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Ensuring Effectiveness of Forum Selection Clauses Under GOL 5-1402

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It has been said that "[n]othing is more wasteful than litigation about where to litigate."[1] To avoid such satellite litigation, contracting parties often include in their agreements a forum-selection clause, also known as a choice-of-forum clause. In such a clause, the parties agree in advance as to what court will be empowered to resolve any disputes that may arise between them.

The modern trend in New York, as elsewhere, is to honor such clauses, by entertaining litigation brought in the parties' agreed-upon forum and dismissing actions brought outside that forum—particularly where the contract provides for the selected forum to be the exclusive one.[2] However, one line of case law has held that a New York court could still dismiss a case filed in New York based on such a clause, where the parties and their dealings had no meaningful connection with New York beyond the clause itself. As a result, some cases have been heard in a court other than the New York court that the parties had agreed upon. And even where the New York court decided to honor the forum-selection clause, it might do so only after motion practice in which the defendant sought a forum non conveniens dismissal.

In 1984, the New York State Legislature sought to reduce these disputes by enacting Section 5-1402 of the General Obligations Law. GOL 5-1402 provides that notwithstanding any other statute, an action arising under or relating to a contract may be brought in New York, even against a foreign individual or corporation, where the contract contains a New York choice-of-law clause, a New York choice-of-forum clause, and a clause in which the parties submit to New York jurisdiction, and the transaction involves at least $1 million. At the same time, CPLR 327, which codifies the common-law doctrine of forum non conveniens, was amended to provide that an action falling within GOL 5-1402 shall not be dismissed on conveniens grounds.

In the first judicial decision applying the new statutes, *Crédit Français Int'l v. Sociedad Financiera de Comercia,* Justice Edward Greenfield recognized the public policy that gave rise to the legislation:

> [T]he enactment of the statute now puts beyond argument the policy question of whether New York courts should burden themselves with litigation involving nonresidents where the only nexus is the contractual agreement to designate New York as a forum. We have declared in no uncertain terms that we are prepared to accept jurisdiction of such disputes provided that the matter in controversy is of sufficient substance, so that we are not burdened by the petty disputes of persons from out of State. Earlier cases, which expressed reluctance to jurisdiction based on agreement are no longer a guide….

Crafting a binding provision that disputes will be resolved in New York is not a simple matter of throwing boilerplate choice-of-forum language into an agreement.

> New York, as the center of international trade and finance, has expressly recognized, as a service to the business community, that its courts will be hospitable to the resolution of all substantial contractual disputes in which the parties have agreed beforehand that our neutrality and expertise should govern their relationships. Just as the dollar has become the international standard for monetary transactions, so may parties agree that New York law is the standard for international disputes….[3]

Continued Application

In the three decades since GOL 5-1402 was enacted, the courts have continued to hold that where a contract satisfies the statute and an action arises out of or relates to the contract, the New York courts must entertain the action.

A 2009 decision by Justice Melvin Schweitzer illustrates the strength of GOL 5-1402.[4] The plaintiffs were U.S.-based investment funds, and the defendants were Israeli corporations. Defendants moved to dismiss the complaint on grounds including forum non conveniens. Justice Schweitzer evaluated factors such as the connections between the litigation and New York, the convenience of witnesses, the location of related litigation, and the applicable substantive law. He concluded that the balance of convenience weighed in favor of litigating the case in Israel rather than New York, and accordingly, dismissed most of the complaint.

However, dismissal was denied as to one cause of action, in which plaintiffs contended that defendants had violated the express terms of a Securityholders Agreement. That agreement provided that any disputes arising under it would be resolved in a New York court and that the parties consented to the court's jurisdiction over such disputes. The court concluded that the statute obliged it to entertain this part of the case, regardless of any forum non conveniens factors or judicial economy concerns that might otherwise apply:

> Under [CPLR 327(b) and GOL 5-1402], the court has clear instructions that it must grant jurisdiction over the plaintiffs' claims relating to the provisions of the Securityholders Agreement with respect to their claim [arising under the agreement], and also must apply the laws of the State of New York to the resolution of this claim…. The court has little discretion in this regard….
>
> The claim under the Securityholders Agreement must be adjudicated in New York in accordance with the express agreement of the parties notwithstanding this court's holding that the relevant forum non conveniens tests mandate resolution of the other claims in Israel.

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Not a Magic Bullet

Although GOL 5-1402 upholds certain forum-selection clauses, it does not excuse compliance with other requirements for filing and maintaining an action in New York. For example, it does not shield an action from being stayed under Business Corporation Law §1312, which closes the New York courts to an action commenced by an unauthorized foreign corporation that is doing business within the state without authority, until the corporation has obtained authorization to do business in New York and all back franchise taxes have been paid.[5]

In one case, the First Department held that even though the statute shielded a "preemptive" declaratory judgment action filed in New York from dismissal, that action could still be stayed where another, more comprehensive action between the parties and their affiliates was pending in another forum, in which the sole issue presented in the New York action would necessarily be resolved.[6]

Drafting the Clause

If parties located in New York enter into a contract to be performed in New York, they may not need to rely on GOL 5-1402 as a basis for upholding their chosen forum. However, where parties located outside New York and entering into a contract unconnected with New York wish to ensure that New York will exercise jurisdiction over any disputes, they must ensure that the agreement satisfies all the preconditions of GOL 5-1402. If they fail to do so, they take the risk that a New York court will dismiss the case despite a contractual forum-selection clause. Indeed, in some cases the New York court will be required to dismiss such an action despite the parties' desire for a New York forum.

In *Techo-TM v. Fireaway*, 123 A.D.3d 610, 999 N.Y.S.2d 64 (1st Dept. 2014), the Appellate Division dismissed a breach-of-contract action between two foreign corporations, holding that the New York courts lacked jurisdiction. The parties' transaction involved more than $1 million, and it expressly provided that any action brought by the plaintiff against the defendant under the contract would be resolved in New York. Moreover, the defendant consented to New York jurisdiction in any such action.

The defendant nonetheless moved to dismiss the action pursuant to Business Corporation Law §1314(a), which provides, in substance, that the New York courts will not entertain an action between two foreign corporations unless the dispute has some connection to New York. (The term "foreign corporation" here refers to sister-state and foreign-country corporations.) Sufficient connections to New York under BCL 1314 exist where (1) the foreign corporations entered into a contract made or to be performed within New York, (2) the subject-matter of the action is situated within New York, (3) the cause of action arose within New York, (4) the defendant foreign corporation is subject to personal jurisdiction under New York's long-arm statute, CPLR 302, or (5) the defendant foreign corporation is authorized to do business in New York.

The *Techo-TM* court concluded that none of these exceptions applied in this case. The defendant foreign corporation neither did business nor was authorized to do business in New York. The contract was not made and was not to be performed in New York. And the defendant's consent to New York's exercise of jurisdiction over it, as reflected in the forum-selection clause, was held insufficient to satisfy BCL 1314, on the (seemingly hyper-technical) ground that consent is recognized as a basis for personal jurisdiction in New York under the general jurisdiction statute, CPLR 301, rather than the long-arm statute, CPLR 302. Accordingly, dismissal of the action "for lack of subject matter jurisdiction" was mandatory.

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At first blush, this result may seem inconsistent with GOL 5-1402, which is not mentioned in the decision. The record of the case shows that the parties' contract satisfied most of the conditions required for GOL 5-1402 to apply. It included an express New York choice-of-forum clause, the defendant's consent to New York jurisdiction in such a suit, and a transaction involving over $1 million.

However, the parties' contract provided that it was to be governed by and construed under the law of Washington State, not of New York. As noted above, to fall within GOL 5-1402, a contract must include a New York choice-of-law clause as well as a New York choice-of-forum clause. This makes sense, because while the New York courts are experienced at determining and applying the laws of other jurisdiction where appropriate, their greatest expertise is necessarily with the law of New York. To invoke the Legislature's especially expansive embrace of the New York courts to resolve significant contract disputes, the parties must select New York law to govern their contract, as well as the New York courts to enforce it.

Conclusion

Crafting a binding provision that disputes will be resolved in New York is not a simple matter of throwing boilerplate choice-of-forum language into an agreement. The parties should ensure that wherever possible, they have satisfied all of the conditions to the applicability of GOL 5-1402: a New York choice-of-law clause, a New York choice-of-forum clause, all parties' consent to jurisdiction in New York, and a representation that the transaction at issue involves more than $1 million (where that is the case and it is not already obvious in the document).

In addition, where the parties are in agreement that all disputes between them should be heard and resolved only in New York, the choice-of-forum clause should be exclusive rather than permissive. It should be clear as to whether the parties are amenable to suit in federal as well as state court, if federal jurisdiction might exist. The clause should be written broadly so as to apply to any and all claims that may arise from the parties' relationship, rather than merely claims for breach of the contract itself.

Such a carefully thought-out and broadly worded clause will increase the odds that if the parties do later wind up in court, they can focus their attention on litigating and resolving the economic substance of their dispute, rather than having to expend their and the courts' resources on "litigation about where to litigate."

1. *Bowen v. Massachusetts*, 487 U.S. 879, 930 (Scalia, J., dissenting).
2. See, e.g., *Sebastian Holdings Inc. DB AF*, 78 A.D.3d 446, 912 N.Y.S.2d 13 (1st Dep't 2010); *Sterling Nat'l Bank v. Eastern Shipping Worldwide*, 35 A.D.3d 222, 222, 826 N.Y.S.2d 235, 237 (1st Dept. 2006). See generally, T. Barry Kingham, Enforcement of Forum Selection and Arbitration Clauses, in Robert L. Haig, ed., "Commercial Litigation in New York State Courts," ch. 12 (3d ed. 2010 & supp. 2014).
3. *Crédit Français Int'l v. Sociedad Financiera de Comercia*, 128 Misc.2d 564, 569-70, 490 N.Y.S2d 670, 675 (Sup. Ct. N.Y. Co. 1985).
4. *Imaging Holdings I v. Israel Aerospace Industries*, 26 Misc.3d 1226(A), 2009 N.Y. Slip Op 52749(U), 2009 N.Y. Misc. LEXIS 3630 (Sup. Ct. N.Y. Co. Dec. 11, 2009). The author of this column represented parties in certain litigation related to *Imaging Holdings*, but not in *Imaging Holdings* itself.
5. *Credit Suisse Int'l v. URBI, Desarrollos Urbanos, S.A.B. de C.V.*, 41 Misc.3d 601, 971 N.Y.S.2d 177 (Sup. Ct. N.Y. Co. 2013).
6. *AIG Financial Prods. Corp. v. Penncara Energy*, 83 A.D.3d 495, 922 N.Y.S.2d 288 (1st Dept. 2011).

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