

# Dispute Resolution Hotline

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## DELHI HIGH COURT UPHOLDS CLAUSE CONFERRING JURISDICTION ON FOREIGN COURT (BHARAT HEAVY ELECTRICALS LTD V ELECTRICITY GENERATION INCORPORATION)

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**Dispute Resolution analysis:** The High Court in Delhi has upheld a jurisdiction clause conferring jurisdiction on the Commercial Court in London. It held that where a jurisdiction clause refers to a specific forum and clearly follows the intention of the parties the court must give effect to that clause. Sahil Kanuga, co-head of the commercial disputes practice at Nishith Desai Associates and Sanjika Dang, an associate at the firm, consider the decision and its implications.

### ORIGINAL NEWS

**Bharat Heavy Electricals Ltd v Electricity Generation Incorporation (CS (Comm) 190/2017)**

### WHAT ARE THE PRACTICAL IMPLICATIONS OF THIS CASE?

This is an important Delhi High Court decision and gives rise to a number of practical implications:

- having expressly conferred jurisdiction upon a particular court, parties will ordinarily be required to approach only such court
- where a contract vests jurisdiction in a foreign court, the absence of the word 'only' will not mean that such jurisdiction is not exclusive
- a Bank Guarantee is an independent contract and jurisdiction arising from related contracts will be irrelevant for disputes pertaining to the guarantee itself
- the place where a Bank Guarantee is issued will not confer territorial jurisdiction on a court if the contract contains a jurisdiction clause

### WHAT WAS THIS CASE ABOUT?

The Delhi High Court recently dealt with questions regarding conferring of jurisdiction on foreign courts. In this situation, a counter bank guarantee was issued in India but the performance bank guarantee under a separate agreement was issued by a private Turkish Bank. Further, the underlying agreement between the parties provided for the Courts at Ankara, Turkey having jurisdiction. There were, consequently, three separate agreements containing three different dispute resolutions provisions.

### WHAT WERE THE FACTS?

Electricity Generation Incorporation (EGI), a state-owned company incorporated under the laws of Turkey, entered into a contract for the rehabilitation of a hydroelectric power plant, for which Bharat Heavy Electricals Ltd (BHEL) was engaged as a contractor (the Contract). The jurisdiction under the Contract was conferred upon the Courts at Ankara, Turkey.

A Performance Bank Guarantee had to be furnished under the Contract (PBG). BHEL procured a Counter Bank Guarantee through the Bank of Baroda (BoB) in favour of AKBank TAS (AKBank), a privately-owned bank in Turkey (the Counter Guarantee). The Counter Guarantee was governed by English Law and jurisdiction was conferred upon the Commercial Court at London. On the basis of the Counter Guarantee, AKBank issued a PBG to EGI.

On March 9, 2017, BoB informed BHEL that EGI had terminated the Contract and invoked the PBG under the Contract. Claiming that EGI's breach was wrongful, BHEL filed a suit before the court seeking declaratory reliefs and a permanent injunction against encashment of the PBG.

### WHAT WERE THE MAIN LEGAL ARGUMENTS ARISING?

The issue was whether the court had territorial jurisdiction over the dispute.

### BHEL's Contentions

The Counter Guarantee had been entered into in Delhi and a part of the cause of action arose in Delhi—equity thus demanded that jurisdiction must be conferred on the court.

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The word 'only' was missing from the jurisdiction clause, and so the jurisdiction of the Commercial Court in London was not exclusive.

BHEL could not sue or enforce a decree against BoB either at Ankara or in London, since the same would be a meaningless exercise when both BHEL and BoB are situated at Delhi. Therefore, the court has territorial jurisdiction to entertain the present suit.

It was not possible for BHEL to approach the Commercial Court in London on such short notice, so the court must assume jurisdiction in light of the paucity of time.

### Respondent's Contentions

The Counter Guarantee provided for exclusive jurisdiction of the Commercial Court in London.

AKBank neither resided in Delhi nor carried on its business or profession within the jurisdiction of the court. Mere issuance of the Counter Guarantee by BoB was not sufficient to confer jurisdiction on the court.

### WHAT DID THE COURT DECIDE?

After discussing several judgments, the court reached the conclusion that it did not have territorial jurisdiction over the dispute. It was held that:

#### The place of issuance of guarantee was irrelevant

The issuance of the Counter Guarantee in Delhi was not sufficient to vest territorial jurisdiction on the court. Furthermore, the Counter Guarantee was an independent contract and the existence or nonexistence of the underlying contract is irrelevant to it.

#### The absence of 'only' in the jurisdictional clause was irrelevant

The argument that the word 'only' being missing from the jurisdictional clause implied that the jurisdiction of the Commercial Court in London was not exclusive, must be rejected. Even in the absence of such a word, a court may be granted exclusive jurisdiction, as the specific reference to a court reflects the parties' intention to grant exclusive jurisdiction to it.

#### The paucity of time is not a valid ground to confer territorial jurisdiction

In the present case, both the applicable contracts clearly vest jurisdiction on courts outside India. Notwithstanding the same, BHEL had argued that the jurisdiction must be vested in the court due to paucity of time. The court held that this is not a valid justification to confer jurisdiction on a court. Furthermore, even if the court accepted that paucity of time was one of the grounds, time could be granted to BHEL to approach the court of competent jurisdiction. Accordingly, the court extended the ad-interim order in favour of BHEL for 45 days so that it could approach a court of appropriate jurisdiction.

#### Parties can choose a 'neutral forum'

If the cause of action has taken place in India and the Indian law applies, the parties cannot choose to vest territorial jurisdiction to try the suit in a court which does not have the jurisdiction. Parties may agree to vest exclusive jurisdiction in one of such courts having jurisdiction. However, where one party is not subject to the law of India, the parties may vest jurisdiction outside the country in a neutral forum or a 'court of choice'.

### TO WHAT EXTENT IS THE JUDGMENT HELPFUL AND WHAT PRACTICAL LESSONS ARE THERE TO BE LEARNED?

Given the nature of cross-border business relations prevalent between parties which are, more often than not, contained in a number of separate and independent agreements, each possibly containing separate and distinct dispute resolution provisions, this judgment provides a critical insight into the scope of exclusive jurisdiction clauses in contracts that are ancillary to primary agreements.

By identifying the fact that (i) the Counter Guarantee and the PBG both vest jurisdiction in courts outside India; and (ii) the only averment made by BHEL to attempt to confer jurisdiction upon the court was that of paucity of time to approach the English court, i.e., the agreed court; the court demonstrated that attempts to bypass contractual provisions on jurisdiction would require parties to meet a very high threshold. The court dealt with BHEL's averment regarding paucity of time by extending the ad-interim relief granted in their favour for a further period of 45 days, in order to enable them to approach the court having jurisdiction to entertain and try the dispute.

Where a party attempts to file proceedings before a court, which court does not ordinarily have jurisdiction to entertain and try the dispute, several factors will be looked into. These include:

- the country in which the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the Indian and foreign courts
- whether the law of the foreign court applies and, if so, whether it differs from Indian law in any material respects
- whether either of the parties are closely connected to any jurisdiction, and if so, how closely
- whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages
- whether the plaintiffs would be prejudiced by having to sue in a foreign court because they would:
  - (i) be deprived of security for that claim
  - (ii) be unable to enforce any judgment obtained
  - (iii) be faced with a time-bar not applicable domestically
  - (iv) for political, racial, religious or other reasons be unlikely to get a fair trial

While these factors may be helpful in determining territorial jurisdiction, it has been held that jurisdictional clauses that refer to a specific forum and clearly detain the intention of the parties, must ordinarily be given effect to.

### CASE DETAILS

- Court: High Court of Delhi at New Delhi

■ Judge: The Honourable Ms Justice Mukta Gupta

■ Date of judgment: 19 September 2017

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.*

– **Sanjika Dang & Sahil Kanuga**

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