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Expert Analysis

International Cases Court of Appeals Decided in 2012, Looking Ahead to 2013

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The courts of New York provide an attractive forum for litigants around the world for many reasons, including the reliability and predictability of the New York courts, New York's well-developed law and discovery regime, and the position of New York City as a major international financial center. In large part, New York's highest court sets the parameters for determining which disputes the New York courts will entertain. In each of the four international cases decided by the New York Court of Appeals in 2012, the events giving rise to the dispute occurred primarily, if not exclusively, outside of the United States. The decisions in these cases provide some insight into the circumstances under which foreign litigants can successfully access the New York courts.

Commercial Contracts

In the purely commercial context, both the New York Legislature and the Court of Appeals have made clear that the New York courts are open to parties whose disputes arise out of significant commercial contracts, even where the transaction in question has no connection at all to New York.

Almost 30 years ago, to reinforce New York's standing as a commercial and financial center, the Legislature enacted two related statutes. Section 5-1401 of the General Obligations Law (GOL),[1] provides that the choice of New York law in significant commercial contracts will be enforced regardless of whether the contract has a New York connection. The Legislature sought to "encourage the parties of significant commercial, mercantile or financial contracts to choose New York law" by eliminating any uncertainty as to whether a New York court would respect the parties' choice of law even where the dispute had no contacts with New York.[2] The companion provision, GOL 5-1402,[3] opens the courts to foreign parties by providing that any person can sue a foreign party in the New York courts where (i) the parties chose New York law in their contract pursuant to GOL 5-1401, (2) the contract exceeds $1 million, and (3) the foreign party consented to the jurisdiction of the New York courts.

The Court of Appeals embraced this policy of open access in *IRB-Brasil Resseguros v. Inepar Investments*,[4] a case involving a Brazilian reinsurance company, IRB-Brasil Resseguros, S.A. (IRB), which sued in New York Supreme Court to collect on global notes issued by an Uruguayan corporation, guaranteed by a Brazilian corporation, and payable through a fiscal agent in London to an account at a Brussels clearinghouse. The documents contained a New York choice of law clause, a non-exclusive New York forum clause, and a consent to New York jurisdiction. The authors represented IRB in this litigation.

After the issuer defaulted, the guarantor asserted that its guarantee was void under Brazilian law because it had not been duly authorized by its board of directors. IRB argued, among other things, that the choice of law clause, which provided that the guarantee was "governed by, and shall be construed in accordance with, the laws of the State of New York," required application of New York law, and that the guarantee was enforceable under New York principles of ratification and apparent authority. The guarantor claimed that because the clause did not contain the language "without regard to conflict-of-law principles," the clause required a common law conflicts-of-law analysis which, it contended, would result in application of Brazilian law. The Supreme Court granted summary judgment to IRB and the Appellate Division, First Department, affirmed.[5]

The Court of Appeals granted leave to appeal and held that the choice of New York law clause in the guarantee required

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application of New York substantive law without regard to whether there were contacts between the transaction and New York. The court also affirmed that GOL 5-1401 and 5-1402 "read together permit parties to select New York law to govern their contractual relationship and to avail themselves of New York courts despite lacking New York contacts." It reasoned that "[t]o find here that courts must engage in a conflict-of-law analysis despite the parties' plainly expressed desire to apply New York law would frustrate the Legislature's purpose of encouraging a predictable contractual choice of New York commercial law and, crucially, of eliminating uncertainty regarding the governing law." The court therefore "conclude[d] that parties are not required to expressly exclude New York conflict-of-laws principles in their choice-of-laws provision in order to avail themselves of New York substantive law." Indeed, it indicated that if parties want to employ conflict-of-law principles, they must expressly so state in their contracts.

Tort and Antitrust Actions

In the tort and antitrust context, the ability to access the New York courts is not so clear, as reflected in the Court of Appeals decisions in *Global Reinsurance Corp.-U.S. Branch v. Equitas,*[6] and *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*.[7]

In *Global Reinsurance*, the New York branch of a German reinsurance company sued a group of London reinsurers, collectively known as Equitas. Equitas was formed by Lloyds of London, an insurance marketplace comprised of many syndicates, so that Equitas could take an aggressive approach to claims under retrocessional reinsurance treaties. Plaintiff alleged that the creation of Equitas violated New York's Donnelly Act because, unlike Lloyds, which had an interest in obtaining future business from claimholders, Equitas had no competitive disincentive to deal harshly with claims.

The Court of Appeals reinstated the dismissal of the claim against Equitas. Among other things, it held that the Donnelly Act cannot extend to a foreign antitrust conspiracy where the only New York connection was that plaintiff allegedly suffered injury in the state because its New York branch purchased the coverage in the London marketplace. The court observed that "there is nothing in the pleadings to justify an inference that [Equitas] targeted United States commerce specially or that its effect upon commerce in this country was substantial."

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The court reviewed the reach of the Sherman Act, explaining that the federal limitations on the reach of that act would be essentially negated if states were permitted to authorize claims going beyond that scope. However, the court noted that "[e]ven if the Sherman Act could reach the purported conspiracy, it does not follow that the Donnelly Act should be viewed as coextensive." It thus grounded its decision in the lack of alleged harm to competition in New York, holding that "[f]or a Donnelly Act claim to reach a purely extraterritorial conspiracy, there would, we think, have to be a very close nexus between the conspiracy and injury to competition in this state."

In *Licci*, however, the Court of Appeals found sufficient New York contacts to exercise jurisdiction over Lebanese Canadian Bank, SAL (LCB). The *Licci* plaintiffs were Israeli residents or their family members who were injured or killed in rocket attacks allegedly launched by Hezbollah. They brought claims in New York Supreme Court, which were subsequently removed to federal court, under the Alien Tort Statute and the Anti-Terrorist Act and for negligence and breach of Israeli law, alleging that LCB assisted Hezbollah in committing the attacks by facilitating international monetary transactions through a foundation that is part of the financial arm of Hezbollah. They asserted personal jurisdiction over LCB based on New York's long-arm statute, claiming that LCB transacted business in New York by transferring several million dollars, using dozens of international wire transfers, through a correspondent bank account with American Express Bank.[8]

The U.S. District Court for the Southern District of New York granted LCB's motion to dismiss for lack of personal jurisdiction.[9] Plaintiffs appealed, and the U.S. Court of Appeals for the Second Circuit certified two questions to the New York Court of Appeals, both of which the court answered in the affirmative:

> (1) Does a foreign bank's maintenance of a correspondent bank account at a financial institution in New York, and use of that account to effect "dozens" of wire transfers on behalf of a foreign client, constitute a "transact[ion]" of business in New York within the meaning of Section 302(a)(1) of the New York Civil Practice Law and Rules (CPLR)?
>
> (2) If so, do the plaintiffs' claims… "aris[e] from" LCB's transaction of business in New York within the meaning of CPLR 302(a)(1)?[10]

In answering the first question in the affirmative, the New York Court of Appeals clarified its holding in *Amigo Foods Corp. v. Marine Midland Bank–N.Y.*,[11] that a correspondent bank relationship, without more, may not establish long-arm jurisdiction under CPLR 302, explaining that the bank account can be sufficient if the defendant's use of the account was purposeful. The court held that "complaints alleging a foreign bank's repeated use of a correspondent account in New York on behalf of a client—in effect, a 'course of dealing'—show purposeful availment of New York's dependable and transparent banking system, the dollar as a stable and fungible currency, and the predictable jurisdictional and commercial law of New York and the United States."

As to the second question, the court explained that "the 'arise-from' prong [under CPLR 302(a)(1)] limits the broader 'transaction-of-business' prong to confer jurisdiction only over those claims in some way arguably connected to the transaction." The court held that the complaint alleged LCB violated duties owed to plaintiffs, and that those alleged breaches occurred when

LCB used its correspondent bank account in New York, thus satisfying the "arise-from" requirement. The allegation that LCB used the account "dozens" of times to route the transfer of funds for Hezbollah was important to the court because it indicated "desirability and a lack of coincidence," as opposed to use of the account only once or twice or by mistake. The court ruled that as long as one element of a claim arises from a New York contact, the transaction "arises from" within the meaning of CPLR 302(a)(1).

Judgment Enforcement

Finally, given New York's prominence as an international financial center, its courts frequently contend with judgment enforcement actions complicated by competing foreign interests. The Court of Appeals last year considered one such case, *Swezey v. Merrill Lynch, Pierce, Fenner & Smith*,[12] in which a representative of a class of Philippine victims of human rights abuses by Ferdinand Marcos sought the proceeds of a brokerage account held in New York to satisfy a $2 billion judgment entered by a federal court in Hawaii. The court considered whether the invocation of sovereign immunity by the Republic of the Philippines required dismissal under CPLR 1001(b), which requires joinder of a necessary non-party, unless jurisdiction over the non-party can only be obtained by consent and justice requires allowing the action to proceed without the party.[13]

After a class representative commenced a CPLR 5225 turnover proceeding to execute the judgment against a brokerage account at the New York office of Merrill Lynch, Pierce, Fenner & Smith, several Philippine entities moved to intervene and requested dismissal of the action under CPLR 1001, asserting that the Republic of the Philippines and a Philippine commission organized to locate stolen national assets were necessary parties that could not be joined due to the assertion of sovereign immunity. The New York Supreme Court denied the motion to dismiss, but the Appellate Division, First Department, reversed and certified to the Court of Appeals the question of whether its decision was correct.[14]

The Court of Appeals affirmed, holding that the case could not "'be decided without the presence of the foreign government.'" The court considered the five statutory factors enumerated in CPLR 1001(b), finding, among other things, that the Republic would be "severely prejudiced by a turnover proceeding" because allowing the $2 billion judgment against Marcos' estate "to be executed on property that may rightfully belong to the citizens of the Philippines could irreparably undermine the Republic's claim to the…assets," and could create the possibility of inconsistent judgments with the Republic and the class both executing against the same assets. While the court recognized that the class would not have a readily available remedy if the proceeding were dismissed for non-joinder, it gave greater weight to the Republic's right to self-governance and national sovereignty, recognizing the importance of respecting its declaration of sovereign immunity.

Looking forward, the Court of Appeals will hear argument later this month in another case, *Commonwealth of the Northern Mariana Islands v. Canadian Imperial Bank of Commerce*,[15] in which the Commonwealth of the Northern Mariana Islands (CNMI) seeks to collect tax judgments against two individuals through a turnover proceeding against a Canadian bank whose Cayman subsidiary allegedly holds funds of the individuals. In that case, CNMI brought suit in federal court seeking an order compelling Canadian Imperial Bank of Commerce (CIBC), a Canadian bank with a New York branch, to turn over funds held in certain accounts at CIBC's Cayman Islands subsidiary. The Southern District of New York was faced with the question of whether, for purposes of CPLR 5225(b), CIBC has "possession or custody" of assets held in accounts at the Cayman subsidiary, which CIBC asserts is a separate entity twice removed from CIBC. (The authors' firm represents CIBC in these proceedings.)

The District Court held that CIBC did not have possession or custody of the assets within the meaning of CPLR 5225(b), largely because CPLR 5225(b), like 11 other provisions in the CPLR relating to the disposition of property, uses the phrase "possession or custody" and not the word "control." In contrast, five separate provisions of the CPLR relating to the disclosure of information use the phrase "possession, custody or control."[16] Plaintiff appealed and the Second Circuit certified to the New York Court of Appeals the questions whether a court may issue a turnover order "to an entity that does not have actual possession or custody of a debtor's assets, but whose subsidiary might have possession or custody of such assets" and, if so, what factual considerations a court should consider in determining whether to issue such an order.

Since the Court of Appeals decision four years ago in *Koehler v. Bank of Bermuda Ltd.*,[17] which held that a garnishee bank subject to the New York courts' jurisdiction could be required to turn over share certificates belonging to a customer which it held outside of New York, the federal and state courts have struggled with the scope of New York's turnover statute.[18] While the *CNMI* case may touch upon some issues related to *Koehler*, it is unlikely to be the last turnover dispute considered by the Court of Appeals.

1. N.Y. Gen. Oblig. Law §5-1401 (McKinney 2010).
2. Sponsor's Mem., Bill Jacket, L. 1984, ch. 421.
3. N.Y. Gen. Oblig. Law §5-1402 (McKinney 2010).
4. 2012 N.Y. Slip Op. 08669 (Dec. 18, 2012).
5. *IRB-Brasil Resseguros, S.A. v. Inepar Investments, S.A.*, 83 A.D.3d 573 (1st Dept. 2011).
6. 18 N.Y.3d 722 (2012).
7. 2012 N.Y. Slip Op. 07854 (Nov. 20, 2012).
8. 2012 N.Y. Slip Op. 07854 at *2.
9. *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 704 F.Supp.2d 403 (S.D.N.Y. 2010).
10. *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F. 3d 50, 75 (2d Cir. 2012) (certifying questions).
11. 39 N.Y.2d 391 (1976).
12. 19 N.Y.3d 543 (2012).
13. N.Y. C.P.L.R. §1001(b) (McKinney 2012). 14. *Swezey v. Lynch*, 87 A.D.3d 119 (1st Dept. 2011) (decision); *Swezey v. Lynch*, 2011 N.Y. Slip Op. 85283(U) (1st Dept. Sept. 29, 2011) (granting motion for leave to appeal to the Court of Appeals).
15. 693 F.3d 274 (2d Cir. 2012) (per curiam).
16. *Commonwealth of the Northern Mariana Islands v. Canadian Imperial Bank of Commerce*, No. 11-mc-00099-LAK (S.D.N.Y. April 12, 2012).
17. 12 N.Y.3d 533 (2009).
18. See Gregory A. Litt, "International Enforcement of Judgments and Arbitral Awards: Challenges for Creditors, Debtors and International Banks," Corp. Disp. October–December 2012, at 17, 19