

Foreign Parties Seek Forum to Litigate – Is Florida Open for Business?

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Introduction

A contract provision familiar to most lawyers is one that designates the forum for resolving disputes arising out of the contract. This type of provision often works in tandem with a provision that designates the law that will govern such disputes. These provisions are especially important in contracts involving parties located in different countries because of the inherent uncertainty in predicting which country's law will govern contract-related disputes and which country's courts can properly exercise jurisdiction over the parties to the dispute.² By choosing the forum and governing law in the contract, the parties seek to minimize the uncertainty, delay and expense associated with litigating over the proper forum and applicable law.³ These provisions can also allow the parties to choose a forum that is completely unconnected to the contract or the parties, and the law of a jurisdiction that likewise has no connection to the contract or the parties. For example, the parties may prefer a forum that has no connection to the contract because it is considered mutually convenient and neutral. Similarly, the parties may find the law of a completely unrelated jurisdiction impartial or better developed for the subject matter of their contract.

As a crossroads for international commerce, Florida is a natural choice for foreign parties seeking a convenient and neutral forum for dispute resolution. Florida also offers a well-developed court system and body of commercial law that foreign parties can readily find sophisticated and impartial. To take advantage of these attributes of Florida's legal system, the International Law Section of the Florida Bar is supporting amendments

to Florida statutes that, if enacted into law, will serve as an invitation to foreign companies to choose Florida as their forum and Florida law as the law to govern their disputes, even where the companies and their contract have no relationship at all with Florida. This article discusses these proposed amendments and some of the advantages they offer, along with a potential problem with extending such a wide invitation to litigate in Florida.

The Current Law

Florida law is currently not receptive to foreign companies choosing Florida courts and Florida law absent a reasonable connection between their transaction and the state. On the statutory level, Sections 685.101 and 685.102, Florida Statutes, expressly authorize certain parties to choose Florida courts and Florida law for resolution of their contract disputes. In doing so, however, these statutes lack any clear authorization for foreign companies whose transaction does not bear a relationship to Florida. Section 685.102 provides in pertinent part:

685.102 Jurisdiction

Notwithstanding any law that limits the right of a person to maintain an action or proceeding, any person may, to the extent permitted under the United States Constitution, maintain in this state an action or proceeding against any person or other entity residing or located outside this state, if the action or proceeding arises out of or relates to any contract, agreement, or undertaking for which a choice of the law of this state, in whole or in part, has been made pursuant to s. 685.101 and which contains a provision by which such person or other entity residing or located outside this state agrees to submit to the jurisdiction of the courts of this state.

This section vests the courts with jurisdiction over foreign parties if in their contract they agree to submit to the jurisdiction of the Florida courts and if they choose Florida law pursuant to Section 685.101.

However, Section 685.101 creates significant doubt about the ability of foreign companies to effectively choose Florida law. It provides in pertinent part:

685.101 Choice of law.

1) The parties to any contract, agreement, or undertaking, contingent or otherwise, in consideration of or relating to any obligation arising out of a transaction involving in the aggregate not less than \$250,000, the equivalent thereof in any foreign currency, or services or tangible or intangible property, or both, of equivalent value, including a transaction otherwise covered by s. 671.105(1),⁴ may, to the extent permitted under the United States Constitution, agree that the law of this state will govern such contract, agreement, or undertaking, the effect thereof and their rights and duties thereunder, in whole or in part, whether or not such contract, agreement, or undertaking bears any relation to this state.

(2) This section does not apply to any contract, agreement, or undertaking:

(a) Regarding any transaction which does not bear a substantial or reasonable relation to this state in which every party is either or a combination of:

1. A resident and citizen of the United States, but not of this state; or
2. Incorporated or organized under the laws of another state and does not maintain a place of business in this state;

This section contains two key limitations on the ability of foreign parties to choose Florida law. First, the section does not apply to transactions involving in the aggregate less than \$250,000. Second, a fair reading of the statute is that where (a) the transaction is between companies that are organized under the laws of another jurisdiction, (b) those companies do not maintain a place of business in Florida and (c) the transaction does not bear a substantial or reasonable relation to this state, the companies are not authorized by the statute to select Florida law. Because Section 685.101 does not authorize the companies to select Florida law, the Florida courts are not authorized under Section 685.102 to exercise jurisdiction over the companies, even if the companies expressly consented to such jurisdiction in their contract. The lack of authority to exercise jurisdiction would likely deter the companies from selecting Florida as the forum for

resolving disputes relating to their contract.

The limits imposed by Sections 685.101 and 685.102 are not eased by the case law. Florida courts have consistently held that the mere fact that parties have agreed to submit themselves to the jurisdiction of the Florida courts is not alone a sufficient basis for the exercise of jurisdiction over the parties.⁵ A party seeking to establish jurisdiction over a foreign party must show that the foreign party's conduct falls within the purview of Florida's long arm statute before a court may properly exercise jurisdiction.⁶ Typically, this would require proof that the foreign party conducted substantial business in the state, or that the party committed a wrongful act in the state such as a tort or breach of contract.⁷ Thus, the fact that the parties have stipulated to a Florida court exercising jurisdiction over them and likewise stipulated to the applicability of Florida for governing their contract are merely factors to be considered by the court and weighed in favor of exercising jurisdiction.⁸ However, where neither the parties nor the contract bear any recognizable relationship to Florida, these two factors will likely fail to convince a court to exercise jurisdiction over a foreign party.

The Amendments

The amendments to Sections 685.101 and 685.102 proposed by the International Law Section would eliminate any requirement that the companies be located in Florida or that their contract bear any relationship to the state. The key modification to the statute would read as follows:

685.101 Choice of law.

(1) The parties to any contract, agreement, or undertaking, contingent or otherwise, in consideration of or relating to any obligation arising out of a transaction involving in the aggregate not less than \$250,000, the equivalent thereof in any foreign currency, or services or tangible or intangible property, or both, of

equivalent value, including a transaction otherwise covered by s. 671.105(1), may, to the extent permitted under the United States Constitution, agree that the law of this state will govern such contract, agreement, or undertaking, the effect thereof and their rights and duties thereunder, in whole or in part, whether or not such contract, agreement, or undertaking bears any relation to this state.

(2) This section does not apply to any contract, agreement, or undertaking:

~~(a) Regarding any transaction which does not bear a substantial or reasonable relation to this state in which every party is either or a combination of:~~

~~1. A resident and citizen of the United States, but not of this state; or~~

~~2. Incorporated or organized under the laws of another state and does not maintain a place of business in this state;~~

...

The purpose of this amendment is to make clear that for choice of law and jurisdictional purposes it does not matter whether the parties are organized under the law of another jurisdiction or that their contract does not bear any relationship to Florida. The amendment should serve as a signal that foreign parties are authorized to bring their contract disputes to the Florida courts to be governed by Florida law so long as they can meet the \$250,000 amount-in-controversy threshold.⁹

Advantages to Enacting the Amendments

If the Florida legislature enacts these amendments, it would not be alone in the effort to attract foreign litigation to domestic courts. Florida would become the seventh state in the nation to modify its law governing the enforcement of contractual choice-of-law clauses in favor of foreign litigants that wish to bring their litigation to the United States. California,¹⁰ Delaware,¹¹ Illinois,¹² Oregon,¹³ and Texas¹⁴ have all broadened the scope of litigable disputes within their jurisdiction following New York's¹⁵ groundbreaking changes to its law in 1984. The proponents of the changes in New York crafted their changes with the goal of securing and enhancing the state's position and reputation in the international commercial arena and to respond to challenges then

existing to New York's status as a leading financial and commercial center.¹⁶ The proponents of the Florida amendments have the same goals in mind.

Florida is in the midst of a struggle to increase its role as an international commercial and legal center and to be perceived as such in the minds of business people and governments all over the world. This struggle includes efforts by the state government and various other organizations to have Miami selected as the official seat of the Permanent Secretariat of the Free Trade Area of the Americas ("FTAA").¹⁷ The FTAA, which is being negotiated by 34 Western Hemisphere nations, is intended to be the most far-reaching trade agreement in history.¹⁸ Landing the seat of the permanent secretariat of the FTAA, would place Florida squarely at the center of international commerce in this hemisphere and further position Florida as an ideal venue for international dispute resolution.¹⁹ There are also efforts underway to protect and enhance Florida's position as a center for the arbitration of international commercial disputes. These efforts include work the by the International Law Section of the Florida Bar aimed at ensuring that recently proposed amendments to the Florida Bar's multi-jurisdictional practice rules do not unreasonably impede the ability of foreign lawyers to represent their clients in international arbitrations seated in Florida.²⁰

In the context of the above efforts, the proposed amendments to Sections 685.101 and 685.102 can be seen as part of an overall strategy to promote Florida as a jurisdiction that welcomes international dispute resolution within its borders. If the efforts are successful, Floridians should receive direct economic benefits flowing from serving as a bustling hub of international litigation and arbitration. These benefits should include, at a bare minimum, the hiring of more lawyers, mediators, arbitrators, expert witnesses, court

reporters and translators and an increased usage of the state's hotels, meeting facilities and transportation services. More indirectly, Florida should be more widely perceived as a place receptive to international business and as a logical place for foreign parties to have a business presence.

In addition, international business disputes tend to be more complex and involve more cutting edge legal issues than domestic disputes. As more international disputes are brought to Florida, the courts will be called upon to decide more of these sophisticated cases which should augment and refine the state's body of international commercial law. Even international arbitrations that are designed to exclude the involvement of the courts tend to be complex and frequently spill over into the court system, requiring judicial intervention before their ultimate resolution. With more international cases, Florida's lawyers will more frequently be called upon to handle these complex and sophisticated matters. A well-trained corps of international commercial litigators and arbitration specialists should emerge. With better law and better lawyers to handle international cases, Florida law and the Florida court system should become even more appealing to foreign parties, bringing more economic benefits and a heightened quality in the practice of commercial law.²¹

Potential Constitutional Issues

The constitutionality of statutes that completely eliminate “significant contact[s]” or a “reasonable relationship” from the choice of law analysis is questionable under current U.S. Supreme Court precedent. Two potential constitutional limitations on such statutes are the due process clause and the full faith and credit clause. The U.S. Supreme

Court addressed these constitutional limitations on choice-of-law in two fairly recent opinions, *Allstate Ins. Co. v. Hague*²² and *Phillips Petroleum Co. v. Shutts*.²³

In a plurality opinion in *Hague*, Justice Brennan opined that “for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a *significant contact* or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair (emphasis added).”²⁴ In *Shutts*, Justice Rehnquist reaffirmed the “significant contact” test set forth in *Hague*.²⁵ However, he referred to the test as a “modest restriction” on successfully choosing a state’s substantive law in a constitutionally permissive manner.²⁶ The *Shutts* opinion highlights the importance of the expectations of the parties in assessing whether the choice of the law to be applied is fundamentally fair as required by the test announced in *Hague*.²⁷ Thus, the question arises whether the parties’ voluntary choice of a state’s law and submission to the state’s jurisdiction in an international contract constitutes a sufficient “significant contact” such that choice of law is neither arbitrary nor fundamentally unfair. Although this somewhat daunting question remains unanswered, the 1984 New York law, which served as the foundation for Florida’s proposed amendments and the similar statutory enactments in California and Illinois, have not yet faced a constitutional challenge in the courts.²⁸

It is hoped that if a constitutional challenge does arise, the courts will conclude that the parties engaged in international business transactions should have the autonomy to voluntarily select the law that governs their transaction and the forum for resolution of their disputes. Such a conclusion would seem neither arbitrary nor unfair where (a) it allows parties from different countries to minimize the uncertainty, delay and expense

associated with litigating over the proper forum and applicable law and to mutually benefit from a convenient and neutral forum for resolving their disputes, and (b) the forum they have chosen has statutorily invited the parties to select its law and its courts for resolution of their disputes.

Conclusion

Legal rules that permit contracting parties to choose the applicable law and forum for dispute resolution are based in part on the notion that parties should have autonomy in deciding the rights and responsibilities between them. Florida law is generally receptive to this notion of party autonomy in commercial transactions but currently contains limitations that deter foreign parties from effectively choosing Florida as a venue for international dispute resolution. The proposed amendments to Chapter 685 seek only to increase party autonomy by lessening these limitations while simultaneously enhancing Florida's reputation as a logical place to conduct international business and to resolve international business disputes.

¹ This article is submitted on behalf of the International Litigation and Arbitration Committee of the International Law Section of the Florida Bar.

² As described by William Prosser, “[t]he realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.” William Prosser, *Interstate Publication*, 51 Mich. L. Rev. 959, 971 (1953).

³ See William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 SMU L. Rev. 697, 699-700 (2001); Edith Freidler, *Party Autonomy Revisited: A Statutory Solution to a Choice of Law Problem*, 37 U. Kan. L. Rev. 471, 471 (Spring 1989).

⁴ Florida Statute § 671.105(1) provides a choice of law rule for Florida's version of the Uniform Commercial Code as follows: “[e]xcept as provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation, the parties may agree that the law either of this state or of such other state or nation will govern their rights and duties. Failing such agreement, this code applies to transactions bearing an appropriate relation to this state.”

⁵ *McRae v. J.D./M.D., Inc.*, 511 So.2d 540, 544 (Fla. 1987) (where parties and contract had absolutely no connection with Florida forum selection clause cannot operate as sole basis of exercising jurisdiction over

objecting party); *Four Stars Resorts Bahamas, Ltd. v. Allegro Resorts Management Services, Ltd.*, 811 So.2d 809 (Fla. 3rd DCA 2002).

⁶ *McRae*, 511 So.2d at 543.

⁷ *Armaly v. Practice Management Associates, Inc.*, 533 So.2d 920, 922 (Fla. 2nd DCA 1988).

⁸ *Id.*

⁹ Additionally, the proposed amendments alter § 685.101(2)(c) by eliminating the language “unless such contract, agreement, or undertaking concerns a trust at least one trustee of which resides or transacts business as a trustee in this state, in which case this section applies.” This change is intended to enhance the ability of Florida law to be selected as the governing law of foreign trusts and thereby enhance the ability of the parties to the trust to choose Florida as the forum for trust related disputes.

¹⁰ Cal. Civil Code § 1646.5 (West Supp. 2002).

¹¹ Del. Code Ann. tit. 6 § 2708 (1999).

¹² 735 Ill. Comp. Stat. Ann. 105/5-5 (West 2002).

¹³ Or. Rev. Stat. § 81.120 (West 2001).

¹⁴ Tex. Bus. & Comm. Code Ann. §§ 35.51-.52 (Vernon 2002).

¹⁵ N.Y. Gen. Oblig. Law §§ 5-1401,1402 (McKinney 2001).

¹⁶ Committee Report, Proposal for Mandatory Enforcement of Governing-Law Clauses and Related Clauses in Significant Commercial Agreements, 38 Rec. A.B. City N.Y. 537, 548-50 (1983) (title 14 needed to attract new business to New York City).

¹⁷ See <http://www.Floridaftaa.org>.

¹⁸ *Id.*

¹⁹ The FTAA currently is intended to be the most far-reaching trade agreement in history. It is an effort to unite the economies of the Western Hemisphere into a single free trade agreement comprising 800 million consumers with a combined gross domestic product of \$14 trillion.

²⁰ See *Panel Tweaks MJP Rules to Accommodate Arbitrations*, *Florida Bar News*, October 1, 2003.

²¹ Practitioners would benefit from a clearer statutory rule that the amendments discussed in this article would provide. “In general, the correct choice-of-law analysis has been the focus of extensive intellectual debate for centuries. This debate has only led to confusion and uncertainty. While inherently disturbing to the international business community which requires a reasonable amount of certainty and predictability in order to trade freely and efficiently in today's global economy, it arguably is equally or, perhaps, even more disturbing to the legal profession which is called upon to advise that community.” Christopher L. Ingram, *Choice-of-Law Clauses: Their Effect on Extraterritorial Analysis – A Scholar's Dream, a Practitioner's Nightmare*, 28 Creighton L. Rev. 663, 664 (1995).

²² 449 U.S. 302 (1981).

²³ 472 U.S. 797 (1985).

²⁴ *Hague*, 449 U.S. at 312-313.

²⁵ *Shutts*, 472 U.S. at 818.

²⁶ *Id.* at 822.

²⁷ *Id.*

²⁸ In a recent decision in the Southern District of New York, a federal court applied the older “reasonable basis” standard to a personal service contract that was clearly outside the purview of N.Y. Gen. Oblig. Law § 5-1401. *See Radioactive, J.V. v. Manson*, 153 F.Supp.2d 462, 470 (S.D.N.Y. 2001) (reiterating the legislative intent and scope of applicability of the statute in *dicta*).