Landed a Cross-Border Transaction? Why You Should Include a New York Forum Selection Clause and Appoint New York Process Agents

By William F. Hennessey 2nd

Congratulations, you just closed a lucrative cross-border transaction! Are you ready to litigate? While the last thing your client wants to think about at a closing dinner is having to run to court to enforce its rights, as attorneys we know this is an unfortunate possibility. This is why every written agreement should contain not only the details of the transaction, but also choice of law, forum selection, and service of process provisions to govern disputes arising from the transaction.

New York is a popular choice for both governing law and forum. But what if your transaction does not bear a reasonable relation to New York—can you still litigate in New York? In most cases, New York courts will enforce New York forum selection provisions, but you still need to properly serve your counterparty. Without proper service of process, a plaintiff in a litigation may not obtain the relief he or she is seeking from New York courts.

Why Choose New York Law and Courts?

In addition to describing the products or services that the counterparties have contracted for, written agreements outline each party's respective rights and remedies, including what happens if one party defaults or some other legal dispute arises between parties. And disputes often do arise, despite the parties' best intentions when they enter into an agreement.

In many financial transactions, one or both parties are corporations based in different countries. Each country may have its own unique body of law and precedent governing commercial transactions. Parties often negotiate a "neutral" jurisdiction to govern any disputes that may arise related to the commercial transaction, which may be different from the "home" jurisdiction of foreign counterparties. The parties will often look for a jurisdiction that has an established body of commercial law and/or one where the assets of the borrower are located.

New York is often chosen as the governing law and venue for disputes in a commercial agreement because of its recognized body of commercial law and established commercial precedent in large financial transactions. This gives the parties some predictability in potential outcomes, in addition to fairness and neutrality for parties based in different foreign jurisdictions. New York has a good reputation among corporate entities for offering both a well-developed jurisprudence and a business- friendly court system to resolve business disputes.

In 1995, New York established the Commercial Division of the New York Supreme Court to specifically deal with sophisticated commercial disputes. The Commercial Division handles commercial and non-commercial cases that meet certain thresholds. For example, in New York County the Commercial Division hears breach of contract cases arising out of business dealings that seek monetary damages of at least $500,000.[1] The Commercial Division was established with the goal of being a cost-effective, predictable, and fair forum for the adjudication of complex commercial cases. The Commercial Division's judges are selected based on their extensive experience in resolving sophisticated commercial disputes, and devote themselves almost exclusively to these matters. The Commercial Division's rules are also attractive to corporate counterparties. As stated in the Preamble, the Commercial Division's rules address "proportionality in discovery, optional accelerated adjudication, robust expert disclosure, limits on depositions and interrogatories, streamlined privilege logs, special rules concerning entity depositions, model forms to facilitate discovery, expedited resolution of discovery disputes, simplification of bench trials, time limits on all trials, streamlined presentation of evidence at trials, and a strong commitment to early case disposition through the Division's alternative dispute resolution program."

Do You Need a Nexus to New York To Litigate in New York Courts?

What happens if one or both parties are not New York entities or individuals, and the transaction does not have a nexus to New York—can the counterparties still take advantage of New York's law and courts? New York courts will usually respect the parties' decision to contract for a specific forum. Numerous New York cases treat forum selection clauses as a permissible substitute for minimum contacts with New York State to sustain personal jurisdiction over a defendant under CPLR 301. Absent proof of fraud, undue influence, or overreaching, or evidence that the forum is so inconvenient as to deprive the litigant of his day in court, New York courts will find forum selection clauses enforceable.

In 1984, New York enacted a limited statutory exception for certain significant commercial transactions which may otherwise lack a sufficient nexus to New York. Under General

Obligations Law § 5-1401, parties without New York contacts may choose New York law to govern a contract if the transaction in the aggregate involves an obligation of at least $250,000. Under General Obligations Law § 5-1402, New York forum selection clauses involving foreign corporations and non-residents are enforceable in contracts with choice of law provisions pursuant to § 5-1401 and which include an obligation in the aggregate of at least $1,000,000. These rules do not apply to contracts for labor or personal services.

The New York legislature enacted General Obligations Law §§ 5-1401 and 5-1402 in order to eliminate any uncertainty and ensure that a court cannot reject a choice of law or forum selection provision in cases involving significant commercial or financial contracts. The New York Court of Appeals has found that these "statutes read together permit parties to select New York law to govern their contractual relationship and to avail themselves of New York courts despite lacking New York contacts."[2]

Serving Process

Even if your written agreement contains an enforceable forum selection clause, a plaintiff still needs to properly serve process on its counterparty. Due process requires that before a plaintiff or petitioner can obtain the relief it is seeking, all of the other parties to the matter must be formally notified that the case has been commenced. "Process" includes the summons and complaint, and service of process is the legal means by which a person or entity is required to appear in court or a defendant is given notice of a legal action against it. A plaintiff must serve his complaint on the defendant within 120 days after the commencement of an action or proceeding, although a court may extend the time for service "upon good cause shown."[3]

CPLR 311 governs service upon domestic and foreign corporations.[4] Personal service upon a corporation shall be made by delivering the summons and complaint to an officer, director, managing or general agent, cashier or assistant cashier, or any other agent authorized by appointment or law to receive service on behalf of the corporation. A "cashier" refers to someone in charge of the corporation's funds at a high level. Service on an employee who is not an officer, director, cashier, or agent of the corporation and not authorized to accept service will be deemed ineffective.[5]

CPLR 311 also allows a plaintiff to serve a corporation pursuant to § § 306 or 307 of New York's Business Corporation Law. Domestic and authorized foreign corporations are required to designate the New York secretary of state as an agent upon whom process against the corporation may be served.[6] Under BCL § 306, a plaintiff may serve a domestic or authorized foreign corporation by personally delivering two copies of the summons and complaint on an authorized person in the secretary of state's office in Albany (service on offices in other cities in New York is improper). The secretary of state shall then "promptly" send a copy of the process by certified mail, return receipt requested, to the corporation at the address specified on file in the department of state. Service of process on the corporation is complete when the secretary of state is served, not when the corporation receives the process.[7]

If a foreign corporation is not authorized to do business in New York, BCL § 307 still allows process to be served on the New York secretary of state as agent of the foreign corporation by personally delivering and leaving a copy of the process with an authorized person to receive such service in the secretary of state's office in Albany. Such service will be considered sufficient if notice and a copy of the process are then either delivered personally to such foreign corporation by a person and in the manner authorized to serve process in that jurisdiction, or by registered mail with return receipt requested.[8] For personal service, proof of service by affidavit and process must be filed with the court within 30 days after service. For service by mail, proof of service by affidavit, proof of delivery or refusal to accept delivery, and process must be filed within 30 days after receipt of proof of delivery. Service will be considered complete 10 days after the filing.

What happens if your foreign counterparty has a presence in the United States, but not New York? Some such counterparties may request (or demand) to be served at an affiliate's office in Connecticut or Florida, for example. They may also have already appointed an agent for service of process in another state. Would service on a non-New York agent or on an officer, director, cashier, assistant cashier, or other agent authorized to receive process for the counterparty be valid?

As long as your agreement includes a forum selection clause providing for jurisdiction in New York courts, then your counterparty will have consented to personal jurisdiction in New York under CPLR 301. Pursuant to CPLR 313, a person subject to the jurisdiction of New York under CPLR 301 may be served outside of New York in the same manner as service is made within New York by either a person authorized to make service within New York who is a resident of New York, or by any person authorized to make service by the laws of the jurisdiction where service is made (e.g., the jurisdiction of an office of the counterparty or its agent). This means that you can follow the procedure under CPLR 311 to serve a New York summons and complaint on a foreign corporation, or under CPLR 308 to serve individuals outside of New York.

If your counterparty does not have a presence or an agent for service of process in the United States, CPLR 313 will allow you to make service on a counterparty outside the United States. However, you must be mindful of any service requirements imposed by the Hague Convention on the Service Abroad

of Judicial and Extrajudicial Documents (the "Hague Service Convention"). If the counterparty is located in a country that is a signatory to the Hague Service Convention, then you need to abide by any conditions or restrictions that jurisdiction imposes on service.[9] Service through the Hague Service Convention can add additional costs and delay to serving a counterparty. The Hague Service Convention does not apply if the foreign counterparty is properly served in the United States.

Conclusion and Recommendations

When negotiating your agreement, you should be sure to include not only governing law and forum selection provisions, but also a provision governing service of process. The service provision should require that the counterparty appoint a reputable agent for service of process in New York for the duration of your agreement. The agent should be prohibited from resigning during the term of the agreement, and the agent's fees should be pre-paid. The agent should be appointed prior to the release of any funds under the terms of the agreement, and you should periodically check to make sure the agent is still engaged. To the extent an agent does resign or needs to be replaced, you should have the reasonable ability to approve any replacement or, to the extent your counterparty does not appoint a replacement, appoint an agent yourself.

If your counterparty insists on being served at one its non-New York offices in the United States or through a non-New York process agent in the United States, be sure to use an authorized person to carry out service and to follow the rules of service (e.g. no service on Sundays). Failure to appoint a process agent in the United States can frustrate service on a foreign counterparty with no contacts in the United States. Without proper service, a party will not be able to obtain the relief it seeks, and may not be able to enforce any default judgments.

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Endnotes

1. Each county has its own monetary threshold, which ranges from $50,000 to $500,000.
2. *IRB-Brasil Resseguros, S.A. v. Inepar investments, S.A.*, 20 N.Y.3d 310, 315 (2012).
3. CPLR 306-b, a
4. For matters brought in New York federal courts, Federal Rule of Civil Procedure 4(h) requires a plaintiff to serve a foreign or domestic corporation pursuant to New York's laws for service of a foreign or domestic corporation.
5. *See Covillion v. Tri State Service Co., Inc.*, 48 A.D.3d 399 (2d Dep't, 2008), *Goodwin v. Upper Room Baptist Church*, 15 A.D. 3d 1500 (2d Dep't 2019).
6. BCL § 304.
7. BCL § 306(b)(1)(i).
8. BCL § 306(b) outlines the various methods of sending notice and a copy of the process on the foreign corporation through registered mail.
9. *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 S. Ct. 2104, (1988) ("By virtue of the Supremacy Clause . . . the Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies").