



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2021 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium, provided the original work is properly cited.

Exclusive Jurisdiction Clauses: Meaning, Limitations, and Problems in Its Interpretation

Anshita Sethi^a

^aO.P. Jindal Global University, Sonipat, India

Received 29 May 2021; Accepted 12 June 2021; Published 15 June 2021

Parties consider, among other things, the most convenient and cheap venues for resolving disagreements when designing dispute resolution terms in commercial contracts. However, they must decide how much liberty they will have in selecting a suitable forum. Parties often jointly agree to pursue their issues before a certain court to avoid the burden of suing in an inconvenient or time-consuming venue. These provisions are written with the parties' economic and geographic interests in mind. This post will go over some of the most important points to consider when it comes to exclusive jurisdiction provisions. "All Courts have jurisdiction to try all civil matters, according to Section 9 of the Code of Civil Procedure 1908 ('CPC'), unless the jurisdiction is explicitly or impliedly prohibited. A suit may be brought either where the defendant habitually dwells or does business, or where any portion of the cause of action originates, according to Section 20 of the CPC. Section 20 makes it clear that a lawsuit may be tried in more than one court (For example: When any part of the cause of action arises in a place other than where the defendant ordinarily resides or carries on business)." There may also be instances when the cause of action arises in various locations, each of which is subject to the jurisdiction of a separate court.

Keywords: *jurisdiction, exclusive jurisdiction, jurisdiction clause.*

INTRODUCTION

Parties in an agreement tend to include a certain clause in their contract called the jurisdiction clause. This clause can be classified into being either exclusive or non-exclusive. Whether a clause is exclusive or non-exclusive depends on its interpretation,¹ but courts have failed to apply a consistent method of interpretation around jurisdiction clauses. There are no guidelines laid down for determining how a jurisdiction clause should be interpreted, which has, over the years, created a lot of irregularity. This paper, while focusing on exclusive jurisdiction clauses and their certain limitations and qualifications, seeks to lay down and analyze a few issues which have been faced in the interpretation of these clauses, particularly those which do not consist of express terms, through important case laws. The paper further seeks to put forth certain approaches which can be adopted in the future in order for us to have a clear understanding of the interpretation of these clauses.

EXCLUSIVE JURISDICTION CLAUSES

Exclusive jurisdiction clauses are those which confer jurisdiction only on the courts mentioned in the clause, ousting the jurisdiction of other competent courts. While forming an exclusive jurisdiction clause, the parties need to keep in mind the Indian Contract Act, 1872 (hereinafter referred to as “the Act”), particularly Sections 23 and 28.

Section 23 of the Act states that an agreement is unlawful if “it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of law; or opposed to public policy.”² Section 28 lays down those agreements which restrict any party to enforce his rights “by the usual legal proceeding in the ordinary tribunals,” which will be held as void.³ A simple reading of these two sections clearly portrays that parties to a contract are barred from completely ousting the jurisdiction of all the competent courts.⁴

¹ *British Indian Steam Navigation Co Ltd v Shanmughavilas Cashew Industries & Ors* (1990) 3 SCC 481 (India)

² Indian Contract Act 1872, s 23

³ *Ibid* s 28

⁴ Aarohee Gursale & Sonam Mhatre, ‘India: Exclusivity of Territorial Jurisdiction’ (*Mondaq*, 31 October 2018) <<https://www.mondaq.com/india/contracts-and-commercial-law/750604/exclusivity-of-territorial-jurisdiction>> accessed 18 April 2021

Furthermore, the Code of Civil Procedure,⁵ 1908 (hereinafter referred to as “the Code”) gives way to the possibility that more than two courts can have jurisdiction on a certain matter – one where the cause of action arises and the other where the defendant resides, works, etc. In certain cases, the defendants’ place of work or residence can be different from the place where the cause of action arises. Therefore, in such a case, there will be two (or more) courts that will be competent to entertain a suit. While the parties cannot oust the jurisdiction of both these courts, they can through their agreement, mutually agree to confer jurisdiction to only one of them, ousting the jurisdiction of the other court.⁶

Thus, reading all these three sections together, it is clear that there is scope for a partial restriction by limiting parties’ recourse to one forum. Exclusive jurisdiction clauses occupy this space between an absolute restraint and convenience-based forum shopping.⁷

Parties, however, through the exclusive jurisdiction clauses, cannot confer jurisdiction on any court of their choice. The one thing which has to be considered before granting jurisdiction to a court under this clause is that this court needs to have a certain pre-existing jurisdiction on the matter, that is, parties cannot mutually agree to the exclusive jurisdiction of some third court⁸ where no cause of action has arisen, or where the defendant does not reside or work. This is a well-settled principle in *Hakam Singh v. M/S Gammon*,⁹ wherein the Supreme Court held that it was not the prerogative of the parties to confer jurisdiction, by their agreement, on a court which does not possess jurisdiction under the Code. The parties, however, have an option to choose between courts that have jurisdiction on the basis of the Code. This is one of the first things which the court sees before moving forward in a case which deals with the interpretation of

⁵ Code of Civil Procedure 1908, s 20

⁶ BVR Sharma, ‘Agreements which restrain legal proceedings – An Analysis’ (*Manupatra*) <<http://docs.manupatra.in/newsline/articles/Upload/968A00BF-EA62-4871-AF51-AE0DB6F096F1.pdf>> accessed 18 April 2021

⁷ Nivedita Shenoy & Sharanya Shivaraman, ‘Exclusive Jurisdiction Clauses in a Contract: Key issues’ (*Bar and Bench*, 11 September 2019) <<https://www.barandbench.com/columns/exclusive-jurisdiction-clauses-contract-key-issues>> accessed 18 April 2021

⁸ Kinjal Gala & Priyanka Shah, ‘Exclusivity of Jurisdiction Clause in Contracts/Agreements’ (*Legal Services India*, 30 July 2020) <<http://www.legalserviceindia.com/legal/article-2769-exclusivity-of-jurisdiction-clause-in-contracts-agreements.html>> accessed 18 April 2021

⁹ *Hakam Singh v Gammon (India) Ltd* (1971) 1 SCC 286 (India)

jurisdiction clauses. If the clause does not abide by the Code, no further argument can be made by the parties in favour of this clause being exclusive.

It is when jurisdiction clauses do not use explicit words like 'only,' 'alone,' 'exclusive,' among a few others that courts face difficulty with regard to their interpretation of whether they are exclusive or not. Courts have, for a long time, tried to lay down a common rule for the use of these words in such clauses, but they have not yet come to a clear conclusion. Exclusive jurisdiction clauses, undoubtedly, have to be very crisp and precise,¹⁰ but the question is whether such explicit words make them so.

SOME LANDMARK CASES & RECENT DEVELOPMENT

*ABC Laminart Pvt Ltd v. AP Agencies*¹¹, a 1989 judgement, was one of the first cases related to exclusive jurisdiction clauses, wherein the importance of the express words mentioned above, was laid down. The Supreme Court held that those jurisdiction clauses, which consisted of these express words, were explicit and that there was no need to assess their exclusionary nature. The intention of parties to oust the jurisdiction of all other courts was held to be clear in such clauses. However, in cases where these clauses did not use such express terms, the meaning and interpretation of the clauses could not be found by an on the face reading of the clauses. Deciphering the intention of the parties was of utmost importance and the only way that could be done was by looking into the facts and circumstances of such cases extensively. *ABC Laminart* was the first one that laid emphasis on the phrase "*expressio unius est exclusio alterius*", which translates as "expression of one means exclusion of others".¹² According to the Supreme Court, this was only to be used once the intention of parties was made clear. If the facts and circumstances proved that the parties had in fact intended to oust the jurisdiction of all other courts except the one mentioned in their clause, this phrase was to be applied to the extent that no other court except the one mentioned in the clause could have jurisdiction on the matter. Since the agreement, in this case, did not contain express words in its jurisdiction clause, the

¹⁰ 'Jurisdiction Clauses' (Ashurst, 12 February 2020) <<https://www.ashurst.com/en/news-and-insights/legal-updates/jurisdiction-clauses/>> accessed 19 April 2021

¹¹ *ABC Laminart Pvt Ltd & Anr v AP Agencies, Salem* (1989) 2 SCC 163 (India)

¹² *Ibid*

Supreme Court delved into the facts and circumstances, after which it finally held that the jurisdiction clause in question, in this case, was non-exclusive and did not oust the jurisdiction of other courts. What the Court failed to state was how and why the facts and circumstances of this case, proved the lack of intention of the parties. Due to this, the non-appliance of “*expressio unius est exclusio alterius*”, seems arbitrary.

Since *ABC Laminart* was one of the first cases wherein the Supreme Court took a stance (though not a very clear one) on exclusive jurisdiction clauses, numerous later cases related to such jurisdiction clauses placed their reliance on this case.¹³ But since the Supreme Court in *ABC Laminart*, did not lay down guidelines to determine what may or may not be “an appropriate case” to apply “*expressio unius est exclusio alterius*”¹⁴, novel cases also just blindly stated whether or not the intention of parties to oust the jurisdiction of other courts was seen on the basis of the facts and circumstances, without providing actual reasons for the same.

The Supreme Court in a 1995 case, *Angile Insulations v. Davy Ashmore India Ltd. And Anr*,¹⁵ placed reliance on *A.B.C. Laminart* while announcing its verdict. The court held that the jurisdiction clause, which did not use express terms, was exclusionary. The clause was said to be “unambiguous and explicit,” but the Court did not lay down how the facts and circumstances of this case proved the intention of the parties. It was simply stated that the jurisdiction clause of the agreement was not void under Section 28 of the Act, and was not against public policy under Section 23 of the Act. However, this reasoning does not actually play a role in determining the intention of the parties. A similar case, *Balaji Coke Industry Pvt Ltd v. M/S Maa Bhagwati Coke*¹⁶ came up in 2009, where once again, the Supreme Court did not give a factual analysis as to why the jurisdiction clause, which did not have express words, was exclusionary.

¹³ *ABC Laminart* (n 11)

¹⁴ V Niranjana, ‘Swastik Gases v Indian Oil Corporation’ (*India Corp Law*, 22 August 2013) <<https://indiacorplaw.in/2013/08/guest-post-swastik-gases-v-indian-oi.html>> accessed 19 April 2021

¹⁵ *Angile Insulations v Davy Ashmore India Ltd & Anr* (1995) 4 SCC 153 (India)

¹⁶ *Balaji Coke Industry Pvt Ltd v M/S Maa Bhagwati Coke* (2009) 9 SCC 403 (India)

In a 2004 case – *M/S Hanil Era Textiles Ltd v. M/S Puromatic Filters (P) Ltd*¹⁷, the Supreme Court again relied on *ABC Laminart*.¹⁸ In this case, it held the jurisdiction clause to be exclusive and said that it ousted the jurisdiction of all other courts except that of Mumbai. The reason they held this clause, which did not contain express terms, to be exclusionary was that a larger part of the cause of action arose in Mumbai. But as per Section 20 of the Code,¹⁹ courts of a place where the cause of action has arisen even partly, have jurisdiction over the matter. So the rationale behind the application “*expressio unius est exclusio alterius*” here, again does not seem to be correct and it cannot be considered as reasoning which proves the intention of parties involved.

There have been many more cases like the ones stated above, where the courts have either not laid down the reasons as to why a jurisdiction clause without express terms was exclusionary or not, or have given reasons based on the fact that a larger part of the cause of action arose in the mentioned areas.

In 2013, however, another major judgement related to exclusive jurisdiction clauses was delivered in *Swastik Gases Pvt Ltd v. Indian Oil Corporation Ltd*.²⁰ although this case used *ABC Laminart* as its precedent,²¹ the judgement delivered here was quite different from the previous one. The Supreme Court took a much clear stand in this case. Madan B. Lokur J., in his concurring but different opinion, divided exclusive jurisdiction clauses into two parts – ones that used express words and ones that did not. He went on to say that the use of these specific words was “neither decisive” nor did it make “any material difference” in the outcome of the case. What, according to him, was of importance was the intention of the parties in the agreement. If two parties had already agreed to put in an unambiguous jurisdiction clause in their agreement, their intention to oust the jurisdiction of all other courts, was clear and could not be questioned. In other words, the very existence of an unequivocal jurisdiction clause in an

¹⁷ *M/S Hanil Era Textiles Ltd v M/S Puromatic Filters (P) Ltd* (2004) 4 SCC 671 (India)

¹⁸ *ABC Lamniart* (n 11)

¹⁹ Criminal Procedure Code 1908

²⁰ *Swastik Gases Pvt Ltd v Indian Oil Corporation Ltd* (2013) 9 SCC 32 (India)

²¹ *ABC Laminart* (n 11)

agreement clarifies the intent of the parties behind it.²² The Supreme Court, also shed light on the meaning and usage of the phrase “*expressio unius est exclusio alterius*,” by holding that this phrase was applicable in all those unambiguous jurisdiction clauses which did not use express terms.

The judgements delivered in both *ABC Laminart* and *Swastik Gases* were very different. *ABC Laminart*, on one hand, saw express words as important in exclusive clauses. If the clauses did not have these words, their facts and circumstances were to be looked into, in order to deduce the intention of the parties. *Swastik Gases*²³, on the other hand, did not put too much emphasis on these words. According to this case, the intention to oust the jurisdiction of all other courts was clear if the parties had simply inserted a jurisdiction clause, with or without express terms, in their agreement. Another thing that is of great relevance here is that *Swastik Gases* came out years after *ABC Laminart*. It used the latter as a precedent, but delivered an extremely different verdict, which in fact, clarified the application of the phrase “*expressio unius est exclusio alterius*”, something that was not done in *ABC Laminart*.

Due to the fact that *Swastik Gases* is a more recent judgement, it has been used as a precedent in almost all cases after 2013, related to exclusive jurisdiction clauses. But these cases, much like *Swastik Gases*, have not overruled what was laid down in *ABC Laminart*. In *Brahmani River Pellets Ltd v. Kamachi Industries Ltd*,²⁴ a 2019 divisional bench judgement, the Supreme Court, in accordance with *Swastik Gases*, held that where a contract specified the jurisdiction of a court of a particular place, all other courts are excluded and only the court mentioned in the clause could have jurisdiction over the matter. But the same case also emphasized *ABC Laminart* instead of overruling it.

The legal situation now is that when parties who have not included express terms in the jurisdiction clause of their agreement, approach a court, the court can either rely on *ABC*

²² DH Law Associates, ‘Exclusive Jurisdiction in Arbitration’ (*Manupatra*, June 2014) <https://www.manupatrafast.in/NewsletterArchives/listing/Newslex%20DHLaw/2014/Resources_%20Newslex%20-%20June%202014%20-%20D.%20H.pdf> accessed 21 April 2021

²³ *Swastik* (n 20)

²⁴ *Brahmani River Pellets Ltd v Kamachi Industries Ltd* (2020) 5 SCC 462 (India)

Laminart or *Swastik Gases*. With its reliance on *ABC Laminart*, the court can come to two conclusions after looking into the facts and circumstances of the case. One is that it can hold the clause to be exclusionary if facts and circumstances prove the intention of the parties to oust the jurisdiction of all other courts. Reliance on *Swastik Gases* will have the same outcome,²⁵ even though the approach will be different because according to this case, the intention is proved simply because the parties have included a jurisdiction clause. The second outcome can be that the court does not see the jurisdiction clause as exclusionary on the reasoning that the facts and circumstances fail to prove the intention of the parties. This is in complete contravention to *Swastik Gases*, and thus there is a major inconsistency in the law in relation to the interpretation of jurisdiction clauses that do not contain express words.

To eradicate this inconsistency and confusion of the law related to jurisdiction clauses, it is imperative for the courts to clarify the stance it has taken. The best way for it to do this is by overruling *ABC Laminart* due to its vagueness and arbitrariness. Once this happens, all unambiguous jurisdiction clauses, even though they contain express words or not, will be treated as exclusionary, based on *Swastik Gases*. The other approach which the court can take is to lay down guidelines as to how the facts and circumstances of a case can prove the intention of parties in an agreement. This will also make it easier for courts to interpret jurisdiction clauses and decrease the vagueness which was created by *ABC Laminart*.²⁶ However, since *Swastik Gases* is a more recent case, the first option seems far more practical and logical and will remove all the legal irregularities in the interpretation of jurisdiction clauses.

CONCLUSION

Although exclusive jurisdiction clauses may be enforced as contemplated by the Supreme Court in *Swastik Gas* in a vast majority of cases, it is necessary to recognize some exceptions. For instance, exclusive jurisdiction clauses are included in most adhesion contracts where there has been no negotiation of the clause and the bargaining power is unequal. Situations may also arise in which, the parties could not have reasonably foreseen that institution of proceedings in the

²⁵ *Swastik* (n 20)

²⁶ *ABC Laminart* (n 11)

chosen forum would cause extraordinary hardship or inconvenience. In view of this, the approach of the High Court of Calcutta in this regard appears to be a more pragmatic one.