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# **A GLOBAL MARKET FOR JUDICIAL SERVICES**

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**Abstract:**

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The world's nations vary widely in the quality of their judicial systems. In some jurisdictions, the courts resolve disputes quickly, fairly, and economically. In others, they are slow, inefficient, biased, incompetent, or corrupt. These differences are important not just for litigants, but for nations as a whole: effective courts are important for economic development.

A natural implication is that countries with underperforming judiciaries should reform their courts. Yet reform is both difficult and slow. Another way to deal with a dysfunctional court system is for litigants from afflicted nations to have their cases adjudicated in the courts of other nations that have better-functioning judicial systems. We explore here the promise of such cross-jurisdictional litigation, and the reforms needed to make it succeed.

The issue is timely. The increasing pace of global commerce is creating pressures for legal reforms that will dramatically improve the legal environment for litigating across borders. Moreover, advances in transportation and telecommunications are making it increasingly practical for parties to litigate in remote courts. Just as residents of New York City now commonly obtain assistance with utility bills and computer software telephonically from service personnel in Bangalore, it should become possible for merchants in Bangalore to have their disputes decided in New York courts via the internet.

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## ***I. Introduction***

The world's nations vary widely in the quality of their judicial systems. In some jurisdictions, the courts resolve disputes quickly, fairly, and economically. In others, they are slow, inefficient, biased, incompetent, or corrupt. These differences are important not just for litigants, but for nations as a whole: effective courts appear to be important for sustained economic development. The problem is particularly conspicuous for developing and transition economies, though there are striking disparities in the quality of courts among developed countries as well.

A natural implication is that countries with underperforming judiciaries should reform their courts. Yet reform is difficult and slow,<sup>2</sup> especially when such basic attributes as the independence and integrity of the judiciary are in question.

Another approach to dealing with a dysfunctional court system -- and one that can go hand in hand with domestic judicial reform -- is for litigants from afflicted countries to have their cases adjudicated in the courts of other nations that have better-functioning judicial systems. Our object here is to explore the promise of such extra-jurisdictional litigation. If well developed, the result could be, effectively, a global market for judicial services. The issue is particularly timely for two important reasons.

First, the increasing pace of global commerce is already creating pressures for legal reforms that could dramatically improve the legal environment for the emergence of a global market for judicial services. The most important development in this respect is the 2005 Hague

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<sup>2</sup> Cf. Edgardo Buscaglia & Pilar Domingo, *Impediments to Judicial Reform in Latin America*, in *THE LAW AND ECONOMICS OF DEVELOPMENT* (Edgardo Buscaglia et al. eds., 1997), 291, 298-309 (analyzing obstacles to judicial reform in Latin America); Fen Osler Hampson, *Making Peace Agreements Work: The Implementation and Enforcement of Peace Agreements between Sovereigns and Intermediate Sovereigns: Can Peacebuilding Work?*, 30 *CORNELL INT'L L.J.* 701, 713 (1997) (noting the "slow pace of judicial reform in El Salvador"); Jeffrey Kahn, Note, *Russian Compliance with Articles Five and Six of the European Convention of Human Rights as a Barometer of Legal Reform and Human Rights in Russia*, 35 *U. MICH. J.L. REFORM* 641, 644 (2002) (calling judicial reform in Russia "agonizingly slow"); Michael Knox, Comment, *Continuing Evolution of the Costa Rican Judiciary*, 32 *CAL. W. INT'L L.J.* 133, 141 (2001) (noting political obstacles to judicial reform); Anna M. Kvizmik, *Recent Development: Rule of Law and Legal Reform in Ukraine: A Review of the New Procuracy Law*, 34 *HARV. INT'L L.J.* 611, 616 (1993) (describing judicial reform in Ukraine as "difficult").

Convention on Choice of Court Agreements,<sup>3</sup> which – if and when it comes into force – promises to facilitate the recognition and enforcement of foreign court judgments. As has traditionally been the case with the law and literature on choice of law and choice of forum, however, the Convention applies only to international cases,<sup>4</sup> which principally means cases involving parties from different states.<sup>5</sup> Our concern here, in contrast, is with creating access to foreign courts for litigants *from a single nation* whose dispute does not, other than in their choice of forum, have international elements. Nonetheless, the reforms that will facilitate free choice of forum for international disputes are highly complementary to those needed for free choice of forum in purely domestic disputes.

Second, technological advances in the field of telecommunications and transportation are making it increasingly feasible for litigants to use high-quality courts located in foreign jurisdictions. A number of U.S. courts already allow for the electronic filing of documents,<sup>6</sup> reducing the inconvenience of litigating in distant forums. It seems entirely predictable that, as technologies such as videoconferencing mature, it will be increasingly possible to conduct litigation without requiring that parties and witnesses appear physically before a judge, with the consequence that litigation can be conducted in remote courts conveniently and inexpensively. Just as residents of New York City now commonly obtain assistance with computer software or utility bills telephonically from service personnel in Bangalore, it should become possible for merchants in Bangalore to conduct litigation in New York courts via the internet.

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<sup>3</sup> Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294 [hereinafter Hague Convention].

<sup>4</sup> See Hague Convention, *supra* note 3, art. 1(1).

<sup>5</sup> See *infra* Part VII.A.4

<sup>6</sup> For example, certain courts in New York and Delaware fall into this category. See, e.g., The Commercial Division of the State of New York, Electronic Filing Overview, [http://www.nycourts.gov/comdiv/e\\_filing.htm](http://www.nycourts.gov/comdiv/e_filing.htm) (last visited Feb. 27, 2007); STATE OF CONNECTICUT JUDICIAL BRANCH, Welcome to e-filing, [http://www.nycourts.gov/comdiv/e\\_filing.htm](http://www.nycourts.gov/comdiv/e_filing.htm) (last visited Feb. 27, 2007); Court of Chancery, Administrative Directive of the Chancellor of the Court of Chancery of the State of Delaware No. 2003-1, eFile Administrative Procedures, Oct. 10, 2003, *available at* [http://courts.delaware.gov/Rules/?AD2003\\_1.pdf](http://courts.delaware.gov/Rules/?AD2003_1.pdf). Cf. also FED. RULES CIV. PROC. R. 5 (allowing courts to adopt rules permitting or requiring papers to be filed by electronic means).

We are concerned here with disputes involving commercial transactions between private parties, and not with litigation in general. More particularly, we limit our focus to litigation in which all parties consent to employing the foreign court, either by means of a choice of forum clause in their original contract or by mutual agreement after their dispute arises. Resolution of such disputes is essentially<sup>7</sup> a private good for the litigants immediately involved, in the sense that the benefits of the litigation go overwhelmingly to the litigants and that they can, if desired, be made to pay the costs of the litigation.<sup>8</sup> Consequently, as with other goods and services, there is good reason to keep adjudication of commercial disputes free from domestic protectionism and open to international competition. Private arbitration services already provide an important alternative to domestic courts, and their role will and should continue to expand. As we discuss, however, there is good reason to believe that, for the foreseeable future, private arbitration will not provide an adequate substitute for public courts. Consequently, if litigants in commercial cases are to be given alternatives to their domestic courts, those alternatives will have to be supplied in important part – and probably overwhelmingly – by the public courts of other jurisdictions.

There already exists a substantial literature on “regulatory competition” among the legal systems of different jurisdictions. The best-developed branch of that literature deals with corporate law, focusing on the choice of jurisdiction for chartering corporations<sup>9</sup> or for registering their securities.<sup>10</sup>

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<sup>7</sup> Of course, the resulting precedents can be qualified as a public good. See, e.g., David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2623 (1995). But the ratio of private benefits to public benefits for most lawsuits appears to be quite high. See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 261 (1978) (stressing the importance of the private good aspects of a decision).

<sup>8</sup> Confer the title of the article by Landes & Posner, *supra* note 7, at 237.

<sup>9</sup> For recent contributions to the debate on regulatory competition in corporate law, see, e.g., Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U.L. REV. 1559 (2002); Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679 (2002) [hereinafter Kahan & Kamar, *Myth*]; Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205 (2001) [hereinafter Kahan & Kamar, *Discrimination*]; Mark Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003).

<sup>10</sup> Important contributions to this quickly growing debate include ROBERTA ROMANO, *THE ADVANTAGE OF COMPETITIVE FEDERALISM FOR SECURITIES REGULATION* (2002) [hereinafter ROMANO, *COMPETITIVE FEDERALISM*]; Stephen Choi, *Regulating Investors Not Issuers: A*

While that literature recognizes the importance of differences in the quality of courts to the market for corporate charters,<sup>11</sup> its principal concern is with freedom to choose among different systems of substantive law. We focus here, instead, on commercial contracts in general, and on choice of courts rather than on choice of law. While choice of forum and choice of law are often closely connected, between the two the former seems more important for typical commercial transactions. Given the rough uniformity of basic contract law around the world, and the freedom that the law gives to parties to tailor their individual transactions, the specific substantive law that will govern a contract appears of distinctly secondary importance compared to the effectiveness with which the law – and hence the contract itself – will be enforced.

## ***II. Contrasts in National Judiciaries***

Differences across nations in the quality of courts are profound. The following description of the Mexican courts – which surely are far from the world's worst – gives a sense of the problems facing litigants in many countries<sup>12</sup>:

[L]egal proceedings in Mexico have, traditionally, been characterized by inefficiency, uncertainty, and the perception that the "contravention of the law is the daily rule rather than the exception." . . . Judicial proceedings are carried out in accordance with inefficient, highly formalistic, non-transparent, and corruption-inducing procedures. Substantive laws and rulings are -- to the detriment of citizens, merchants, and creditors alike -- often overly-idealized, obsolete, unclear, and/or for sale. Interlocutory and final decisions can, with the

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*Market-Based Proposal*, 88 CALIF. L. REV. 279 (2000); Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359 (1998); Frederick Tung, *Lost in Translation: From U.S. Corporate Charter Competition to Issuer Choice in International Securities Regulation*, 39 GA. L. REV. 525 (2005).

<sup>11</sup> See, e.g., Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 557 (2002); Rochelle C. Dreyfuss, *The Sixth Abraham L. Pomerantz Lecture: Article: Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOKLYN L. REV. 1, 4 (1995); Kahan & Kamar, *Myth*, *supra* note 9, at 708.

<sup>12</sup> Robert Kossick, *The Rule of Law and Development in Mexico*, 21 ARIZ. J. INT'L & COMP. LAW 715, 715-717 (2004). *Cf. also* Michael C. Taylor, *Why No Rule of Law in Mexico? Explaining the Weakness of Mexico's Judicial Branch*, 27 N. M. L. REV. 141, 142 (1997) (noting the weakness of Mexico's judiciary).

proper manipulation of the rules of law and procedure, be prejudicially partial and delayed for years, while the subsequent execution of a judgment . . . may hinge on factors completely extraneous to the interests of justice. And . . . the judiciary has been more independent in theory than in fact.

The problems emphasized in qualitative descriptions like this<sup>13</sup> are reflected as well in quantitative measures of the performance of judicial systems around the world. The most extensive and systematic data have been assembled by the *Lex Mundi* project, which developed estimates of the time required in the courts of 109 nations to obtain and enforce a judgment in lawsuits involving commonplace disputes. The results varied widely. The mean time required to collect against the writer of a bad check, for example, was 234 days, with 12 nations (including the U.S.) requiring less than 75 days and 14 requiring more than 400 days.<sup>14</sup> While speed is not, of course, the only important factor in adjudication, such large disparities suggest real differences in the quality of justice. Similarly stark variations can be seen among the 219 nations for which the World Bank has estimated a numerical “rule of law” index, which includes the effectiveness of contract enforcement among its components.<sup>15</sup>

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<sup>13</sup> For descriptions of analogous problems in the courts of India, see Bryan Bertram, Note, *Building Fortress India: Should a Federal Law be Created to Address Piracy Concerns in the United States-Indian Business Process Outsourcing Relationship?*, 29 B.C. INT'L & COMP. L. REV. 245, 258 (2006) (claiming that Indian courts are “exceedingly slow”); Priti H. Doshi, Note, *Copyright Problems in India Affecting Hollywood and “Bollywood”*, 26 SUFFOLK TRANSNAT'L L. REV. 295, 322 (2003) (noting that Indian courts are “exceedingly slow and backlogged”); Tracy S. Work, Comment, *India Satisfies Its Jones for Arbitration: New Arbitration Law in India*, 10 TRANSNAT'L LAW. 217, III.A. (1997) (claiming that Indian courts are “often expensive, uncertain, and riddled with procedural delay”). On the Russian judiciary, see Ethan S. Burger, *Corruption in the Russian Arbitrazh Courts: Will there be Significant Progress in the Near Term?*, 38 INT'L. LAW. 15, 22 (2004) (stating that corruption is a “significant problem”). On the Chinese judiciary, see Kenneth W. Dam, *China as a Test Case: Is the Rule of Law Essential for Economic Growth* 18, 23 (U. Chic. L. & Econ., Olin Working Paper No. 275, 2006), available at <http://ssrn.com/abstract=880125> (noting corruption, lack of judicial independence, and poor training of judges).

<sup>14</sup> Simeon Djankov, Rafael La Porta, Florencio Lopez-De-Silanes, & Andrei Shleifer, *Courts*, 118 Q. J. ECON. 453, 494-500 (2003). Cf. also EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ), EUROPEAN JUDICIAL SYSTEMS 89 (2006) (showing that the percentage of cases still pending after three years varies considerably across European countries), available at [http://www.coe.int/t/dg1/legalcooperation/cepej/evaluation/2006/CEPEJ\\_2006\\_eng.pdf](http://www.coe.int/t/dg1/legalcooperation/cepej/evaluation/2006/CEPEJ_2006_eng.pdf).

<sup>15</sup> D. Kaufmann, A. Kraay, and M. Mastruzzi, *Governance Matters V: Governance Indicators for 1996–2005* (Appendix Table C5: Rule of Law) 102-4 (2006), available at

Problems with courts are most conspicuous in developing and formerly socialist nations. Large disparities in the quality of judicial services can also be found, however, among the nations of the first world. The *Lex Mundi* project estimated, for example, that 664 days would be required to collect on a bad check in the notoriously slow courts of Italy.<sup>16</sup>

These disparities have important consequences. Bad courts are harmful, not just to individual litigants, but to the welfare of society as a whole. Douglass North has gone so far as to assert that “the inability of societies to develop effective, low-cost enforcement of contracts is the most important source of both historical stagnation and contemporary underdevelopment in the Third World.”<sup>17</sup> Recent empirical research has tended to confirm the relationship between weak courts and a weak economy, finding correlation between the quality of courts and various measures of economic performance. And while correlation is not the same as causation, there is substantial evidence in the literature that a

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www.govindicators.org. The rule of law index seeks to capture “the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, the police, and the courts, as well as the likelihood of crime and violence” *Id.* at 11. The range of the variable is from -2.5 to 2.5, with observations running from -2.36 for Somalia to 2.02 for Switzerland, with Mexico at -0.48, India at 0.09, Italy at 0.51, and the U.S. at 1.59. *Cf. also* Frederique Dahan & John Simpson, *Secured Transactions in Central and Eastern Europe: European Bank for Reconstruction and Development (EBRD) Assessment*, 36 UCC L.J. 77, 87-103 (2004) (exploring variation in the amount of a debt that can be recovered, and the time to recovery, in the courts of a sample of developing countries).

<sup>16</sup> Djankov et al., *supra* note 14, at 497. See also Istat.it, Territorial Information System on Justice, Movement of the judicial examination proceedings in first instance and main indicators of functionality at the court (absolute values and quotients). Year 2004, <http://giustiziaincifre.istat.it/Nemesis/jsp/dawinci.jsp?q=pl01-0010011000&an=2004&ig=2&ct=272&id=1A|14A> (last visited Feb. 27, 2007) (2.4 years on average required to dispose of a civil claim in Italian courts of general jurisdiction). Complaints about the speed of Italian Courts are legion. See, e.g., Jennifer M. Anglim, *Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes over Artwork and Other Chattels*, 45 HARV. INT'L L.J. 239, 282 (2004) (often “slow-moving dockets”); Larry Coury, Note, *C'est What? Saisie! A Comparison of Patent Infringement Remedies Among the G7 Economic Nations*, 3 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1101, 1146-47 (2003) (“slow adjudication process”); Kimberly A. Moore & Francesco Parisi, *Symposium on Constructing International Intellectual Property Law: The Role of National Courts: Thinking Forum Shopping in Cyberspace*, 77 CHI.-KENT. L. REV. 1325, 1355 n.20 (2002) (“reputation for slow case resolution”).

<sup>17</sup> DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 54 (1990).

functioning judiciary is an important precondition for – rather than simply a consequence of – robust economic growth.<sup>18</sup>

### **III. What Would Global Access to Judicial Services Look Like?**

Our focus is on the potential for “cross-jurisdictional litigation,” in which two citizens of one state (the “importing state”) try their case in the public courts of another state (the “exporting state”). There are three principal ways in which this can be accomplished. The first -- “extraterritorial litigation” -- is simply to let citizens of the importing state use the existing courts of the exporting state to settle their disputes. The second -- “extraterritorial courts” -- is for the exporting state to go further, easing physical access to its courts by establishing courts of its own on the

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<sup>18</sup> While macro-level empirical studies provide strong evidence that credible third-party enforcement of contracts by the state enlarges the forms taken by financial intermediation, such as permitting broader use of equity as opposed to debt financing, they have not succeeded in establishing a significant causative relationship between contract enforcement and economic development in general. See, e.g., Daron Acemoglu & Simon Johnson, *Unbundling Institutions*, 113 J. POL. ECON. 949 (2005). More microanalytic studies give reason to believe, however, that such a relationship exists, at least for particular types of societies in particular stages of development. For an extensive and thoughtful review of the empirical literature, see Michael Trebilcock & Jing Leng, Symposium, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 VA. L. REV. 1517, 1524-1580 (2006).

Important individual studies and assessments include, e.g., Kathryn Hendley et al., *Law Works in Russia: The Role of Law in Interenterprise Transactions*, in ASSESSING THE VALUE OF LAW IN TRANSITION ECONOMIES 56, 88 (Peter Murrell ed., 2001) (finding that legal enforcement mechanisms – particularly the new economic courts – add value to the Russian economy); Katharina Pistor, Martin Raiser, & Stanislaw Gelfer, *Law and Finance in Transition Economies*, 8 ECON. TRANSITION 325, 356 (2000) (concluding that “legal effectiveness,” including contract enforcement, plays a critical role in promoting financial market development in transition economies); Tullio Jappelli, Marco Pagano, & Magda Bianco, *Courts and Banks: Effects of Judicial Enforcement on Credit Markets*, (Center for Stud. in Econ. & Fin., Univ. di Salerno, Working Paper No 58, 2002) (finding that improvements in judicial efficiency improve the availability of credit across Italian provinces and in a cross-country sample); Lars P. Feld & Stefan Voigt, *Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators* 23 (CESifo Working Paper Series No. 906, 2003), available at <http://ssrn.com/abstract=395403> (finding that while de jure judicial independence does not have any clear impact on economic growth, de facto judicial independence positively influences real GDP growth per capita in a sample of 57 countries). Cf. also Kenneth W. Dam, *The Judiciary and Economic Development* 1 (U Chic. L. & Econ., Olin Working Paper No. 287, 2006), available at <http://ssrn.com/abstract=892030> (noting wide agreement among economists and lawyers that “the judiciary is a vital factor . . . in economic development”); Kenneth W. Dam, *China as a Test Case: Is the Rule of Law Essential for Economic Growth* 46 (U. Chic. L. & Econ., Olin Working Paper No. 275, 2006), available at SSRN: <http://ssrn.com/abstract=880125> (considering the “Chinese experience [to be] . . . consistent with [the] view that considerable development is possible without strong legal institutions but sustainable growth to higher per capita levels requires considerable development of legal institutions”).

territory of the importing state.<sup>19</sup> The third -- “federal and supranational courts” -- is to make available, to citizens of the importing state, courts established by a broader federal state or by an interstate compact of which the importing state is a member. In each case, choice of law can be left independent of choice of forum, with the dispute being governed by the law of the importing state, of the exporting state, or of yet a third state.

There is precedent for each of these three approaches to the use of foreign courts, though none of them is in widespread use today. For illustration, we review here briefly the experience with each. We postpone to later a discussion of the legal doctrines and practical considerations that currently limit each of these approaches, and of the reforms that might be undertaken to make them more workable.<sup>20</sup>

### **A. Extraterritorial Litigation**

There appear to be no thorough studies of the amount of extraterritorial litigation that takes place today.

#### **1. Within the United States**

The best data available is limited to litigation among the states of the U.S., and derive from Eisenberg and Miller’s impressive analysis of more than 2800 large commercial contracts in which at least one party is a publicly-traded U.S. corporation.<sup>21</sup> The relevant contracts were of sufficient importance to be deemed material for the relevant corporation and were therefore filed with the Securities Exchange Commission. It appears that roughly one-third of the contracts in the sample involve choice of a forum

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<sup>19</sup> The United States, like other countries, has made use of extraterritorial courts in the past. *Cf., e.g.,* Teemu Ruskola, Law’s Empire: The Legal Construction of ‘America’ in the ‘District’ of China (Sep. 2, 2003) (unpublished manuscript, on file with authors and *available at* <http://ssrn.com/abstract=440641>) (describing the role of the U.S. court for China which was created in 1906).

<sup>20</sup> *See infra* Parts VI-XI.

<sup>21</sup> The construction of the sample, which Eisenberg and Miller explore in several essays, is described most thoroughly in Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in Publicly-Held Companies’ Contracts* 18-20 (Cornell Legal Studies Research Paper Series, Paper No. 06-023, 2006), *available at* SSRN: <http://ssrn.com/abstract=927423> [hereinafter Eisenberg & Miller, *Arbitration*].

state that is not the home state of either party to the contract.<sup>22</sup> The great majority of these contracts specify the law and courts of either New York or Delaware, with New York the clear favorite even though most of the firms filing these contracts have chosen Delaware as their state of incorporation. This suggests, as Miller emphasizes in a separate paper, that we see here a “market” for contract law,<sup>23</sup> at least for the large contracts and sophisticated parties represented in the Eisenberg and Miller data.

Eisenberg and Miller do not report how many contracts in their sample involve choice of a forum in which neither of the contracting parties are resident or have other significant contacts. More particularly, they do not report how many, if any, of the contracts in their sample involve a purely domestic transaction between two parties resident in a single state, yet designate the courts of a different state to adjudicate disputes arising under the contract. It is the latter situation, however, that is our focus here.

To gain some insight into the latter issue, we examined contract cases that were filed between July 1, 2006 and February 28, 2007 and that were heard by judges of the Commercial Division of New York County. To permit us to determine the geographical origin of the parties, we focused exclusively on those cases in which both plaintiffs and defendants were corporations or limited liability companies. Out of the 144 cases in the sample, only 8, or 5%, clearly involved both a plaintiff and a defendant that were neither incorporated nor headquartered in New York, and only one of the latter cases involved a plaintiff and a defendant that were both from the same foreign jurisdiction.

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<sup>22</sup> In the Eisenberg and Miller sample, of the contracts that specify the state whose substantive contract law is to govern, 36% choose a state that is not the home state of either party. Among these, New York law is clearly most popular choice. See Geoffrey Miller, *The Market for Contracts* 19 (NYU Center for Law and Economics, Law & Economics Research Paper Series Working Paper No. 06-45, 2006), available at <http://ssrn.com/abstract=938557> [hereinafter Miller, *Market*]. And, while the authors do not report directly on the issue, it appears from their data that these contracts typically choose as forum the same state whose law they choose – or so we might reasonably infer from the fact that roughly the same percentage of contracts in the overall sample choose New York law (46%) as choose New York for a forum (43%), suggesting substantial overlap between the two. *Id.* at 12, 19. From this it would follow that about 36% of the contracts, or perhaps slightly fewer, also choose a forum state that is not the home state of either party.

<sup>23</sup> Miller, *Market*, *supra* note 22, at 3.

In short, it is clear from the Eisenberg and Miller data that New York's courts are highly popular as a forum among parties who, absent a choice of forum clause, would also have other forums where they could litigate -- as, for example, where one party to the contract is resident or incorporated in New York and the other in Delaware. But it appears that the New York courts are infrequently chosen where neither party is from New York, and only rarely chosen for purely domestic transactions between parties from a single non-New York jurisdiction. In other words, even within the United States, extraterritorial litigation is at present poorly developed.

## **2. *Between Nations***

Internationally, there is even less reason to believe that extraterritorial litigation is presently a common choice in purely domestic disputes. Our data on the New York Commercial Division did not turn up a single case involving two parties from foreign countries. Nor do we find data from other countries that would lead us to believe that extraterritorial litigation is currently a common choice for purely domestic disputes. Of particular interest, in this context, is the situation in Europe, because -- as we discuss below<sup>24</sup> -- European Community Law makes it relatively easy, by international standards, for two parties from one Member State to litigate in another Member State and have the resulting judgment recognized and enforced in their home state. Nevertheless, data from Belgium, Germany, and Italy suggest that at present such litigation is, at best, a marginal phenomenon even within the EU.

Belgium seems a prime example of a country whose citizens might want to make use of a market for judicial services. It is only about a seventy mile drive from Brussels, the capital of Belgium, to Lille, a French city boasting a court of general jurisdiction. French-speaking citizens, who constitute the majority in Belgium, can find French-speaking courts in France or Luxembourg. Dutch-speaking Belgians could turn to Dutch courts. Nonetheless, the number of foreign judgments declared enforceable in Belgium appears minimal. Under Belgian law, the judgment creditor who

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<sup>24</sup> See *infra* Part VII.

seeks to enforce a foreign judgment generally needs to initiate legal proceedings to have the judgment declared enforceable.<sup>25</sup> While we have not been able to obtain the number of proceedings of this type,<sup>26</sup> the decision to declare a foreign judgment enforceable can be appealed to the *cour d'appel*,<sup>27</sup> and in 2005, the number of decisions handed down in cases where such an appeal was brought was 0.05% of all appellate cases, or less than 79 in total.<sup>28</sup> Moreover, that number also includes those cases where the parties were from different Member States, suggesting that the number of cases where Belgians made use of foreign court in purely domestic transactions is minimal.

Data from Germany paint a similar picture. The total number of proceedings seeking enforcement of a foreign judgment in 2004 was below 8883,<sup>29</sup> or less than 0.3% of the overall total of 3,155,482 enforcement proceedings.<sup>30</sup> And, as in the case of Belgium, these 0.3% include cases where the parties are from different countries, meaning extraterritorial litigation in purely domestic cases is extremely rare. Italian data tell the same story.<sup>31</sup>

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<sup>25</sup> Loi portant le Code de droit international privé [Law Containing the Code of Private International Law], July 16, 2004, *Le Moniteur belge* 1 (July 27, 2004), art. 23(1).

<sup>26</sup> The relevant proceedings are governed by sec. 1025-1034 of the Code Judiciaire. See *Loi portant le Code de droit international privé*, July 16, 2004, art. 23(3)(1). While there are official statistics on the number of decisions handed down in such procedures, these statistics don't distinguish between exequatur and other proceedings. See SERVICE PUBLIC FÉDÉRAL JUSTICE, *LES STATISTIQUES ANNUELLES DES COURTS ET TRIBUNAUX. ANALYSE DES STATISTIQUES DE LA PERIODE 1999-2005*, 18 (2006) (on file with authors).

<sup>27</sup> See Code Judiciaire, Oct. 10, 1967, art. 1031.

<sup>28</sup> Decisions handed down in exequatur proceedings amounted to 0.05 % of all civil court of appeal decisions in 2005. See SERVICE PUBLIC FÉDÉRAL JUSTICE, *LES STATISTIQUES ANNUELLES DES COURTS ET TRIBUNAUX. ANALYSE DES STATISTIQUES DE LA PERIODE 1999-2005*, 16 (2006) (on file with authors). In the same year, the total number of decisions handed down by the civil branches of the courts of appeal was 134,439. See *id.* at 2. It follows that less than 79 decisions must have been rendered in exequatur proceedings.

<sup>29</sup> STATISTISCHES BUNDESAMT, *FACHSERIE 10 REIHE 2.1: RECHTSPFLEGE ZIVILGERICHTE 2004*, 20, 46 (2006) (on file with authors). This number includes not just proceedings to enforce foreign judgments but also proceedings involving other titles that are not automatically enforceable.

<sup>30</sup> *Id.* at 12.

<sup>31</sup> The court in charge of declaring judgments from other Member States enforceable is the *corte d'appello*. See Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, annex II, 2001 O.J. (L 12), 1. Unfortunately, no statistics seem to be available regarding the exact number of the relevant proceedings. This said, in the judicial year 2005/2006, the number of decisions granting or denying recognition to foreign judgments must have been below 12,716, because that is the number of decisions not falling into any

In sum, we have little reason to believe that extra-jurisdictional litigation in purely domestic disputes is today a common phenomenon, either in the U.S. or internationally. Yet, as we discuss below, this state of affairs is by no means necessary. Rather, there is reason to believe that the principal obstacles to extraterritorial litigation either can be overcome by means of legal reform, or will fade away as a result of technological progress.

### ***B. Extraterritorial Courts***

If the potential volume of foreign litigants is sufficiently large, an exporting state may consider establishing courts on the territory of the importing state. To take a conspicuous example, the excellence of the Delaware Chancery Court in resolving corporate disputes is widely recognized.<sup>32</sup> Why not, then, establish branches of the Delaware Chancery courts in, say, Singapore and San Paolo, or even Frankfurt and San Francisco? Or, to handle general contract litigation, why not establish commercial branches of the New York or UK courts in India or Hong Kong? Extraterritorial courts were widespread in the nineteenth century, when occupying colonial powers imposed them on their colonies. As a consequence of this historical experience, the notion of extraterritorial courts has the bad odor of imperialism.<sup>33</sup> But there is nothing necessary about this connection. Extraterritorial courts can be designed to serve the interests of the importing country as much as or more than those of the exporting country.

### ***C. Federal and International Courts***

In federal systems one can, of course, set up federal courts to resolve disputes between citizens, as the United States has done. In addition to

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other of the listed categories. See Ministero della Giustizia, Movimento dei procedimenti civili – Anno guidizario 2005/2006: Dati nazionali, [http://www.giustizia.it/statistiche/statistiche\\_dog/organigramma.htm](http://www.giustizia.it/statistiche/statistiche_dog/organigramma.htm) (follow “Materia Civile-Attiva Uffici-Dati Nazionali”) (last visited March 1, 2007). Given that the overall number of civil proceedings filed in courts of general jurisdiction alone exceeded one million, see *id.*, it is clear that the vast majority of parties are litigating locally.

<sup>32</sup> See the sources cited *supra* note 12.

<sup>33</sup> For a drastic illustration of the perceptions underlying extraterritorial courts cf. *In Re Ross*, 140 U.S. 453 (1891) (noting that in the past “[t]he intense hostility of the people of Moslem faith ... and ... the barbarous ... punishments inflicted in those countries [made it] ... a matter of deep interest to Christian governments to withdraw the trial of their subjects ... from the arbitrary and despotic action of the local officials.”).

judging cases arising under federal law, the U.S. federal courts have “diversity” jurisdiction over disputes arising under state law when the litigants are from different states.<sup>34</sup> Federal diversity jurisdiction is in theory a means of avoiding home-state bias in the state courts, and does not extend to disputes between two residents of the same state. In many commercial matters, however, such as those involving corporations, it is easy to arrange nominal diversity among the parties to the dispute, and hence to have the matter tried in the federal courts, which are often considered more competent than their state-level counterparts. By adjusting jurisdictional rules, the availability of the federal courts for such cases can be increased or decreased – though a constitutional amendment would presumably be required to give the federal courts plenary jurisdiction over disputes arising under state law even when the litigants exhibit no diversity of residence. In Europe, federal jurisdiction of this character does not yet exist: a citizen cannot sue another citizen before a European Court, whether they are from the same or different member states.<sup>35</sup> The creation of Community courts with jurisdiction over state-law matters remains an option, however.

In the absence of a federal government, fully sovereign nations can potentially achieve a similar solution by means of international treaties creating a system of cross-national courts as a distinct project. One can imagine, for example, that a regional organization of states, such as the African Union, might create a system of commercial courts under its own aegis to which citizens of member states could take private disputes if they wished faster or more professional adjudication than that available in their domestic courts. Something roughly in this direction has already been created under the auspices of the World Bank, namely the International Centre for Settlement of Investment Disputes (ICSID). The mission of the ICSID, which was formed via a multilateral treaty in 1966,<sup>36</sup> is to settle

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<sup>34</sup> 28 U.S.C. § 1332(a) (2000).

<sup>35</sup> See Consolidated Version of the Treaty Establishing the European Community, Dec. 24, 2002, O.J. (C 325) 33, 2002, arts. 226-228.

<sup>36</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter CSID].

disputes between member countries and private foreign contractors doing business with those countries.<sup>37</sup>

#### ***IV. Some Practical Considerations***

Whatever its attractions, a global market for judicial services might seem doomed by some basic practical obstacles, including language barriers, the difficulty of finding competent counsel, and foreign judges' lack of familiarity with the litigants' local law and culture. We address these problems here briefly, to make the case that, though constraining in particular cases, these obstacles need not be a serious impediment to the extra-jurisdictional litigation in general. We deal with other difficulties in later sections.

##### ***A. Language***

Many languages are spoken in more than one country. While the English language may deter Chinese businessmen from litigating in the courts of New York, it is unlikely to prevent Indian litigants from choosing that forum. Spanish-speaking litigants could potentially have their case heard anywhere in Latin America outside of Brazil, in Spain, or (increasingly) in the United States. Germans could litigate in Austria, in Switzerland, or in those parts of France and Belgium where German is understood, while litigants from France could litigate in a panoply of countries such as Belgium, Luxembourg, Switzerland, and Canada. Moreover, in the long run, it is entirely imaginable that entrepreneurial jurisdictions might offer judicial services in foreign languages precisely to attract foreign litigants. Indeed, even now some countries offer judicial procedures in different languages.<sup>38</sup> For example, in Switzerland, litigants can choose any of the

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<sup>37</sup> See *id.* art. 1. The CSID refers to its dispute resolution mechanisms as "arbitration" and "conciliation". See *id.* However, the use of the word "arbitration" is somewhat misleading in this context. The so-called Arbitral Tribunal consists of one or a greater uneven number of "arbitrators". See *id.* art 37. While the parties are, in principle free in choosing outsiders as arbitrators, art. 40 (1), they also have the option of selecting them from among the members of the so-called Panel of Arbitrators. The members of the Panel of Arbitrators, however, have much in common with judges: They are being chosen for terms by the contracting states and are partly paid by those states. *Id.* arts. 13(1), 17. Consequently, the ICSID arguably has more in common with public courts than with private arbitration. See *infra* Part V.

<sup>38</sup> For example, the Constitution of Canada gives any person the right to use either English or French in a federal court. See Canadian Charter of Rights and Freedoms, Part I of the Constitution, 1982, being schedule B to the Canada Act 1982, ch.11 (UK), § 19(1).

national languages of Switzerland, which include German, French, Italian, and Romansh.<sup>39</sup> Should Swiss courts prove successful at selling their services abroad, it is conceivable that they might even add English and Spanish to the menu offered.

### ***B. Distance***

The argument that distance will prove a decisive obstacle is even less convincing. To begin with, the argument simply does not apply where litigants can choose between their own country's courts and those of a foreign country situated close by. Yet even where distances are considerable, e.g. because European litigants choose to litigate in the United States, they are unlikely to remain a significant obstacle to the global market for judicial services. To begin with, we consider it entirely feasible that successful jurisdictions might establish courts in the territory of other countries with the latter's consent, an option that we will discuss in more detail below. And, in any case, changes in transportation and communication technologies will render distance ever less important. Even now, documents can be filed electronically.<sup>40</sup> Very soon, videoconferencing is likely to have matured sufficiently to make litigation without physical appearances entirely feasible, and at least some jurisdictions are likely to offer that option.

### ***C. Law and Culture***

The question remains whether foreign judges' lack of familiarity with the law governing the case, or with the commercial and cultural setting in which the case arose, will badly handicap cross-jurisdictional litigation.

When contracting parties choose a foreign forum, there is necessarily a dilemma involved in their choice of substantive law. If – as seems most common in current practice – they choose the substantive law of the forum

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Belgium officially has four linguistic regions, namely a French-speaking one, a Dutch-speaking one, a bilingual one where both French and Dutch are spoken, and a German-speaking one. See *La Constitution Belge* [The Belgian Constitution], Feb. 17, 1994, art. 4(1).

<sup>39</sup> See *Bundesverfassung, Constitution Federale, Costituzione Federale* [Constitution] art. 4 (Switzerland).

<sup>40</sup> See the sources cited *supra* note 6.

state,<sup>41</sup> they can be assured that the court will be familiar with the law. But then the parties themselves may be less familiar with the law than they would be with the law of their home state. Conversely, if the parties choose to have their contract governed by their home state's substantive law, they run the risk that the foreign court they've chosen will be unfamiliar with that law, adding expense and delay to the proceedings and perhaps reducing the predictability of the results.

It seems likely, however, that this dilemma will not be serious in practice. Presumably only one or a very few exporting states will become substantial players in any given importing state, and the law of those exporting states will consequently become familiar to merchants and their lawyers. Moreover, substantive commercial law is becoming increasingly uniform across nations. This is particularly true, of course, within the European Community, where the percentage of substantive law that has been harmonized via Community legislation is ever-increasing.<sup>42</sup> But to some extent the same observation applies with respect to the international level in the strict sense, an important example being the United Nations Convention on Contracts for the International Sale of Goods (CISG).<sup>43</sup> And even in the absence of uniformity, many jurisdictions share common legal origins, allowing judges from one jurisdiction to apply the law of other jurisdictions with relative ease,<sup>44</sup> and allowing parties and their lawyers to

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<sup>41</sup> In the Miller's and Eisenberg's sample of major commercial contracts, for example, most contracts choose New York substantive law and New York courts as the forum for resolving disputes. See Miller, *Market*, *supra* note 22, at 48. Likewise, firms incorporate in Delaware to gain access to both Delaware's corporate law and Delaware's Chancery Court. See, e.g., Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 557 (2002).

<sup>42</sup> Cf., e.g., Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 39 N.Y.U. J. INT'L L. & POL. 1, 49 (2006) (noting the broad extent of private law harmonization in the European Community).

<sup>43</sup> Final Act of the United Nations Conference on Contracts for the International Sale of Goods, Apr. 10, 1980, U.N. Doc. A/Conf./97/18, with Annex, United Nations Convention on Contracts for the International Sale of Goods, repr. in 19 I.L.M. 668-99 (1980). A list of the signatory nations is available on the website of the United Nations Commission on International Trade Law (UNCITRAL) at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html). As of February 21, the list includes 70 countries, among them many of the largest and economically most important nations.

<sup>44</sup> For example, within the United States, few would doubt that Delaware's Chancery Court, or a federal District Court, is perfectly able to handle cases calling for the application of the corporate law of Texas or New York. Similar examples can readily be found in the

understand easily, and work within, the law of forum jurisdictions other than their own.

And will foreign judges also be able to understand the factual context within which the parties' dispute arose? The increasing homogeneity of commercial practices will presumably render this problem, like the problem of working with foreign law, increasingly easy to deal with. Moreover, just as in domestic litigation and in international litigation, lawyers and witnesses will serve to inform judges in cross-jurisdictional cases about the salient elements of the transaction involved.

### ***V. The Limits to Arbitration***

The question remains whether parties in countries with weak courts would generally find private arbitration a superior alternative to foreign courts in resolving their disputes.

We are principally concerned here with the public versus private character of the forum, in contrast to the style in which disputes are resolved. Consequently, we will use the term "courts" to refer to all government-provided forums for the resolution of private disputes, while reserving the term "arbitration" for all privately-provided dispute resolution services, regardless of their degree of formality. The question above can then be rephrased as follows: Would parties in countries with weak courts generally find the dispute resolution services offered by private providers superior to those offered by foreign governments?

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international context. For example, Austrian civil law should hold no insurmountable challenges for German judges, and vice versa.

Empirical research on federal courts supports the thesis that a judge need not belong to a jurisdiction to apply its law competently. A majority (55 %) of a sample of defendant attorneys who had cases removed from state to federal court under diversity jurisdiction thought that the federal judges were more familiar with the substantive law issues in question. Neal Miller, *An Empirical Study of Forum Choices in Removal Cases under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 415 (1992). There may be selection bias in this sample, since the attorneys questioned were those who had chosen to leave state for federal courts. However, in a corresponding sample of cases that were removed to federal court under federal question jurisdiction, the percentage of defendant attorneys who thought that the federal judges were more familiar with the substantive law issues was only slightly higher (65.2 %). *Id.*

There is strong reason to believe that the answer is no: while arbitration will continue to play an important and perhaps growing role in dispute resolution, it will not be an adequate substitute for public courts.

### **A. Empirical Evidence**

The first reason for this conclusion is empirical. Arbitration does not seem to compete strongly with courts in practice.

While systematic data on the use of arbitration is scarce, the Eisenberg and Miller contract study throws substantial light on the issue at hand.<sup>45</sup> Overall, only 11% of these contracts included binding arbitration clauses.<sup>46</sup> Arbitration clauses appeared in only 10% of the domestic contracts and a still-small 20% of the international contracts (those involving a non-U.S. party).<sup>47</sup> Of the 89% of the contracts in the overall sample that did not call for arbitration, 40% specified the courts of a particular state as the choice of forum. Among the latter, 43% chose the courts of New York for their forum, followed by Delaware with 11% and California with 8%.<sup>48</sup>

In short, the overwhelming majority of these contracting parties – who were clearly sophisticated and well represented and had much at stake -- did not consider it in their mutual interest to resolve their disputes through arbitration rather than in the public courts. Indeed, the public courts of a single state – New York – were far more popular than arbitration. It is of course possible that the contracts in this sample were for some reason less amenable to arbitration than would be other contracts, and particularly contracts of more modest value – though the more standardized contracts in the sample in fact called for arbitration less often than the more idiosyncratic ones.<sup>49</sup> But the results nonetheless throw substantial doubt on the proposition that arbitration is generally a good substitute for public courts in commercial contracting.

### **B. International Arbitration**

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<sup>45</sup> See Eisenberg & Miller, *Arbitration*, *supra* note 21.

<sup>46</sup> *Id.* at 21.

<sup>47</sup> *Id.* at 23.

<sup>48</sup> Computed from figures in Miller, *Market*, *supra* note 22, at 10, 17, & 19.

<sup>49</sup> Eisenberg & Miller, *Arbitration*, *supra* note 21, at 29.

The Eisenberg and Miller data confirm the conventional wisdom that arbitration is more commonly provided for in international contracts than in domestic contracts – though they find a frequency of only 20%, as compared to anecdotal estimates that have often run much higher.<sup>50</sup> In any event, the reasons for choosing arbitration over courts in international disputes today may not extend to extraterritorial litigation in the future.

The two dominant reasons for choosing arbitration over courts, according to a broad survey of participants in international arbitration, are neutrality of the forum and enforceability of judgments in other jurisdictions.<sup>51</sup> The advantage in neutrality presumably reflects the parties' conclusion that the alternative to arbitration is to have their dispute adjudicated in the courts of one of the parties' home countries, since a judgment from the courts of a third state might not be enforceable. So the neutrality advantage is derivative of the advantage in enforceability.

And the advantage in enforceability is largely a consequence of the present state of international law: the New York Convention of 1958,<sup>52</sup> which provides widespread international enforcement of arbitral decrees, has been signed by more than 140 countries.<sup>53</sup> By contrast, the Hague Convention on Choice of Court Agreements, which would guarantee similar advantages with respect to foreign court decisions, still has not entered into force. If, as we discuss below, this imbalance is rectified, then arbitration will lose its important advantage over courts in enforceability and in neutrality as well.

### **C. Arbitration's Handicaps**

We will not offer a comprehensive review of the relative advantages of arbitration and courts, which are the subject of a large literature (albeit a

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<sup>50</sup> *Id.* at 17 (citing one estimate according to which as much as 90 % of international contracts have arbitration clauses).

<sup>51</sup> CHRISTIAN BÜHRING-UHLE, LARS KIRCHHOFF, & GABRIELE SCHERER, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 107-10 (2d ed., 2006).

<sup>52</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (entered into force with regard to the United States Dec. 29, 1970).

<sup>53</sup> A list of the nations who have signed the convention is available on the website of the United Nations Commission on International Trade Law (UNCITRAL) at

[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)

literature, as we have noted, that is scarce on systematic data).<sup>54</sup> A few remarks are on order, however, on the problems that handicap arbitration in competing with courts.

As it is typically practiced today, arbitration is a rather different service than that offered by courts. For some types of commercial actors, and for some types of disputes, the advantages that arbitration has to offer such as greater confidentiality<sup>55</sup> and greater procedural flexibility<sup>56</sup> will presumably continue to be sufficiently important to assure continued demand for arbitration even when the alternative is a highly efficient system of courts. But the advantages of arbitration are closely tied to some offsetting disadvantages that place important limits on the role that arbitration can play.

**Cost and Time.** Commercial arbitrators are typically individuals who have other sources of employment and who are paid by the hour for their services – both of which are important in giving parties the broad discretion in choice of decision-makers that is among the important benefits of arbitration. The consequence of these arrangements, however, is a weak incentive to economize on time and cost. This presumably helps explain why survey evidence suggests that cost is not generally considered an advantage of arbitration,<sup>57</sup> and many participants do not consider speed an advantage either.<sup>58</sup>

**Predictability of Decisions.** Courts evidently have an advantage over arbitration in reaching predictable decisions.<sup>59</sup> One reason for this, presumably, is that, because arbitrators are commonly chosen (directly or

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<sup>54</sup> Eisenberg & Miller, *Arbitration*, *supra* note 21, at 2-9, provide extensive references to the literature.

<sup>55</sup> See, e.g., Gregg A. Paradise, Note, *Arbitration of Patent Infringement Disputes: Encouraging the Use of Arbitration Through Evidence Rules Reform*, 64 *FORDH. L. REV.* 247, 248 (1995).

<sup>56</sup> See, e.g., Stefano E. Cirielli, *Arbitration, Financial Markets and Banking Disputes*, 14 *AM. REV. INT'L ARB.* 243, 244 (2003); Paradise, *supra* note 55, at 248.

<sup>57</sup> BÜHRING-UHLE, KIRCHHOFF, & SCHERER, *supra* note 51, at 109 (noting that only 41 % of respondents considered arbitration to be “generally less expensive” as opposed to 43 % of respondents finding arbitration to be “generally not less expensive”).

<sup>58</sup> *Id.* at 110 (noting that while 67% of survey respondents consider arbitration to be “generally faster”, 21 % believe arbitration to be “generally not faster”, and 8 % consider it “faster only compared to litigation in particular countries”).

<sup>59</sup> See *id.* at 108 (noting that a majority of survey respondents find arbitration less predictable than courts).

indirectly) and paid by the parties, they have an interest in rendering decisions that will maximize the chances that they will be chosen again in future disputes. The result is an incentive to render compromised judgments that do not badly offend either party. Another reason for unpredictability is that, in keeping with the parties' ability to choose their own arbitrators, and to reduce time and expense, arbitral decisions generally cannot be appealed. And a third reason is that, to provide confidentiality to the parties, decisions commonly are not published and hence cannot be studied to predict future outcomes.

But unprincipled and unpredictable decisions bring high costs. An important reason for negotiating and drafting a contract is to constrain the parties' future behavior. If third party enforcement is to be effective in serving this end, it is generally important that, when a third party decision-maker is called upon to resolve a dispute, they interpret and enforce the contract as the parties intended when it was written. Compromise judgments may minimize collective offense to the parties *ex post*. But the expectation of such judgments weakens the parties' ability to structure their transaction *ex ante*.

Some evidence of the importance of this consideration is offered by the state of New York. New York has taken various steps that make its courts attractive for litigation involving commercial contracts. Among those steps is the self-conscious adoption of relatively strict norms of contract interpretation that focus on the plain meaning of the document. To be sure, all U.S. states<sup>60</sup> – including New York<sup>61</sup> - allow the use of extrinsic evidence where a written contract is ambiguous. Yet despite this common point of departure, the views on the use of extrinsic evidence diverge widely. Some states go as far as allowing the use of extrinsic evidence regardless of any ambiguity in the text.<sup>62</sup> Another, much more widely held view continues to

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<sup>60</sup> See, e.g., E. ALLAN FARNSWORTH, 2 FARNSWORTH ON CONTRACTS § 7.12 (2001).

<sup>61</sup> *E.g.*, *South Rd. Assocs., LLC v. IBM*, 826 N.E.2d 806, 810 (N.Y. 2004); *Greenfield v. Philles Records*, 780 N.E.2d 166, 170 (N.Y. 2004).

<sup>62</sup> *E.g.*, *Froines v. Valdez Fisheries Dev. Ass'n*, 75 P.3d 83, 88 (Alaska 2003); *Alyeska Pipeline Serv. Co. v. O'Kelley*, 645 P.2d 767, 771 n.1 (Alaska 1982); *Stuhmer v. Centaur Sculpture Galleries*, 871 P.2d 327, 330 (Nev. 1994); *Hilton Hotels Corp. v. Butch Lewis Prods.*, 808 P.2d 919, 921 (Nev. 1991); *C.R. Anthony Co. v. Loretto Mall Partners*, 817 P.2d 238, 242-43 (N.M. 1991).

adhere to the plain meaning rule, but allows extrinsic evidence to be brought in with respect to the determination of whether the writing is ambiguous or not.<sup>63</sup> New York, by contrast, stubbornly adheres to the so-called “four corners” rule: Not only will an unambiguous contract be interpreted according to its terms, without recourse to extrinsic evidence.<sup>64</sup> New York also refuses to consider extrinsic evidence to determine whether the writing is ambiguous.<sup>65</sup> Because the question of ambiguity is one of law that is for the court to decide,<sup>66</sup> New York law offers a high degree of certainty to the parties. It is unclear whether New York courts have followed this approach with a view to maintaining the attractiveness of New York law to foreign litigants in particular. However, what is certain is that New York courts are very much aware that their case law on contract interpretation is of particular importance to commercial transactions. Thus, the four corners rule has been explicitly justified on the grounds that it “imparts ‘stability to commercial transactions . . .’”<sup>67</sup> And, we might note, it protects against the kinds of unprincipled – and hence *ex ante* unpredictable -- judgments to which arbitration is prone.

#### ***D. Can Better Forms of Arbitration Be Devised?***

It is reasonable to ask whether alternative forms of arbitration might be developed that avoid handicaps of the type just mentioned and offer the principal benefits of courts. What if, for example, private dispute resolution services were to (1) employ salaried full-time decisionmakers who are assigned to disputes rather than chosen by the litigants, (2) publish opinions, (3) provide for appellate review, and possibly even (4) develop their own bodies of substantive commercial law? Might such a private

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<sup>63</sup> *E.g.*, *Walls v. Bank of Prattville*, 575 So.2d 1081, 1083 (Ala. 1991); *Dore v. Arnold Worldwide, Inc.*, 39 Cal. 4th 384, 391 (2006); *Royal Banks of Missouri v. Fridkin*, 819 S.W.2d 359, 362 (Mo. 1991).

<sup>64</sup> *E.g.*, *Vt. Teddy Bear Co. v. 538 Madison Realty Co.*, 807 N.E.2d 876, 879 (N.Y. 2004); *South Rd. Assocs., LLC v. IBM*, 826 N.E.2d 806, 809 (N.Y. 2004); *Signature Realty, Inc. v. Tallman*, 814 N.E.2d 429, 430 (N.Y. 2004); *Greenfield v. Philles Records*, 780 N.E.2d 166, 170 (N.Y. 2004).

<sup>65</sup> *E.g. South Rd. Assocs. LLC*, 826 N.E.2d at 810; *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998); *W.W.W. Assoc., Inc. v. Giancontieri*, 566 N.E.2d 639, 642 (N.Y. 1990).

<sup>66</sup> *E.g. South Rd. Assocs. LLC*, 826 N.E.2d at 810; *Greenfield v. Philles Records*, 780 N.E.2d 166, 170 (N.Y. 2004); *Kass*, 696 N.E.2d at 180; *W.W.W. Assoc., Inc.*, 566 N.E.2d at 642.

<sup>67</sup> *W.W.W. Assoc., Inc.*, 566 N.E.2d at 642 (citing FISCH, NEW YORK EVIDENCE § 42, at 22 [2d ed]).

service serve as a superior alternative, for residents of nations with weak courts, to cross-jurisdictional litigation?

There is good reason to be skeptical. Governments have some natural advantages in establishing effective judicial systems. Among the most important of these is ease of establishing a widespread reputation for principle and predictability in decision-making. The governments of many states are stable and durable entities with well-functioning courts whose reputation has long been firmly established.

Moreover, the quality of adjudication that the courts of a state provide for nonresidents cannot easily be varied from that offered to the state's own citizens. Consequently, a state's political accountability to its citizens provides some assurance that the state will not deviate excessively from principled decision-making just to please one or another important class of foreign litigants. In effect, at least for courts in states with well-functioning political systems, the courts' responsibility to their domestic clientele bonds their credibility to their foreign clientele. It would surely be difficult for a private organization to develop a comparable reputation.

Also, foreign states can signal the integrity of their judges by providing that corruption is subject to harsh criminal sanctions. Given that criminal sanctions cannot easily be mimicked by contractual means, arbitrators have no comparable advantage.

Furthermore, just as arbitration might be restructured to adopt some of the advantages of courts, courts can be reformed to offer some of the advantages of arbitration, and hence become more competitive themselves. Obvious steps in this direction that courts can and have taken include better case management and streamlined procedures to speed up proceedings, and the creation of specialized courts with judges chosen for their expertise.

Finally, if arbitration were a perfect substitute for courts, one would expect the number of cases filed in public courts per inhabitant to decline drastically in states with inefficient judiciaries. Yet data on the number of cases filed in 43 European countries cast doubt on whether that is

happening. To gauge the quality of courts in these countries, we use the value assigned to each country in the already mentioned “rule of law index” developed by the World Bank<sup>68</sup> and, where available, the percentage of cases pending for more than three years. The simple correlation between cases filed and the rule of law measure is statistically insignificant, with a coefficient that is in fact negative.<sup>69</sup> Regression of the number of cases filed on both the rule of law measure and the number of cases pending more than three years (for which the sample is smaller) also shows no significant dependence on either.<sup>70</sup> Consequently, though we do not have data on the number of arbitration cases brought annually in these countries, the lack of a negative correlation between the number of lawsuits brought and the quality of a country’s judicial system<sup>71</sup> is strong evidence that arbitration is not serving as an important substitute for a weak judicial system.

## ***VI. The Costs and Benefits of Judicial Competition***

We have already spoken in general terms of the potential benefits of creating a global market for judicial services. We now offer a more systematic assessment of those benefits, and of possible offsetting costs.

### ***A. The Benefits***

We see four principal benefits.

#### ***1. Giving Litigants Access to Better Courts***

The first benefit is familiar and is frequently mentioned as an argument for allowing choice-of-forum clauses: Litigants from jurisdictions with low-quality courts are given access to better courts.<sup>72</sup> We wish to stress,

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<sup>68</sup> See *supra* text accompanying note 15.

<sup>69</sup> The Pearson correlation coefficient is  $-.185$ , with a significance of  $.247$  (two-tailed test).

<sup>70</sup> See the detailed regression results in Annex I.

<sup>71</sup> Once more, the example of Italy proves enlightening: The value assigned under the World Bank Index is low (0.51) by Western European standards, and, as pointed out above, Italian courts are notoriously slow. Yet at the same time, the number of civil and administrative suits filed per inhabitant (6159) is much higher than in, say, France or Germany.

<sup>72</sup> The advantage of being able to choose the most suitable court is frequently mentioned. See, e.g., Dreyfuss, *supra* note 11, at 37; Celia R. Taylor, *Comment: National*

however, that it is not only the litigants themselves who profit. Rather, their country of origin in general profits as well, because its economic development is no longer hamstrung by inefficient courts.

## **2. Providing Benchmarks**

A less obvious but perhaps equally important benefit of a market for judicial services lies in the information that such a market would provide to the home state. By observing the behavior of local litigants who flock to foreign courts, the home state can gain precise insights into what is wrong with its own court system. To be sure, in many cases, the relevant weaknesses will be quite obvious. For example, if a country's judges are generally perceived to be slow, corrupt, and incompetent, then the home state should already know where the challenges lie. But a judiciary's weaknesses need not always be so easy to perceive.

For example, it is not completely clear to what extent jury-based systems are superior to non-jury-based systems,<sup>73</sup> although at least one of us believes that the success of the Delaware Chancery Court, which is a court of equity<sup>74</sup> and therefore sits without a jury,<sup>75</sup> provides a strong hint as to the right answer.<sup>76</sup> And many other issues are unresolved as well. Scholars disagree vigorously as to whether or not a system that gives judges broad responsibility in discovering the facts, as in civil law countries, is superior to the U.S. system, where that task is largely left to

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*Iranian Oil Co. v. Ashland Oil, Inc.: All Dressed Up and Nowhere to Arbitrate*, 63 N.Y.U.L. Rev. 1142, 1146 (1988).

<sup>73</sup> But see Theodore Eisenberg & Geoffrey Miller, *Do Juries Add Value? Evidence from an Empirical Study of Jury Trial Waiver Clauses in Large Corporate Contracts* 16 (Cornell Law School research paper No. 06-044, 2006) (examining a sample of 2,816 contracts filed with the SEC as exhibits in Form 8-K filings and finding that only about 20% of these contracts waived jury trials).

<sup>74</sup> DEL. CODE ANN. tit. 10, § 341 (2007).

<sup>75</sup> DEL. CONST. art IV § 10.

<sup>76</sup> Indeed, it has long been argued that the absence of a jury is part of what makes the Chancery Court attractive to litigants. See, e.g., Jill E. Fisch, *Thirteenth Annual Corporation Law Symposium: Contemporary Issues in the Law of Business Organizations: The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1077 (2000); Kahan & Kamar, *Myth*, *supra* note 9, at 708; Kahan & Kamar, *Discrimination*, *supra* note 9, at 1212; Stephen J. Massey, *Chancellor Allen's Jurisprudence: Chancellor Allen's Jurisprudence and the Theory of Corporate LAW*, 17 DEL. J. CORP. L. 683, 704 (1992).

the attorneys.<sup>77</sup> Similarly, persons may reasonably differ about the degree of formalism that is optimal in civil proceedings. Nor is there clear evidence concerning the value of appeals. Should the parties always have the right to appeal the decision? And should the decision of the court of appeal be subject to an appeal as well?

If litigants have broad choice among courts in differing legal systems, it will become far easier to make comparisons between differing approaches to these issues and to discover which work best in given circumstances. And that information can then be used, not just by litigants in their choice of courts, but by lawmakers in reforming their judicial systems.

### **3. Specialization**

A global market for judicial services promises important benefits from judicial specialization. To provide high-quality services, it is an advantage for judges to be familiar with the area of the law that they are applying and with the business context in which the case is situated. But such expertise is hard to get if cases are uncommon. For example, most civil court judges will be familiar with contract law, but how many of them are well-versed in the intricate rules governing publicly-traded business corporations? Against this background, it makes sense to have cases involving public corporations litigated before courts that specialize in such cases. And, of course, that is exactly what is happening in corporate law. Delaware's Chancery Court has become the go-to forum for cases involving publicly-traded corporations,<sup>78</sup> and there is a broad consensus in the literature that an important part of the Chancery Court's attractiveness is due to its specialization on corporate law cases,<sup>79</sup> which make up about three

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<sup>77</sup> Compare John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 824 (1985) (invoking the German experience as an argument in favor of restricting the parties' role in fact-gathering) with Ronald J. Allen et al., *Legal Institution: The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U.L. REV. 705, 716-735 (1988) (advancing various counterarguments).

<sup>78</sup> Cf. Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 881 (calling the Chancery Court "the most prominent corporate law court"); Massey, *supra* note 76, at 705 (pointing to the Chancery court's "prominence as a forum for the adjudication of corporate law issues").

<sup>79</sup> See, e.g., Dreyfuss, *supra* note 11, at 4; Kahan & Kamar, *Myth*, *supra* note 9, at 708; Fisch, *supra* note 76, at 1077.

quarters of its case load,<sup>80</sup> thereby allowing its judges to gain particular expertise in that area of the law.<sup>81</sup>

In many nations, the absolute number of cases arising in a given area of the law is too small to allow for a meaningful degree of specialization. A global market for judicial services would likely provide at least a partial remedy to this situation.

#### **4. Competition**

Finally a global market for judicial services should yield important benefits in terms of judicial competition.<sup>82</sup> While many jurisdictions would arguably be too inflexible or preoccupied to make active efforts to attract foreign litigants, some would probably take a more entrepreneurial approach – an issue we return to below.<sup>83</sup> And at least to some extent, the resulting competition for litigants would be a race for quality, given that some of the qualities that are likely to attract foreign litigants, such as speedy decisions and highly qualified judges, are unequivocally positive.

#### **B. The Costs of a Global Market for Corporate Law**

The potential costs of a global market for corporate law take two forms. First, the chosen forum may end up being worse for the parties than the forum that would have been selected in the absence of a global market for judicial services. Second, the parties' choice, while advantageous for the parties themselves, may produce negative externalities, or may fail to produce positive externalities that would otherwise have resulted.

##### **1. Informational Problems**

It is possible that broad choice among competing systems of courts might induce contracting parties to choose a court that is less beneficial to

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<sup>80</sup> See, e.g., Fisch, *supra* note 76, at 1077-78; Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 903 (1990). Cf. also Kahan & Kamar, *Discrimination*, *supra* note 9, at 1212 (noting that the Chancery Court's docket "consists mostly of corporate claims").

<sup>81</sup> See, e.g., Kahan & Kamar, *Myth*, *supra* note 9, at 708; Fisch, *supra* note 76, at 1077-78; Kahan & Kamar, *Discrimination*, *supra* note 9, at 1212.

<sup>82</sup> Cf. also Nita Ghei & Francesco Parisi, *Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as a Spontaneous Order*, 25 CARDOZO L. REV. 1367, 1391 (2004) (noting, in passing, that permitting alternative forums increases competition among the states).

<sup>83</sup> See *infra* Part IX.

them than the court that would otherwise have heard their case. The principal reasons lie in informational problems.

**a) Informational Asymmetries between Parties**

We are concerned here only with situations in which both parties to a dispute have consented to have their dispute heard by a foreign court, either in their contract or after their dispute arose. This restriction removes the most obvious problems of plaintiff's forum shopping that can arise when parties are given a choice of forum. It does not, however, eliminate all such problems.

Even where the forum is chosen by contract, the parties may end up picking a suboptimal forum if one of the parties is much better informed about the relevant facts than is the other. The general problem is familiar, and isn't limited to choice of forum clauses. Consumers, for example, commonly do not understand, or even read, the terms in standard form contracts, including particularly esoteric terms such as choice of forum clauses.<sup>84</sup> The result is a market for lemons. Consumers are unable to distinguish between fair and unfair standard form contracts, and are therefore unable to reward sellers for using fair rather than unfair standard form contracts. Consequently, sellers have the incentive and the opportunity to put exploitative terms in their contracts.

This problem can be managed with respect to choice of forum clauses using the same techniques employed for standard form contract terms in general. One approach is to prohibit the use of certain terms across the board; another is to use a balancing test, focusing on the specific circumstances of the case. With respect to forum selection clauses, both approaches are already being used. German law, for example, contains a near complete ban on forum selection clauses in consumer contracts,<sup>85</sup> while most U.S. jurisdictions take a case by case approach and look at the

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<sup>84</sup> See Lee Goldman, *Public Policy: My Way or the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 *Nw. U.L. REV.* 700, 716-17 (1992).

<sup>85</sup> See *Zivilprozessordnung [ZPO] [Code of Civil Procedure] Dec. 12, 2005, Bundesgesetzblatt [BGBl.] 3202, as amended, § 38 ZPO* (imposing a general ban on forum selection clauses in contracts with nonmerchants with only a few narrowly drawn exception, e.g. where neither party has a place of general jurisdiction in Germany).

reasonableness of the forum selection clause.<sup>86</sup> In any case, these concerns do not justify rejecting the judicial market as a whole, but only the adoption of specific protection for consumers and other parties who are similarly affected by informational disadvantages.

### ***b) Agency Problems***

Another problem in this context results from opportunism in the lawyer-client relationship. There are several reasons why lawyers might recommend a choice of forum that is less than optimal for the client.

To begin with, the number of jurisdictions where the lawyer is admitted to the bar, and with whose law she is familiar, is usually limited. Hence, she may recommend a particular jurisdiction, not because of the efficiency of that jurisdiction's judiciary, but because the lawyer is well-acquainted with the relevant procedural rules and is admitted to the local bar. Second, there are the rules governing lawyer's fees to be considered. Some jurisdictions have much more liberal fee rules than others. For example, some countries, such as the United States, allow contingent fees, while others do not.<sup>87</sup> Hence, law firms may be tempted to shepherd their clients towards jurisdictions with more generous rules on lawyer's fees. Finally, it is not clear that lawyers have a preference for efficient legal proceedings. For example, lawyers may prefer more hearings or drawn out proceedings if they are paid on a per hour basis.

These concerns should not, however, be given great weight. A lawyer's decision to litigate the case in a foreign jurisdiction will presumably be scrutinized more diligently by the client than the decision to litigate locally.

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<sup>86</sup> See, e.g., *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 593-594 (1991) (holding, in an admiralty case, that forum selection clauses, even where included in a consumer contract, are not generally invalid but subject to judicial scrutiny for fairness); *Caspi v. Microsoft Network*, 732 A.2d 528, 531 (N.J. Super. 1999) (holding that inclusion in a consumer contract does not make forum selection clause invalid).

<sup>87</sup> Under German law, contingent fee arrangements are void. See, e.g., *Bundesgerichtshof*, 12/4/1996, 40 NJW [Neue Juristische Wochenschrift] 3203, 3204 (1987); *Bundesgerichtshof*, 2/28/1963, 16 NJW [Neue Juristische Wochenschrift] 1147, 1147 (1963); *Bundesgerichtshof*, 6/19/1980, 33 NJW [Neue Juristische Wochenschrift] 2407, 2408 (1980). French law is somewhat more generous, allowing agreements under which the lawyer is entitled to a supplemental fee if he wins the case. See Jens C. Dammann, *Freedom of Choice in European Corporate Law*, 29 YALE J. INT'L L. 477, 501 (2004). U.K. law also provides a limited degree of flexibility by allowing arrangements under which a lawyer who wins the case can double the fee that she would otherwise have been entitled too. See *id.*

Moreover, as a general matter, the quality of courts is unlikely to be overly case-specific. That means that it will not take much specialized knowledge for the client to monitor his attorney when it comes to choice of forum decisions. And this should be true even if, as seems both likely and desirable, particular jurisdictions specialize in certain areas of the law, as Delaware has done with corporations and New York has done with contracts. The number of jurisdictions that are deemed to offer attractive courts is likely to be limited, and there will probably develop a general sense in the marketplace as to which courts are to be sought or avoided.

## ***2. Negative Externalities***

The emergence of a global market for judicial services also has the potential to create negative externalities, and to reduce positive externalities that otherwise would have been realized.

### ***a) Less Refinement of Origin State's Law***

Litigation can yield positive externalities of two types. First, it can produce benefits for the substantive law of the state whose law is applied, principally through the refinement of precedent. Second, it can produce benefits for the court system where the litigation takes place by permitting judges to hone their skills. At first glance, it may not seem to matter, in these respects, whether the litigation is in one jurisdiction or another; it is just a question of who reaps the benefits. Yet the question of where suits are brought may in fact affect the size of the relevant benefits.

In particular, the marginal benefit of an additional case may decline as the intensity of litigation in a jurisdiction increases. For example, assume that two parties from Luxembourg decide to subject their contract to New York law and litigate in New York courts. In that case, the additional litigation may add little to the value of New York case law, or to the experience of New York judges in handling commercial disputes. Yet the case might have provided the Luxembourg judiciary with useful training and might have contributed important precedent for the law of Luxembourg.

It is difficult, however, to make useful predictions about the comparative utility of litigation to one state or another. An example from the area of

corporate may serve to illustrate: A takeover case litigated in Rhode Island may do little for the quality for the local judiciary, because it is unlikely that another such case, even if it were to occur, would come before the same judge. Similarly, the case may add little to the value of the case law of Rhode Island, because it may be unlikely that a similar scenario will occur again in so small a state. By contrast, the same case might prove a valuable precedent in Delaware because similar scenarios are much more likely to occur in the latter state, which is home to many publicly traded corporations. Similarly, expanding the number of Delaware Chancery Court judges from the current five to ten or twenty, to handle an increased volume of litigation, may increase the amount of fruitful collegial interchange among the judges, so that even Delaware's already experienced judiciary would profit from additional corporate law cases. Moreover, the benefits of the refined precedent produced in Delaware need not be confined to that jurisdiction; courts in other jurisdictions with much less corporate litigation can still take guidance from Delaware precedent when they face a corporate law issue.

In sum, it is not at all obvious *a priori* that the emergence of a global market for judicial services will produce a net reduction in the positive externalities from litigation, and very plausible that the net effect will instead be positive.

### ***b) Weakening Voice by Exit***

As Albert Hirschman famously observed, competition for local services, including public services, can weaken incentives for consumers to press for the local providers to improve the services they offer.<sup>88</sup> This could happen with courts. If prominent merchants who would otherwise have a stake in the quality of a country's courts are given the opportunity of simply taking their litigation elsewhere, the result may be to remove much of the political pressure for reforming the local courts. Consequently, services might not improve, or might even decline, for those litigants who do not or cannot use foreign courts.

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<sup>88</sup> ALBERT HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

As a result, it is difficult to predict *a priori* whether competition from foreign courts will, in any given jurisdiction, cause local courts to improve or to deteriorate. As with other services, however, this seems best left to the market to sort out. If local courts can be improved with relative ease, the stimulus of foreign competition is likely to press them in that direction, allowing local residents to avoid any expense or uncertainties involved with using foreign courts. If, conversely, local courts are unresponsive to competition, they would probably also be refractory even if the citizenry were denied other options.

### **c) Burdens on Witnesses**

Another concern involves the interests of witnesses who are, perhaps against their will, involved in litigation. Witnesses stand to lose time and effort from participation in a trial, and may have to reveal information that they would rather have kept secret for personal or business reasons. The obvious problem with a global market for judicial services is that the parties, in choosing a forum, will not take these costs into account. For example, the parties may choose a forum that does not ensure that witnesses are adequately reimbursed for their efforts, or that is overly aggressive in forcing the witnesses to disclose confidential information.

At present, this problem is largely theoretical, because courts generally have little capacity to force witnesses in other countries to cooperate.<sup>89</sup> To facilitate the emergence of a market for judicial services, however, it may be desirable to increase (by treaty or convention) courts' ability to enforce the cooperation of witnesses located in other jurisdictions. Yet there are means of assuring that such rules do not place additional burdens on witnesses. One is to require that the burden imposed on witnesses not exceed the burden imposed by the law of the state where the witness is located. For example, if, in a given case, the parties and the witnesses are located in Switzerland, but the parties decide to litigate in London, then, under the rule suggested, the London court could not burden the witness

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<sup>89</sup> The relevant rules, which are quite restrictive, can be found in The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231.

beyond what Swiss law would have allowed. In this way, externalities can be largely avoided.

### ***C. Comparing Benefits and Costs***

Would the benefits outweigh the costs? The question must ultimately be settled empirically, not theoretically. But the potential benefits seem so substantial, and the possible costs sufficiently easy to contain, that the experiment seems very well worth running.

## ***VII. Obstacles to Jurisdiction and Enforcement***

If a global market in judicial services is to develop, the international legal environment must exhibit two key elements. First, parties to a contract must be free to choose the forum in which their disputes will be adjudicated. Second, judgments obtained in one jurisdiction must be enforceable in another. At the international level in particular, neither of these elements is widely established.

### ***A. Legality of Forum Selection Clauses***

We consider first the ability of parties to determine by themselves, via contract, the forum in which their disputes will be adjudicated. There are two relatively distinct issues here. The first is whether the jurisdiction chosen by the parties will respect that choice and hear their case. The second is whether the parties themselves can be held to the choice – that is, whether, once a dispute has arisen, one of the parties can successfully bring suit in a jurisdiction other than the one originally agreed to.

We consider the state of the law in three different inter-state contexts: the United States, the European Community; and among nonfederated nations in general.

#### ***1. The United States***

Within the United States, forum selection clauses are generally given broad effect. Following the lead of the U.S. Supreme Court,<sup>90</sup> most state courts now treat such clauses as valid provided that they are reasonable and

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<sup>90</sup> See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (holding that forum selection clauses are enforceable unless enforcement is unreasonable).

do not deprive the litigant of his day in court.<sup>91</sup> That is true both for courts of the jurisdiction that has been selected<sup>92</sup> and for courts in other jurisdictions that are asked to dismiss the case because a different forum has been chosen.<sup>93</sup>

To be sure, in some states, the chosen court can theoretically apply the *forum non conveniens* doctrine and refuse to exercise its jurisdiction despite the presence of a valid forum selection clause.<sup>94</sup> However, even in the latter states, a court chosen by way of a forum selection clause will not usually refuse to hear the case.<sup>95</sup> Moreover, two states, namely New York and Delaware, have enacted statutory provisions that further seek to enhance legal certainty for the parties by providing that, at least for controversies exceeding a certain amount, the parties' choice of forum will

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<sup>91</sup> *But see* Vanier v. Ponsoldt, 833 P.2d 949, Syl. P2 (Kan. 1992) (holding that a "reasonable relationship" between the transaction and the selected forum is required); *In re the Marriage of Yount*, 122 P.3d 1175, 1179 (Kan App. 2005) (same); *Aylward v. Dar Ran Furniture Indus.*, 87 P.3d 341, 344 (Kan. App. 2004) (same). Even in states that consider outbound forum selection clauses invalid they are sometimes deemed relevant to the application of the *forum non conveniens* doctrine. *See, e.g.*, *Davenport Machine & Foundry Co. v. Adolph Coors Co.*, 314 N.W.2d 432, 437 (Iowa 1982).

<sup>92</sup> *See, e.g.*, *Capital Group Cos. v. Armour*, C.A. No. 422-N, 2004 Del. Ch. LEXIS 159 at \*23 (holding that forum selection clauses are generally enforced unless party is denied day in court or placed at substantial and unfair disadvantage); *Aon Corp. v. Utley*, No. 1-05-2824, 2006 Ill. App. LEXIS 1021, at \*14 (2006) (holding that a forum selection clause will be enforced unless it deprives one party of her day in court).

<sup>93</sup> *See, e.g.*, *Société Jean Nicolas et Fils, J. B. v. Mousseux*, 597 P.2d 541, 543 (Az. 1971) ("In the absence of fraud, fairly bargained for forum selection clause will be enforced as long as it is reasonable "and does not deprive a litigant of this day in court."); *Parsons Dispatch, Inc. v. John J. Jerue Truck Broker, Inc.*, 199 S.W.3d 686, 690 (Ark. App. 2004) (holding that clause will be enforced unless "unreasonable and unfair."); *Terry v. Student Transp. of Am.*, 2001 Conn. Super. LEXIS 3664 at \*5 (holding that clause is enforceable unless enforcement is unreasonable); *Dexter Axle Co. v. Baan USA, Inc.*, 833 N.E.2d 43, 48 (Ind. App. 2005) (holding that clause is enforceable if "reasonable and just under the circumstances" and "no evidence of fraud or overreaching"); *Forrest v. Verizon Communs., Inc.*, 805 A.2d 1007, (D.C. App. 2002) (holding that clause is enforced unless unreasonable); *Prezocki v. Bullock Garages*, 938 S.W.2d 888, (Ky. 1997) (holding that clause is enforced unless "unfair or unreasonable"); *Ex parte Soprema, Inc.*, No. 1050466, 2006 Ala. LEXIS 172, at \*8 (July 21, 2006) (holding that outbound forum selection clause will be enforced unless unfair or unreasonable).

<sup>94</sup> *See, e.g.*, *Life of Am. Ins. Co. v. Baker-Lowe-Fox Ins. Mktg.*, 873 S.W.2d 537, 539 (Ark. 1994); *Olinick v. BMG Entertainment*, 42 Cal. Rptr. 3d 268, 274 (Cal. App. 2006). *But see* *Terry v. Student Transp. of Am.*, 2001 Conn. Super. LEXIS 3664 at \*8, \*12 (declaring the *forum non conveniens* standard to be inapplicable in case of a forum selection clause); *Aon Corp. v. Utley*, No. 1-05-2824, 2006 Ill. App. LEXIS 1021, at \*14-15, 17 (2006) (arguing that defendant had waived arguments based on *forum non conveniens* by agreeing to forum selection clause).

<sup>95</sup> *See, e.g.*, *Olinick v. BMG Entertainment*, 42 Cal. Rptr. 3d 268, 274 (Cal. App. 2006).

definitively be respected if the parties have chosen the relevant state's substantive law, too.<sup>96</sup>

Federal courts will also generally consider forum selection clauses valid if they are reasonable.<sup>97</sup> While there is a federal equivalent to the forum non conveniens doctrine,<sup>98</sup> a court will typically refuse to invoke this power to override the choice of the parties in the presence of a valid forum selection clause.<sup>99</sup>

## **2. European Community**

Within the European Community, the ability of the parties to select a forum of their choice is likewise broad, though somewhat differently contoured. The legality of choice of forum clauses selecting a foreign court is in important part governed by a Council Regulation.<sup>100</sup> As long as one deals with a contract between merchants, forum selection clauses are generally valid. The basic rule is that, as long as one or more of the parties is domiciled in any of the Member States, the parties can agree that the courts of a particular Member State or one particular court in a particular

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<sup>96</sup> Under § 5-1401 (1) of New York's General Obligations Law, the parties can select New York law to govern their contract even in the absence of a reasonable relationship to New York, if the contract involves at least \$ 250,000. See N.Y. C.S. GEN. OBLIG. § 5-1401 (2007). Further, the parties can litigate in New York if they have submitted to the jurisdiction of New York and chosen New York law to govern their contract, provided, however, that the proceeding must relate to a contract involving at least \$ 1,000,000. See N.Y. C.S. GEN. OBLIG. § 5-1402 (2007). Delaware law takes a similar approach. It gives the parties to a contract the right to agree to the application of Delaware law if they are subject to the jurisdiction of Delaware courts and can be served with process. Any party to a contract that chooses Delaware law and in which the parties have submitted to the jurisdiction of Delaware's courts, may bring suit in Delaware. However, Delaware law restricts the scope of application of these rules to contracts involving at least \$ 100,000. See DEL.CODE ANN. tit. 6 § 2708 (2007).

<sup>97</sup> See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 15 (1972) (holding that clause is enforceable unless enforcement would be "be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching . . . [or that] enforcement would contravene a strong public policy of the forum . . ."); *In re Fireman's Fund Ins. Cos.*, 588 F.2d 93, 95 (5<sup>th</sup> Cir. 1979) (holding that clause is enforceable unless shown to be unreasonable, unfair, or unjust).

<sup>98</sup> A federal district court may, for the convenience of parties and witnesses, transfer any civil action to any other district where the relevant action might have been brought, 28 U.S.C. § 1404(a) (2004).

<sup>99</sup> *Cf. In re Ricoh Corp.*, 870 F.2d 570, 573 (1989) (noting that a forum selection clause is "rarely . . . outweighed by other . . . factors"); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (holding that a forum selection clause is a "significant factor that figures centrally in the . . . calculus.>").

<sup>100</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. (L 12), 1 [hereinafter Council Regulation].

Member State shall have jurisdiction to the exclusion of all other courts.<sup>101</sup> Such an agreement is not only valid, but also bestows jurisdiction on the relevant court.<sup>102</sup> The designated court cannot invoke the forum non conveniens doctrine.<sup>103</sup> Unless the parties have agreed otherwise, that jurisdiction will be considered exclusive.<sup>104</sup>

### **3. The International Context**

In the global context, the enforceability of forum selection clauses has traditionally been governed by a mixture of multilateral treaties, bilateral treaties, and national law. Accordingly, parties' capacity to litigate before a court of their choice depends on exactly which jurisdictions are involved. In general, while there may be many jurisdictions willing to hear cases involving foreign litigants, the ability of the litigants to get the resulting judgments enforced in their home state is often fraught with uncertainty.

### **4. The Hague Convention**

This range of international choice could be greatly broadened if -- as remains uncertain<sup>105</sup> -- the Hague Convention on Choice of Court Agreements of June 30, 2005<sup>106</sup> were to come into force. The Convention applies to exclusive choice of forum agreements in civil and commercial matters,<sup>107</sup> which are defined as agreements that designate "the courts of

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<sup>101</sup> See Council Regulation, *supra* note 100, art. 23(1)(1).

<sup>102</sup> See *id.*, art. 23.

<sup>103</sup> E.g. Hannah L. Buxbaum, *Forum Selection in International Contract Litigation: The Role of Judicial Discretion*, 12 WILLAMETTE J. INT'L L. & DISPUTE RES. 185, 208 (2004).

<sup>104</sup> See Council Regulation, *supra* note 100, art. 23(1)(2).

<sup>105</sup> So far, not a single state has signed let alone ratified the Convention. See Hague Conference on Private International Law, Status Table 37: Convention of 30 June 2005 on Choice of Court Agreements, available at: [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=98](http://www.hcch.net/index_en.php?act=conventions.status&cid=98). Nonetheless, commentators seem optimistic regarding the Convention's chances of entering into force. See, e.g., Chadbourne & Parke LLP, United States, *The Hague Convention on Choice of Court Agreements: A New York Style Global Convention for Litigants*, MONDAQ BUSINESS BRIEFING (Feb. 14, 2006) (claiming that according to the State Department, becoming a party to the Convention is a high priority); Andrew C. Schneider, *New Treaty Will Help Firms Operate Abroad*, KIPLINGER BUSINESS FORECASTS (Oct. 10, 2005) (expressing confidence that Convention will pass Congress "without difficulty" and that it will be signed by the EU Member States as well as by Canada, Mexico, Japan, and China). U.K. commentators seem slightly more cautious. See Patrick Sherrington & Daniela Vella, *Choice words*, LEGAL WEEK (Jan 12, 2006) (claiming it is "difficult to say exactly when the Convention will enter into force" in the U.K.).

<sup>106</sup> See *supra* note 3.

<sup>107</sup> Hague Convention, *supra* note 3, art. 1(1).

one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts.”<sup>108</sup>

With respect to the validity and effect of forum selection clauses, the Convention distinguishes between two situations. The first is that in which one of the parties brings suit in the courts of the state chosen in the parties’ agreement. The validity of the forum selection clause is then determined according to the law of that state.<sup>109</sup> Moreover, the Convention specifically provides that, if the forum selection clause is valid according to the law of the chosen state, the courts of that state may not decline to exercise their jurisdiction on the ground that the dispute should be decided in a court of another State.<sup>110</sup> In other words, assuming the validity of the choice of forum clause, there is no such rule as the *forum non conveniens* doctrine that would allow the court to decline to hear the case.

The second situation is that in which the plaintiff ignores the forum selection clause and brings suit in a jurisdiction other than the designated (“chosen”) one. In that case, the validity of the forum selection clause still has to be judged according to the law of the chosen state.<sup>111</sup> Accordingly, the court seized by the plaintiff in violation of the forum selection clause must suspend or dismiss the case if the forum selection clause is valid according to the law of the chosen state.<sup>112</sup> There are, however, a number of exceptions to this rule. Thus, there is no obligation to dismiss the case if (a) one of the parties lacked the capacity to conclude the agreement under the law of the state of the court seized, (b) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the state of the court seized, (c) the choice of forum agreement cannot reasonably be performed for exceptional reasons beyond the control of the parties, or (d) the chosen court has refused to hear the case.

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<sup>108</sup> *Id.* art. 3(a).

<sup>109</sup> *Id.* art. 5(1).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* art. 6(a).

<sup>112</sup> *Id.*

However, the Convention only governs “international cases”.<sup>113</sup> As for what constitutes an international case, the Convention distinguishes between two situations. Once a foreign judgment exists and the judgment creditor seeks to enforce that judgment, the case automatically qualifies as an international one, regardless of where the parties are from and where the events giving rise to the litigation took place.<sup>114</sup> By contrast, before the foreign court has handed down its judgment, matters are more complicated. At that stage, a case qualifies as international “unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.”<sup>115</sup> Consequently, there is no duty to respect forum selection clauses in purely domestic cases. Nor does the chosen state have a duty to hear the case, nor does the Convention impose a duty on other courts to abstain from hearing the case. That, of course, considerably reduces the value of the Convention in purely domestic cases. Unless countries voluntarily go beyond what the Convention demands of them, a party to a purely domestic transaction has no way of being sure that any dispute that arises will actually be litigated in the selected forum: The chosen court may refuse to hear the case, or the other party may successfully renege on the forum selection agreement and bring suit in a local court.

To be sure, this limitation to the Convention might not matter much if the parties could easily turn their dispute into an international one. However, that is not the case. As the text of the Convention makes clear,<sup>116</sup> the mere choice of a foreign forum is insufficient to create an international case. Nor does the choice of foreign substantive law offer an easy way of ensuring the international character of a dispute. To begin with, there may well be some cases where the choice of a foreign substantive law places a considerable burden on the parties. More importantly, it is not clear that the

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<sup>113</sup> *Id.* art. 1 (1).

<sup>114</sup> *Id.* art. 1 (3).

<sup>115</sup> *Id.* art. 1 (2).

<sup>116</sup> *See id.*

choice of foreign substantive law would be sufficient to turn the case into an international one. Rather, the Convention remains vague on this issue.

Under general principles of international law, international treaties should be interpreted first and foremost by reference to the ordinary meaning of their terms in their context and in light of their purpose.<sup>117</sup> Yet this approach yields no clear result when applied to the provision at issue. Under the text of the Convention, the international character of the case is to be denied only where “all other elements to the dispute” are connected with the state where the parties reside. On the one hand, the common meaning of the word “element” is certainly broad enough to encompass a choice of law clause. On the other hand, the picture changes as soon as one considers the purpose of the provision at hand. That provision ensures that the chosen court is under no obligation to hear a case that is completely internal to a third country, and it also ensures that the courts of that third country are not prevented from hearing the case. In other words, the provision at issue purposefully restrains the freedom of the parties to select a court of their choice. If the choice of a foreign legal system were enough to turn a case into an international one, that restriction would arguably lose much of its practical importance. In other words, there is considerable tension between the plain meaning of the provision at issue and its purpose.

Moreover, the resulting ambiguity cannot be resolved by looking to the preparatory works. To be sure, at least in those cases where the text of a treaty is unclear, it is generally considered acceptable to look to the preparatory works.<sup>118</sup> Yet in the case at issue, the preparatory works prove

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<sup>117</sup> That is the principle set forth in art. 31 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. While some countries including the United States have not ratified the Convention, the latter is generally deemed to reflect, more or less, the state of customary international law. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Intro. Part III (1986); *Avero Belg. Ins. v. Am. Airlines, Inc.*, 423 F.3d 73, 79 (2<sup>nd</sup> Cir. 2006); *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2<sup>nd</sup> Cir. 2000).

<sup>118</sup> Art. 32 of the Vienna Convention explicitly allows recourse to the preparatory works where the text is ambiguous. While it is sometimes suggested that this rule may not, in fact, accurately reflect customary international law, the only criticism is that this provision is too restrictive in allowing the use of the preparatory works. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 cmt. e (1986).

no clearer than the text and purpose. On the contrary, the Draft Report on an earlier version contains the following passage:<sup>119</sup>

“The objection to the reference to “the relationship of the parties and all elements relevant to the dispute” is its vagueness. For example, if the parties designated a foreign system of law as the governing law of the contract, would this mean that all elements of the dispute were no longer connected with the same State?”

In other words, the parties were fully aware of the vagueness of the Convention with respect to the issue at hand, yet abstained from clarification.

From our perspective, it is, of course, preferable that the Convention be interpreted generously on the issue at hand. Yet states that are eager to curtail their duties under the Convention can exploit the Convention’s vagueness to minimize its scope of application. In short, the Convention does not give parties the clear right to litigate a purely domestic dispute in a foreign court, even if (as we believe should not be necessary) the parties have chosen to have their dispute governed by foreign substantive law.

This restriction is understandable if – as was evidently the case with the drafters of the Convention – one sees choice of forum clauses mainly as an instrument for facilitating the administration of justice in transnational legal relationships. The convention seeks to give the parties to such relationships the ability to choose one or the other of their home states or – if they are concerned about having a neutral forum – the courts of a third state to resolve their disputes. However, in creating a global market for judicial services, this limitation is crucial. Such a market requires that the opportunity to choose the forum must be accorded not just in international cases but in domestic cases as well.

## ***B. Enforcement of Foreign Judgments***

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<sup>119</sup> Hague Conference on Private International Law, Preliminary Document No 25 of March 2004 drawn up for the attention of the Special Commission of April 2004 *on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, Preliminary Draft Convention on Exclusive Choice of Court Agreements, Draft Report 22 (March 2004), drawn up by Masato Dogauchi and Trevor C. Hartley , available at [http://www.hcch.net/upload/wop/jdgm\\_pd25e.pdf](http://www.hcch.net/upload/wop/jdgm_pd25e.pdf).

More important than the obstacles to the legality of forum selection clauses are the obstacles to the enforcement of foreign judgments. Again, we begin discussion with the arena in which these obstacles have been reduced to a minimum, namely the United States.

### **1. Within the United States**

Within the United States, the enforcement by any given state of a judgment from another state is generally not a problem, especially if the parties use a forum selection clause. Under the Full Faith and Credit Clause of the U.S. Constitution, each state must recognize and enforce final judgments from other states.<sup>120</sup> While states can refuse enforcement if the court that handed down the judgment lacked jurisdiction,<sup>121</sup> forum selection clauses, as we have noted, are generally deemed a sufficient basis for the exercise of jurisdiction.<sup>122</sup>

Nor does the enforcement of foreign judgments lead to significant practical problems, at least where money judgments are concerned. All U.S. states except California, Indiana, Massachusetts, and Vermont have adopted the Uniform Enforcement of Foreign Judgments Act (UEFJA).<sup>123</sup> Under the UEFJA, the procedure prescribed for the enforcement of sister state judgments is very simple: the judgment creditor must file an authenticated copy of the foreign judgment in a domestic court,<sup>124</sup> after which the foreign judgment has the same effect as a judgment of the court in which it is filed.<sup>125</sup> While the judgment debtor can seek to vacate or stay

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<sup>120</sup> U.S. CONST., art. IV § 1.

<sup>121</sup> See, e.g., *Bd. of Public Works v. Columbia College*, 84 U.S. 521, 528 (1873). There is no public policy exemption to the full faith and credit clause. See *McKnett v. St. Louis & S. F. R. Co.*, 292 U.S. 230, 233 (1934).

<sup>122</sup> See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.14 (1985); *Phoenix Leasing v. Kosinski*, 707 A.2d 314, 316 (Ct. App. 1998).

<sup>123</sup> UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT, 13 U.L.A. 154 (1986) [hereinafter UEFJA]. A list of the states that have adopted the UEFJA is available on the website of the National Conference of Commissioners on Uniform State Laws. See Uniform Law Commissioners, A Few Facts About the Uniform Enforcement of Foreign Judgments Act, [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-uefja.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uefja.asp) (last visited March 3, 2007).

<sup>124</sup> UEFJA, *supra* note 123, § 2. A filing fee must be paid in the state where the judgment is to be enforced. However, these fees are modest in most states. In Texas, for example, the judgment creditor usually has to pay a flat fee in the amount of \$ 50. See TEX. CIV. PRAC. & REM. CODE § 35.007(a) (2005) (declaring that the fee to be paid is the regular fee for filing suit); TEX. GOV'T CODE § 51.317 (2005) (setting the regular filing fee at \$ 50).

<sup>125</sup> UEFJA, *supra* note 123, § 2.

the judgment on the ground that it was not entitled to full faith and credit, such an attack is governed by the same procedures and rules that govern an attack on a judgment of a domestic court,<sup>126</sup> and places the burden of proof on the judgment debtor.<sup>127</sup>

## **2. Within the European Community**

The situation is slightly more complicated when a party from one Member State of the European Community seeks to have a money judgment enforced in another Member State. The applicable rules are a mixture of Community law and Member State law.

As a matter of Community law, the recognition of judgments in the areas at issue is governed by a Council Regulation.<sup>128</sup> Like the Full Faith and Credit Clause, that Council Regulation requires Member States to recognize and enforce judgments handed down by courts in other Member States. Moreover, the grounds for denying recognition, while slightly more numerous than under U.S. law, are very limited:<sup>129</sup> A foreign judgment will not be recognized if it is irreconcilable with a domestic judgment<sup>130</sup> or with an earlier judgment from another Member State.<sup>131</sup> Furthermore, a lack of jurisdiction on the part of the foreign court may, in certain circumstances, provide a ground for denying recognition. If the foreign judgment is a default judgment, another ground for denying recognition is that the process of service was inadequate.<sup>132</sup> Finally, there is no duty to recognize foreign judgments in cases where such recognition is "manifestly contrary to public policy" in the state where enforcement is sought.<sup>133</sup>

While European Community law is thus similar to its U.S. counterpart in that it largely guarantees the recognition and enforcement of foreign judgments in civil and commercial matters, the practical burden imposed

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<sup>126</sup> *Id.* § 2.

<sup>127</sup> *Id.* § 4.

<sup>128</sup> Council Regulation, *supra* note 100. Special simplified enforcement rules apply in case of uncontested claims. These rules can be found in Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, 2004 O.J. (L 143) 15, 15-39.

<sup>129</sup> Council Regulation, *supra* note 100, arts. 34, 35.

<sup>130</sup> *Id.* art. 34 Nr. 3.

<sup>131</sup> *Id.* art. 34 Nr. 4.

<sup>132</sup> *Id.* art. 34 Nr. 2.

<sup>133</sup> *Id.* art. 34 Nr. 1.

on the judgment creditor is considerably greater in Europe than it is in the United States.

To be fair, the Council Regulation goes to some length to ensure that the proceedings for enforcing judgments from other Member States are neither overly time-consuming nor unduly complicated or expensive. Under the Council Regulation, a judgment from a foreign Member State will be enforced once it has been declared enforceable,<sup>134</sup> which in turn requires that the judgment creditor apply to a domestic court.<sup>135</sup> In principle, the relevant procedure is governed by the domestic law of the member state where enforcement is sought.<sup>136</sup> However, the Council Regulation restricts the autonomy of the member states in various ways. Most importantly, the Council Regulation requires that the foreign judgment be declared enforceable "immediately" upon completion of certain formalities set forth in the regulation.<sup>137</sup> Moreover, as in the United States, the judgment debtor can attempt to show that the foreign judgment is not entitled to recognition, but cannot do so before the judgment is declared enforceable.<sup>138</sup> Rather, she can only appeal the decision to declare the foreign judgment enforceable.<sup>139</sup> And, as in the United States, the reasons on which the appeal can be based are very limited. The Council Regulation specifically prohibits domestic courts from reviewing the foreign judgment as to its substance.<sup>140</sup> Rather, the court can only examine whether one of the above-mentioned grounds for non-recognition is given.<sup>141</sup> Finally, to limit the amount of fees that are levied, the Council Regulation prohibits the member states from charging fees in reference to the value of the

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<sup>134</sup> *Id.* art 38 (1).

<sup>135</sup> *Id.* art. 39(1).

<sup>136</sup> *Id.* art 40(1).

<sup>137</sup> *Id.* art 41(1).

<sup>138</sup> *Id.* art. 41.

<sup>139</sup> *Id.* art. 43(1).

<sup>140</sup> *Id.* art. 45(2).

<sup>141</sup> *Id.* art. 45(1).

matter.<sup>142</sup> This means that the states are limited to imposing flat fees, which in practice tend to be quite modest.<sup>143</sup>

This said, the situation of a European judgment creditor is still considerably less favorable than that of his U.S. peer. Two aspects are particularly noteworthy in this context:

First, the formalities to be followed by a judgment creditor are somewhat more burdensome under European Law. The formalities in question are limited: the judgment creditor must produce “a copy of the judgment which satisfies the conditions necessary to establish its authenticity”<sup>144</sup> and a specific “certificate”, which is a standardized form to be filled out by a court or other competent authority in the state where the judgment was issued.<sup>145</sup> The domestic court can also demand a certified translation of the relevant documents, though it is not required to do so.<sup>146</sup>

Second, and more importantly, the Community procedure for having sister state judgments declared enforceable is more likely to engender delay. While the judgment creditor is not heard in the proceedings preceding the declaration of enforceability, the judgment debtor cannot, in most states, restrict herself to filing the foreign judgment as he can in the U.S. under the Uniform Enforcement of Foreign Judgments Act. Rather, the domestic court must render a decision. What is more, the Council Regulation allocates the decision-making responsibilities in a manner that can permit delay. For example, it specifically provides that in Germany, the matter is to be brought before a judge presiding over a chamber of judges at the Landgericht (court of appeal).<sup>147</sup> The presiding judge cannot delegate the decision.<sup>148</sup> To be sure, because of its formal character, this procedure

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<sup>142</sup> As for out-of-pocket costs, the Council Regulation only provides that the Member States may not levy any fees “by reference to the value of the matter”. *Id.* art. 52.

<sup>143</sup> For example, in Germany, a fixed fee of € 200 is levied if no appeal is brought. Gerichtskostengesetz [GKG-KV] (Court Costs Act), May 5, 2004, Bundesgesetzblatt [BGBl] I 718, as amended, Anhang 1 (Kostenverzeichnis) No. 1510.

<sup>144</sup> Council Regulation, *supra* note 100, art. 53(1).

<sup>145</sup> *Id.* art. 53(2).

<sup>146</sup> *Id.* art. 54(2).

<sup>147</sup> *Id.* annex II.

<sup>148</sup> Reinhold Geimer, *Anh. III AVAG, in ZIVILPROZESSORDNUNG [CODE OF CIVIL PROCEDURE]*, 2829 (Richard Zöller ed., 25th ed. 2005).

does not have to be time-consuming. Yet, unlike in the United States, the creditor cannot be sure that delay will be avoided.<sup>149</sup>

### **3. The International Context**

In the general international context, the situation is more complicated. At present, for example, the United States is not party to any international convention calling for the mutual recognition and enforcement of foreign judgments.<sup>150</sup> Consequently, parties must depend on the voluntary cooperation of the state where the judgment is to be enforced. The extent of such cooperation varies strongly from country to country. For example, whereas U.S. judgments not involving punitive damages will generally be recognized and enforced in Germany,<sup>151</sup> Belgian courts will only do so after reviewing the relevant judgments on the merits.<sup>152</sup>

Moreover, even where the recognition and enforcement of U.S. judgments is, in principle, assured, the ease and speed with which enforcement of a foreign judgment is possible, varies considerably. For example, it has been estimated that having a U.S. money judgment declared enforceable takes six months to one year in Spain,<sup>153</sup> and between one and two years in South Africa.<sup>154</sup>

### **4. The Hague Convention**

As with the validity of choice of forum clauses, the international recognition of foreign judgments in civil and commercial matters will improve substantially if the recently signed Hague Convention on Choice of

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<sup>149</sup> Cf. Francisco Ramos Romeu, *Litigation Under the Shadow of an Exequatur: The Spanish Recognition of U.S. Judgments*, 38 INT'L LAW. 945 n38 (2004) (estimating that it takes "less than six months" to have a foreign judgment from another member state declared enforceable in Spain).

<sup>150</sup> Wolfgang Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 BERKELEY J. INT'L L. 175, 177 (2005); Buxbaum, *supra* note 103, at 206.

<sup>151</sup> See Wurmnest, *supra* note 150, at 200.

<sup>152</sup> See The Committee on Foreign and Comparative Law, *Survey on Foreign Recognition of U.S. Money Judgments*, 56 THE RECORD 378, 399 (2001) [hereinafter Committee, *Survey*]; Nicole van Crombrughe, *Belgium*, in PROCEDURES TO ENFORCE FOREIGN JUDGMENTS 9, 13 (Paul J. Omar ed., Burlington, Vt. 2002); Ray Y. Chan, Note, *The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of Chromalloy*, 17 B.U. INT'L L.J. 141, 189 n.249 (1999).

<sup>153</sup> Romeu, *supra* note 149, at n.38.

<sup>154</sup> Committee, *Survey*, *supra* note 152, at 409.

Court Agreements comes into effect.<sup>155</sup> The Convention requires that judgments rendered by the courts of a Contracting State in accordance with a valid exclusive choice of forum agreement must be recognized and enforced in other Contracting States.<sup>156</sup>

There are, however, a number of limitations to this principle. To begin with, the Convention contains a list of grounds on which recognition can be denied.<sup>157</sup> In particular, the Convention contains a public policy exemption,<sup>158</sup> and also provides that there is no duty to recognize or enforce a judgment to the extent that it awards punitive damages.<sup>159</sup> Much more importantly, the Convention does little to ensure that enforcement occurs without delay and at little cost. To be sure, the courts of the state where the judgment is to be enforced are to act “expeditiously”.<sup>160</sup> However, the Convention imposes no specific deadline for declaring foreign judgments enforceable, and the enforcement procedure is, in principle,<sup>161</sup> left to the state where the judgment is to be enforced.<sup>162</sup>

### **C. Legal Obstacles to Extraterritorial Courts**

Further legal obstacles arise where judicial services are to be exported via extraterritorial courts.

As a general principle of international law, “officials of one state may not exercise their functions in the territory of another state without the latter's consent”.<sup>163</sup> To be sure, there are some grey areas. Thus, in the landmark case *Société Nationale Industrielle Aérospatiale*, the U.S. Supreme Court

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<sup>155</sup> See *supra* note 3.

<sup>156</sup> Hague Convention, *supra* note 3, art. 8(1).

<sup>157</sup> *Id.* art. 9.

<sup>158</sup> *Id.* art. 9(e).

<sup>159</sup> *Id.* art. 11(1).

<sup>160</sup> *Id.* art. 14.

<sup>161</sup> The freedom that the states enjoy in determining procedural issues is subject to a few limitations. See *id.* art. 14 (imposing a duty to act expeditiously), art. 13 (listing the required documentation), and art. 15 (governing partial enforceability).

<sup>162</sup> *Id.* art. 14.

<sup>163</sup> Restatement (Third) of the Foreign Relations Law of the United States section 432 ct. b (1987). Cf. also Silvia B. Pinera-Vazquez, Comment, *Extraterritorial Jurisdiction and International Banking: A Conflict of Interests*, 43 U. MIAMI L. REV. 449 (1988) (“[A] state has exclusive authority over the exercise of governmental power within its borders.”); Bernard H. Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. MIAMI L. REV. 733, 764 (1983) (“[T]he monopoly of governmental power . . . lies at the heart of territorial sovereignty.”).

took the view that U.S. Courts could order the taking of evidence by the parties' attorneys where the evidence was located in the territory of another nation, even though, under the law of the relevant foreign country, the taking of evidence constituted a public act.<sup>164</sup> Also, the U.S. Court of Appeals for the D.C. Circuit, in a famous obiter, noted that the mere service of notice on French soil via the French mail did not violate French sovereignty, stressing the informal character of such an act.<sup>165</sup> But neither of these cases involved the actual presence of public employees on foreign soil. By contrast, the creation of extraterritorial courts not only necessitates the presence of public officials, but also requires that these officials exercise the very core of the foreign nation's judicial power. There can be no doubt, therefore, that the consent of the host state is needed. Moreover, other nations tend to view the principle of territorial sovereignty even more strictly than does the United States.<sup>166</sup> For example, Switzerland, based on a formalist understanding of sovereignty, regards service of process by any other process than through Swiss governmental personnel to be a criminal act.<sup>167</sup> Given that such countries are unlikely to abandon their own understanding of what territorial sovereignty entails, jurisdictions seeking to establish extraterritorial courts have little choice but to seek their consent, with no guarantee that consent will be granted.

#### ***D. Resistance to Reform***

We will discuss below the legal reforms that might be undertaken to facilitate a global market in judicial services. Before turning to reform proposals, however, it is important to address the sources of resistance to reform, which are substantial. That resistance seems to be of two principal types. The first is active, based principally on protectionism. The second is passive, based on lack of entrepreneurship. In the following sections, we address these two types of obstacles in turn.

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<sup>164</sup> See *Société Nationale Industrielle Aérospatiale v. United States*, 482 U.S. 522, 539-540 (1987).

<sup>165</sup> *FTC. v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1313 (D.C. Cir. 1980).

<sup>166</sup> Cf., e.g., Yvonne A. Tamayo, *Catch Me if You Can: Serving United States Process on an Elusive Defendant Abroad*, 17 HARV. J. LAW & TEC 211, 238-239 (2003) (describing the French and Swiss view that service of process violates territorial sovereignty).

<sup>167</sup> See, e.g., Tamayo, *supra* note 166, at 239.

### ***VIII. Protectionism in Importing States***

There are two likely sources of protectionist sentiment: lawyers and public officials, both of which may feel threatened by local recognition of foreign judgments.

#### ***A. Local Lawyers***

Lawyers in potential importing states may fear that the emergence of a global market for judicial services will lead them to lose business to lawyers in other jurisdictions. Indeed, such a fear is not unfounded. The litigation itself will take place in a foreign forum; to the extent that practical or legal factors require the involvement of a foreign lawyer, some of the fees earned for litigation services will therefore go to the foreign lawyer. In addition, the choice of a foreign forum will sometimes go hand in hand with the choice of a foreign law. That, in turn, may mean that the lawyer in the importing state may not only lose the litigation business, but may also lose her comparative advantage as a legal adviser in general.

There are, to be sure, examples to the contrary. In the U.S., Delaware dominates both substantive law<sup>168</sup> and litigation<sup>169</sup> for publicly-traded corporations. This dominance would not be possible without the cooperation of corporate lawyers in other states that advise their clients to incorporate in Delaware. This cooperation is forthcoming, moreover, even though Delaware law requires that parties litigating before the Chancery Court use the help of a lawyer admitted to the Delaware bar.<sup>170</sup> There are reasons, however, why this development may have only modest bearing on the potential for a global market for judicial services in general. It has taken a century for Delaware to achieve its dominance, which is still far from complete. Many of the law firms that advise major corporations are located in one jurisdiction, New York City, and those law firms have both engineered, and made a profitable specialty out of, the dominance of Delaware law. And, perhaps most strikingly, none of the other forty-nine

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<sup>168</sup> More than half of all publicly traded corporations in the United States are incorporated in Delaware. See Del. Div. of Corporations, *Why Choose Delaware As Your Corporate Home?*, <http://www.state.de.us/corp/> (last visited March 12, 2007).

<sup>169</sup> See *supra* text accompanying note 78.

<sup>170</sup> DEL. CH. CT. R. 170 (2004).

states in the U.S. has managed to challenge Delaware's lead in this vital and lucrative area of law.<sup>171</sup>

### ***B. Public Officials***

Like local lawyers, local judges, legislators, and government officials may well be concerned about the loss of influence and prestige that a global market for legal services could bring. When parties' choice of a foreign court prompts the choice of foreign substantive law, home state legislation no longer governs domestic affairs. Even when litigants choose a foreign court, but stipulate the application of the law of the state of origin, the interpretation of the law, and probably as well the development of precedent that will guide even domestic courts, will be yielded to foreigners.<sup>172</sup> And, quite beyond any such substantive weakening of domestic governmental control over private affairs, there is the simple indignity of seeing those affairs governed by foreign states.

### ***C. Countervailing Interests***

While the protectionist influence wielded by local lawyers, judges, and government officials must be taken seriously, there will, of course, be countervailing forces. The worse a jurisdiction's court system, the stronger local businesses will fight to gain access to the courts of foreign jurisdictions once they recognize this as a possible solution to their problems. Moreover, even governmental actors may find some virtues in having foreign litigation serve as a safety valve for the more pressing local commercial interests.

## ***IX. Incentives for Exporting States***

Even if states of origin permit their residents to litigate in foreign courts, an effective global market for judicial services will not develop unless there

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<sup>171</sup> Regarding Nevada's modestly successful attempt to compete for corporate charters see *infra* note 178.

<sup>172</sup> While a state of origin need not recognize foreign interpretations of its law as precedents, experience from civil law countries shows that the influence of case law does not necessarily depend on whether the relevant decisions count as binding precedents or not. Moreover, a dearth of precedents produced in the state of origin may practically force the courts of that state to attach importance to foreign decisions. U.S. corporate law offers an illustration. Simply because so many important decisions regarding public corporations are handed down by Delaware courts, those decisions end up being cited as touchstones by the courts of other U.S. states.

are foreign courts prepared to accept those litigants. It may not be important that many states play this role. Informational economies would, in any event, probably lead to the emergence of only a small number of states with a widespread reputation for offering excellent judicial services. One sees this effect already, for example, in the singular dominance of Delaware in corporate law and New York in contract law.

Moreover, active competition may not be necessary to the development of an effective market. Even if a sufficient number of states simply accept foreign litigation more or less passively, without undertaking strong efforts to attract it, the incentives of the parties themselves to choose favorable jurisdictions should have a substantial selection effect.

Nevertheless, active competition would make a substantial difference. In particular, jurisdictions are much more likely to allow foreign litigants to choose between various languages, or make ample use of technological devices such as videoconferencing, if these jurisdictions purposely seek to attract foreign litigants. Can such competition be expected?

There are, generally speaking, three incentives for states to compete: (a) fees for local lawyers and providers of ancillary services, such as hotels and translators; (b) court fees; and (c) altruism. We take them in turn.

#### **A. Sale of Ancillary Services**

We expect that, at least in the beginning, local revenue from the sale of legal and other ancillary services (such as hotel and restaurant services), and the political pressure of those who will gain that revenue, will generally be the principal stimulus for countries to open their courts to foreigners. This was presumably the driving force behind the New York legislation guaranteeing enforcement of forum selection clauses in contractual disputes involving amounts in excess of \$1 million.<sup>173</sup> Moreover, because lawyers as a group tend to be relatively well-positioned to exercise political influence in the legislative process,<sup>174</sup> their interest in attracting foreign

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<sup>173</sup> See *supra* text accompanying note 96.

<sup>174</sup> See, e.g., Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 506-07 (1987) (explaining reasons for influence of Delaware bar); Larry E. Ribstein, *Delaware, Lawyers, and Contractual Choice*

litigants may make itself felt in the political process even where lawyers stand to gain relatively little from the market. Once more, a comparison with the charter market appears helpful. The additional revenues that Delaware's lawyers derive from the chartering business are relatively insignificant when compared to the revenues that Delaware reaps in the form of franchise fees.<sup>175</sup> Nonetheless, there is widespread agreement that Delaware's lawyers play an active role in shaping Delaware corporate law.<sup>176</sup> Moreover, Nevada's efforts to compete in the corporate chartering business<sup>177</sup> has evidently been driven entirely by hoped-for sales of ancillary services – perhaps principally hotels, restaurants, and entertainment – since Nevada charges only nominal corporate franchising fees.<sup>178</sup>

Nonetheless, revenues from ancillary services may play only a relatively limited role in the long run. One reason is that forcing foreign litigants to make use of the services of local attorneys is a rather inefficient way of making these litigants pay for the judicial services they get. Hence, states making use of that mechanism may be priced out of the market for foreign litigants by those jurisdictions that seek to attract foreign litigants by relying on the straightforward mechanism of court fees. To be sure, the example of Delaware, which does impose a duty on foreign litigants to cooperate with local lawyers, seems to point in the opposite direction. Delaware's success in the charter market, however, is chiefly limited to large, publicly traded corporations for which the cost of retaining a local litigator may not matter

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*of Law*, 19 DEL. J. CORP. L. 999, 1003 (1994) (noting that lawyers are “a powerful interest group in many states”).

<sup>175</sup> Cf. Kahan & Kamar, *Myth*, *supra* note 9, at 697 (estimating the additional lawyer income for 2001 to amount to \$ 165 million).

<sup>176</sup> See, e.g., Michal Barzuza, *Symposium: Association of American Law Schools: Private Parties as Defendants in Civil Rights Litigation: Article: Price Considerations in the Market for Corporate Law*, 26 CARDOZO L. REV. 127, 157 (2004); Macey & Miller, *supra* note 174, at 506-07; Larry E. Ribstein, *Delaware, Lawyers, and Contractual Choice of Law*, 19 DEL. J. CORP. L. 999, 1009 (1994); Omri Yadlin, *Symposium: Management and Control of the Modern Business Corporation: Corporate Speech and Citizenship: Commentary on Sitkoff*, 69 U. CHI. L. REV. 1167, 1186 (2002).

<sup>177</sup> Nevada famously tried to become the Delaware of the West. See, e.g., ROMANO, *COMPETITIVE FEDERALISM*, *supra* note 10, at 78; Daines, *supra* note 9, at 1574. Of course, it never managed to challenge Delaware's lead. See, e.g., ROMANO, *COMPETITIVE FEDERALISM*, *supra* note 10, at 78; Fisch, *supra* note 76, at 1067.

<sup>178</sup> For example, for a corporation with 1,000,000 no par value shares, the initial incorporation fee is \$ 375. See NEV. REV. STAT. ANN. § 78.760 (2006). The same is true for the annual fee. See NEV. REV. STAT. ANN. § 78.150 (2006).

much. By contrast, in most commercial transactions, even sizable ones, the parties may well be concerned about the cost of having to pay local counsel.

Moreover, some jurisdictions may be unable to impose a constraint to work with local litigators. While states can generally insist that litigants use the services of an attorney admitted to the local bar, they may be unable to ensure that the relevant attorneys actually reside in the state in question. Indeed, the Supreme Court has recently struck down a residence requirement for attorneys on the grounds that it was incompatible with the Full Faith and Credit Clause.<sup>179</sup>

Nor do other circumstances ensure that attorneys litigating in, for example, New York will actually be operating there. For, as we have pointed out above, technical progress is likely to make litigation at a distance entirely feasible within the foreseeable future. Against that background, litigants willing to litigate in New York may well make use of attorneys in their home state who happen to be admitted to the New York bar, rather than to incur the additional expense and delay that results if two different lawyers work on the same case. And, of course, litigation by videoconferencing obviates the need to consume hotel and restaurant services in the exporting state.

### ***B. Court Fees and Subsidies***

If, as it appears, revenues from sale of ancillary services will play a smaller and perhaps vanishing role in the future, then perhaps revenue from court fees and other direct charges for judicial services could provide offer potential importing states an alternative incentive to open their courts to foreigners.

As it is, the state government of Delaware obtains about 20% of its annual revenue from corporation franchise fees, which are evidently an important motivation for Delaware's ongoing efforts to induce foreign

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<sup>179</sup> Supreme Court of N.H. v. Piper, 470 U.S. 274, 283 (1985) (holding that in-state residency requirement for admission to the state bar violates Privileges and Immunities Clause). *Cf. also* Supreme Court of Va. v. Friedman, 487 U.S. 59, 70 (1988) (holding that residency requirement for "admission on motion" violates Privileges and Immunities clause).

corporations to choose its law and courts.<sup>180</sup> Those franchise fees are substantial payments made annually for, in effect, the right to use the Delaware courts if the need should arise. A similar system might, in theory, be employed for commercial contracts. Parties to a contract who wish to choose, say, New York courts as the forum for resolving contractual disputes could be required to pay to New York a contract registration fee – perhaps proportional to the value of the transaction -- upon signing the contract. Without payment of the fee, the choice of forum clause would not be honored by the New York courts if litigation were subsequently to arise. Yet such a system would, quite probably, be unworkable. Among other problems, registering the contracts and paying the associated fee could involve high transaction costs; determining the appropriate fee for different types of contracts might be complex and problematic; and the system might be subject to adverse selection, with registration being sought only for the most litigation-prone contracts and parties.

Rather, it appears that the most workable means of charging foreign litigants for an exporting court's judicial services is through more traditional court fees levied at the time litigation arises. At present, however, and particularly in the United States, court fees are insufficient to cover costs; the courts are subsidized.<sup>181</sup> Consequently, viewed in terms of court fees,

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<sup>180</sup> For the year 2007, the projected revenues from corporate franchise taxes are \$ 544,300,000. The projected revenues from business entity fees are \$ 63,100,000. See Delaware, Office of the Governor, FY 2007 Governor's Financial Summary, Charts, and Schedules 2 (2006) (available at <http://www.budget.delaware.gov/fy2007/operating/07opfinsumcharts.pdf>). For the same year, Delaware's total revenues are projected to reach an amount of \$ 3,152,400,000 after subtracting revenue refunds. See *id.*

<sup>181</sup> See, e.g., Barry E. Adler, *The Questionable Ascent of Hadley v. Baxendale*, 51 STAN. L. REV. 1547, 1549 n.6 (1999); Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 299 (1999); Laurie Kratky Dore, *Symposium: Secrecy in Litigation: Article: Public Courts versus Private Justice: It's Time to Let some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT. L. REV. 463, 465 (2006); Jaime Pieras, Jr., *Judicial Economy and Efficiency Through the Initial Scheduling Conference: The Method*, 35 CATH. U.L. REV. 943, 943-44 (1986). Some numbers from Delaware may serve to illustrate this point. In the fiscal year 2007/08, the costs of the Chancery Court are expected to reach \$ 5,214,100, whereas the revenues directly attributable to the Chancery Court are expected to amount to \$ 2,690,000. In other words, the Delaware Chancery Court will recoup only about half of its costs via court fees and the like. See STATE OF DELAWARE, OFFICE OF MANAGEMENT AND BUDGET, FY 2008 GOVERNOR'S RECOMMENDED OPERATING BUDGET VOLUME I, 26 (2007). Of course, the relevant expenditures are dwarfed by the revenues from incorporation fees, a substantial portion of which are

potential importing states have a strong *disincentive* to attract foreign litigation. The question, then, is whether court fees can be increased to make them fully compensatory to the state. There are several ways to do this.

One approach is to raise the fees for all litigants, including citizens of the state. There are, however, policy reasons for maintaining a subsidy for domestic litigants even in purely commercial matters, with the balance of the costs borne by the jurisdictions' populations through general taxation. Precedent from any single case serves all state residents,<sup>182</sup> so that the marginal costs of litigation should be kept below actual costs. Moreover, strong courts provide a credibility-enhancing function for parties to transactions of all sorts, including those transactions – the overwhelming majority – that do not give rise to litigation.

Consequently, there are advantages to a second approach: adopt a discriminatory fee system that maintains below-cost fees for domestic litigants, while charging foreign litigants higher charges that equal or exceed the additional costs of serving them. There are other public services for which this approach has long been employed. Higher education is a conspicuous example. In the U.S., as in most countries, higher education is primarily a governmental service: approximately 80% of U.S. college and university students attend public institutions, most of which are owned and operated by state governments. It is common practice for the state universities to admit out-of-state students, but to charge them tuition that is considerably higher than the heavily tax-subsidized tuition charged in-state students. The same practice could be adopted for litigation.

A discriminatory court fee structure would, of course, require formal criteria for distinguishing between domestic and foreign litigants. This

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presumably paid in order to profit from the services of the Delaware Chancery Court. Yet Delaware's court of general jurisdiction, the Superior Court, is subsidized even more heavily. Thus, the expenditures on the Superior Court amount to \$ 21,850,700, whereas the revenues attributable to the Superior Court only sum up to \$ 3,652,800. *See id.* at 28.

<sup>182</sup> The fact that precedents constitute positive externalities has been widely noted in the literature. *See, e.g.*, Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1597 n.402 (2000); Landes & Posner, *supra* note 7, at , at 236.

would necessarily involve some arbitrary choices, but should not be difficult. A more substantial barrier is presented by federal constitutional provisions in both the U.S. and the EU that appear to bar discrimination in the provision of judicial services. We examine those bodies of law in the next Section.<sup>183</sup> We simply observe here that those doctrines seem not to bar higher court fees for parties from states outside the U.S. or the EU, respectively. Moreover, it is quite possible that norms against discrimination in court fees will be largely abandoned if and when cross-border litigation becomes inexpensive. At that point jurisdictions with strong courts will face a choice between charging higher fees to foreigners or seeking to bar them entirely (through, for example, a broad doctrine of *forum non conveniens*), at which point the former option may well seem both more locally attractive and more internationally principled than the latter.

There is also a third approach to accommodating foreign litigants that need not require a fee structure that discriminates among types of litigants. Higher fees can be attached to those aspects of judicial services that are most attractive to foreign litigants. Trials conducted by videoconferencing, for example, might be subjected to special fees. Or a state might establish special courts that are expert in complex commercial litigation and that have expedited procedures for handling that litigation, and then charge substantially higher (and highly remunerative) fees for litigating in those courts rather than in the courts of general jurisdiction. In effect, this third approach combines elements of the first two: it involves charging remunerative fees to both domestic and foreign litigants, but does so only for types of litigation likely to involve disproportionate numbers of foreigners.

### ***C. Altruism***

Even jurisdictions that do not find pecuniary incentives sufficiently attractive may be motivated by altruism to make judicial services available to foreigners. Former colonial powers, for example, might feel a sense of

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<sup>183</sup> See *infra* Part X.

responsibility to permit litigants from their former colonies to have access to their own courts, or to create extraterritorial courts in the former colonies. Or, to take yet another example alluded to above, regional associations, such as the African Union, might be prepared to create collectively-managed courts to improve adjudication in their member states, and particularly in the weakest of them.

#### ***D. Entrepreneurialism Overall***

Through a combination of the preceding, it appears entirely practical to make cross-jurisdictional litigation remunerative, in pecuniary and nonpecuniary terms, to exporting states. It remains to ask whether states can reasonably be expected to act with sufficient entrepreneurship to create a substantial global market in judicial services. Governments – and particularly large, principled, and stable governments – tend not to be particularly aggressive marketers of their services, especially to nonresidents. We repeat, however, that large gains in global welfare may be available from cross-jurisdictional litigation even absent aggressive marketing of judicial services by governments. So long as nations open up their courts to easy access by foreign litigants, demand alone may be sufficient to bring wide use of the resulting opportunities for seeking better courts.

#### ***X. Legal Obstacles to Discrimination in Court Fees***

Because the ability to charge higher fees to foreign litigants may be important if nations are to be convinced to open their courts to purely domestic cases from other jurisdictions, we examine here briefly some of the potential legal obstacles involved.

##### ***A. The United States***

In the United States, the extent to which states can impose discriminatory court fees depends on the willingness of Congress to enact legislation authorizing such discrimination.

##### ***1. Fees in the Absence of Congressional Action***

In the absence of such legislation, discriminatory fees might well violate the (dormant) Commerce Clause, which “directly limits the power of the States to discriminate against interstate commerce”.<sup>184</sup>

To be sure, the Supreme Court has long held that this stricture does not apply where states themselves enter the market<sup>185</sup> as a seller<sup>186</sup> or buyer<sup>187</sup> of goods or services. In that context, states are free to favor their own citizens. For example, although the Supreme Court has never ruled directly that the dormant Commerce Clause does not bar discrimination in tuition against out-of-state students at public educational institutions, “[t]here are . . . strong indications that the Court would find no commerce clause problem if the question were squarely presented.”<sup>188</sup> Yet despite the obvious parallel between offering educational services to non-residents at higher prices and offering dispute resolution services to non-residents at higher prices, it is not at all clear that the Supreme Court would apply the market participant exemption to the latter scenario. In part, that is because the Court has hinted that the market participant exemption does not apply where a state acts “in its distinctive governmental capacity” rather than “in the more general capacity of a market participant”.<sup>189</sup> Despite the emergence of a veritable market for judicial services, the administration of justice might be seen as too closely related to the core functions of the state to be exempted from the commerce clause. In addition, the Supreme Court has long held that the Commerce Clause bars discrimination against nonresidents in user fees<sup>190</sup> such as fees paid for the use of state waterways,<sup>191</sup> state highways,<sup>192</sup> or government-owned airports.<sup>193</sup> One

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<sup>184</sup> *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988).

<sup>185</sup> See *id.* at 277; *Western Oil & Gas Asso. v. Cory*, 726 F.2d 1340, 1342 (9<sup>th</sup> Cir. 1984).

<sup>186</sup> See, e.g., *Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980) (sale of cement).

<sup>187</sup> See, e.g., *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (State, under a plan to pay a bounty for the destruction of vehicles formerly titled in that state, discriminated between in-state and out-of-state processors of scrap vehicles.).

<sup>188</sup> Dan T. Coenen, *State User Fees and the Dormant Commerce Clause*, 50 VAND. L. REV. 795, 806 n.60 (1997) (collecting lower federal court cases upholding tuition discrimination against Commerce Clause challenges and Supreme Court cases upholding tuition discrimination against other constitutional challenges).

<sup>189</sup> *New Energy Co.*, 486 U.S. at 277.

<sup>190</sup> An excellent review of the relevant case law is given by Coenen, *supra* note, 188, at 805-823.

<sup>191</sup> *Guy v. Balt.*, 100 U.S. 434, 443 (1880).

prominent commentator has suggested reconciling these results with the market participant exemption by understanding the user fee exemption to be limited to discriminatory fees imposed for the use of the “infrastructure of interstate trade.”<sup>194</sup> Even accepting this distinction, the application to court fees is not absolutely clear. While courts might well be seen as part of the infrastructure of interstate trade, resolution of the purely domestic disputes of nonresidents also resembles, and competes with, the privately marketed services of commercial arbitrators.

Even if discriminatory court fees in the area of commercial contracting are subject to scrutiny under the commerce clause, it remains open to a state to justify them on the basis that they “advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”<sup>195</sup> More particularly, the Supreme Court has stated that “[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden[s].”<sup>196</sup> But the Court has applied this exception very narrowly, requiring among other things that “the events on which the interstate and intrastate taxes are imposed must be ‘substantially equivalent’”<sup>197</sup> And according to the Court, that condition is not met where a discriminatory fee is imposed to compensate for the fact certain services are partially financed via the general taxes imposed on residents.<sup>198</sup>

In light of the above, a fee scheme discriminating against nonresidents is likely to run afoul of the Commerce Clause. Indeed, that is true even where the discrimination is restricted to litigants from outside the United States. That is because the Commerce Clause is not restricted to

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<sup>192</sup> *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs*, 332 U.S. 495, 501-503 (1947).

<sup>193</sup> *Northwest Airlines v. County of Kent*, 510 U.S. 355, 369 (1994).

<sup>194</sup> See Coenen, *supra* note 188, at 805-823.

<sup>195</sup> *Oregon Waste Sys. v. Department of Env'tl. Quality*, 511 U.S. 93, 101 (1994).

<sup>196</sup> *Id.* at 102 (citing *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)).

<sup>197</sup> *Id.* at 103 (citing *Armco, Inc. v. Hardesty*, 467 U.S. 638, 643 (1984)).

<sup>198</sup> *Id.* at 104.

commerce “among the several states”, but also extends to commerce “with foreign nations”.<sup>199</sup>

## **2. Fees in the Case of Congressional Action Allowing Discrimination**

One limitation of the dormant Commerce Clause doctrine is that it applies only in the absence of congressional action: “[A]ny action undertaken by a state within the scope of ... congressional authorization is rendered invulnerable to Commerce Clause challenge.”<sup>200</sup> Hence, a federal statute permitting states to impose discriminatory fees would place such a practice beyond the ambit of the Commerce Clause. Yet even then, such discrimination would have to comply with other constitutional prohibitions on discrimination. Among those,<sup>201</sup> the decisive one for the present purpose is the Privileges and Immunities Clause, which “secures the right of the citizens of one [s]tate . . . to resort to the courts of another, equally with the citizens of the latter [s]tate”.<sup>202</sup> Of course, the constraints imposed by the Privileges and Immunities Clause are in important respects less burdensome than those imposed by the Commerce Clause. With respect to discriminatory fee arrangements in particular, the Court has made it clear a state “is not without power . . . to charge non-residents a differential which would merely compensate the State for any added . . . burden they may impose or for any . . . expenditures from taxes which only residents pay.”<sup>203</sup>

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<sup>199</sup> It is well established that states are not permitted to place burdens on foreign commerce any more than they are allowed to place burdens on interstate commerce. *See, e.g.,* *Sherlock v. Alling*, 93 U.S. 99, 102 (1876); *Brown v. Houston*, 114 U.S. 622, 630 (1885); *Smith v. Alabama*, 124 U.S. 465, 473 (1888). Quite on the contrary, it has been held that the protection afforded to international commerce is “broader than the protection afforded to interstate commerce”. *Kraft Gen. Foods v. Iowa Dep't of Revenue & Fin.*, 505 U.S. 71, 79 (1992).

<sup>200</sup> *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 653 (1981).

<sup>201</sup> The Equal Protection Clause presumably would not be violated by federal legislation allowing discriminatory court fees. Where federal law discriminates between U.S. residents and non-residents, none of the suspect classifications are involved, and the desire to create a workable market for judicial services would presumably qualify as a sufficient reason for the discrimination.

<sup>202</sup> *Missouri P. R. Co. v. Clarendon Boat Oar Co.*, 257 U.S. 533, 535 (1922). *Accord, McKnett v. St. Louis & S. F. R. Co.*, 292 U.S. 230, 233 (1934) (holding that states are required “to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens”).

<sup>203</sup> *Toomer v. Witsell*, 334 U.S. 385, 398 (1948). *See also* *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 298 (1998) (“[T]he state must demonstrate that “(i) there is a

Hence, higher court fees for non-residents are likely to be consistent with the Privileges and Immunities Clause so long as they are necessary to protect free-riding at the expense of the state's taxpaying residents.

Fees for nonresidents that are above cost, and hence produce a profit for the state, might be more difficult to justify under existing precedent.<sup>204</sup> But the Privileges and Immunities Clause does not protect aliens<sup>205</sup> (or corporations<sup>206</sup>), and thus would allow discriminatory fees for the litigants who would benefit the most from cross-jurisdictional litigation.

### **B. Europe**

In the European Community, the constitutional obstacles are similar, though apparently even more severe. Article 12 of the Treaty Establishing the European Community contains a general prohibition of discrimination on the basis of nationality – a prohibition that comprises discrimination on the basis of residence as well. While the European Court of Justice has not directly addressed the issue, there is little reason to believe that discriminatory court fees would be sustained. The Court has, in contrast to the U.S. Supreme Court, even held that higher fees for university students from other member states are unlawful.<sup>207</sup> While the court has indicated

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substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective ....").

<sup>204</sup> Thus, in *Toomer*, the Court demanded that there be "a reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced upon them." *Toomer*, 334 U.S. at 399. Failure to make a profit might be hard to justify as a "danger."

<sup>205</sup> See, e.g., *Zobel v. Williams*, 457 U.S. 55, 74 (O'Connor, J., concurring); Donald E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 814 n.67 (1988); J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 510-11 (2007); Laurence H. Tribe, Comment, *Saenz Sans Prophecy: Does the Privileges and Immunities Clause Portend the Future – or Reveal the Structure of the Present*, 113 HARV. L. REV. 110, 193 n.353 (1999). Cf. also *Paul v. Va.*, 75 U.S. 168, 177 (1869) ("The term citizens as there used applies only to natural persons, members of the body politic, owing allegiance to the State . . .") (dictum).

<sup>206</sup> See, e.g., *Philadelphia Fire Assoc. v. N.Y.*, 119 U.S. 110, 117 (1886); *Liverpool Ins. Co. v. Mass.*, 77 U.S. 566, 573 (1871); *Paul v. Va.*, 75 U.S. 168, 177 (1869).

<sup>207</sup> The leading case on discriminatory fees is *Gravier v. City of Liège*, Case 293/83, *Françoise Gravier v. City of Liège*, 1985 E.C.R. 593, in which a student of French nationality who sought to study at a Belgian University objected to a rule under which he was to pay an enrollment fee although no equivalent fee was demanded from students of Belgian nationality. Despite the fact that public education was subsidized by the Belgian taxpayers and the Belgian government invoked the need to compensate for this burden, the Court held that a rule which imposes a fee on foreign students while failing to impose the same fee on

that discrimination might be permissible to avoid extreme financial burdens, it is not apparent that extra-territorial litigation would ever reach that level. And, as in the U.S., it seems clear that the Court would not approve higher fees for litigants from other member states that are intended to yield a profit.

It seems unfortunate that the EU restrictions on discriminatory fees are, if anything, more rigid than those in the U.S., since there is arguably greater potential gain from cross-jurisdictional litigation within the EU than within the legally more homogeneous U.S. – gain that might not be realized if member states have little incentive to make their courts attractive to out-of-state litigants. On the other hand, as in the U.S., the EU antidiscrimination rules do not apply to treatment of persons from non-member states. Consequently, individual member states might still seek to attract litigation from the second and third worlds, employing higher than ordinary court fees to compensate them for the effort.

## ***XI. Reforms***

A number of policy recommendations follow from our analysis. For the sake of clarity, we stress that these recommendations are addressed only to those situations where the foreign court was chosen bilaterally, either before or after the cause for litigation arose.

### ***A. Forum Selection in Domestic Cases***

Widespread adoption of the 2005 Hague Convention on Choice of Court Agreements – currently uncertain – is a fundamentally important step to ensure the enforcement of foreign judgments in cases where the parties

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students with the citizenship of the relevant member state amounted to an illegal discrimination on the basis of nationality. *Id.* at ¶ 26.

See also Case C-147/03, *Commission v. Austria*, 2005 E.C.R. I-5969 ¶ 76 (holding that Austria must grant non-Austrian holders of secondary education diplomas the same access to higher and university education as holders of secondary education diplomas awarded in Austria, despite Austria's claim that the resulting free-rider problems would overburden its educational system). *But see* Case C-209/03, *The Queen v. London Borough of Ealing*, 2005 E.C.R. I-2119 ¶¶ 56-57 (categorizing as justified a residence requirement for subsidized loans given to students by the U.K. to cover maintenance costs, on the grounds that otherwise the subsidies could become an unreasonable burden and reduce the overall level of assistance granted by the state, while also stressing the illegality of a rule that would deny such loans even to those students who had – even if only in their capacity as students – been residing long enough in the U.K. to achieve the relevant level of integration into U.K. society).

chose the foreign court via a forum selection clause. The Convention does not, however, go far enough. It should be extended to cover purely internal cases, in which the only international element is the choice of a foreign court. If this should prove politically difficult in the near future, potential exporting and importing states should seek to negotiate bilateral or regional treaties to the same effect.

### ***B. Streamlining Enforcement Procedures***

It is important that procedures for enforcing foreign judgments be streamlined. To achieve this aim, the Hague Convention should be modified to simplify the procedure governing the enforcement of foreign judgments. Ideally, the Convention should follow the lead of the Uniform Enforcement of Foreign Judgments Act, which governs the enforcement of sister state judgments in the United States and impose a filing system under which the judgment creditor only has to file a foreign judgment with a local court in order for the judgment to become enforceable. Of course, there is a certain potential for abuse. Judgment creditors, relying on forged contracts or invalid forum selection clauses, may find it easy to obtain foreign judgments fraudulently, judgments that can then be enforced against the unsuspecting “judgment creditor”. To remedy this problem, a number of additional steps seem appropriate.

First, as is the case under the Uniform Enforcement of Foreign Judgments Act,<sup>208</sup> the court with which the foreign judgment is filed should mail notice of the filing of the foreign judgment to the judgment debtor. Second, the foreign judgment should only become enforceable after a brief waiting period – perhaps, a month.<sup>209</sup> Third, in case the judgment creditor

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<sup>208</sup> See UEFJA, *supra* note 123, art. 3(b).

<sup>209</sup> The Uniform Enforcement of Foreign Judgments Act, too, envisions a certain waiting period before the judgment is enforced, though it leaves it up to the states to determine the length of that waiting period. State law differs considerably on this point. Most states impose no waiting period at all. See, e.g., TEX. CIV. PRAC. & REM. CODE § 35.004 (2006). By contrast, Alabama, Louisiana, Maine, and Tennessee impose a waiting period of 30 days. See CODE OF ALA. § 6-9-233(c) (2006); LA. R.S. 13:4243(c) (2006); 14 M.R.S. § 8004(3) (2006); TENN. CODE ANN. § 26-6-105(c) (2007). Delaware, Kentucky, Minnesota, Mississippi, Oklahoma, and Rhode Island impose a twenty day waiting period. See DEL. CODE ANN. tit. 10 § 4783(c) (2007); KRS § 426.960 (3) (2006); MINN. STAT. § 548.28(2) (2006); MISS. CODE ANN. § 11-7-305(c) (2007); 12 OKL. ST. § 722 (c) (2006); R.I. GEN. LAWS § 9-32-3(c) (2007). In Wisconsin, there is a fifteen day waiting period. See Wis. Stat. §

seeks to have the enforcement of the foreign judgment stayed, it should be up to the judgment creditor to prove the existence and authenticity of the forum selection agreement underlying the contract. For a legitimate judgment creditor, that allocation of the burden of proof should spell no trouble. After all, he simply has to make sure that he has a signed copy of the original contract, and in case of doubt, he can insist on having the contract notarized. By contrast, this requirement will largely eliminate any threat resulting from forged or otherwise fraudulent foreign judgments. To be sure, there is always the risk that foreign courts will hand down decisions that are patently wrong. However, as long as the simplified enforcement procedure is limited to those cases where the parties have chosen the foreign court bilaterally and voluntarily, they can easily protect themselves against bad foreign courts.

### ***C. Allowing for the Establishment of Extraterritorial Courts***

Another important step towards the creation of a global market for judicial services would be the creation of extraterritorial courts.<sup>210</sup> Given that this requires the consent of the host state, the question is how that consent is to be secured. While informal consent would satisfy international law, formal consent seems essential to induce reliance both by exporting states and by litigants. Therefore, to make extraterritorial courts a serious option, it will take multilateral or at least bilateral treaties guaranteeing jurisdictions the right to create courts on the territory of the other contracting states.<sup>211</sup> Once one embraces the desirability of a market for judicial services, there is little principled reason to oppose such a treaty.

### ***D. Permitting Price Discrimination***

Finally, though perhaps most difficult, it is important to explore means for permitting importing states to charge court fees adequate to cover the

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806.24(c) (2006). Arkansas and the Virgin Islands impose a ten day waiting period. A.C.A. § 16-66-603(c) (2006), 5 V.I.C. § 554(c) (2006). And Idaho has a five day waiting period. IDAHO CODE § 10-1303(c) (2006).

<sup>210</sup> See *supra* Part III.B.

<sup>211</sup> The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231, does not solve the problem at hand. While that convention provides for the taking of evidence in the territory of another country, it does so within narrow limits.

costs of accepting cross-jurisdictional litigation. The most obvious approach, explored above, is to permit importing states to charge higher court fees for cross-jurisdictional litigation than for domestic litigation. There are two obvious alternatives for drawing the line between those cases that are subject to the same fees charged to the state's own domestic litigants and those cases subject to higher charges. One alternative is to permit higher charges for litigation in any case in which the only basis for the importing state's jurisdiction is a contractual choice of forum clause, accompanied perhaps by a clause choosing, as well, the importing state's substantive law. A second, narrower alternative is to permit higher fees only in cases that not only meet the criterion just stated, but involve a purely domestic transaction between parties from the same importing state.

Either of these approaches to fee discrimination would involve a degree of ambiguity and potential for manipulation. Those problems, however, would seemingly be manageable. More awkward is the fact that existing bilateral treaties often prohibit discrimination vis-à-vis foreign litigants even where such discrimination is allowed by Constitutional Law.<sup>212</sup> While those treaties were not drafted with an eye to the type of cross-jurisdictional litigation that concerns us here, their language would arguably extend to that litigation. Hence, the treaties in question would have to be amended to allow fee discrimination in appropriately circumscribed cases. Moreover, to permit fee discrimination within existing federations, such as the United States or the European Community, would, as we have observed, require a liberal (re)interpretation of constitutional constraints – something that would be less difficult in the United States than in the European Community. But then, facilitating cross-jurisdictional litigation in those federations, whose

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<sup>212</sup> The United States, in particular, has concluded numerous Treaties of Friendship, Commerce and Navigation. See, e.g., Treaty of Friendship, Commerce and Navigation, U.S.-F.R.G., Oct. 29, 1954, 7 U.S.T. 1839, T.I.A.S. No. 3593; Treaty of Friendship, Commerce and Navigation, U.S.-Isr., Aug. 23, 1951, 5 U.S.T. 550, T.I.A.S. No. 2948; Treaty of Friendship, Commerce and Navigation, U.S.-Japan, Apr. 2, 1953, U.S.T. 2063, T.I.A.S. No. 2863. Among other things, these treaties prohibit discrimination with respect to access to courts. See, e.g., Treaty of Friendship, Commerce and Navigation, U.S.-F.R.G., art. VI (1), Oct. 29, 1954, 7 U.S.T. 1839, T.I.A.S. No. 3593 (imposing a duty to grant "national treatment with respect to access to the courts of justice").

member states do not differ radically in the effectiveness of their courts, is less important than it is in the broader international context.

## ***XII. Conclusion***

Important developments are today creating an environment in which a global market for judicial services seems entirely foreseeable. These developments include decreasing costs of transportation, rapid advances in telecommunications, a dramatically increasing volume of commercial litigation worldwide as national economies grow and as an increasing fraction of those economies are organized on a market basis, and the rapidly spreading internationalization of the bar.

Such a market should be welcomed, and the appropriate legal and practical groundwork for it should be established. While private arbitration will surely continue to play an important role in resolving commercial disputes, there is strong reason to believe that it will not provide an adequate substitute for litigation in the public courts of well-established states. We should therefore turn our attention to promoting worldwide access to our existing national systems of public adjudication – in short, to creating a strong global market in judicial services.

**Annex:****Quantity of Litigation versus Quality of Courts****(Dependent variable: Cases filed per 1,000,000 population)**

	Unstandardized		Standardized	t	Significance
	Coefficients				
	Coefficient	Standard Error			
Constant	2764.680	1069.498		2.585	.022
Rule of Law	-152.009	712.699	-.057	-.213	.834
Cases > 3 Years	4.090	72.458	.015	.056	.956