International commercial litigation in New York

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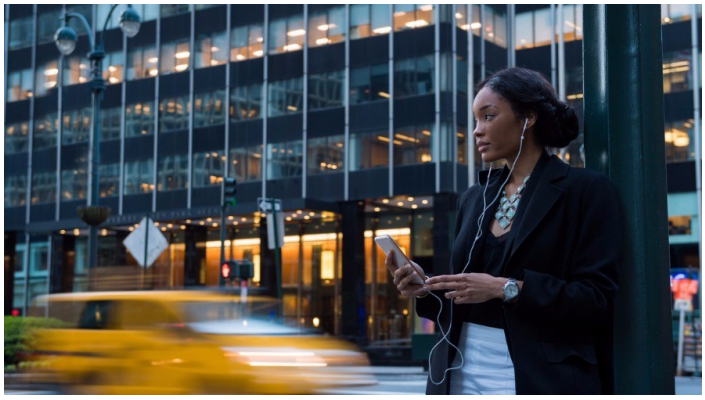

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New York has positioned itself as an attractive forum for resolution of international commercial disputes, with flexible rules permitting contracting parties to agree to procedures specific to their needs. That choice works best for parties who take the necessary time in advance to negotiate not only choice of forum, but also the procedural mechanisms of their choice.

New York is a sophisticated international city, and a hub for international banking, finance, commerce, and culture. In 1993, the New York state courts established a Commercial Division to develop expertise in handling domestic and international commercial cases. Since then, the Commercial Division has repeatedly upgraded its rules and procedures to make itself a forum of choice for complex international and domestic matters. Parties entering into international commercial agreements should consider whether New York state is a viable option for dispute resolution. Indeed, foreign parties in commercial transactions with U.S. parties can often obtain important concessions on other issues in exchange for doing so.

International parties may also find themselves litigating in New York without advance choice. For example, when international contracts or business arrangements have no forum selection clause, New York may be the only (or the best) place to obtain personal jurisdiction over a defendant. Likewise, given the United States' and New York's relatively broad views of personal jurisdiction, foreign persons may find themselves hauled into court here, contrary to their expectations.

New York has a well-developed, sophisticated body of substantive and procedural commercial law, suitable for resolution of complex international and domestic commercial legal issues. It has a large volume of reasoned, reported cases establishing and explaining this law. The New York courts also regularly apply foreign commercial law, or the law of other States, to resolve multinational or multistate commercial disputes.

Litigating in New York can be relatively speedy and efficient, especially where jury trials are waived. Jury-trial waivers in New York increase efficiency, because trial-ready commercial cases are scheduled for bench trials fairly quickly, but take significantly longer to be heard by a jury. Furthermore, jury verdicts are less predictable, harder to appeal, and usually unexplained, while a court determination will be reasoned.

New York's rules for pleading, procedural and dispositive motions, discovery (including e-discovery), and trial are user-friendly, and case law interpreting them is well-developed and easy to find online. Commercial judges actively manage their cases with a goal of expeditious resolution. They generally permit (or require) the parties to proceed with discovery while dispositive motions are pending. They demand that the parties cooperate during discovery, especially on e-discovery issues, and make good faith settlement efforts. They will often seek to resolve discovery issues by conference, without extensive motion practice. Thus, while litigation is never the desired outcome of a commercial transaction, the New York commercial courts can be an attractive forum, if necessary.

Choosing a New York Forum

Under NY-BCL §1314, New York courts ordinarily do not have subject matter jurisdiction to hear disputes between two non-New York business entities unless the transaction, the subject matter, the cause of action, or one of the parties are sufficiently connected to New York. However, New York permits contracting parties to agree to a New York forum, even if none of them have any New York connections, provided they comply with NY-GOL §§5-1401 and 5-1402.

Under §5-1401, parties to commercial contracts with a value of at least $250,000 may, with limited exceptions, agree by contract to the application of New York law, even if the transaction and parties have no connection to New York.

Under §5-1402, parties who choose New York law under §5-1401 may further agree, in their contract, to have disputes arising under that contract resolved in New York, if:

a. The value of the contract is at least $1 million; and

b. The parties agree to submit to personal jurisdiction in New York.

See, e.g., *IRB-Brasil Resseguros, S.A. v. Inepar Invest., S.A.*, 20 N.Y.3d. 310, 315 (2012); *Hemlock Semiconductor Pte. Ltd. v. Jinglong Indus. & Comm. Group Co., Ltd.*, 56 Misc.3d 324 (N.Y. Sup. Ct. 2017); *Bristol Inv. Fund Ltd. v. ID Confirm, Inc.*, 2008 N.Y. Misc. LEXIS 7549, *6-7 (N.Y. Sup. Ct. 2008). However, failure to follow these two statutes may deprive a New York court of subject matter jurisdiction, absent another New York connection. See *DDR Real Estate Servs. v. Burnham Pac. Props.*, 1 Misc.3d 802 (Mon. Sup. Ct. 2003), aff'd 12 A.D.3d 1182 (4th Dep't 2004).

Practical Issues

When agreeing to a New York forum, foreign parties should also consider whether to agree in advance to procedures for service of process, discovery, trial testimony, legal fees, publicity, and enforcement of judgments.

a. Process: The United States is a signatory to the Hague Convention for Service of Process, and many Hague Convention countries permit service by postal channels. Parties should consider the laws of all contracting parties, including non-Hague Convention signatories. For example, if lawful in the receiving country, a contract could permit service by registered international mail, with a copy by email. See, e.g., *Alfred E. Mann Living Trust v. ETIRC Aviation S.A.R.L.*, 910 N.Y.S.2d 418, 422 (1st Dep't 2010) (service of process by email in Hague signatory country valid if contractually agreed to); *LF USA v. Eurostyle Group, Ltd.*, 2014 N.Y. Misc. LEXIS 473 (N.Y. Sup. Ct. 2014) (service by international certified mail valid, where contractually agreed to); but see *Rockefeller Tech. Invests. (Asia) VII v. Changzhou SinoType Tech. Co., Ltd.*, 24 Cal. App.5th 115, 131-133 (Cal. App. 2018) (disagreeing with *Alfred E. Mann*, and holding that parties may not contract around Hague Convention service requirements).

b. Discovery: The broad discovery available in the United States may create difficulties under foreign data protection laws. While an analysis of the conflict between U.S. discovery rules and foreign data protection rules is beyond the scope of this article, New York courts may balance the competing policies and give some leeway to parties caught in this dilemma.

Parties may also agree in advance to apply New York Commercial Division Rule 9, entitled "Accelerated Adjudication," by adding the following (or similar) language to their contract:

Subject to the requirements for a case to be heard in the Commercial Division, the parties agree to submit to the exclusive jurisdiction of the Commercial Division, New York State Supreme Court, and to the application of the Court's accelerated procedures, in connection with any dispute, claim or controversy arising out of or relating to this agreement, or the breach, termination, enforcement or validity thereof.
22 N.Y.C.R.R. §202.70, Rule 9(a). Alternatively, parties may agree to Rule 9 after litigation commences.

Under Rule 9, parties agree to have their case trial-ready in nine months and irrevocably waive: (a) any objection based on lack of personal jurisdiction or forum non conveniens; (b) the right to trial by jury; © the right to punitive damages; and (d) the right to any interlocutory appeal. More important, under Rule 9, parties waive any discovery except either: (a) discovery the parties agree to, or (b) the default limited discovery provided by Rule 9.

Default discovery under Rule 9 may be more expansive than foreign discovery, as it provides for seven depositions per side, seven interrogatories, five requests to admit, and electronic discovery limited to document custodians most likely to have material evidence. However, under Rule 9, international parties may tailor their discovery proceedings to be more similar to proceedings they are familiar with and/or best suit to their needs.

Parties may use Rule 9 to comply, to some extent, with foreign data protection (i.e., by agreeing to redact personal information). Arguably, similar contractual discovery limitations are valid, even absent Rule 9. The U.S. trend is towards freedom of contract in issues such as choice of forum, personal jurisdiction, jury trial waivers, and arbitration. Theoretically, pre-agreed discovery limitations should be similarly upheld. However, this issue has not been litigated extensively, and it is not yet clear that courts would uphold pre-agreed discovery limitations absent a rule permitting them.

Conversely, broad discovery allows parties to obtain evidence necessary to prove their case, prevents trial by surprise, and gives parties realistic assessments of their cases for settlement purposes. Foreign parties may be attracted to New York because of the broad discovery available. Using Rule 9 to allow for discovery more extensive than available in a foreign country, but less than ordinarily available in New York, could be a reasonable compromise.

New York also permits broad non-party discovery. However, where non-parties are not U.S. citizens and reside abroad, it may not be easy to compel them to participate in discovery. While New York courts may issue letters rogatory seeking foreign judicial assistance, compelling discovery from unwilling foreign non-parties may become expensive, or even impracticable, depending on their location.

c. Trial Testimony: Parties to New York proceedings may be compelled to produce persons under their control (i.e., officers, directors, employees) as trial witnesses, even if those persons are not themselves within the court's subpoena power. See CPLR §2303-a. Alternatively, the parties may agree to use videotaped depositions of these witnesses at trial. If there are foreign witnesses outside the parties' control who will not voluntarily appear for trial, the only choice may be letters rogatory for videotaped depositions.

d. Legal Fees: Generally, under New York law, prevailing parties are not entitled to recover legal fees. However, the parties can agree to shift fees to the losing party by contract, or explore contingency fee arrangements and third-party litigation funding.

e. Public Proceedings: U.S. court proceedings, including most filings, are presumptively public. Courts do permit limited confidentiality orders, requiring parties to keep certain discovery confidential for good cause (privacy, foreign data protection issues, commercial sensitivity, trade secrets, etc.). Courts may also permit parties to file sensitive information under seal for good cause. See 22 N.Y.C.R.R. §216.1. Nevertheless, court

decisions referring to this information will likely be public. If a matter goes to trial or hearing, a commercial court is highly unlikely to seal a courtroom or prevent the press from reporting on proceedings.

f. Enforcing Judgments: Where a New York judgment will need to be enforced abroad, contractual provisions regarding jurisdiction, process, and enforcement should be acceptable in the jurisdictions of potential enforcement. Contracts can also permit parties to commence proceedings to enforce a New York judgment, or permit any necessary additional proceedings, in any jurisdiction where a judgment debtor has assets.

Conclusion

New York has positioned itself as an attractive forum for resolution of international commercial disputes, with flexible rules permitting contracting parties to agree to procedures specific to their needs. That choice works best for parties who take the necessary time in advance to negotiate not only choice of forum, but also the procedural mechanisms of their choice.

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