MORE ON CHOICE OF LAW PROVISIONS IN INTERNATIONAL CONTRACTS

Smarter Way to Cross Blog Archives
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I would like to build on the previous posts of my colleagues Vicky Saxon and Dave Reed regarding choice of law and, in particular, choice of New York law. Desperate for a blog topic? Perhaps. But in my defense, I was asked the following question by a Canadian lawyer a week or so ago. His Canada-based client was going to sign a license agreement with a non-North American licensee, and the parties had agreed upon what was perceived to be a neutral New York govern law provision. As previously detailed by Vicky, this is a valid choice of law under New York General Obligations Law Section 5-1401 provided the contract involves not less than $250,000. The Canadian lawyer was concerned that New York's pre-sale franchise registration and disclosure law might apply to the relationship even though there was no connection to New York. By way of background, the scope of New York franchise law is very broad and often applies to licensing relationships that the parties might not otherwise consider to be franchises. Was he right to be concerned?

It is fairly well established that New York franchise law (New York General Business Law, Article 33, Sections 680 through 695) may apply to franchises in other states (see *Mon-Shore Mgmt., Inc. v. Family Media Inc.*, 584 F. Supp. (S.D.N.Y. 1984)) and arguably to franchises located outside the United States. New York's franchise law applies when an offer or sale of a franchise is made in New York. The definition of when an offer or sale is made in New York is very broad. Summarizing Section 681. 12, an offer or sale of a franchise is made in New York when (i) the offer originates from the state, (ii) the offer is directed by the offeror to the state and received at the place to which it was directed, (iii) the acceptance of an offer is communicated to the offeror from the state, (iv) the franchisee is domiciled in the state, or (v) the franchised business is or will be operated in the state. If the franchise agreement and the parties have no connection to New York other than the choice of law, then none of these tests are met, and New York franchise law should not apply. However, this was not the conclusion in *Mon-Shore*, where the court stated that a New York choice of law clause was sufficient for it to apply New York franchise law. Fortunately, this conclusion was refined recently in *JM Vidal, Inc. v. Texdis USA, Inc.*, 746 F. Supp. 2d. 599 (S.D.N.Y. 2011). The court in *JM Vidal* held that a New York choice of law provision was not sufficient for it to apply New York's franchise law to a franchise located outside of New York. It is important to note that this court stated its conclusion would be different if the license agreement contained a provision

explicitly deeming it made in New York (as was the case in *Schwartz v. Pillsbury, Inc.*, 989 F.2d 840 (9th Cir. 1992) and also in *Mon-Shore*). However, the *JM Vidal* ruling is not without controversy. The *JM Vidal* court may have gone too far in finding that an offer made by a corporation with its principal office in New York did not originate from New York. However, this point does not alter the general proposition that a New York choice of law clause will not implicate a New York law that otherwise, under its own scope provisions, does not apply.