

NEW YORK MAY BE YOUR BEST BET WHEN CHOOSING THE GOVERNING LAW AND FORUM FOR YOUR CROSS-BORDER CONTRACT

Smarter Way to Cross Blog Archives
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A blog entry by my colleague David Reed spoke of the importance of choice of law and forum provisions in international contracts and suggested generally factors that might influence the choice of law and forum. The purpose of this post is to advance the proposition that New York law and forum may be a good choice in many cases, assuming a decision has been made that U.S. law will apply. This is in part because of the provisions of New York General Obligations Law (GOL) Sections 5-1401 and 5-1402 (collectively, the GOL Provisions).

What are the GOL Provisions? GOL §5-1401 provides that the parties to a contract, involving not less than \$250,000, may agree that New York law governs their rights and duties under the contract—**whether or not such contract bears a reasonable relation to New York**. GOL §5-1402 provides a party to a contract that includes such a choice of New York law and that involves not less than \$1,000,000 may maintain an action to enforce such contract in the courts of the State of New York against another party that has agreed in the contract to submit to the jurisdiction of the courts of the State of New York.

As a result of the GOL Provisions, if the parties to a contract meeting the \$1,000,000 threshold have selected New York law and forum, a court of the State of New York should retain and determine any action brought to enforce such contract without regard to the matter's connection to New York. Forum non conveniens or lack of reasonable relation to the State of New York should not be factors. The GOL Provisions make it fairly certain that such a choice of New York law and forum will be enforceable, eliminating a more subjective analysis as to whether a particular matter has an adequate relationship to justify a choice of the law and forum of New York or some other jurisdiction.

But why pick New York law and forum? We have established that the selection of New York law and forum should be enforceable if the dollar thresholds of the GOL Provisions are met. But that doesn't fully answer the question of why parties should select New York law and forum in reliance on the GOL Provisions, particularly when New York may not have a connection to the matter.

One reason the parties may want to select New York law is because New York has a more sophisticated and developed body of commercial law than the other U.S. states, which makes the outcome of a dispute more predictable. The GOL Provisions in fact serve to promote the further development of this body of law.

Another reason is uniformity in multistate transactions. One common situation involves guaranties or security agreements given by numerous entities that may be located or have assets in various states within the United States. By selecting New York law, all of the documents of all of the guarantors can be the same even though some (or even all) of the guarantors have no connection to New York.

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Selecting New York law and forum may also facilitate the giving of an opinion by a New York lawyer who may already have a role in a deal rather than having to engage a lawyer in another jurisdiction. As New York lawyers, we encounter this last situation frequently, and most typically we find that parties are agreeable to a choice of New York law and forum. In particular, lenders generally view the law of New York as more favorable than the law of certain other states (e.g., California) and are frequently willing to accommodate a choice of New York law.

Other considerations. The following series of questions and answers will highlight some additional considerations relating to the GOL Provisions.

What if the contract doesn't meet the thresholds in the GOL Provisions?

The parties may still select New York law and forum. But the enforceability of such choice of law and forum will be subject to other conflict of law principles of New York law. For example, a choice of law clause may be held unenforceable if there is no real connection to New York. Similarly, a New York court could refuse to entertain a matter, notwithstanding the choice of New York forum, on the basis of forum non conveniens. But the GOL Provisions aren't themselves a basis for invalidating any choice of law or forum.

Are there any situations where a choice of law and forum made in reliance upon the GOL Provisions may not be enforceable?

Yes.

- GOL §5-1401 by its terms does not apply to labor and personal contracts and may be overridden by certain choice of law provisions of the Uniform Commercial Code set forth in GOL §5-1401. However, these exceptions from GOL §5-1401 should typically have no effect on a guaranty, security agreement, acquisition agreement, or other typical contract among commercial parties.
- A court may not enforce a choice of law or forum that was obtained by fraud or overreaching.
- Courts have suggested that the enforceability of choice of law clauses, including one made pursuant to GOL §5-1401, is subject to potential constitutional restrictions imposed by the full faith and credit clause and the doctrine of comity. Legal opinions often include a carve-out for such constitutional limits. But it would take a very compelling public policy interest of another jurisdiction for a court to override on a constitutional basis the parties' choice of law.
- The enforceability of the choice of New York law doesn't mean that the underlying agreement is enforceable under New York law. In determining the enforceability of an agreement governed by New York law, the law of another jurisdiction may still have relevance. Legality of a contract is determined under New York law by reference to the law of the place of performance. If the contract is illegal under the law of another jurisdiction where the contract is to be performed, such illegality will render the contract unenforceable under New York law if the parties knew or were deliberately ignorant of such illegality.

Do I need to expressly refer to the GOL Provisions when selecting New York law and forum?

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No. Out of an abundance of caution, we frequently use choice of law and forum provisions that do contain references to the GOL Provisions. But the New York Court of Appeals in a recent case upheld a choice of law provision under GOL §5-1401 that had no reference to such provision and further held it was not necessary to expressly exclude conflicts of law principles when selecting the law of New York.

Does GOL §5-1402 apply to a consent to the jurisdiction of the federal courts of the United States located in New York?

No. GOL §5-1402 mandates that the *courts of the State of New York* exert jurisdiction over a matter if there has been a consent to the jurisdiction of such courts. The parties cannot take advantage of GOL §5-1402 by agreeing to the jurisdiction of the *courts of the United States* located within New York.