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CPLR 327(b): Forum Non Conveniens Relief May No Longer Be Granted by a Court If, Pursuant to Certain Contracts, the Parties Have Agreed on New York as Their Choice of Forum in Accordance with Section 5-1402 of the GOL

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the legislature intended to alter the well known *Yellowstone* injunction. The Court interpreted the new enactment, which directs the civil court to grant the tenant a ten day cure period after a breach has been found, to provide effectively the same remedy as a *Yellowstone* injunction, which preserves the tenancy by tolling the cure period during the pendency of the action. Therefore, the Court, in an effort to relieve crowded supreme court dockets, held that under the amendment the civil court, not the supreme court, is the proper forum for settling a landlord-tenant dispute.

Addressing a question of intermediate appeals in criminal proceedings, the Court of Appeals in *Abrams v. Anonymous* determined that a direct appeal from a decision to disqualify an attorney representing individuals under criminal investigation may be taken because such a proceeding is civil in nature. Examining the nature of the proceeding and the relief sought, the *Abrams* Court held that a disqualification proceeding is not made criminal because the underlying subject matter is a criminal investigation. In so ruling, the Court concluded that the general rule prohibiting interlocutory appeals in criminal proceedings was not in issue.

The members of Volume 59 hope that the discussion and analysis of the cases contained in *The Survey* will be of interest and value to the New York bench and bar.

CIVIL PRACTICE LAW AND RULES

CPLR 327(b): Forum non conveniens relief may no longer be granted by a court if, pursuant to certain contracts, the parties have agreed on New York as their choice of forum in accordance with section 5-1402 of the GOL

CPLR 327 provides that a court may stay or dismiss an action on the basis of forum non conveniens when it is determined that, in the interest of substantial justice, the action should be heard in another forum.[1] The rule further states that application of forum

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[1] *See* CPLR 327(a) (McKinney Supp. 1984-1985). Rule 327(a) provides:

> When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

Id. The doctrine of forum non conveniens originated at common law and was invoked with regularity prior to its codification. *See The Survey*, 46 ST. JOHN'S L. REV. 561, 589-91 (1972); *see also* Barrett, *The Doctrine of* Forum Non Conveniens, 35 CALIF. L. REV. 380, 386-87

non conveniens shall not be precluded solely because one of the parties to the action resides within the state of New York.[2] Although the residency of a party within New York historically had foreclosed application of the doctrine,[3] both the Court of Appeals and the legislature abandoned this long-standing restriction[4] and granted the courts broad discretion to balance the equities of justice, fairness, and convenience to determine the applicability of forum non conveniens.[5] Recently, however, Rule 327 was amended to

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(1947). The typical factors considered by the courts in granting such motions include the residences of the parties and witnesses, the difficulty of applying unfamiliar law, the accessibility of evidence, and the administrative burden on the courts. *See* Brilmayer & Underhill, *Congressional Obligation To Provide a Forum For Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws*, 69 VA. L. REV. 819, 836 (1983); *The Survey*, *supra*, at 592-93; Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 22-29 (1929).

[2] *See* CPLR 327(a) (McKinney Supp. 1984-1985); *supra* note 1.

[3] *See, e.g.*, de la Bouillerie v. de Vienne, 300 N.Y. 60, 62, 89 N.E.2d 15, 15 (1949) (courts are bound to try tort action when either plaintiff or defendant is resident of state); Gregonis v. Philadelphia & Reading Coal & Iron Co., 235 N.Y. 152, 161, 139 N.E. 223, 224 (1923) (residency of either party eliminates argument of inconvenience and court must hear case); *see also* Silver v. Great Am. Ins. Co., 35 App. Div. 2d 317, 317-18, 316 N.Y.S.2d 186, 187 (1st Dep't 1970) (appellate division bound by precedent but requested reevaluation by Court of Appeals), *rev'd*, 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972); Smit, *Report on Whether to Adopt in New York, in Whole or in Part, the Uniform Interstate and International Procedure Act*, THIRTEENTH ANN. REP. N.Y. JUD. CONFERENCE 130, 138 (1968) (residency as sole determining factor is objectionable and represents only respect in which New York courts have been inflexible).

[4] *See* Silver v. Great Am. Ins. Co., 29 N.Y.2d 356, 361, 278 N.E.2d 619, 622, 328 N.Y.S.2d 398, 402 (1972); CPLR 327(a) (McKinney Supp. 1984-1985). Rule 327 codified the *Silver* holding. *See* REPORT TO THE 1973 LEGISLATURE IN RELATION TO THE CIVIL PRACTICE LAW AND RULES, in NINETEENTH ANN. REP. N.Y. JUD. CONFERENCE (1974); CPLR 327, commentary at 274 (McKinney Supp. 1984-1985). In *Silver*, the Court of Appeals held that the rule barring application of forum non conveniens when one of the parties is a New York resident should be relaxed. 29 N.Y.2d at 361, 278 N.E.2d at 622, 328 N.Y.S.2d at 402. Rather than using a single factor, such as residence, the Court held that the application of forum non conveniens should be based on a balancing of all relevant considerations. *See id.*; Martin v. Mieth, 35 N.Y.2d 414, 418, 321 N.E.2d 777, 779, 362 N.Y.S.2d 853, 857 (1974).

[5] *See, e.g.*, Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474, 479, 467 N.E.2d 245, 248, 478 N.Y.S.2d 597, 600 (1984), *cert. denied*, 105 S. Ct. 783 (1985); Silver v. Great Am. Ins. Co., 29 N.Y.2d 356, 361, 278 N.E.2d 619, 622, 328 N.Y.S.2d 398, 402 (1972); Bewers v. American Home Prods. Corp., 117 Misc. 2d 991, 994, 459 N.Y.S.2d 666, 669 (Sup. Ct. N.Y. County 1982) *rev'd on other grounds*, 99 App. Div. 2d 949, 472 N.Y.S.2d 637 (1st Dep't 1984). Private interests, such as convenience and fairness, public interests, such as the financial and administrative burdens of entertaining litigation that has little or no nexus with the state, and the burden of applying foreign law, are considered under the balancing test. *See, e.g.*, *Islamic Republic of Iran*, 62 N.Y.2d at 479, 467 N.E.2d at 248, 478 N.Y.S.2d at 600; *see also* Strand v. Strand, 57 App. Div. 2d 1033, 1034, 395 N.Y.S.2d 254, 255 (3d Dep't 1977) (doctrine of forum non conveniens is equitable in nature and is dictated by public policy considerations).

deny courts the discretion to grant a dismissal on the ground of forum non conveniens when the action involves a contract in which the parties have chosen New York as the governing law and forum, and the base transaction is, in the aggregate, one million dollars or more.[6]

Ostensibly, the purpose of the amendment to Rule 327 is to enhance the status of New York as a leading commercial and financial center.[7] Proponents of the amendment urged that by removing the possibility that courts will refuse to entertain qualifying actions, parties will be encouraged to choose New York as the governing law and forum.[8] It is argued that the result will be ex-

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In *Silver*, Chief Judge Fuld, obviously concerned with the increased congestion in the court system occasioned by expanding jurisdiction, stated that "[i]t has become increasingly apparent that a greater flexibility in applying the doctrine is not only wise but, perhaps, necessary." *Silver*, 29 N.Y.2d at 361, 278 N.E.2d at 622, 328 N.Y.S.2d at 403. "The great advantage of the doctrine—its flexibility based on the facts and circumstances of a particular case—is severely, if not completely, undercut when our courts are prevented from applying it solely because one of the parties is a New York resident or corporation." *Id.*

[6] CPLR 327(b) (McKinney Supp. 1984-1985). Rule 327(b) provides:

> Notwithstanding the provisions of subdivision (a) of this rule, the court shall not stay or dismiss any action on the ground of inconvenient forum, where the action arises out of or relates to a contract, agreement or undertaking to which section 5-1402 of the general obligations law applies, and the parties to the contract have agreed that the law of this state shall govern their rights or duties in whole or in part.

Id. Subdivision (b) was enacted to foreclose use of rule 327 as an "escape hatch" from enforcement of newly enacted GOL § 5-1402 (McKinney Supp. 1984-1985). Section 5-1402 provides, in pertinent part:

> 1. Notwithstanding any act which limits or affects the right of a person to maintain an action or proceeding, . . . any person may maintain an action or proceeding against a foreign corporation, non-resident, or foreign state where the action or proceeding arises out of or relates to any contract, agreement or undertaking for which a choice of New York law has been made in whole or in part pursuant to section 5-1401 and which (a) is a contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate, not less than one million dollars, and (b) which contains a provision or provisions whereby such foreign corporation or non-resident agrees to submit to the jurisdiction of the courts of this state.

Id. Section 5-1402 in turn requires compliance with GOL § 5-1401 (McKinney Supp. 1984-1985). Section 5-1401 provides that "[t]he parties to any contract . . . covering in the aggregate not less than two hundred fifty thousand dollars . . . may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract . . . bears a reasonable relation to this state." *Id.* § 5-1401.

[7] *See* R. Tierney, Memorandum in Support of Assembly Bill 7307-A, at 2 (1983) (legislative representative of the City of New York) [hereinafter cited as Tierney Memorandum].

[8] *See id.* at 1-2. Supporters of the amendment argued that any uncertainty surrounding the ability of contracting parties to be heard in a New York forum will deter the parties from choosing New York. *Id.* at 2.

tensive economic benefits, particularly within the New York financial community.[9]

It is suggested that the burdens created by the newly amended CPLR 327 may outweigh the benefits that the amendment purports to achieve. For a contractual dispute to be adjudicated in a New York forum prior to enactment of the amendment, the contract had to bear a reasonable relation to the state.[10] Under the amendment, however, no such relation is required as long as the statutory requirements of section 5-1402 of the GOL are met.[11] Thus, one consequence of the amendment is to allow foreign parties that otherwise have little or no contact[12] with New York to avail themselves of the judicial resources of the state.[13] In view of the high proportion of corporate contracts that regularly exceed the million-dollar threshold amount,[14] the added drain on the resources of the state, in the form of decreased revenues[15] and in-

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[9] *See id.* at 2. The benefits to be realized include those conferred upon banks, securities and commodities dealers, investment companies, and the service industries that support them, such as printers, accountants, lawyers, hotels, and allied industries. *See id.*

[10] *See* A.S. Rampell, Inc. v. Hyster Co., 3 N.Y.2d 369, 381, 144 N.E.2d 371, 381, 165 N.Y.S.2d 475, 486 (1957); Gambar Enters. v. Kelly Servs., Inc., 69 App. Div. 2d 297, 303, 418 N.Y.S.2d 818, 822 (4th Dep't 1979); North Am. Bank, Ltd. v. Schulman, 123 Misc. 2d 516, 518, 474 N.Y.S.2d 383, 385 (Westchester County Ct. 1984).

[11] *See supra* note 6 and accompanying text; *see also* Tierney Memorandum, *supra* note 7, at 1 (amendment designed to eliminate possibility that "some New York courts would reject a choice of New York law on the ground that the particular contract had insufficient 'contact' or 'relationship' with New York").

[12] Although the transaction may have insufficient contacts to warrant state interest, this should not be confused with the "minimum contacts" required to establish a constitutional jurisdictional basis. *See, e.g.*, Rush v. Savchuk, 444 U.S. 320, 327-29 (1980) (in personam jurisdiction); Shaffer v. Heitner, 433 U.S. 186, 212 (1977) (quasi in rem jurisdiction). Under GOL § 5-1402, a contract must include a provision whereby the parties agree to submit to the jurisdiction of New York courts. GOL § 5-1402 (McKinney Supp. 1984-1985). The courts have full power to assert jurisdiction over a party who has agreed in advance to confer such power upon the court, *see, e.g.*, National Equip. Rental Ltd. v. Szukhent, 375 U.S. 311, 315-16 (1964); CPLR 301, commentary at 16 (1972); *cf.* N.Y. BUS. CORP. L. § 304 (McKinney 1963) (filing of certificate of authority to do business in New York by foreign corporation deemed consent to jurisdiction), but nonetheless may decline such jurisdiction, *see supra* note 1 and accompanying text.

[13] *See supra* notes 5 & 10 and accompanying text.

[14] *See, e.g.*, Wall St. J., Oct. 23, 1984, at 18, col. 1 (Staley agreed to acquire CFS Continental, Inc. for $330.6 million); Wall St. J., Oct. 22, 1984, at 12, col. 3 (private investor threatened to purchase Mohawk Date Services Corp. for $250 million in securities); Wall St. J., Oct. 16, 1984, at 4, col. 1 (investor group agreed to purchase Diversifoods, Inc. for $525 million).

[15] It is submitted that the amendment to CPLR 327 will not actually serve as a true incentive to parties establishing contacts with the state, since the newly amended rule does not require that any action take place in New York for qualifying agreements to be enforce-

creased administrative costs, could prove to be a significant burden.[16]

It is further submitted that the impediment placed on the discretion of the courts by the amendment is unnecessary because the objectives sought to be achieved through the amendment are best served by the traditional balancing test. Although a forum-selection clause and the substantial dollar amount involved in a transaction[17] do not guarantee that the dispute will survive a forum non conveniens challenge,[18] they are given great weight by the courts under the traditional balancing approach.[19] Consequently, the party seeking relief under the doctrine prior to this amendment undertook a heavy burden to show that the clause should not be enforced.[20] Nevertheless, even under the amendment there remains

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able. *See* CPLR 327(b) (McKinney Supp. 1984-1985). This is in contrast to the common-law rule under which the parties must either hold negotiations, file certificates of authority to do business, maintain an office or bank account, or otherwise transact some business in New York to avail themselves of New York courts. *See supra* note 10 and accompanying text. Parties whose contracts qualify under GOL § 5-1402, however, need not incur any of these expenses in New York. *See supra* note 12 and accompanying text.

[16] *See* Silver v. Great Am. Ins. Co., 29 N.Y.2d 356, 361, 278 N.E.2d 619, 621, 328 N.Y.S.2d 398, 402 (1972). In *Silver*, the Court stated that the courts of the state "should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York." *Id.*; *see also* Bewers v. American Home Prods. Corp., 117 Misc. 2d 991, 994, 459 N.Y.S.2d 666, 669 (Sup. Ct. N.Y. County 1982) (minimal relationship with forum does not justify burden on judicial resources of forum), *rev'd on other grounds*, 99 App. Div. 2d 949, 472 N.Y.S.2d 637 (1st Dep't 1984); Regal Knitwear Co. v. M. Hoffman & Co., 96 Misc. 2d 605, 613, 409 N.Y.S.2d 483, 488 (Sup. Ct. N.Y. County 1978) (insufficient nexus to state did not warrant expenditure of judicial resources of New York).

[17] *See supra* note 6 and accompanying text.

[18] *See supra* note 1 and accompanying text.

[19] The courts of New York have demonstrated a strong preference to honor forum-selection clauses in commercial disputes. *See, e.g.*, ACLI Int'l Inc. v. E.D. & F. Man (Coffee) Ltd., 76 App. Div. 2d 635, 643, 430 N.Y.S.2d 858, 864 (2d Dep't 1980) (considerable weight must be accorded to choice of forum); Arthur Young & Co. v. Leong, 53 App. Div. 2d 515, 517, 383 N.Y.S.2d 618, 619 (1st Dep't 1976) (absent showing of fraud, mistake, or conflicting public policy, choice of forum should be enforced); *cf.* Ahearn v. Burch, 90 App. Div. 2d 635, 636, 456 N.Y.S.2d 208, 210 (3d Dep't) (doctrine "may not be used as a shield by parties who have themselves selected the forum"), *appeal dismissed*, 58 N.Y.2d 654, 444 N.E.2d 1004, 458 N.Y.S.2d 540 (1982).

[20] *See* Roman v. Sunshine Ranchettes, Inc., 98 App. Div. 2d 744, 744, 469 N.Y.S.2d 449, 450 (2d Dep't 1983); Bader & Bader v. Ford, 66 App. Div. 2d 642, 648, 414 N.Y.S.2d 132, 134 (1st Dep't), *appeal dismissed*, 48 N.Y.2d 649, 396 N.E.2d 481, 421 N.Y.S.2d 199 (1979); Pyramid Co. v. Original Great Am. Chocolate Chip Cookie Co., 102 Misc. 2d 1056, 1059, 425 N.Y.S.2d 230, 232 (Sup. Ct. Onondaga County 1980). In a forum non conveniens motion "the burden is on the moving party to establish clearly that another jurisdiction is the more appropriate forum." *Sunshine Ranchettes*, 98 App. Div. 2d at 744, 469 N.Y.S.2d at 450. Unless the balance is strongly in the defendant's favor, the plaintiff's choice of forum

a possibility that the choice of forum may be circumvented as under the traditional test; while the rule now compels New York courts to honor qualifying forum-selection clauses, it cannot mandate that either the parties themselves or foreign tribunals do so.[21] Moreover, the traditional balancing of equities approach permits a court to dismiss an action on forum non conveniens grounds when it would be inconvenient or burdensome for the court to entertain the action.[22] Thus, the doctrine protects the courts from becoming

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should remain intact. *See, e.g., Bader & Bader*, 66 App. Div. 2d at 648, 414 N.Y.S.2d at 136; *Pyramid*, 102 Misc. 2d at 1059, 425 N.Y.S.2d at 232.

[21] Two possible avenues of avoiding a forum-selection clause, it is submitted, remain open to the parties to a contract qualifying under GOL § 5-1402. First, a forum-selection clause may be circumvented when the resisting party is a plaintiff who commences an action in a forum other than New York. Treatment of such actions, however, is outside the scope of this Survey and thus will not be addressed. For a thorough discussion of the enforceability of forum-selection clauses by courts other than the selected forum, see Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L.F. 133.

The second possible method for circumventing a choice-of-forum provision occurs when the resisting party is a defendant seeking removal to federal court on diversity grounds. Under the federal removal statute, if the action originally could have been brought in a federal court under the court's diversity jurisdiction, removal is possible when no properly joined and served defendant is a citizen of the state in which the action is pending. *See* 28 U.S.C. § 1441(b) (1982); C. WRIGHT, THE LAW OF FEDERAL COURTS § 38, at 214 (4th ed. 1983). The initial inquiry by a federal court, upon a motion to remove, would be whether removal would be proper and reasonable in light of the forum-selection clause, and removal may be granted if the forum-selection provision is interpreted as including federal courts sitting in New York. *See* City of New York v. Pullman, Inc., 477 F. Supp. 438, 442 (S.D.N.Y. 1979); Gruson, *supra*, at 134 & n.3.

In addition, removal might be permissible if the district court found the forum chosen by the parties to be "seriously inconvenient," *see* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 16 (1972), or discovers fraud or overreaching in the agreement, *see* Richardson Greenshields Sec., Inc. v. Metz, 566 F. Supp. 131, 133 (S.D.N.Y. 1983). Permission for removal on the ground of inconvenience necessarily would presuppose a motion to transfer by the defendant, since removal alone would not remedy any inconvenience present in a state court. A thorny question thus would arise as to whether state or federal law would govern a motion to transfer on the ground of forum non conveniens in a diversity action. The conflicting federal statute provides that "[f]or the convenience of parties and witnesses, . . . a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1982). In Byrd v. Blue Ridge Rural Elec. Corp., 356 U.S. 525 (1958), the Supreme Court stated that the critical inquiry when there is such a conflict "is whether the federal policy . . . should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court." *Id.* at 538. Since the place of venue would not be "outcome-determinative," the federal courts presumably would be free to apply the federal rule, and thus would be free to transfer upon a finding that a New York court was seriously inconvenient.

[22] *See, e.g.*, Varkonyi v. S.A. Empresa De Viacao Airea Rio Grandense (Varig), 22 N.Y.2d 333, 339, 239 N.E.2d 542, 544, 292 N.Y.S.2d 670, 673 (1968); Winters v. General Tire

congested with actions, whether meritorious or not, that have no real nexus to New York.[23] The result achieved by applying the balancing test, therefore, more effectively advanced the legislative objectives of the amended Rule 327 than does the amendment itself.[24]

The doctrine of forum non conveniens provides the courts with an effective tool for dismissing actions that are unduly burdensome and for which a more appropriate forum exists. In light of the significant restriction placed on the courts' discretion by the amendment to Rule 327, which appears superfluous in light of the traditional balancing approach, it is urged that the legislature reevaluate this legislation. Otherwise, the courts of this state will be compelled to entertain actions that may contravene the very purpose that the amendment sought to achieve.

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General Obligations Law

GOL § 15-108: Judgment against defendant is reduced by the equitable share of the damages attributable to the defendant who settled when that settling defendant is a vicariously liable employer

Section 15-108 of the General Obligations Law provides that a release given to one or more persons liable in tort for the same

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& Rubber Co., 13 App. Div. 2d 470, 470, 212 N.Y.S.2d 285, 286 (1st Dep't 1961); Regal Knitwear Co. v. M. Hoffman & Co., 96 Misc. 2d 605, 613, 409 N.Y.S.2d 483, 488 (Sup. Ct. N.Y. County 1978). Recognition of a "public duty" to protect the court system from unrelated actions has led the courts to make the motion *sua sponte*. *See, e.g., Regal Knitwear*, 96 Misc. 2d at 614, 409 N.Y.S.2d at 488; Wachsman v. Craftool Co., 77 Misc. 2d 360, 362, 353 N.Y.S.2d 78, 81 (Sup. Ct. N.Y. County 1973).

[23] *See supra* notes 10 & 23 and accompanying text.

[24] *Compare supra* note 8 and accompanying text (economic benefits offered by the amendment) *with supra* notes 12-17 and accompanying text (possibility of detrimental economic effect). While those parties with beneficial contacts to the forum should be confident that their actions will be entertained upon invoking a forum-selection clause, it is submitted that those attempting to use the judicial resources of New York without offering any benefit to the state should not be permitted to burden the courts.