



NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL
COUNSEL

MEMORANDUM

June 28, 2017

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on Proposed Amendment to the Rules of the Commercial Division to Include a Sample Choice of Law Clause for Use in Commercial Contracts

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The Commercial Division Advisory Council has recommended the amendment of section 202.70(d) of the Rules of the Commercial Division to add a sample New York choice of law provision for use by parties in commercial contracts (Exh. A, pp. 5-6). As described in a memorandum of the Council supporting the proposal, the promulgation of the sample clause is intended to (1) provide guidance and assistance to litigants who wish to choose New York law to govern their disputes (Exh. A, p. 2); (2) reduce litigation over choice-of-law issues (Exh. A, pp. 2-4); and (3) both “assist the Advisory Council in showcasing New York’s comprehensive body of predictable and sensible commercial law” and facilitate use of New York courts in commercial disputes (Exh. A, p. 4).

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Persons wishing to comment on the proposed provision should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than August 25, 2017.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

MEMORANDUM

TO: Commercial Division Advisory Council

FROM: Subcommittee on Procedural Rules to Promote Efficient Case Resolution (“Subcommittee”)

DATE: May 2, 2017

RE: **Proposed Amendment to Section 202.70 of Uniform Rules for the Supreme and County Courts addressing sample choice of law clause**

The purpose of this memorandum is to recommend that Section 202.70 of the Uniform Rules for the Supreme and County Courts (Rules of the Commercial Division of the Supreme Court) be amended by adding language to Section 202.70(d), which currently relates only to sample choice of forum clauses, to address the possible use of a sample choice of law clause calling for the application of New York law (which sample clause would be added as a new Appendix).

The Commercial Division Advisory Council has previously recommended an amendment to the Commercial Division Rules to refer to an Appendix containing a sample Forum Selection Clause. In response, the Administrative Board of the Courts requested public comment on the Advisory Council’s proposed amendment. The Office of Court Administration received no public comments on the proposed amendment. Thereafter, this amendment was adopted and then later modified. Specifically, Section 202.70(d)(2) now provides that parties to a contract may consent to the exclusive jurisdiction of the Commercial Division or the federal courts in New York State by including such consent in their contract, and includes a reference to Appendix C to the Commercial Division Rules, which contains sample choice of forum clauses. The

Subcommittee proposes that the Council adopt another amendment to the Commercial Division Rules to refer to a new Appendix D containing a sample choice of law clause that could be used by the parties to a contract.

In New York, “[w]hen the parties to a contract have designated a choice of law in their agreement, and that choice bears a reasonable relationship to the parties’ agreement, it will generally be upheld” R. Haig, Commercial Litigation in New York State Courts, § 14:7, at 1181-82 (4th ed. 2015). There also are New York statutory provisions that govern choice of law provisions. Under Section 5-1401 of the General Obligations Law, “parties to contracts may agree to have their disputes governed by New York law, regardless of whether the agreement bears a reasonable relation to New York, provided that the amount in controversy is at least \$250,000.” *Id.*, § 14:9, at 1187.¹ In addition, Section 1-105(1) of the Uniform Commercial Code codifies “the general common law rule that parties may agree to the law to govern construction of their contracts.” *Id.*, § 14:10, at 1191.

A number of benefits would result from an amendment to the Commercial Division Rules that refers to a sample choice of law clause. Such a clause would provide guidance and assistance to litigants who wish to choose New York law to govern their disputes, but are not sure how to draft an effective clause. A sample clause of law clause would also reduce litigation over the law to be applied to a dispute and thus save time and money for both courts and litigants. In this connection, a litigation in the Commercial

¹ Under Section 5-1402 of the General Obligations Law, “parties to certain contracts may agree to submit to the jurisdiction of New York courts where the parties have included a New York choice of law clause and the obligations of the contract amount to at least \$1 million.” *Id.*

Division arising out of a contract with interstate or transnational contacts requires the court to choose the substantive law of the appropriate state or nation to apply to the transaction. In the absence of a provision in the contract specifying the applicable law, the court will generally resort to New York's choice of law rules, the application of which may defeat the expectations of one or both of the parties. Therefore, contracting parties should designate in their contracts the law that they intend to govern in the event of a dispute. Such choices are important not only to ensure certainty but also uniformity in multistate transactions, such as franchising agreements.

The utility and value of choice of law clauses is particularly apparent when the frequent complexity of litigation over conflicts of law principles is considered. Absent a choice of law clause, New York courts analyze the "center of gravity" or "grouping of contacts" between the controversy and the relevant jurisdictions to determine which jurisdiction's laws govern disputes involving the interpretation and enforcement of the contract. The factors that determine which jurisdiction has the most significant relationship to a contract dispute include: (1) the place of contracting, (2) the place of contract negotiation, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the domiciles or places of business of the parties. In the absence of a choice of law clause, it is not unusual for there to be extensive and time-consuming litigation over the application of these principles of conflicts of law to the facts of a particular dispute. Such litigation may include extensive motion practice, discovery proceedings, evidentiary hearings, and appeals. It is also entirely possible that the result of such litigation may be application of the law of a jurisdiction which was not within the expectation or even contemplation of the parties at the time they executed their

agreement. All of this time, expense, and uncertainty can be eliminated through the use of an effective choice of law clause.

In addition, a sample choice of law clause in the Commercial Division Rules would assist the Advisory Council in showcasing New York's comprehensive body of predictable and sensible commercial law. Finally, the increased use of New York General Obligations Law §§ 5-1401 and 5-1402 could result in additional commercial litigation in New York courts.

Thus, the Subcommittee now recommends that Section 202.70(d) of the Rules of the Commercial Division be amended as follows:

(d) Assignment to the Commercial Division

(1) Within 90 days following service of the complaint, any party may seek assignment of a case to the Commercial Division by filing a Request for Judicial Intervention (RJI) that attaches a completed Commercial Division RJI Addendum certifying that the case meets the jurisdictional requirements for Commercial Division assignment set forth in subdivisions (a), (b) and (c) of this section. Except as provided in subdivision (c) below, failure to file an RJI pursuant to this subdivision precludes a party from seeking assignment of the case to the Commercial Division.

(2) Subject to meeting the jurisdictional requirements of subdivisions (a), (b) and (c) of this section and filing an RJI in compliance with subsection (d)(1) above, the parties to a contract may consent to the exclusive jurisdiction of the Commercial Division of the Supreme Court by including such consent in their contract. A sample choice of forum provision can be found at Appendix C to these Rules of the Commercial Division. Alternatively, subject to meeting the jurisdictional and procedural requirements applicable to the Commercial Division and the federal courts, the parties to a contract may consent to the exclusive jurisdiction of either the Commercial Division of the Supreme Court or the federal courts in New

York State by including such consent in their contract. An alternative sample choice of forum provision to that effect can also be found at Appendix C to these Rules of the Commercial Division. In addition, the parties to a contract may consent to having New York law apply to their contract, or any dispute under the contract. A sample choice of law provision can be found at Appendix D to these Rules of the Commercial Division.

APPENDIX D. COMMERCIAL DIVISION SAMPLE CHOICE OF LAW PROVISION

Purpose

The purpose of this sample choice of law provision is to offer contracting parties a streamlined, convenient tool in expressing their consent to having New York law apply to their contract, or any dispute under the contract.

This sample provision is not intended to modify governing case law or to replace any parts of the Commercial Division Rules, the Uniform Civil Rules, the CPLR, or any other applicable rules or regulations. This sample provision should be construed in a manner that is consistent with governing case law and applicable sections and rules of the Commercial Division Rules, the Uniform Civil Rules, the CPLR, and any other applicable rules and regulations. Parties which use this sample provision must meet any requirements of applicable law.

The Sample Choice of Law Provision

To express their consent to have New York law apply to the contract between them, or any disputes under such contract, the parties may include specific language in their contract, such as: “THIS AGREEMENT AND ITS ENFORCEMENT, AND ANY CONTROVERSY ARISING OUT OF OR RELATING TO THE MAKING OR PERFORMANCE OF THIS AGREEMENT, SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAW OF THE STATE OF NEW YORK, WITHOUT REGARD

TO NEW YORK'S PRINCIPLES OF CONFLICTS
OF LAW."