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THE NEW YORK COURTS ARE OPEN FOR BUSINESS TO FOREIGN LITIGANTS

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Parties who choose New York law to govern their commercial contracts should be aware of a New York statute that also permits them to access the New York courts in the event of a dispute, regardless of whether the transaction has any other connection to New York. While many parties to international commercial agreements agree to submit their disputes to arbitration, others seek a neutral judicial forum. New York's highest court, the Court of Appeals, recently reaffirmed that the New York courts are open to foreign parties whose disputes arise out significant commercial contracts, and the courts will honour the parties' selection of New York law to govern their agreements.

Nearly 30 years ago, the New York legislature passed two related statutes that open the New York courts to foreign parties even where the transaction at issue has no other connection to New York. These statutes, which grew out of an effort by the legislature to reinforce New York's standing as a commercial and financial centre, remain in force today and were bolstered by the Court of Appeals' recent decision.

The first, Section 5-1401 of the General Obligations Law (GOL), seeks to ensure that courts will honour parties' choice of New York law in significant commercial contracts. Where the requirements of GOL 5-1401 are met, it applies automatically. Generally, this means that the choice of New York law

will be enforced, regardless of whether the contract bears any connection to New York, if the contract is valued at $250,000 or more and does not relate to labour, personal, household or family services, or certain transactions covered by the Uniform Commercial Code.

In enacting GOL 5-1401, 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. As the law stood prior to the enactment of statute, some New York courts engaged in a common law conflicts of law analysis notwithstanding an unequivocal choice of New York law, sometimes resulting in the application of a different jurisdiction's law where the transaction lacked significant contacts with New York. The legislature noted that even the "mere existence of th[e] possibility" that a New York court would not apply New York law designated in the contract would "deter[] parties from choosing the law of New York for major contracts, to the detriment of the standing of New York as a commercial and financial center", and determined that the application of New York law therefore should be statutorily guaranteed. A handful of other states, including Delaware, have followed the New York legislature and enacted similar provisions.

The companion provision, Section 5-1402 of the GOL, 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; (ii) the contract exceeds $1m; and (iii) the foreign party consented to the jurisdiction of the New York courts. At the same time, the legislature also amended New York Civil Practice Law and Rules 327(b) to make clear that a court lacks discretion to stay or dismiss any action on *forum non conveniences* grounds where GOL 5-1402 applies. Although certain parties opposed the legislation on the grounds that it would burden the New York courts, the legislature struck a balance by requiring parties to choose New York law and to consent to jurisdiction as a prerequisite for accessing the New York forum.

"The legislature struck a balance by requiring parties to choose New York law and to consent to jurisdiction as a prerequisite for accessing the New York forum."

The recent case of *IRB-Brasil Resseguros, S.A. v. Inepar Investments, S.A.*, __ N.E.2d __, 20 N.Y.3d 310 (Dec. 18, 2012), provides an example of how the

GOL provisions operate and confirms that the New York courts will recognise and give effect to the legislature's desire for open access. The *IRB* case involved a Brazilian reinsurance company which sued in New York Supreme Court to collect on global notes issued by an Uruguayan corporation, guaranteed by a Brazilian corporation (the 'Guarantor'), and payable through a fiscal agent in London to an account at a Brussels clearinghouse. IRB purchased the bonds in a global note offering in which the governing documents contained a New York choice of law clause, a non-exclusive New York forum clause, and a consent to New York jurisdiction. After the issuer defaulted, the Guarantor asserted that its guarantee was void under Brazilian law because it had not been duly authorised 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 reasoning advanced by the Guarantor would have created a loophole through which parties could circumvent the requirement in GOL 5-1402 that foreign parties choose New York law in order to access the New York courts.

After the trial court and first level appellate court ruled in IRB's favour, the Court of Appeals granted leave to appeal and, in a decision of first impression, held that the choice of New York law clause in the guarantee required application of New York substantive law without regard to whether the transaction had any New York connections. 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 of Appeals' decision should remove any uncertainty as to whether the New York courts will honour New York choice of law and forum clauses included in international commercial contracts. CD

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