

GOVERNING LAW AND JURISDICTION CLAUSES Q&A: US (NEW YORK)

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US - specific information concerning the key legal issues that need to be considered when drafting and enforcing governing law and jurisdiction clauses.

This Q&A provides country-specific commentary on *Practice note, Governing law and jurisdiction: Cross-border* and forms part of *Cross-border dispute resolution*.

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RECOGNITION OF PARTIES' CHOICE OF GOVERNING LAW

1. Do local courts recognise foreign governing law clauses? Do local courts respect a choice of governing law even where a different jurisdiction has been selected by the parties to hear the dispute?

New York courts, particularly the State and Federal courts in New York City, routinely recognise foreign governing law clauses. However, the question of whether a particular New York court will respect a choice of governing law clause is not straightforward. Whether New York courts will respect party autonomy to select the law governing their contracts and other commercial arrangements turns on a number of factors.

The New York Court of Appeals (New York's highest court) has held that "[a]s a general matter, the parties' manifested intentions to have an agreement governed by the law of a particular jurisdiction are honored" (*Freedman v Chemical Construction Corp.*, 43 N.Y.2d 260, 265 n. * (1977)). Similarly, the Second Circuit (the Federal appellate court covering the New York metropolitan area) has held that "[i]n the absence

of a violation of a fundamental state policy, New York courts generally defer to the choice of law made by the parties to a contract", while also noting that New York law authorises a court to disregard the parties' choice when the "most significant contacts" with the matter in dispute are in another jurisdiction (*Cargill v Charles Kowsky Resources, Inc.*, 949 F.2d 51, 55 (2d Cir.1991)).

The traditional view was that the intention of the parties when contracting was the primary factor in determining the law governing the contract. The more modern, current prevailing view, is that, while the intention of the parties remains a significant factor, it is not conclusive. Rather, New York courts will also look to determine the place with the most significant contacts with the matter in dispute and will often apply that jurisdiction's substantive law, even if in derogation of the contracting parties' choice of law.

To maximise the chance that a governing law clause will be applied by the New York court, it is best to select a jurisdiction's law that not only is acceptable to the parties, but that also has a substantial relationship to the parties themselves or to the performance of their obligations.



FORMAL REQUIREMENTS: GOVERNING LAW CLAUSE

2. What are the requirements for a governing law clause to be valid?

Under New York Law, governing law clauses are not dispositive in and of themselves.

Where both contracting parties are sophisticated, negotiated at arm's length, and the parties themselves, or the contemplated performance, have some relationship to the chosen jurisdiction, governing law clauses are often enforceable. It is, however, well recognised that New York courts will decline to enforce a governing law provision where there is no reasonable relationship between the chosen jurisdiction's law and the parties or transaction, or the provision contravenes "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal" (*Welsbach Elec. v MasTec N. Am.*, 7 N.Y.3d 624, 629 (2006)). Factors affecting the validity of governing law clauses include, but are not limited to:

- Whether the contract is one of adhesion.
- Whether the governing clause was reasonably communicated to the non-drafting party.
- The sophistication of the parties.
- Whether enforcement of the governing clause will offend principles of fundamental fairness.

LAW GOVERNING MATTERS OF PROCEDURE

3. Will the law of the forum (in other words, the law of the place where the dispute is heard), or the law chosen by the parties to govern the contract, determine matters of procedure such as, questions relating to the rules of evidence (including the burden of proof), the remedies available, the assessment of damages and the limitation of actions?

In New York, the law of the forum governs procedural issues, regardless of the law chosen by the parties to govern the contract.

CHOICE OF FOREIGN GOVERNING LAW IN DOMESTIC CONTRACTS

4. Can two (or more) domestic parties choose a foreign law as the governing law of their contract?

Two or more domestic parties may choose a foreign jurisdiction's law as the governing law of their contract. As discussed in Question 1, where such governing law provisions exist and "the jurisdiction chosen by the parties has a substantial relationship to the parties or their performance, New York courts will typically honor the parties' choice insofar as matters of substance are concerned, so long as fundamental policies of New York law are not thereby violated." (*Woodling v Garrett Corp.*, 813 F.2d 543, 551 (2d Cir.1987).)

MANDATORY LAWS OF THE FORUM

5. Are there any circumstances or mandatory rules or regulations of the forum that can override the parties' choice of governing law?

New York law allows a court to disregard the parties' choice of governing law when:

- The chosen jurisdiction's law has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for the parties' choice.
- Application of the law of the chosen jurisdiction would be contrary to a fundamental policy of a jurisdiction that has a materially greater interest than the chosen jurisdiction.

(§ 187, Restatement (Second) of Conflicts of Law.)

LAW GOVERNING NON-CONTRACTUAL CLAIMS

6. Can parties choose a governing law to cover non-contractual claims (such as, negligence and misrepresentation)? If so, should the clause expressly state "including non-contractual disputes or claims"?

Parties may choose a governing law to cover non-contractual claims. However, care should be exercised when drafting such clauses. In particular, the clause should specify the types of claims falling within the ambit of the governing law clause. Importantly, jurisdiction clauses applying to "any and all claims arising from this Agreement" have, at times, been held inapplicable to statutory claims which, courts have reasoned, do not "arise out of" the contract. (*Gessler v Sobieski Destylarnia SA*, 572 F.3d 86, 90-91 (2d Cir. 2009).)

APPLICATION OF FOREIGN LAW BY LOCAL COURTS

7. What is the approach of local courts in exercising jurisdiction over a dispute which is governed by a foreign law?

New York courts, when exercising jurisdiction over a dispute governed by foreign law, have broad powers of discretion as to the evidence required to prove or interpret issues of foreign law (§ 4511(b), NYCPLR). A court may therefore "consider any testimony, document, information or argument on the subject, whether offered by a party or discovered through its own research" (§ 4511(d), NYCPLR). It follows that NYCPLR § 4511 "firmly commits the determination of foreign law to the court and authorises the court to make this determination after any presentation of evidence which furnishes the court sufficient information to decide." (*Stichting Pensioenfonds ABP v Credit Suisse Grp. AG*, 38 Misc. 3d 1214(A) (Sup. Ct. NY Cnty, Nov. 30, 2012).) As a result, New York courts, in circumstances where the court determines that information about the foreign law will aid it in its determination of the issues, often allow expert evidence on questions of foreign law.

GOVERNING LAW IN THE ABSENCE OF CHOICE

8. What is the courts' approach to determine what law governs the parties' contract in the absence of a specific clause in international commercial contracts?

In the absence of a governing law clause, New York courts employ the "significant relationship" test of the Restatement (Second) of Conflict of Laws § 188. The test requires application of the law of the jurisdiction with the most substantial contacts with the contract. The contacts considered include, but are not limited to:

- The place of contracting.
- The place of negotiation of the contract.
- The place of performance.
- The location of the subject matter of the contract.
- The domicile, residence, nationality, place of incorporation and place of business of the parties.

RECOGNITION OF PARTIES' CHOICE OF JURISDICTION

9. Do local courts recognise jurisdiction clauses in a contract?

In New York, a contractual jurisdiction or forum selection clause is "prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court." (Premium Risk Group v Legion Ins. Co., 294 AD2d 345, 346 (2002)).

FORMAL REQUIREMENTS: JURISDICTION CLAUSE

10. Are there any formal requirements for a jurisdiction clause to be valid?

In general, a jurisdiction clause should state whether it is exclusive or permissive in nature, and specify what claims are subject to its reach. New York courts will apply the governing law designated in the contract to interpret the nature and scope of the jurisdiction clause. In the absence of a governing law clause, New York law will govern the enforceability of a jurisdiction clause.

EXCLUSIVE AND NON-EXCLUSIVE JURISDICTION CLAUSES

11. Do local courts recognise exclusive jurisdiction clauses and non-exclusive jurisdiction clauses? Are the words "exclusive" or "non-exclusive" considered to be sufficient to give the clause its full intended effect?

Local courts do recognise exclusive jurisdiction clauses and non-exclusive jurisdiction clauses. In general, inclusion of the words "exclusive" or "non-exclusive" is sufficient to give the clause its intended effect.

BREACH OF EXCLUSIVE JURISDICTION CLAUSE

12. Do local courts award remedies for breach of an exclusive jurisdiction agreement in their favour?

In general, New York law allows the recovery of damages for breach of a jurisdiction clause, consistent with breach of contract principles. Under the governing principle, an injured party will be restored to the position it would have been if the breach had not been committed.

RESTRICTIONS ON JURISDICTION CLAUSES

13. Are there any circumstances in which the local courts will take jurisdiction over a dispute notwithstanding that the parties' contract contains a jurisdiction clause which purports to confer jurisdiction on the courts of another country?

There are, of course, circumstances in which New York courts will exercise jurisdiction over a dispute regardless of a contractual jurisdiction clause purporting to confer jurisdiction on the courts of another country. New York courts have discretion to set aside jurisdiction clauses where the clause is:

- Unreasonable or unjust.
- Against public policy.
- Invalid due to fraud or overreaching.

Additionally, certain statutory choice of law rules, such as Article 9 of the Uniform Commercial Code (relating to secured transactions), may not be modified by contract.

CHOICE OF FOREIGN JURISDICTION IN DOMESTIC CONTRACTS

14. Can two (or more) domestic parties choose a foreign jurisdiction for their contract?

Yes. Two or (more) domestic parties may choose a foreign jurisdiction for their contract.

ANTI-SUIT INJUNCTIONS AND STAY ORDERS

15. What is the general approach to issuing anti-suit injunctions and stay orders in cases where proceedings involving the same cause of action between the same parties have been issued in another jurisdiction in breach of a jurisdiction agreement in favour of the local court? Please indicate the significance of the contract including an exclusive OR non-exclusive jurisdiction clause in favour of the local courts.

New York courts will entertain anti-suit injunctions in cases where parallel proceedings involving the same cause of action between the same parties have been brought in another jurisdiction in breach of a jurisdiction agreement in favour of the local court.

The anti-suit injunction is typically analysed under a preliminary injunction standard, and demonstrating “irreparable injury” tends to be the dispositive issue. In considering these issues, New York courts often note that application of the international comity doctrine is discretionary and is therefore not an “imperative obligation of courts”, but rather a “discretionary rule of practice, convenience, and expediency” (*Madden International v Lew Footwear Holdings*, 650209/2015, NYLJ 1202750254518, at *1 (Sup. Ct. NY Co., Jan. 15, 2016)). Factors that New York courts look to when analysing the propriety of issuing an anti-suit injunction include, but are not limited to:

- The sophistication of the parties.
- Whether the clause is mandatory or permissive.
- Whether the jurisdiction clause was the product of an arm’s-length transaction.

ONE WAY JURISDICTION CLAUSES

16. Are one-way, unilateral or asymmetrical jurisdiction clauses (that limit one party to a particular jurisdiction and not the other party) considered valid in your jurisdiction?

Yes. One-way or non-mutual jurisdictional clauses are enforceable in New York courts.

INCORPORATION OF GOVERNING LAW AND JURISDICTION CLAUSES BY REFERENCE

17. What is the approach of the local courts when parties’ contracts refer to the governing law and jurisdiction clauses in a party’s standard terms and conditions?

There is no straightforward answer to this question because the manner in which New York courts approach disputes where the parties’ contracts refer to the governing law and jurisdiction clauses in a party’s standard terms and conditions depends on a number of factors.

In general, a governing law or jurisdiction clause may be challenged if its existence was not reasonably communicated to the plaintiff. For example, in *Jerez v JD Closeouts, LLC*, 36 Misc 3d 161 (Nass. Dist. Ct. 2012), the court found the jurisdiction clause to be unenforceable because the clause was “buried or ‘submerged’ in multiple layers of web-pages, and such terms [were] not specifically brought to the buyer’s attention”. The court also noted that the “forum selection clause will not be deemed part of the parties’ agreement”.

If, however, a party can demonstrate that its counterparty knew about and accepted its standard terms and conditions, then New York courts will typically enforce those terms and conditions, including where they contain a governing law or jurisdiction clause.

RELATED AGREEMENTS

18. How do local courts approach jurisdiction in disputes that have arisen from several related agreements, with conflicting jurisdiction clauses, which are part of one transaction?

This question does not lend itself to a straightforward answer and will necessarily turn on the specific nature of the dispute. Generally, New York courts apply principles of contract interpretation to resolve a conflict between jurisdiction clauses from several related agreements that are part of one transaction. Courts will therefore attempt to resolve the conflict by looking at the nature of the claims, the competing provisions and the hierarchy of the contracts.

Additionally, New York courts can set aside jurisdiction clauses where the clause is unreasonable or unjust, or is against public policy, or is invalid due to fraud or overreaching.

In particular, federal courts, including those in New York, “construing conflicting forum selection clauses governing separate claims raised in a single action often decline to enforce both clauses out of concern for wasting judicial and party resources” (*Jones v Custom Truck & Equip., LLC*, No. 10-611, 2011 WL 250997, at *4 (E.D. Va. Jan. 25, 2011)).

SEPARABILITY OF JURISDICTION CLAUSE

19. Are jurisdiction clauses considered separable from the main contract?

In general, a jurisdiction clause is “separable” from the main contract, so that a dispute as to the validity of the contract itself does not necessarily affect the validity of the jurisdiction clause.

LAW GOVERNING JURISDICTION CLAUSE

20. Which law governs a jurisdiction clause?

New York courts will apply the governing law designated in the contract to interpret the nature and scope of the jurisdiction clause. In the absence of a governing law clause, New York law will govern the enforceability of a jurisdiction clause.

JURISDICTION IN THE ABSENCE OF PARTY CHOICE

21. What factors are taken into account by local courts to determine jurisdiction in the absence of a specific clause in international commercial contracts? Can submission to the jurisdiction of a foreign court be implied or inferred if the agreement is governed by foreign law and vice versa?

Under the doctrine of forum non conveniens, a state or a federal court may utilise its discretionary power and decline jurisdiction, in favour of a more convenient forum.

In New York, a court is authorised to stay or dismiss an action "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum" (§ 327, NYCPLR).

Factors considered in evaluating the propriety of such dismissal include, but are not limited to:

- The residency of the parties and convenience of potential witnesses.
- The location where the actionable events took place.
- The location of evidence.
- The availability of an alternative forum.
- The burden on the New York court if the case is retained.

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