved two parties, Zapata an American Corporation and Unterweser a German company. Unterweser was to tow Zapata's oil rig from Louisiana to Italy, but however they would not be liable for any error in navigation of the tow or damage suffered by the oil drilling rig. Furthermore it was specified that all disputes arising out of the contract would have to be litigated in London. During the performance of the contract the rig was damaged when it encountered a storm in international waters near the Gulf of Mexico. As instructed by Zapata, the damaged oil drilling rig was taken to the nearest port in Tampa, Florida. In contravention to the forum selection clause, Zapata initiated a suit for damages in the federal court in Tampa. On the other side of the Atlantic, Unterweser filed a suit for damages in the High Court of Justice, London. Zapata thereafter challenged the court's jurisdiction which failed as the court held that Zapata had not been able to show unfairness of the choice of court, hence the forum selection clause would be valid. In the court of law, Tampa, it was held that the court in England would apply the English Law, i.e. *lex*

³⁸ 7 HALSBURY LAWS OF ENGLAND, *Civil Procedure* (5th ed. 2009).

³⁹ *Id.*

⁴⁰ *Supra* note 27.

⁴¹ Nadelmann, *supra* note 26, at 124.

arbitri. An appeal was made by Unterweser in the US Court of Appeals for the 5th Circuit which upheld the decision, relying on *Carbon Black Export Inc. v. The S. S. Monrosa*⁴². The Supreme Court accepted the view that a forum selection clause was valid unless it could be shown that it were in itself unreasonable and unjust. From the facts of the case, it could not be inferred as to how a neutral forum was to be held as unreasonable. Hence the forum selection clause survived the judicial turmoil before the apex Court of United States.

The U.S. Supreme Court again had an occasion to examine the question of the enforceability of forum selection clauses in the said case. *The Tropicale* operated by the Carnival Cruise Lines, Inc. had taken Mrs. Shute and her husband from Mexico to Los Angeles. It was near Mexico when an accident took place that injured Mrs. Shute. Thereafter she initiated a suit for damages against Carnival Cruise Lines, Inc in the Federal Court of Washington, United States of America (the place of her residence). The ticket which she had bought for the cruise had a forum selection clause which predetermined that in case there was any litigation it was to be initiated in the state of Florida (place of business of Carnival Cruise Lines, Inc). Accordingly the Supreme Court upheld the forum selection clause, thereby vesting the courts in Florida with the sole jurisdiction.

Enforcement of Forum Selection Clause in India

Disputes arising from a breach of contract are civil suits⁴³ and the Civil Procedure Code 1908 provides that all courts have jurisdiction to try any civil suit,⁴⁴ except criminal magisterial courts. The forum selection clause is a medium through which a court is given jurisdiction to hear a matter; in turn the other courts are ousted from exercising their jurisdiction.

When more than one court has the inherent jurisdiction to try a particular case, then a forum selection clause is a solution to the

⁴² *Carbon Black Export, Inc. v. The S.S. Monrosa*, 254 F.2d 297 (C.A. 5 1958).

⁴³ *Pratabmull v. K.C. Sethia*, A.I.R. 1960 Cal. 702.

⁴⁴ See COD. CIV. P. § 9

parties. On having reached a consensus, parties can choose a particular court having inherent jurisdiction.⁴⁵ The parties once bound under the jurisdiction of a court cannot opt for another while proceedings are pending.⁴⁶ The forum clause provides that if dispute arises from a contract⁴⁷ one may institute a proceeding before a particular court as predetermined by the parties.

In all the circumstances, the court must have inherent jurisdiction, meaning that the parties cannot confer such jurisdiction through selection of forum⁴⁸, as that is against section 28 of the Indian Contract Act 1872.⁴⁹ It cannot be contended that the jurisdiction of the court which was not selected should hear the suit rather than the one selected by the parties.⁵⁰ In the penumbra of the judicial dictum it can be seen that in civil disputes, the jurisdiction lies in the place of dispute and while jurisdiction can be ousted by a predetermined contract, the parties specifically select a viable court having inherent jurisdiction.

On 18th April, 1995, the question of the enforceability of forum selection clause came up for consideration in the Supreme Court in the *Angile Insulations Case*.⁵¹ The Appellant filed for recovery of dues under a contract before a subordinate court of Dhanbad district. The agreement between the parties stated that the courts of Bangalore would be the appropriate forum in case of dispute. Consequently, the subordinate court returned the suit and three years later, the High Court dismissed the revision petition as well.

⁴⁵ *Supra* note 34.

⁴⁶ *Shiram City Union Corp. Ltd. v. Rama Mishra*, A.I.R. 2002 S.C. 2402.

⁴⁷ *Chiranjil Lal v. Sumer Oil Mills*, A.I.R. 1953 Raj. 134.

⁴⁸ *Globe Transport Corporation v. Triveni Engineering Works*, (1983) 4 S.C.C. 707 (India); *Modi Entertainment Network v. W.S.G. Cricket Pte. Ltd.*, A.I.R. 2003 S.C. 1177; *Mahanagar Telephone Enigma Ltd. v. Chairman Central Board Direct Taxes*, A.I.R. 2004 S.C. 2432 at 2434; *Hindustan Metal v. M/s. Vishal Goods Transport Co.*, A.I.R. 2002 Raj. 248; *Prakash Road Lines (Pvt.) Ltd. v. H.M.T. Bearing Ltd.*, A.I.R. 1999 A.P. 106.

⁴⁹ *See Lalit Chandra Raisurana v. Tak Machinery Ltd.*, (1993) 1 B.L.J.R. 109.

⁵⁰ *I.V.R. Constructions Ltd. v. Technocraft Industries India Ltd.*, 2010 (2) A.L.T. 239 (243) (D.B.).

⁵¹ *M/s. Angile Insulations v. M/s. Davy Ashmore India Ltd. & Anr.*, (1995) 4 S.C.C. 153.

Under the special leave petition, the Supreme Court delved into the issue and ruled in consonance with the previous lower courts. It can be seen that the apex court followed the precedent as set in *A.B.C. Laminart*.⁵² After careful examination of the forum clause, the outcome was that the clause was not in contravention of section 23 of the Indian Contract Act 1872. However, it was ruled that contract clauses which would absolutely oust the jurisdiction of any court would be invalid as it was against public policy.

The Supreme Court of India was confronted with a question as to where the jurisdiction would lie when there exists a forum selection clause in a contractual agreement and the courts are in dispute while both have inherent jurisdiction. This is a ruling which is contrary to the Calcutta High Court decision in *Subhalaxmi Fabrics v. Chand Baradia*,⁵³ the appellants who carried on business all over India delivered clothing units having, to the respondent who were cloth merchants based in Calcutta. The contract between them under clause 6 stated 'in case of any dispute arising from the contract, it shall be decided by the courts of Bombay.'⁵⁴ An issue with respect to the validity of the arbitration clause in the contract was raised before the City Civil Court of Calcutta. The court refused to accept the case as the forum clause provided jurisdiction to Bombay High Court to try the case, leading to appeal before the Calcutta High Court which in contrary accepted jurisdiction to try the matter in as it was the place of business of the parties. However, the Supreme Court held in the negative, upholding the decision of the City Civil Court.

Forum selection is not authorizing a court without jurisdiction but selecting from given options. The legislation has the sole power to enlarge the jurisdiction of the court and no court, whether superior or inferior or both combined, can do or divest a person of his rights of revision and appeal.⁵⁵ Court having no inherent jurisdiction can neither by acquiescence nor by waiver or estoppels make a

⁵² *A.B.C. Laminart Pvt. Ltd. and Anr. v. A.P. Agencies, Salem*, (1989) 2 S.C.C. 163.

⁵³ A.I.R. 2005 S.C. 2161.

⁵⁴ *Id.* at ¶ 3.

⁵⁵ *A.R. Antulay v. R.S. Nayak*, (1988) 2 S.C.C. 602.

jurisdiction for itself.⁵⁶ If courts without jurisdiction pass decree which is *corum non iudice*, then it is not binding on the parties.⁵⁷ Inherent jurisdiction is important to be determined before any selection of forum is done through agreement between the parties. The parties are bound by the contract and its clauses, in case the forum selected does not have inherent jurisdiction on the matter, it will lead to non compliance with the clause. This is a contradiction to the rule of law that governs contracts and the parties lose their binding relation. The question then arises as to the selection of the forum because inherent jurisdiction of the courts primarily restricts the choice of the parties. Territorial jurisdiction of a court to try a dispute has been provided under section 20 of the Civil Procedure Code 1908 where it has been stated that the place of performance, place of the parties residence or where the offer and acceptance of the contract has been done can also be the place of jurisdiction. The local courts, have the jurisdiction to hear such an issue under section 17 of the Code. Thus, deciding the correct forum brings a contrary view from that of choosing the forum selected through contract.

In *Magnum Builders & Developers & Chawla Constructions (JV) v. Ircon International Ltd.*,⁵⁸ the view taken was that the courts in the place where the contract was entered into would have jurisdiction. It has also been observed that the place of performance, the parties' place of residence, place of work etc. can claim jurisdiction of a dispute.⁵⁹ In contracts, the cause of action arises where contract has been made and where the breach has occurred or at the place of performance.⁶⁰ Therefore, the place where the suit is to be brought

⁵⁶ *Dhirendra Nath v. Sudhir Chandra*, A.I.R. 1964 S.C. 1300; *Chief Justice of Andhra Pradesh v. L.V.A. Dixitulu*, (1979) 2 S.C.C. 34; *Chiranjilal v. Jasjit Singh*, (1993) 2 S.C.C. 507; *Patel Roadways Ltd. v. Prasad Trading Co.*, (1991) 4 S.C.C. 270.

⁵⁷ *Sushil Kumar v. Gobind Ram*, (1990) 1 S.C.C. 193; *Isabella Johnson v. M.A. Susai*, (1991) 1 S.C.C. 494; *Harshad Chiman Lal v. D.L.F. Universal Ltd.*, (2005) 7 S.C.C. 791; *Chief Engineer, Hydrel Project v. Ravindra Nath*, (2008) 2 S.C.C. 350.

⁵⁸ 2008 (5) A.L.J. 362.

⁵⁹ See COD. CIV. P. §20(a).

⁶⁰ *D.V.V. Subhaya Firm v. Biswanath*, A.I.R. 1962 A.P. 388 (D.B.).

is chosen by the plaintiff.⁶¹ It is a clear law that the place where the cause of action arises is to be determined from the conditions established in the contract.⁶² Rent recovery suits can be instituted within the jurisdiction of courts in the vicinity of the property under the lease agreement.⁶³ The views laid down in the above cases suggest different forums for such contractual disputes. Substantially, where a contract is invalid,⁶⁴ all its conditions are also made invalid automatically so is the forum agreed under such a void contract. Jurisdiction therefore belongs to the place of revocation.⁶⁵ Hence, the viability of the forum selection clause is gone and the ousting of relevant jurisdiction of courts cannot be held valid.

Forum Selection vs. Public Policy

Anything less than systematic discussion of public policy would result in a dismal understanding of the concept in itself and the ancillary areas across which it meanders.⁶⁶ Theoretically, public policy exists and evolves with changing social needs. A simplistic view would be to hold all such contracts as contrary to such policy. However, such a narrow view may not be able to harmonize and balance the interests of the parties with that of the public and may lead to future disputes.

Parties can exercise their private rights over a particular subject matter and the court will hold it as a legal transaction. However, the power to contract is not unlimited and a contract against public

⁶¹ Chiranji Lal v. Sumer Oil Mills, A.I.R. 1953 Raj. 134.

⁶² 1967 A.L.J. 348.

⁶³ Kanhaiya Lal v. Kanti Lal, A.I.R. 1962 Raj. 106; *See also* Court of Wards v. R. Dharan Devchan, A.I.R. 1961 Punj. 143 (D.B.).

⁶⁴ Fertilizers Corporation of India v. Surjit Singh, A.I.R. 1965 Punj.107.

⁶⁵ *See* Sarkar, *supra* note 31.

⁶⁶ Richardson v. Mellish, (1824) 2 Bing 229; (“J. Burrough viewed public policy as a ‘very unruly horse, and when once you get astride it you never know where it will carry you.’; However a contrary view as observed by Lord Denning, With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by friction and come down on the side of justice.”); Enderby Town Football (1971) Ch. 591).

policy cannot be binding.⁶⁷ Such principle of public policy is based on the principle of *ex dolo malo non oritur action* which means that from a dishonorable cause, an action does not arise. The fraudulent use of forum selection clauses to shop for favourable clauses unjustly enriches one of the parties to the contract,⁶⁸ and therefore is in contravention to the principles of equity and justice such are against public policy.

Conclusion

Forum selection clauses have become a part and parcel of modern day trade and commercial transactions. Business houses have regularized the applicability of this recently accepted contractual freedom by integrating such redressal mechanism. However, it is important that forum clauses are properly moderated by judicial intervention and statutory limitations when a cause of action arises. Exclusive forum selection clauses are illegal as they infringe upon the rights of a party and is not in consonance with public interest. Parties often draft agreements which oust the courts of law from exercising their judicial power. This is a matter of great concern. Time is very crucial to all business houses and the lackadaisical atmosphere of courts often destroys the true purposes of justice. Slow and inefficient deliveries of judgments have left the parties financially diminished. The present view is that parties are free to include forum selection clauses in their contracts as there is nothing in the Indian Contract Act 1872 which makes it impermissible to do so. It has also been observed that courts are free to invalidate such clauses based upon the tests of reasonableness and fairness. Prorogatory forum selection clauses are valid, with moderations.

The Indian legal regime has provided rigid provisions for invalidating contracts which are against public policy as laid down in section 23 of the Indian Contract Act 1872 and in cases where legal proceedings are restrained, Section 28 of the said Act is applied and such clauses are held void. Usually such conditions are

⁶⁷ Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L. J. 51, 54 (1992).

⁶⁸ See Stephen B. Burbank, *Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media?*, 26 HOUS. J. INT'L L. 385, 398 (2003-2004).

laid down through coercive, fraudulent or unconscionable means which is impermissible under law. Furthermore, standard form of contracts misuse such clauses through complex drafting, making it difficult for the consumer to understand the fine print, making the contract prone to cases of unjust enrichment and fraud. Courts have generally been pro forum clauses but per se, exclusive forum clauses are invalid as they are unreasonable and restrictive in nature. The legal system is a changing realm of intricate and complex concepts which require broader and specific interpretation with the changing times. History tells us that forum selection clauses have often been subjected to criticism, with the idea of a global village becoming increasingly viable, the need for the implementation of remedies to settle business and commercial disputes, is imminent.