

New York Law As An International Standard For Business

BY STEPHEN P. YOUNGER

As an international commercial and financial capital, New York law has traditionally been selected to govern commercial contracts and has served as a venue of choice for the resolution of cross-border disputes. The historic prominence of the state's judiciary and bar, along with its well-developed, fair and predictable body of law have drawn parties from around the world to select New York law to govern their agreements and to choose New York as the venue for resolving their disputes.

Today's era of global commerce has spurred the importance of international law as a key aspect of economic development. Consider that in 2008, dollar receipts from the export of legal services by US law firms was over \$7.25bn (according to an ABA study). At the epicentre of the legal services industry, New Yorkers benefit from hundreds of millions of dollars generated in direct, indirect and tax revenues from legal matters each year.

Consider also that lawyers are typically among the first to be contacted when an international company is deciding where to site a business, where to site a transaction or where to form a corporate entity. The lawyer's role as part of the engine of economic development is thus often underappreciated.

In today's economic climate, it is imperative that New York maintain its reputation as a standard for choice of law and as a stage for international dispute resolution. This need is especially critical in light of recent competition from other legal systems and from international seats of arbitration. Australia, India and Ireland recently established specialised international arbitration courts. France, the United Kingdom, Switzerland, Sweden and China – all jurisdictions well-known for international arbitration – have designated specialised courts or judges to hear cases to challenge or enforce arbitration awards. Several commercial centres such as Hong Kong and Singapore have state-of-the-art international arbitration centres.

Economic experts estimate that if the business of dispute resolution in New York were to increase by only 10 to 20 percent, it could produce approximately \$200m to \$400m in incremental revenues annually, and would no doubt promote New York commerce.

The New York State Bar Association's Task Force on New York Law in International Matters was formed last year to synthesise the advantages of New York Law as an international standard and the use of New York as a neutral forum for resolving international disputes. Comprised of experts in the fields of commercial law, litigation, arbitration and

mediation, the Task Force recently published a report of its findings.

Key advantages of New York and New York law

Chief among the advantages to resolving disputes in New York is the state's highly qualified, diverse and prominent bar, a large segment of which is routinely exposed to the world's most complex and sophisticated international commercial transactions.

Likewise, New York's judiciary has vast experience in presiding over international disputes. Complex commercial litigation in the State's Supreme Court system is likely to be handled by justices in the Court's specialised Commercial Division, a forum of choice for business litigations. Similarly the US Bankruptcy Court for the Southern District of New York, with its proximity to Wall Street, is highly specialised and a natural venue for major Chapter 11 and 15 cases, and litigation within those cases which have an effect on world markets.

New York is also home to a deep roster of international arbitrators and arbitration providers.

International corporations' selection of a particular legal structure is a key factor in the outcome of their disputes. The task force's report points to New York's position as a global financial centre as a major influence on the development of its laws, which are framed around the goal of ensuring stable, just and predictable outcomes. For example, New York courts have articulated a strong interest in "protecting the justifiable expectation" (*J. Zeevi & Sons v. Grindlays Bank [Uganda]*, 37 N.Y.2d 115, 120 (N.Y. 2002)) of foreign parties choosing New York law.

Several key institutional aspects of New York law also make it well-suited for the resolution of international disputes. Because New York is a common law jurisdiction, businesses can rely on the law being clearly articulated in judicial decisions. Litigation results in New York are final upon exhaustion of a defined appeal process. Parties cannot, as is possible in some civil law jurisdictions, introduce new evidence at the appellate level. Cross-examination, too, distinguishes New York from other civil law systems, and ensures the veracity and completeness of witness testimony.

Furthermore, New York courts are uniquely accessible to foreign parties, with minimal restrictions on the ability of a foreign corporation to sue in State Courts and statutes that honour the choice of New York law and venue. The State has a tradition of conforming its statutory law to international trade practice, and, as a part of the United States, complies with relevant treaties and free trade agreements. New York law permits ►►

the consideration of international customs, so parties can vary certain procedural aspects of New York law. For example, parties can waive the right to a jury trial. Parties can provide for attorney-fee shifting if they so desire. And, parties who are wary of American-style litigation discovery may choose to limit discovery through arbitration or through agreed limits in a contract clause.

The potential for economic growth related to international arbitration in particular cannot be understated. In addition to being home to leading arbitrators, lawyers and arbitral institutions, New York offers the highest respect for parties' choice of arbitration and provides an established framework for supporting international arbitration. Importantly, arbitration awards are subject to very limited review by the courts.

Sound case management skills are typically a key ingredient to selecting New York arbitrators. New York arbitrations are characterised by their efficiency in streamlining pre-hearing disclosure, focusing claims and defences early in proceedings, and generally structuring proceedings in a way that is convenient and cost-efficient to the extent possible.

Mediation, too, has become an integral and beneficial component of New York litigation and arbitration, and many courts now regularly provide for court appointed mediation. The resulting efficiency can often be very beneficial. For example, settlement is achieved in the mediation program offered by the United States District Court for the Southern District 88 percent of the time and in the Commercial Division of Supreme Court, New York County over 50 percent of the time. Even these figures do not capture the resolutions reached after mediation that are facilitated by the process.

Recommendations of the Task Force

First, the task force recommends the creation of a permanent centre for international dispute resolution in New York. While suitable facilities are available through the provider organisations in New York City and in various New York law firms, in order to compete with arbitration centres in London, Zurich and Singapore, New York should have a facility dedicated to international arbitration.

As previously stated, the judges in New York's Commercial Division are seasoned in commercial matters. However, the designation of one or more judges in the existing Commercial Division to hear all matters that come before the court involving international and other commercial arbitration issues could serve to enhance New York's attractiveness to international parties.

Finally, the task force proposes creating a 'rocket docket' in the court system's Commercial Division to expedite the handling of international matters. This option might be attractive to international parties who do not wish to use the full array of procedures available under New York civil procedure law. Such parties might elect streamlined procedures modelled on those available generally in international arbitration, such as use of written witness statements in place of affirmative testimony at trial, limitation of pre-trial discovery procedures, waiver of jury trial and possibly limitations on grounds for appeal.

Given the potential for economic growth, it is important for the business community to understand the advantages of invoking New York law and how it can be a flexible legal structure for business people and lawyers around the world. ■



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