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New York Law as the Gold Standard Choice for Global Business Contracts

By Andre R. Jaglom
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A Jamaican rum maker and a Mexican liquor distributor walk into a bar. Funny thing is, it's the New York Bar. When a Jamaican distiller needed to negotiate a contract for the distribution of its rums in Mexico, why did it engage a New York lawyer to negotiate and draft the contract? Because, before they had agreed on any of the commercial terms, the two international businesses involved had agreed that they wanted their relationship to be governed by New York law.

Empirical research suggests that this is not unusual. The substantive benefits to international and domestic businesses of New York law and New York courts and arbitral tribunals have made it a common choice for business contracts around the globe. A study of choice of law and forum clauses in contracts reported in SEC filings by public companies in 2002 found that almost half chose New York law, three times the number choosing the next closest state, Delaware.[2] The authors of a similar study of international contacts observed, "Received wisdom is that English and New York law dominates international business transactions."[3] At least anecdotally, New York thus competes well with English law as the preferred choice for international agreements, despite England's substantial head start that results from the many British Commonwealth countries and former British colonies – including our own! – that have a more than passing familiarity with English law. Where that head start is absent, New York does even better. Central American lawyers, for example, are reported to prefer New York law to govern international agreements.[4]

> The reasons for the preeminence of New York are plain: "New York offers international commercial businesses, investors and co-venturers, as well as exporters and importers around the world, the choice of one of the most sophisticated and developed bodies of contract, commercial, and business partnership law available anywhere to govern their transactions and investments. New York law includes an almost inexhaustible set of rules and precedents covering a wide spectrum of business transactions, ranging from purchases, sales and leases of goods, property rights and business interests, to business collaborations, partnerships, and joint ventures."[5]

Equally important, New York law is guided by the intent of the parties, as expressed in the words they chose in the contract, making the results predictable and certain. The New York Court of Appeals reaffirmed this principle just this year in *159 MP Corp. v Redbridge Bedford.*[6] As former New York Court of Appeals Judge Howard A. Levine observed in discussing that decision, "The majority held that this text-based means of interpreting contracts was "[i]n keeping with New York's status as the pre-eminent commercial center in the United States, if not the world."[7] Quoting a decision by the late Chief Judge Judith Kaye, herself a leading advocate for New York law and arbitral fora, Judge Levine added, "The New York approach, the cases hold, 'imparts stability to commercial transactions . . . . [A]nalysis that begins with consideration of extrinsic evidence of what the parties meant . . . unnecessarily denigrates the contract and unsettles the law.'"[8]

Thus, "New York contract law is private-party driven. It provides a broad framework for honoring, interpreting and enforcing agreements shaped and negotiated by private parties without attempting to dictate the content of such agreements . . . . New York courts are loathe to substitute their judgment for the business decisions of parties to commercial transactions."[9] Instead, New York places great emphasis on the written word, and the specific words the parties chose to express their intent. New York requires many types of commercial contracts to be in writing, going beyond the practice of many civil law jurisdictions. But few practitioners would disagree that this merely embodies best practices for commercial relationships. And New York contract law will not consider evidence of prior negotiations and representations between parties in construing agreements, nor will it consider collateral agreements where the parties have included an "entire agreement" or "merger" clause in the contract. New York law requires that written contracts be interpreted according to the words chosen by the parties and will consider oral evidence of intent only if the written terms "are so ambiguous that cannot reasonably be construed on their own."[10]

In short, parties have freedom of contract, and New York will enforce the terms upon which they agree.

Moreover, New York imposes a high standard of conduct on contracting parties. New York law incorporates the implied covenant of good faith and fair dealing into all contracts. At a minimum, this imposes a duty of honesty in commercial dealings, and often a duty to act in accordance with commercial standards of fair practice in the trade.[11] As Judge Benjamin Cardozo famously wrote about the duties business partners and co-venturers owe to each other, "something more than the morals of the market place is required in the relations of business partners to each other" and "only the punctilio of an honor most sensitive" would suffice.[12]

New York also honors the parties' bargain, even in the face of economic hardship. Such hardship alone will not excuse performance of the agreement, unless performance is rendered impossible by an event that negates a basic assumption of the parties and was unanticipated and unforeseeable, so that the parties could not have been expected to address it in the contract.[13] The standard for sales contracts under the Uniform Commercial Code is somewhat less strict; there may be some relief available when performance has become "impracticable."[14] But consistent with the philosophy of leaving to the parties

the terms of their relationship, they may provide in the contract for adjustments in the face of a fundamental change in circumstances, so long as the circumstances and bases for making such adjustments is stated clearly.[15] Similarly, *force majeure* clauses excusing parties from performance as a result of circumstances beyond their control will be honored – but only in circumstances of the type expressly set forth in the contract as excusing performance.[16]

Finally, New York offers excellent resources for the resolution of contract disputes. New York has established the Commercial Division of the New York State Supreme Court in counties with significant commercial caseloads, with judges whose sole responsibility is the resolution of commercial disputes. These judges thus have broad commercial experience and can give undivided attention to commercial disputes without being diverted to handle criminal, matrimonial, family and other matters. The Commercial Division rules are designed to be efficient and effective, and to expedite resolution of cases. Non-U.S. litigants often are fearful of the expense of litigation in the U.S., particularly the costs of the far more extensive discovery and disclosure generally permitted in the U.S. in contrast to other jurisdictions. The Commercial Division has implemented rules that limit discovery and adopted the notion of proportionality of discovery to the matter involved in the case.[17] Agreements of the parties in the contract to limit discovery will likely be honored as well. In addition, parties can agree to waive jury trial and awards of consequential, special, and punitive damages. The U.S. federal courts sitting in New York are also highly regarded, although the dispute must meet one of the tests for federal jurisdiction, such as a question of U.S. federal law, of international law recognized by the U.S. (such as construction of a treaty to which the U.S. is a party), or diversity of citizenship of the parties as defined by federal law,[18] as well as the venue requirements, which generally would require New York to be the residence of the defendants, where a substantial part of the events giving rise to the claim occurred, or where a substantial part of property that is the subject of the action is located; or, if there no such judicial district meeting those requirements, anywhere a defendant is subject to personal jurisdiction.[19]

New York also offers excellent options for arbitration. New York and federal law will enforce agreements to arbitrate in the same manner as any other contractual provision. Many of the leading arbitral institutions around the world have offices, and often headquarters, in New York, including the International Court of Arbitration of the International Chamber of Commerce, the International Centre for Dispute Resolution, the CPR International Institute for Conflict Prevention and Resolution, and JAMS and JAMS International. In addition, as an international commercial and legal center, New York can offer panels of distinguished arbitrators and former judges, with fluency in many languages. Parties may choose their arbitrators or arbitral institutions, as well as the procedural rules that will govern the arbitration, including discovery and disclosure rules. The New York International Arbitration Center in New York City offers state-of-the art facilities for international arbitrations.[20]

New York has made it easy for parties to choose New York law to govern their commercial contract. If the agreement involves at least $250,000, New York law may be chosen, whether or not the agreement has anything to do with New York.[21] And of course, parties may also choose New York law where there is such a relationship to New York, whether of a party or the subject matter of the agreement. Similarly, the parties may choose a New York state court forum for any commercial dispute where the contract is expressly governed by New York law and

involves not less than $1 million, regardless of any other connection to New York.[22] And where judicial relief is sought in the Commercial Division in New York County in aid of an international arbitration or to confirm or vacate an international arbitration award, the New York courts have designated a single justice to decide such disputes to provide for greater consistency and predictability and to expedite resolution.[23]

In sum, New York offers a sophisticated predictable body of commercial law that respects the expressed intention of the parties, and a range of highly qualified dispute resolution methods for the effective and efficient determination of commercial issues. For that reason it is both the logical and the popular choice of law for commercial contracts, both within the United States and for parties around the globe.

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2. Theodore Eisenberg and Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly Held Companies' Contracts*, 30 Cardozo L. Rev. 1475 (2009), https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1203&context=facpub.

3. Gilles Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws*, 34 N.J. Int'l. & Bus. 455, 516 (2014), http://scholarlycommons.law.northwestern.edu/njilb/vol34/iss3/. This study of choice of law provisions in contract dispute before the International Court of Arbitration of the International Chamber of Commerce in 2007-12 found no comparable dominance of any single jurisdiction, with 11% of the contracts governed by English law, 10% by Swiss law, and 4% by U.S. State law, of which over half chose New York law. It is worth noting, however, that this sample was necessarily skewed. Choice of forum is related to choice of law, and the ICC – a European based institution – is less likely to be chosen as a forum for interpreting New York law than English or Swiss law, so that one would expect New York choice of law provisions to be substantially underrepresented. Indeed, the authors reference a pending study of arbitrations in Singapore and Hong Kong – both with ties to the British Empire and English law – where preliminary indications are that parties choosing to arbitrate in those jurisdictions "virtually never provide for the application of Swiss law, but often provide for the application of English law or the law of the seat of the arbitration (i.e. either Singapore or Hong Kong law)." *Id.* at 516, n.187. Studies of choice of law provisions will necessarily be distorted if they look only at contracts adjudicated in a given forum.

4. Ignacio Andrade Aycinena and Claudia Pontaza, *The New York Law as the Choice of Law in Central America Contracts*, https://nyiac.org/nyiac-core/wp-content/uploads/2019/07/THE-NEW-YORK-LAW-AS-THE-CHOICE-OF-LAW-IN-CENTRAL-AMERICA-CONTRACTS.pdf.

5. Galligan 1 at 39.

6. 33 N.Y.3d 353 (2019).

7. Howard A. Levine, *'159 MP Corp.': Grateful That Majority Rejected Dissent's Radical Approach*, N.Y.L.J. (Sept. 6, 2019), https://www.law.com/newyorklawjournal/2019/09/06/159-mp-corp-gratitude-for-majority-rejecting-dissents-radical-approach/ (subscription required).

8. *Id.,* citing *W.W.W. Assoc's. v. Giancontieri*, 77 N.Y.2d 157, 162–63 (1990) (Kaye, J.).

9. Galligan 1.

10. *Id.*

11. Galligan 1.

12. *Meinhard v. Salmon*, 249 NY 458, 463–64 (1928).

13. Glen Banks, *New York Contract Law: A Guide for Non-New York Attorneys* (NYSBA 2014) § XI.1, citing *Stewart v. Stone*, 127 N.Y. 500 (1891) (destruction of factory by fire excused non-performance of contract to manufacture butter and cheese); *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900 (1987) (impossibility does not excuse performance where event – inability to renew required insurance – could have been guarded against by contract).

14. N.Y. Uniform Commercial Code § 2-615(a) excuses "[d]elay in delivery or non-delivery . . . if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic regulation or order whether or not it later proves to be invalid." *See also Banks, supra*, § XI.4.

It is worth noting that the United States is a party to the United Nations Convention on the International Sale of Goods (the "CISG"), which therefore is incorporated into New York law when it is applicable. As a result, a contract between parties in two countries that are both parties to the CISG will be governed by the CISG and not Article 2 of the New York Uniform Commercial Code, unless the applicability of the CISG is expressly disclaimed. This can have consequences for questions of contract formation, interpretation and performance, and should be carefully considered. *See generally* Galligan 1 at 43.

15. *See Banks, supra*, § XI.12 and Galligan 1 at 42.

16. *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900 (1987) ("The principle of interpretation applicable to such clauses is that the general words are not to be given expansive meaning; they are confined to things of the same kind or nature as the particular matters mentioned").

17. *Rules of the Commercial Division of the Supreme Court*, 22 NYCRR § 202.70, http://ww2.nycourts.gov/rules/trialcourts/202.shtml#70.

18. 28 U.S.C. § 1332.

19. 28 U.S.C. § 1391.

20. *See* Galligan 1 and https://nyiac.org/.

21. N.Y. General Obligations Law § 5-1401.

22. N.Y. General Obligations Law § 5-1402.

23. *Administrative Order of the Administrative Judge for Civil Matters*, 1st Judicial District (Oct. 3, 2013), http://www.nycourts.gov/courts/comdiv/ny/PDFs/Commercial%20International%20Arbitration.Admin%20Order.10-3-13_1.pdf.