Choice-of-Law Provisions, Conflict-of-Law Rules, the Statute of Limitations, and the Borrowing Statute: Ontario, Inc. v. Samsung

Introduction

A?an Ontario-based corporation--commences a New York state court lawsuit against B?a New York-based corporation--in New York state court for breach of contract. The contract contains a mandatory New York choice-of-forum clause and a very broad choice-of-law provision, which, among other things, designates New York law to govern the contract and its "enforcement.? If Ontario's two-year statute of limitations applies, then the suit is time barred, but if New York's six-year statute of limitations applies, then the suit is timely. Is A's suit barred by the statute-of-limitations?

In Ontario, Inc. v. Samsung C&T Corp., ___ A.D.3d ___, No. 2016 NY Slip Op 06671 (1st Dep't Oct. 11, 2017), New York's Appellate Division, First Department, faced with these facts, concluded that A's suit was time-barred because plaintiff was a nonresident of New York, the claim accrued in Ontario and the action was commenced more than two years after the date of the breach.

While the outcome of the Court's decision was right on the mark, the reasoning it used was unusual, and potentially problematic if applied with equal force to cases commenced in New York where the parties agree their contract should be enforced under the law of a state having a statute of limitations that is longer than that of New York. It is also problematic because the statute of limitations is only one of countless other New York laws that are considered ?procedural? for conflict of laws purposes. The Court's decision suggests that parties can, for example, agree that New York Court must apply the California Code of Civil Procedure, rather than the New York's Civil Practice Law & Rules (the ?CPLR?). While it seems unlikely a court would seriously entertain such an argument, the decision arguably provides legal support for it.

The Court could have reached the same outcome had it followed a simpler and more direct interpretive path. Had it done so, the Court would have given full effect to prior precedent. Because the Court followed a different interpretive path, it had to create a potentially broad exception to the traditional conflict-of-law rule that forum law governs procedural matters, a rule that applies even where the parties have agreed to a choice-of-law provision designating a body of law other than forum law to govern the contract. See, e.g., Portfolio Recovery Associates LLC v. King, 14 N.Y.3d 410, 415-16 (2010).

Even apart from that, the Court's consent-to-extra-forum-procedural-law rule was not relevant to the case before it. Assuming parties may opt out of New York procedural law in appropriate circumstances, there was no opt-out here. The parties consented to New York law applying and the suit was brought in New York.

Because the suit was brought in New York, New York law governed procedural matters, unless a statutory exception to that rule applies. That would be true irrespective of the party's choice-of-law provision, and irrespective of whether New York law also governed substantive matters.

Orion, Inc. concerned New York Civ. Prac. L. & R. ("CPLR") Section 202, New York's borrowing statute, which happens to be one

of the few (if not the only) statutory exceptions to the common-law forum-law-governs-procedure conflicts-of-law rule. That exception, as we'll see, would apply, even if we assume that parties have agreed that New York procedural law applies.

Thus whether or not the parties consented to New York procedural law was beside the point.

Finally, the only context in which the consent-to-extra-forum-procedural-law rule could have any meaning would be where suit is brought in New York, but the parties have agreed that another state's laws shall govern the contract and its enforcement. But in that context the rule could, as we'll see, lead to unnecessary confusion; spawn satellite conflict-of-law issues; and create a serious risk of anomalous and unwarranted outcomes, including outcomes that violate New York's rule that parties can consent on a pre-dispute basis to a shorter limitations period, but not to a longer one. See John J. Kassner & Co., Inc. v. City of New York, 46 N.Y.2d 544, 550-52 (1979).

Understanding Ontario, Inc.'s Legal Landscape:

New York Conflict-of-Law Rules Applicable to Choice-of-Law Clauses

Ontario, Inc.'s material facts are straightforward and summarized above. But understanding why the Court's analysis raises some questions requires a brief discussion of some New York conflict-of-law rules that are not necessarily part of every attorney's or client's working vocabulary.

Why were New York's Conflict-of-Law Rules Relevant?

Orion arose out of a transaction involving more than one jurisdiction (the State of New York and the Province of Ontario, Canada). It thus at least potentially raised questions about which jurisdiction's law would apply to which issue. And as it turned out, differences in the length of Ontario's contract statute of limitations and that of New York's required the New York Court to decide which applied, for the answer to that question determined whether plaintiff timely commenced the action.

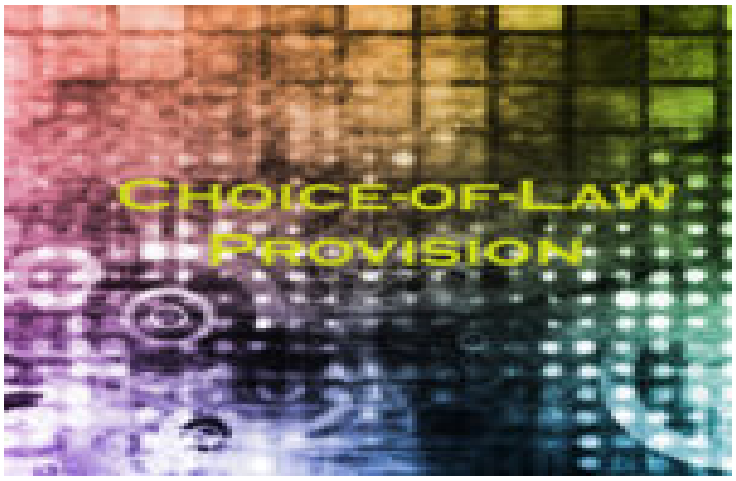
What Conflict-of-Law Rules Apply to Contract Disputes Commenced in New York Courts?

Like most or all other states, New York has a set of common-law and statutory rules and principles which govern choice-of-law questions. These are commonly referred to as ?conflict-of-law rules? or ?choice-of-law rules.? See, e.g., Liberty Synergistics Inc. v. Microflo Ltd., 718 F.3d 138, 151 (2d Cir. 2013); Ministers & Missionaries Benefit Bd. v. Snow, 26 N.Y.3d 466, 466, 474, 479 (2015), rearg. den. 26 N.Y.3d 1136 (2016).

Conflict-of-law rules are not limited to rules and principles courts use to determine which state's law governs one or more issues bearing on the outcome on the merits of a case or controversy. They include all rules and principles that are designed determine what jurisdiction's laws?be they substantive, procedural or conflict-of-law-related?apply to issues arising out of actions commenced in New York which bear some reasonable relationship to one or more foreign jurisdictions or U.S. states other than New York.[1

Examples of conflict-of-law rules are rules or principles concerning: (a) which potentially applicable laws are considered substantive versus procedural for conflict-of-law purposes; (b) which jurisdiction's law applies to procedural, and which to substantive, issues; (c) which jurisdiction's conflict-of-law rules govern the conflict-of-law determination (almost always those of the forum state); and (d) the validity and enforceability of choice-of-law provisions. See Tanges v. Heidelberg North America, Inc., 93 N.Y.2d 48, 54-55 (1999); Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of N.Y., 822 F.3d 620, 642 (2016).
Application of New York's Conflict-of-Law Rules to the Ontario, Inc. Facts
New York's conflict-of-law rules and principles provided the Court with a straightforward way to decide Ontario, Inc. and their application would have yielded the same outcome, with a lesser risk of confusion and anomalous results in cases involving only slightly different facts.

The parties' contract stipulated that New York law would govern the contract and its ?enforcement,? and that the parties would, in the event of a dispute, consent to jurisdiction of a New York state or federal court of competent jurisdiction. This choice-of-law provision was enforceable under New York conflict-of-law rules, either because there was apparently a reasonable relationship between the contract and New York, or because the contract was ?in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than? $250,000.00, which means it was enforceable under New York General Obligations Law (?GOL?) Section 5-1401, even if it did not ?bear[] a reasonable relation? to New York. See N.Y. Gen. Oblig. L. § 5-1401; Fireman's Fund, 822 F.3d at 641-42.



The broad choice-of-law provision evidenced the parties' agreement that New York's substantive law would apply to their dispute. In the absence of party consent, or a statutory directive, courts generally determine the law applicable to substantive issues in a contract-case by analyzing each jurisdiction's contacts with the transaction, and ?grouping? the most significant contacts to identify the jurisdiction having the most meaningful nexus to the dispute. See Re Allstate Ins. Co. (Stolarz), 81 N.Y.2d 219, 226 (1993); Zurich Ins. Co. v. Shearson Lehman Hutton, Inc., 84 N.Y.2d 309, 317-19 (1994) (?most significant relation to the transaction and the parties?).

In general, state interests are ordinarily not taken into account in the same way they are in tort cases. See Shearson Lehman, 84 N.Y.3 at 319; Allstate, 81 N.Y.2d at 226-27. But the grouping of contacts approach is a surrogate of sorts for such an analysis of governmental interests, for the jurisdiction with the most significant relation to the transaction and the parties is, in many instances, also the jurisdiction which has the most significant interest in having its law applied. And courts may consider interests in contract cases when those interests are readily ascertainable and important. See id.; Shearson Lehman, 84 N.Y.3d at 319.

The choice-of-law provision obviated the need for the Court to undertake such a ?grouping of contacts? analysis, but the threshold (and, as it turns out, pivotal) issue was whether the action was barred by the statute of limitations, which for conflict-of-law purposes, New York deems to be procedural, not substantive.

Choice-of-law clauses are ordinarily construed to determine applicable substantive law, without regard to choice-of-law rules (other than those concerning the enforcement of choice-of-law clauses), but not to displace forum procedural law. See Ministers & Ministries, 26 N.Y.3d at 470; IRB-Brasil Resseguros, S.A. v Inepar Invs., S.A., 20 N.Y.3d 310, 315-17 (2012); Portfolio Recovery, 14 N.Y.3d at 415-16. Unlike substantive contract law issues ? e.g., contract validity and enforceability?procedural issues are not subject to a case-by-case analysis to determine which jurisdiction has the most significant grouping of contacts. New York follows the traditional conflict-of-law rule that forum law governs procedural issues, unless there is a statutory or common-law exception to the rule. See Tanges , 93 N.Y.2d at 54-55.

New York deems for conflict-of-law purposes its statute-of-limitations law to be procedural, not substantive because rather than extinguishing a legal right for all purposes, it suspends the remedy for a violation of that right once the time to seek the remedy has elapsed. See Tanges, 93 N.Y.2d at 54-55.

Because New York's statute of limitations is considered procedural, it applied absent a statutory exception that would direct the court to apply the laws of another jurisdiction. The so-called ?borrowing statute??which is codified in Chapter 2 of the CPLR, along with the statutes setting forth New York's limitations periods and other statute-of-limitations provisions?is such an exception. See CPLR § 202.

New York's Borrowing Statute?A Statutory Exception to the Forum-Law-Governs-Procedure Rule

New York's borrowing statute, CPLR Section 202, requires New York courts to find that a nonresident whose claims ?accrued? outside of New York is subject to the shorter of: (a) New York's statute of limitations; and (b) the statute of limitations of the state or other jurisdiction where the claims accrued:
An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.
CPLR § 202.

The borrowing statute has been on the books for over a century. See Global Fin. Corp. v. Triarc, 93 N.Y.2d 525, 528-29 (1999). New York determined it needed a borrowing statute because, among other things, the forum-law-governs-procedure conflict-of-law rule created forum-shopping opportunities for out-of-state plaintiffs. See Antone v. General Motors Corp., 64 N.Y.2d 20, 27-28 (1984); Martin v. Julius Dierck Equipment Co., 43 N.Y.2d 583, 588 (1978). Nonresidents could, but for the borrowing statute, commence in New York actions that would be time-barred in the place where they ?accrued??that is, the place where the last act necessary to establish the cause of action is deemed to occur, which quite often is the plaintiff's residence or domicile?but not time-barred under New York's statute of limitations. See Global Fin. Corp., 93 N.Y.2d at 529-30.

Under the borrowing statute, ?the time limited by the laws of? Ontario applied because: (a) plaintiff was a nonresident of New York; (b) the cause of action accrued in Ontario, the place where plaintiff resided and thus suffered the economic consequences of the breach of contract; and (c) Ontario's two-year statute of limitations was shorter than New York's six-year statute of limitations. Because the action was barred by Ontario's two-year statute of limitations, it could not commenced in New York, even though it would have been timely if New York's six-year statute of limitations applied.

The above analysis would have applied were there no choice-of-law and choice-of-forum clause. It would have applied irrespective of whether the parties' choice-of-law clause were broad or narrow. And even were we, like the First Department, to deem New York CPLR 203 to be simply part of New York's statute of limitations?as opposed to a statutory directive to courts to apply in certain circumstances another jurisdiction's statute-of-limitations?the result would be the same, irrespective of whether the parties agreed to a broad or narrow New York choice-of-law clause.

How did the First Department Decide Ontario, Inc., and Why does it Matter?]]
Stay tuned for Part II and find out ?.

Footnotes:]

[1For present purposes, we are including under the rubric of ?conflict-of-law rules? only rules and principles concerning what are sometimes referred to as ?horizontal conflicts of law,? that is, conflicts between New York law and the laws of one or more jurisdictions of coordinate (or roughly coordinate) sovereignty. Conflicts between federal and state law, which implicate, among other things, federalism concerns regulated by U.S. constitutional law, are sometimes also included under the general rubric of ?conflicts-of-law,? and in that context are sometimes referred to as ?vertical conflicts-of-law.?

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