

India-registered firms will have to rewrite all pacts of arbitration under English law

By [Maulik Vyas](#), ET Bureau | 25 Aug, 2015, 05.48AM IST

MUMBAI: Indian companies and locally registered units of multinationals may have to rewrite their agreements if they have put the clause of English law as the applicable governing rule for any arbitration. The [Bombay High Court](#) has clarified that two Indian parties putting the clauses of foreign law is against public policy.

The high court's ruling, however, is silent on whether companies can choose a foreign location for arbitration but apply Indian law, which may lead to outsourcing of disputes to other countries.

Many lawyers that ET spoke to are of the opinion that while two Indian parties cannot choose foreign law to govern their dispute, they can definitely opt for a foreign location for arbitration.

Already Singapore, London and [Paris](#) are the favourite locations for arbitration involving top Indian companies, and one of the reasons for this is the cost effectiveness and efficiency of those centres.



The high court's clarification came in a recent case involving Addhar Mercantile and [Shree Jagdamba Agrico Exports](#). In this case, the companies, when they entered into an agreement, decided to have the arbitration seat in India or Singapore if any dispute developed between them. They also agreed that they would resolve the dispute under the English law, which the HC struck down after Addhar Mercantile went to court arguing that since both parties were from India, they cannot be allowed to derogate Indian law.

"In my view since both the parties are Indian and cannot derogate the Indian law, this submission of the [learned counsel](#) has no substance and is rejected," Justice RD Dhanuka of the Bombay High Court ruled.

In January, Japanese telecom giant [NTT DoCoMo](#) moved the [International Court for Arbitration in London](#) against its Indian partner, [Tata Teleservices](#). [Reliance Industries](#) has moved to initiate arbitration against the oil ministry while [British telecom major](#) Vodafone has talked about proceeding against the [Indian government](#). These disputes involve at least one foreign party and so can go into foreign arbitration.

Many other Indian companies may take a leaf out of such high-profile cases and choose foreign venues for settlements, said lawyers.

Already, India is a major contributor to arbitration cases in Singapore. According to Pranav Mago, head of [South Asia](#) at [Singapore International Arbitration Centre](#) (SIAC), India has been one of the top three contributors to SIAC cases in the past three years. In 2012, as many as 49 of the total 235 cases involved an [Indian party](#). This number rose to 85 out of 259 cases in 2013.

"Indian parties will have to be [careful](#) to make sure that contracts inter se are governed under the Indian law. However, the (high) court has not said anything about seat of arbitration," said Haigreve Khaitan, [senior partner](#) at law firm Khaitan & Co.

"This means, two Indian parties can arbitrate in other jurisdiction by choosing foreign seat of arbitration as long as they are governing the dispute under Indian law."

The [general counsel](#) at a Mumbai-based pharmaceutical company said the order will have "far-reaching implications" on those incorporated in India but have agreed to arbitrate disputes under English law.

Rajinder Sharma, director and general counsel-South and West Asia at [Samsung](#), said any company registered in India is an Indian citizen being a juristic person under the law and its contractual transaction inter se with any other Indian citizen can't be governed under any other country's law. While companies will increasingly opt for locations and venues outside India for arbitration due to delay and pathetic condition of ad hoc Indian arbitrations, the governing law will still be Indian, he said.

Lawyers don't see the high court order as final. "Similar matters are pending in other courts which will have to be finally decided by the Supreme Court," said Vyapak Desai, partner at Nishith Desai Associates.