

# GLOBALIZING COMMERCIAL LITIGATION

*Jens Dammann & Henry Hansmann*<sup>†</sup>

*The quality of national judicial systems varies widely from country to country. In some jurisdictions, the courts resolve commercial disputes quickly, fairly, and economically, while in others, they are slow, inefficient, incompetent, biased, or corrupt. These differences affect not only litigants, but nations as a whole: effective courts are important for economic development. A natural implication is that countries with underperforming judiciaries should reform their courts. Unfortunately, judicial reform is both difficult and slow. Another way to deal with a dysfunctional court system is for litigants from afflicted nations to have their domestic commercial disputes adjudicated in better-functioning foreign courts. In this Article, we explore the potential advantages and limitations of such extraterritorial litigation and conclude that its promise is strong, particularly in light of a revolution in communications technology that permits litigation in a remote court without travel by parties, witnesses, or lawyers.*

*Private arbitration is another alternative to ineffective local courts, and its role in resolving commercial disputes will surely continue to expand. Public courts, however, have important advantages over private arbitration in resolving commercial disputes. Consequently, broader international access to well-functioning public courts holds unique promise.*

*Presently, the volume of extraterritorial litigation is small. A set of basic legal and practical reforms could, however, change that situation dramatically. To motivate those reforms, it is essential that jurisdictions with strong courts have an incentive to attract foreign litigants. The best way to achieve this is through higher court fees for foreign litigants who lack substantial ties to the forum state. This may require important adjustments in legal culture.*

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<sup>†</sup> Jens Dammann is an Assistant Professor at the University of Texas School of Law. Henry Hansmann is the Augustus E. Lines Professor of Law at the Yale Law School.

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*But only by abandoning formal equality in court fees is it likely that real global equality in access to judicial services can be accomplished.*

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## INTRODUCTION

The world's nations vary widely in the quality of their judicial systems. In some jurisdictions, the courts resolve commercial disputes quickly, fairly, and economically. In others, they are slow, inefficient, incompetent, biased, or corrupt. Weak court systems are a particularly conspicuous problem for developing and transition economies. Yet there are striking disparities in the quality of domestic courts, even among developed countries.<sup>1</sup>

Effective courts are central to sustained economic development. Badly performing courts burden not only litigants, but also nations as a whole.<sup>2</sup> An obvious implication is that countries with underperforming courts should reform them. Yet experience has shown reform to be both difficult and slow,<sup>3</sup> especially where the independence and integrity of the judiciary are in question.

There is, however, another approach to dealing with a dysfunctional court system—one that can go hand in hand with domestic judicial reform. The law can enable litigants from countries with ineffective judicial systems to have their cases adjudicated in the courts of other nations that have better-functioning judicial systems. In this Article, we assess the case for facilitating this type of extraterritorial litigation and conclude that it is strong. Extraterritorial litigation, though presently small in volume, could offer considerable benefits if it were more widely available.

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<sup>1</sup> See *infra* Part I.

<sup>2</sup> See *infra* Part I.

<sup>3</sup> See *infra* Part I.

To be sure, private arbitration services already provide an important alternative to domestic courts, and their role will and should continue to expand. However, when it comes to offering principled adjudication, public courts enjoy a number of structural advantages over private arbitration services.<sup>4</sup> Consequently, if governments give commercial litigants alternatives to their domestic courts, those alternatives should include access to the public courts of other states. This will require that at least some states with strong courts accept broad jurisdiction over purely domestic commercial disputes from other states, and that the latter states recognize this jurisdiction and expeditiously enforce the resulting judgments—all of which will require international legal reforms.

To instill motivation for adopting these reforms and for undertaking the practical steps needed to accommodate extraterritorial litigation, it is essential to provide jurisdictions with a strong incentive to attract foreign litigants. At present, the main incentive is to create business for the local bar and other local service providers. But this approach has obvious drawbacks. In particular, it drives jurisdictions to force foreign litigants to make extensive use of local lawyers and other local service providers, thereby rendering extraterritorial litigation unattractive for all but very high-stakes cases. A superior approach, we argue, is to enable jurisdictions to charge higher court fees for hearing purely foreign cases. This requires altering norms in many jurisdictions that seem to bar the imposition of higher court fees on foreign litigants than on domestic litigants—norms that effectively force some nations' litigants to rely on weak courts and thus have the ironic consequence of frustrating rather than furthering true international equality in access to judicial services.

The issues we discuss here are particularly timely for two important reasons. First, technological advances in the field of telecommunications and transportation make it increasingly feasible for litigants to use high-quality courts located in foreign jurisdictions. Many courts already allow for the electronic filing of documents,<sup>5</sup> and an increasing number of courts are adopting videoconferencing technology,<sup>6</sup>

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<sup>4</sup> See *infra* Part V.

<sup>5</sup> For example, certain courts in New York, Connecticut, and Delaware fall into this category. See, e.g., N.Y. State Sup. Ct., N.Y. County–Civil Branch E-Filing, <http://www.nycourts.gov/suptctmanh/e-filing.htm> (last visited Sept. 25, 2008); Conn. Judicial Branch, Welcome to E-Filing, <http://www.jud.ct.gov/external/super/e-services/efile/> (last visited Sept. 25, 2008); Chancellor of the Court of Chancery, Admin. Directive of the Chancellor of the DEL. Court of Chancery, Amended 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. FED. R. CIV. P. 5(d)(3) (allowing courts to adopt rules permitting or requiring papers to be filed by electronic means).

<sup>6</sup> See MEGHAN DUNN & REBECCA NORWICK, REPORT OF A SURVEY OF VIDEOCONFERENCING IN THE COURTS OF APPEALS 1 (2006) (on file with authors) (noting that

thereby 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. This promises, in turn, that parties will find it practicable to conduct litigation in remote courts—including courts located across international borders—both conveniently and inexpensively. Just as New York City residents often use the telephone to obtain assistance with computer software or utility bills from service personnel in Bangalore, India, merchants in Bangalore should soon be able to have their local commercial disputes decided in New York courts via the Internet.

Second, the increasing pace of global commerce is already creating pressures for legal reforms that could dramatically improve the legal environment for extraterritorial litigation. The most important development in this respect is the 2005 Hague Convention on Choice of Court Agreements,<sup>7</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 forum, however, the Convention only applies to international cases,<sup>8</sup> which principally means cases involv-

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“[v]ideoconferencing is used for conducting oral arguments in the Second, Third, Eighth, Ninth, and Tenth Circuits”). Rule 43(a) of the Federal Rules of Civil Procedure allows the use of videoconferencing technology for witness testimony “for good cause shown in compelling circumstances and upon appropriate safeguards.” FED. R. CIV. P. 43(a). State courts are also making increasing use of videoconferencing technology. *Cf., e.g.,* Carrie A. O’Brien, *The North Carolina Business Court: North Carolina’s Special Superior Court for Complex Business Cases*, 6 N.C. BANKING INST. 367, 383 n.125 (2002) (noting that pretrial hearings at the North Carolina Business Court can be held using videoconferencing technology); Hugh Calkins, *Something About Technology: Videoconferencing Revisited*, 20 ME. B.J. 76, 76–78 (2005) (describing the use of videoconferencing technology by Maine courts); Lisa L. Granite, *Special Report: Legal Tech 2006: Technology Gradually Filtering into Pennsylvania’s Courtrooms*, 28 PA. LAW., Nov.–Dec. 2006, at 40, 42 (noting that “[t]wenty-three counties have either videoconferencing equipment or Web cameras (these can be used for videoconferencing and are often more cost-effective) in at least one courtroom”). The Social Security Administration now routinely uses videoconferencing to conduct hearings in which a presiding administrative law judge is connected to the claimant and his lawyer, as well as any witnesses and experts, all of whom are in a remote hearing room that is often located in a different state. Interview with Roy P. Liberman, Administrative Law Judge, Office of Disability Adjudication and Review, Social Security Administration, in New Haven, Conn. (Sept. 17, 2008). Similarly, courts in other countries use videoconferencing for judicial purposes. For example, in the United Kingdom, the Access to Justice Act of 1999 specifically provides that courts can use videoconferencing for civil hearings if the parties consent. Access to Justice Act, 1999, c. 22 (Eng.); *see also* HER MAJESTY’S CTS. SERV., VIDEO CONFERENCING IN COURTS, [http://www.hmcourts-service.gov.uk/infoabout/video\\_conferencing/index.htm](http://www.hmcourts-service.gov.uk/infoabout/video_conferencing/index.htm) (last visited Sept. 25, 2008).

<sup>7</sup> Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294 [hereinafter Hague Convention], available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=98](http://www.hcch.net/index_en.php?act=conventions.text&cid=98).

<sup>8</sup> *See id.* art. 1(1).

ing parties from different states.<sup>9</sup> Our concern here is, in contrast, creating access to foreign courts for cases in which both parties are *from a single jurisdiction* and their substantive dispute is purely domestic. 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.

We should emphasize that we are concerned here only with disputes between merchants and not with litigation in general. Moreover, 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.<sup>10</sup>

This Article proceeds as follows: Part I surveys the great differences in the quality of judicial services across jurisdictions, including developed nations. Part II assesses the potential role of extraterritorial litigation in general and focuses particularly on its ability to ameliorate the problems of weak local courts. Part III addresses extraterritorial litigation's potential pitfalls for commercial contracts and argues not only that its benefits outweigh its drawbacks, but also that extraterritorial litigation's net advantages are more clear-cut than those offered by the more frequently discussed and still-controversial policy of free choice of regime for corporate law. Part IV examines the practical obstacles to extraterritorial litigation, such as distance, language, and international differences in commercial and legal culture. Part V explores the reasons why arbitration offers an inadequate alternative to litigation in the public courts of other nations. Part VI analyzes legal obstacles to extraterritorial litigation. Part VII explores the available evidence of the current extent of extraterritorial litigation, which indicates that the potential demand is substantial but that the current practice is quite limited. Part VIII considers the appropriate legal reforms for facilitating extraterritorial litigation, and Part IX concludes our argument, turning to the crucial questions of the incentives required for states to accept extraterritorial litigation and the court fee reforms necessary to improve those incentives.

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<sup>9</sup> See *infra* Part VI.C.

<sup>10</sup> Competition among courts is much more problematic in those cases in which the plaintiff can choose the forum unilaterally. In particular, this creates the risk that courts will compete by catering to plaintiffs rather than by improving the quality of their services. Cf. Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179, 1181 (2007) (arguing that, historically, English courts "competed by making the law more favorable to the plaintiffs").

## I

## CONTRASTS IN NATIONAL JUDICIARIES

Differences across nations in the quality of courts are profound. While some countries boast courts that are praised for their excellence,<sup>11</sup> others have courts that are badly failing. Lack of judicial independence,<sup>12</sup> corrupt and biased judges,<sup>13</sup> long delays,<sup>14</sup> and highly formalistic procedures<sup>15</sup> are among the judicial shortcomings that commentators frequently identify.

Quantitative measures of the performance of judicial systems around the world emphasize the same problems to which commentators point.<sup>16</sup> The *Lex Mundi* project has assembled the most extensive and systematic set of data on this topic by developing estimates—which are concededly somewhat subjective—of the time required in 109 nations' courts to obtain and enforce judgments in lawsuits involving commonplace disputes. The results vary widely. The mean time required to collect against the writer of a bad check, for example, was 234 days, with 12 nations (including the United States) requiring less

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<sup>11</sup> The paradigm is Delaware's Chancery Court, which is widely praised as a forum for corporate law cases. See, e.g., Lucian Arye Bebchuk & Allen Ferrell, *A New Approach to Takeover Law and Regulatory Competition*, 87 VA. L. REV. 111, 146 (2001) ("The Delaware Chancery Court, for instance, is renowned for its expertise in corporate law matters."); Brett H. McDonnell, *Two Cheers for Corporate Law Federalism*, 30 J. CORP. L. 99, 106 (2004) (noting that an "important advantage" of Delaware as a state of incorporation "is its Chancery Court, which can move quickly and has specialized expertise"); Leo E. Strine, Jr., "Mediation-Only" Filings in the Delaware Court of Chancery: Can New Value Be Added by One of America's Business Courts?, 53 DUKE L.J. 585, 588 (2003) ("The State of Delaware's investment in a Chancery Court and a Supreme Court that can act with the speed and expertise to meet the business community's needs is an important element of service it provides to its corporate domiciliaries and their stockholders.").

<sup>12</sup> See, e.g., Robert Kossick, *The Rule of Law and Development in Mexico*, 21 ARIZ. J. INT'L & COMP. L. 715, 717 (2004) (noting that in Mexico "the judiciary has been more independent in theory than in fact"); Kenneth W. Dam, *China as a Test Case: Is the Rule of Law Essential for Economic Growth* 18, 23 (Univ. of Chi. Law Sch., John M. Olin Law & Econ. Working Paper No. 275, 2006), available at <http://ssrn.com/abstract=880125> (noting corruption, lack of judicial independence, and poor training of judges in China).

<sup>13</sup> See, e.g., 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").

<sup>14</sup> See, e.g., 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, 308 n.59 (2003) (noting that Indian courts are "exceedingly slow and backlogged"); Tracy S. Work, *India Satisfies Its Jones for Arbitration: New Arbitration Law in India*, 10 TRANSNAT'L LAW. 217, 224 (1997) (claiming that Indian courts are "often expensive, uncertain, and riddled with procedural delay").

<sup>15</sup> See, e.g., Kossick, *supra* note 12, at 715–17 (describing judicial proceedings in Mexico as "highly formalistic").

<sup>16</sup> See sources cited *supra* notes 12–15.

than 75 days and 14 requiring more than 400 days.<sup>17</sup> Although speed is not, of course, the only important factor in the effectiveness of 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>18</sup>

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 countries with well-developed market economies. The *Lex Mundi* project estimated, for example, that an action to collect on a bad check in the notoriously slow courts of Italy takes an average of 645 days—nearly two years.<sup>19</sup>

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<sup>17</sup> Simeon Djankov et al., *Courts*, 118 Q.J. ECON. 453, 494–500 (2003); cf. 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>18</sup> Daniel Kaufmann et al., *Governance Matters VI: Aggregate and Individual Governance Indicators for 1996–2006*, at 88–90 (World Bank Policy Research Working Paper 4280, July 2007, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=999979](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=999979)). 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 4. Observations run from -2.53 for Somalia to 1.96 for Switzerland, with Mexico at -0.49, India at 0.17, Italy at 0.37, and the U.S. at 1.57. *Id.* For a critical view of the rule of law index, see Kevin E. Davis, *What Can the Rule of Law Variable Tell Us About Rule of Law Reforms?*, 26 MICH. J. INT’L L. 141, 148–51 (2004) (raising various objections about the International Country Risk Guide, one of the sources upon which the World Bank’s rule of law index relies); cf. Frederique Dahan & John Simpson, *Secured Transactions in Central and Eastern Europe: European Bank for Reconstruction and Development (EBRD) Assessment*, 36 UCC L.J. 77, 87–102 (2004) (exploring variations in the amount of a debt that can be recovered, and the time to recovery, in the courts of a sample of developing countries). Survey data gathered by Stefan Vogenauer on preferences in cross-border transactions is also instructive: 70% of those surveyed said they were trying to avoid certain forums in cross-border transactions. Stefan Vogenauer, *Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law* 29 (2008) (unpublished manuscript) (on file with authors). Among the five most important considerations in avoiding certain forums were the degree of corruption, the speed of dispute resolution, and, more generally, the quality of courts and judges. *Id.* at 31. These results, too, hint at real differences in the quality of judiciaries across countries.

<sup>19</sup> Djankov et al., *supra* note 17, 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), Court of Appeals Values, Year 2004, <http://giustiziaincifre.istat.it/Nemesis/jsp/dawinci.jsp?q=pl01-0010011000&can=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) (noting the often “slow-moving dockets” of Italian courts); Kimberly A. Moore & Francesco Parisi, *Rethinking Forum Shopping in Cyberspace*, 77 CHI.-KENT. L. REV. 1325, 1355 n.20 (2002) (reporting that Italian courts have a “reputation for slow case resolution”); Larry Coury, Note, *C’est What? Saisie! A Comparison of*

These disparities have important consequences. Bad courts harm not just individual litigants, but 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>20</sup> Recent empirical research has tended to confirm the relationship between weak courts and weak economies, finding correlations between the quality of courts and various measures of economic performance. And while correlation is not the same as causation, substantial evidence in the literature indicates that a well-functioning judiciary is an important contributor to—rather than simply a consequence of—robust economic growth.<sup>21</sup>

For parties to commercial contracts, that well-functioning judiciary might most easily be found abroad. Although court reform should be a top priority in any country with a weak legal system, economic

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*Patent Infringement Remedies Among the G7 Economic Nations*, 3 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1101, 1147 (2003) (observing that Italy is “notorious for a slow adjudication process”).

<sup>20</sup> DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 54 (1990).

<sup>21</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—for example, permitting broader use of equity as opposed to debt financing—they have not established a significant causal relationship between contract enforcement and economic development in general. See, e.g., Daron Acemoglu & Simon Johnson, *Unbundling Institutions*, 113 J. POL. ECON. 949, 988–89 (2005). Some 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, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 VA. L. REV. 1517, 1524–80 (2006).

Important individual studies and assessments include 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 et al., *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); 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 fifty-seven countries); Tullio Jappelli et al., *Courts and Banks: Effects of Judicial Enforcement on Credit Markets* 18 (Ctr. 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); cf. Dam, *supra* note 12, at 46 (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”); Kenneth W. Dam, *The Judiciary and Economic Development* 1 (Univ. of Chi. Law Sch., John M. Olin Law & Econ. 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”).

development should not have to depend on the extremely slow pace with which such reform commonly proceeds.<sup>22</sup> Rather, contracting parties can be given the opportunity to meet their needs with the courts of other jurisdictions. Indeed, extraterritorial adjudication also holds substantial promise for residents of well-developed countries by expanding the range of alternatives available to litigants, encouraging specialization among judicial systems, and exposing courts in general to the stimulus of competition.

## II

### THE PROMISE OF EXTRATERRITORIAL LITIGATION

A variety of obstacles face merchants who wish to use foreign courts to adjudicate purely domestic disputes. Some of these are practical, including distance, language, differences in commercial culture, and the availability of legal counsel. Other obstacles are of a legal character, including the willingness of foreign courts to accept jurisdiction, the willingness of local courts to cede jurisdiction, and the ability to obtain prompt local enforcement of a foreign judgment. We will address all of these obstacles in later sections. First, however, it is important to discover the value of overcoming those obstacles. That is, what are the potential benefits of extraterritorial litigation of commercial contracts, assuming it can be made broadly accessible? We focus here on the advantages and turn to difficulties in the Part that follows.

To improve the clarity of the following discussion, a bit of terminology will be helpful. If two merchants from the same state have their dispute heard in the courts of a different state, we will refer to the first state as the “origin” state and to the second state—the forum state—as the “host” state.

#### A. Giving Litigants Access to Better Courts

The first and most direct benefit of extraterritorial litigation is familiar and is frequently mentioned as an argument for allowing

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<sup>22</sup> Cf. Edgardo Buscaglia & Pilar Domingo, *Impediments to Judicial Reform in Latin America*, in *THE LAW AND ECONOMICS OF DEVELOPMENT* 291, 298–309 (Edgardo Buscaglia et al. eds., 1997) (analyzing obstacles to judicial reform in Latin America); Fen Osler Hampson, *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, 645–46 (2002) (calling judicial reform in Russia “agonizingly slow”); ANNA M. KUZMIK, RECENT DEVELOPMENTS, *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”); 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 in Latin America).

choice of forum clauses: Litigants from jurisdictions with low-quality courts will be given access to better courts to resolve their disputes.<sup>23</sup> Important as this is, however, it is not the most important benefit; the advantages of access to better courts extend well beyond those gained by the persons who actually go to court.

## B. An Improved Contracting Environment

The more fundamental advantage of access to better courts is that, as emphasized above, more effective contract enforcement makes all contractual relationships more dependable, including the overwhelming majority that will never go to court. Consequently, rapid and principled contract enforcement can transform commercial relationships in general, with broad benefits for the efficiency of economic activity.<sup>24</sup>

A caveat seems appropriate here: Countries with poorly functioning court systems will also often do poorly when it comes to enforcing judgments, whether they are domestic or foreign. Giving litigants access to foreign courts does not solve the problem of inadequate enforcement institutions. However, a combination of good courts and poor enforcement seems strongly preferable to a combination of bad courts and poor enforcement.

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<sup>23</sup> Commentators often describe the benefit of being able to choose the most suitable court as an advantage of forum selection clauses. *E.g.*, Rochelle C. Dreyfuss, The Sixth Abraham L. Pomerantz Lecture, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1, 37 (1995); Celia R. Taylor, Comment, *National Iranian Oil Co. v. Ashland Oil, Inc.: All Dressed Up and Nowhere to Arbitrate*, 63 N.Y.U. L. REV. 1142, 1152 (1988).

<sup>24</sup> Effective enforcement of contracts may even have a broad beneficial effect on corporate ownership and control. Ronald Gilson has recently argued that the strong prevalence of family-owned firms in developing countries may owe as much—or more—to weak contract law as to weak shareholder protection in corporate law. Ronald J. Gilson, *Controlling Family Shareholders in Developing Countries: Anchoring Relational Exchange*, 60 STAN. L. REV. 633 (2007). Absent effective legal enforcement of contracts, family ownership of firms “substitutes for law . . . as a means to assure that parties perform their contractual obligations.” *Id.* at 636. Thus, “establishing and sustaining a reputation by performing . . . obligations to trading partners” must be seen as an investment in the firm’s reputation that “will pay off over the corporation’s infinite life.” *Id.* at 641. However, that investment “will not be made unless it is also to the advantage of the short-lived individuals who actually make the corporation’s decisions.” *Id.* Family ownership is a way of solving this problem: “Because of intrafamily inheritance and family ties, the current generation of decision makers . . . treats the next generation’s utility as the equivalent of their own, so there is no temporal distortion of incentives to invest in reputation.” *Id.* at 643. Apart from its explanatory power regarding corporate ownership structures, Gilson’s thesis also has an important implication for the value of an efficient contracting environment. With better contractual enforcement available, corporations need no longer rely upon family ownership to bond their contracts, allowing more diverse, efficient, and equitable patterns of ownership to emerge.

### C. Improvements in Judicial Systems

Beyond giving global access to the world's most effective judicial systems, extensive extraterritorial litigation should improve both judicial systems themselves and the law they administer.

#### 1. *Competition*

In effect, we are proposing a global market for judicial services in contract litigation. The resulting competition should—as competition generally does—provide a stimulus to improve the quality of judicial services offered.<sup>25</sup> Although many jurisdictions would be too inflexible or preoccupied to make active efforts to attract foreign litigants, some are bound to take a more entrepreneurial or altruistic approach—an issue we return to below.<sup>26</sup> And to an important extent the resulting competition for litigants should be a race for quality, given that some of the judicial attributes likely to attract foreign litigants, such as speedy decisions and highly qualified judges, are unequivocally positive.<sup>27</sup>

#### 2. *Comparing Systems*

The advantage of freer choice of forum for commercial litigation lies not just in a stimulus for improvement in quality and efficiency generally, but also in the opportunity for more effective comparison between different approaches to adjudication.

For example, it is not completely clear to what extent jury-based systems are superior to non-jury-based systems. The success in corporate law of the Delaware Chancery Court, which is a court of equity<sup>28</sup> and therefore sits without a jury,<sup>29</sup> suggests one answer.<sup>30</sup> A large sample of commercial contracts studied by Professors Eisenberg and

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<sup>25</sup> Cf. 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>26</sup> See *infra* Part VIII.

<sup>27</sup> We address the unavoidable comparison to regulatory competition in corporate law *infra* Part III.D.

<sup>28</sup> DEL. CODE ANN. tit. 10, § 341 (1999).

<sup>29</sup> DEL. CONST. art. IV, § 10.

<sup>30</sup> Indeed, commentators have long argued that the absence of a jury is part of what makes the Chancery Court attractive to litigants. *E.g.*, Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1077 (2000); Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205, 1212 (2001) [hereinafter Kahan & Kamar, *Discrimination*]; Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 708 (2002) [hereinafter Kahan & Kamar, *Myth*]; Stephen J. Massey, *Chancellor Allen's Jurisprudence and the Theory of Corporate Law*, 17 DEL. J. CORP. L. 683, 704 (1992).

Miller, in which only 20% of litigants waive the right to a jury trial, suggests something different.<sup>31</sup>

Similarly, scholars vigorously disagree 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, which leaves that task largely to the attorneys.<sup>32</sup> Likewise, persons may reasonably differ about the optimal degree of formalism in civil proceedings.<sup>33</sup> Nor is there clear evidence concerning the value of appeals. Should the parties always have the right to appeal the decision?<sup>34</sup> And should the decision of the court of appeal be subject to an appeal as well?<sup>35</sup>

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 others and to discover which work best in given circumstances. That information can then be used not just by litigants in their choice of courts, but also by lawmakers in reforming their judicial systems.

### 3. *Specialization*

To provide high-quality services, it is advantageous 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. Delaware's Chancery Court has become the preferred forum for cases involving publicly traded corporations,<sup>36</sup> and a broad consensus in the literature agrees

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<sup>31</sup> Theodore Eisenberg & Geoffrey P. Miller, *Do Juries Add Value?: Evidence from an Empirical Study of Jury Trial Waiver Clauses in Large Corporate Contracts*, 4 J. EMPIRICAL LEGAL STUD. 539 (2007) (examining a sample of 2,816 contracts filed with the SEC as exhibits in Form 8-K filings).

<sup>32</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., *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>33</sup> Cf. Djankov et al., *supra* note 17, at 456 (finding that "ceteris paribus higher procedural formalism is a strong predictor of longer duration of dispute resolution" and that "[h]igher formalism . . . predicts lower enforceability of contracts, higher corruption, as well as lower honesty, consistency, and fairness of the system" while finding "no evidence that formalism secures justice").

<sup>34</sup> See, e.g., Moshe Bar Niv & Zvi Safra, *On the Desirability of Appellate Courts*, 2 REV. L. & ECON. 381, 382, 381-96 (2006) (concluding "that it is unnecessary to impose judicial systems which enable appeals in all civil litigation").

<sup>35</sup> Cf. Charles M. Cameron & Lewis A. Kornhauser, *Decision Rules in a Judicial Hierarchy*, 161 J. INSTITUTIONAL & THEORETICAL ECON. 264 (2005) (arguing that given certain assumptions, a three-tier judicial hierarchy is superior to a two-tier judicial hierarchy at rectifying errors).

<sup>36</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 30, at 705 (pointing to the Chancery court's "prominence as a forum for the adjudication of corporate law issues"); Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*,

that an important part of the Chancery Court's attractiveness derives from its specialization in corporate law cases.<sup>37</sup> These cases make up about three quarters of its caseload,<sup>38</sup> allowing its judges to gain particular expertise in that area of the law.<sup>39</sup> The advantages of such specialization have stimulated a number of U.S. states—prominently including New York, of which we will say more later<sup>40</sup>—to adopt specialized courts to handle commercial litigation. A global “market” for judicial services promises substantially increased potential for specialization of this sort, with courts either in the same or different jurisdictions specializing not just in contractual disputes but in particular types of contracts.<sup>41</sup>

Moreover, specialization promises not just greater experience and expertise among judges in applying the law, but greater refinement of the law itself through the greater volume and variety of cases that are brought to the jurisdiction.

#### 4. *Courts in States of Origin*

Beneficial changes in judicial services, of the types just noted, should appear with particular prominence in potential host states. But they should also appear in origin states, which will lose their captive hold on litigants and, through migration of litigation overseas, have clear evidence of their weaknesses. Possibly, however, broader choice of forum will also have some deleterious effects on origin-state courts and law, making the overall consequences for origin state judi-

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59 VAND. L. REV. 1975, 1987 (2006) (finding, based on a sample of merger agreements filed with the SEC, that “Delaware . . . leads as a litigation forum choice”).

<sup>37</sup> See, e.g., Dreyfuss, *supra* note 23, at 4; Fisch, *supra* note 30, at 1077; Kahan & Kamar, *Myth*, *supra* note 30, at 708.

<sup>38</sup> See, e.g., Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 903 (1990); Fisch, *supra* note 30, at 1077–78; cf. Kahan & Kamar, *Discrimination*, *supra* note 30, at 1212 (noting that the Chancery Court’s docket “consists mostly of corporate claims”).

<sup>39</sup> See, e.g., Fisch, *supra* note 30, at 1078; Kahan & Kamar, *Discrimination*, *supra* note 30, at 1212; Kahan & Kamar, *Myth*, *supra* note 30, at 708.

<sup>40</sup> See *infra* Part VII.A (describing New York’s role as a leading forum for commercial litigation within the United States).

<sup>41</sup> The Eisenberg & Miller analysis of choice of forum in a sample of commercial contracts, discussed *infra* Part VII.A, in fact shows substantial variance in choice of law across different types of contracts. See Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies’ Contracts* 20–21 tbl.3 (N.Y.U. Ctr. for Law & Econ., Law & Econ. Research Paper Series Working Paper No. 08-13, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1114808](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1114808) (showing the percentage of different types of contracts that chose Delaware law, New York law, California law, or some other state law). Although those authors do not report directly on the matter, the contracts they survey presumably show similar variance in choice of *forum* because choice of forum generally tracks choice of law in their sample. *Id.* at 35–36 tbl.12 (showing how choice of forum correlates with choice of law).

cial services more ambiguous. We turn to this and other problems next.

### III POTENTIAL PROBLEMS

Extraterritorial litigation promises not just benefits but also some potential problems. These largely 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.

#### A. Informational Asymmetries

It is possible that broad choice among competing systems of courts might induce contracting parties to choose a court that is less beneficial to them than the court that would otherwise have heard their case. The principal reasons lie in informational problems.

##### 1. *Taking Advantage of Uninformed 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 serious problems of plaintiffs' forum shopping that can arise when parties are given a choice of forum.<sup>42</sup> It does not, however, eliminate all such problems.

Even if 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 the other party. The general problem is familiar and is not limited to choice of forum clauses.<sup>43</sup>

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<sup>42</sup> Similarly, shopping for substantive law is more likely to be efficient in those situations in which the affected parties work together to choose the applicable law. Erin A. O'Hara & Larry E. Ribstein, *Rules and Institutions in Developing a Law Market: Views from the U.S. and Europe* 8 (Ill. Law & Econ. Research Paper Series, Research Paper No. LE08-010, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1100277](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1100277).

As our Article was being prepared for the press, we encountered a pre-publication draft of LARRY RIBSTEIN & ERIN O'HARA, *THE LAW MARKET* (forthcoming, Oxford University Press 2009) (on file with authors). That book deals broadly with the virtues of expanding freedom for parties to choose another jurisdiction's substantive law to govern their affairs. Although our focus here is, in contrast, on access to other jurisdictions' courts and procedural law, their themes and ours are complementary, and their analysis parallels ours at a number of points.

<sup>43</sup> For example, some have correctly observed that choice of law clauses may lead to inefficient outcomes if the bargaining process is flawed because of problems of informational asymmetry. See, e.g., Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1186 (2000).

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>44</sup> The result is the familiar “market for lemons”:<sup>45</sup> Consumers are unable to distinguish between fair and unfair standard form contracts and therefore are unable to reward sellers for including fair contract terms. Consequently, sellers have the incentive and the opportunity to put exploitative terms in their contracts.<sup>46</sup>

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, courts are already using both approaches. For example, German law contains a near complete ban on forum selection clauses in purely domestic consumer contracts by which the parties designate a German court other than the one that would normally have jurisdiction.<sup>47</sup> Most U.S. jurisdictions take a case-by-case approach and look at the reasonableness of the forum selection clause.<sup>48</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—such as employees, and perhaps franchisees—who might be similarly affected by informational disadvantages. We effectively assume a relatively simple and restrictive approach in our discussion here—permitting free contractual choice of forum only when both

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<sup>44</sup> See Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700, 716 (1992).

<sup>45</sup> See generally George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489–90 (1970) (illustrating the problem of adverse selection by reference to a used car market).

<sup>46</sup> Cf. Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 VA. L. REV. 565, 586–87 (2006) (describing how a market for lemons can result if consumers have imperfect information about the content of standard-form contracts).

<sup>47</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 exceptions, e.g. if neither party is subject to general jurisdiction in Germany). This rule applies only where the chosen court is a German court. If, by contrast, the chosen court is that of another member state of the European Community, then the more liberal European Community law on forum selection clauses applies. See Case C-412/98, *Group Josi Reinsurance Co. SA v. Universal General Ins. Co. (UGIC)*, 2000 E.C.R. I-5925, ¶ 57 (holding that the application of the pertinent European Community rules “is, in principle, dependent solely on the criterion of the defendant’s domicile being in a Contracting State”).

<sup>48</sup> See, e.g., *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 593–94 (1991) (holding, in an admiralty case, that forum selection clauses are not generally invalid but subject to judicial scrutiny for fairness—even if included in a consumer contract); *Caspi v. Microsoft Network*, 732 A.2d 528, 531 (N.J. Super. Ct. 1999) (holding that a forum selection clause is not per se invalid if included in a consumer contract).

parties are merchants—but broader and more nuanced approaches can clearly be taken, particularly as experience with extraterritorial litigation increases.

## 2. *Lawyer-Client Agency Problems*

Another potential problem results from opportunism in the lawyer-client relationship. For several reasons, lawyers might recommend a choice of forum that is less than optimal for the client.

To begin with, the number of jurisdictions in which any given lawyer is admitted to the bar, and with whose law she is familiar, is usually limited. Hence, she may recommend a particular jurisdiction—usually the one where she has her office—not because of the efficiency of that jurisdiction’s judiciary, but because the lawyer is well acquainted with the relevant procedural rules and admitted to the local bar. Second, rules governing lawyer’s fees may distort choices. 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>49</sup> Hence, law firms may be tempted to shepherd their clients toward jurisdictions with more generous rules on lawyer’s fees. Finally, it is not clear that lawyers prefer efficient legal proceedings. For example, lawyers paid on an hourly basis may prefer complex proceedings with numerous hearings.

However, these problems are unlikely to be serious. A client will most likely scrutinize a lawyer’s decision to litigate the case in a foreign jurisdiction more closely than a decision to litigate locally. Moreover, as a general matter, the quality of courts is unlikely to be overly case-specific. Thus, it will not take much specialized knowledge for clients to monitor their attorneys 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

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<sup>49</sup> For example, European countries tend to be less generous when it comes to contingent fees. Under German law, such arrangements have traditionally been considered 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). As of July 1, 2008, contingent fee arrangements are permitted, but only within narrow limits. *See* Gesetz zur Neuregelung des Verbots der Vereinbarung von Erfolgshonoraren [Act Modifying the Prohibition of Contingent Fee Arrangements], June 12, 2008, BGBl. I, at 1001 (F.R.G.) (providing that contingent fees can be agreed upon only in individual cases and only if the client would, because of his economic situation, reasonably abstain from going to court in the absence of a contingent fee agreement). 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). United Kingdom law also provides a limited degree of flexibility by allowing arrangements under which a lawyer who wins a case can double the fee that she would otherwise have been entitled to. *See id.*

contracts.<sup>50</sup> The number of jurisdictions that offer attractive courts for foreign litigants is likely to be limited, and thus clients will probably develop a general understanding of which courts are most effective.

## B. Negative Externalities

The use of foreign courts to adjudicate domestic disputes also has the potential to create negative externalities—deleterious consequences for persons beyond the parties to the contract involved—and to reduce positive externalities that otherwise would have been realized.

### 1. *Less Refinement of Origin State's Law*

Litigation can yield positive externalities of two types. First, it can improve substantive law through the refinement of precedent.<sup>51</sup> Second, litigation can benefit the court system by permitting judges to hone their skills.<sup>52</sup> Extraterritorial litigation shifts those external benefits—at least to begin with—from origin states to host states, threatening to further weaken the legal systems of the origin states.

The problems involved concern both efficiency and distribution. We turn first to the problem of efficiency: From a global point of view, are the external benefits conferred on host jurisdictions and their litigants likely to be greater than any negative externalities suffered by origin states? There are good reasons to believe that the answer is yes, though the issue is complicated and cannot be resolved on a purely a priori basis. Relevant considerations include the production of precedent, the production of judicial expertise, and the production of political pressure to improve the courts.

#### a. *Precedent*

With respect to production of precedent, consider first a case for which clear precedent is lacking both in the origin state and in the (potential) foreign host state. In this situation, beneficial externalities will frequently be greater if the case is tried in the host state. First, the host state will often be chosen because its courts are particularly com-

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<sup>50</sup> See *infra* Part V.A.

<sup>51</sup> E.g., William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 238 (1979) (suggesting that the creation of precedents is a positive externality of adjudication). Scholars have empirically shown that precedents matter to the outcome of legal proceedings. See Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1205 (2005) (concluding “that precedent has some constraining effect on judicial decisions”).

<sup>52</sup> Cf. Massey, *supra* note 30, at 705 (noting that the Delaware Chancery Court's focus on corporate law cases has allowed the Court to “acquire a greater expertise in matters of corporate law than judges on courts with greater diversity of jurisdiction”).

petent. Consequently, the quality of the resulting case law will be particularly high. Second, the parties will typically choose not just the courts but also the substantive law of the host state.<sup>53</sup> Given that litigants from many jurisdictions will end up choosing the same law—namely that of the most popular host state—the resulting case law will benefit a particularly large number of economic actors.<sup>54</sup> Third, a precedent produced within the host state’s law is also available to serve as a guide to origin state courts in addressing similar issues under the origin state’s own law—just as courts from other U.S. states often follow the lead of Delaware’s judiciary when faced with issues of corporate law.<sup>55</sup>

Needless to say, situations may arise in which the optimistic scenario described above does not materialize. That risk seems greatest if the parties choose a foreign court but opt for the substantive law of the origin state. In that case, one may be concerned that the chosen court is less competent about the applicable substantive law. Moreover, there is the risk that host-state courts applying foreign law will make an inefficiently low effort to produce good precedents, given that the benefits of these precedents will be captured by the origin state and not by the host state. Finally, one may fear that—all else being equal—a decision by the host state regarding the substantive law of the origin state will be less useful than a decision by the courts of the origin state would have been. After all, future litigants may not be sure to what extent the courts of the origin state will defer to decisions handed down by foreign courts; and if both jurisdictions use different languages, the courts of the origin state may not even be able to read the decisions handed down by the court in the host state.

These problems need to be taken seriously. However, they should not be exaggerated. If the two jurisdictions involved use different languages, the parties are highly unlikely to combine the choice of

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<sup>53</sup> In their empirical analysis of commercial contracts, Eisenberg and Miller find that choice of forum and choice of law are strongly correlated. See Eisenberg & Miller, *supra* note 41, at 35–36 tbl.12.

<sup>54</sup> An example from corporate law may illustrate this point: More than half of all publicly traded corporations are incorporated in Delaware. Del. Div. of Corps., Dep’t of State, Why Choose Delaware As Your Corporate Home?, <http://www.corp.delaware.gov> (last visited Sept. 25, 2008). Accordingly, the number of publicly traded corporations profiting from Delaware precedents is particularly high. Similarly, at least within the United States, New York has emerged as the leading law for commercial contracts. See *infra* Part VII.A. Consequently, case law produced by New York courts in the area of commercial law will be of particular benefit to many merchants.

<sup>55</sup> Cf. Demetrios G. Kaouris, Note, *Is Delaware Still a Haven for Incorporation*, 20 DEL. J. CORP. L. 965, 1004 (1995) (“Courts [in other states] can elect to follow Delaware precedents, and have often done so.”); cf. also *Cohen v. Mirage Resorts, Inc.*, 62 P.3d 720, 726 n.10 (Nev. 2003) (noting that “[b]ecause the Legislature relied upon the Model Act and the Model Act relies heavily on New York and Delaware case law, we look to the Model Act and the law of those states in interpreting the Nevada statutes”).

a foreign court with the choice of their origin state's substantive law precisely because of the practical problems involved. Similarly, the parties will generally not choose a foreign court to apply their origin state's substantive law if one can expect the foreign court to be significantly less competent with respect to the relevant substantive law. In the same vein, concerns that the foreign court might make insufficient efforts to produce good case law don't seem overly serious. After all, some of the ingredients that are essential to the production of good case law—such as intelligent and impartial judges and competence regarding the applicable law—are likely to be present even if the chosen court applies foreign law; otherwise, the court would not have been selected in the first place. Moreover, the interpretation of state law by U.S. federal courts exercising diversity jurisdiction is not generally considered to have compromised the quality of state law—indeed, rather the contrary is considered true.

Now consider a case for which clear precedent exists in the (potential) host state but not in the origin state. If the case is governed by host-state law, it will likely be settled rather than litigated. If instead the case is governed by origin state law, the resulting uncertainty may result in litigation. That will involve extra expense for the parties immediately involved, but may also produce precedent valuable to those litigants forced to use origin-state rather than host-state law and courts (for example, because they are not merchants). The result is akin to the exit/voice tradeoff discussed below.<sup>56</sup> To the extent that host-state precedents can serve as a guide to origin-state courts, the tradeoff favors having the case governed by host-state law and courts. But host-state case law may not always be suited to serve a strong precedent-like function in the origin-state legal system because of differences in the two states' legal cultures. And even if they might serve that function well, host-state precedents may, by virtue of their foreignness, have too little salience for judges, lawyers, and individual economic actors in the origin state to guide their actions as clearly as origin-state precedents.

In sum, good reasons support our belief that the positive externalities of adjudication will tend to be greater with freer access to extraterritorial litigation, though we readily concede that this does not necessarily have to be the case.

#### b. *Judicial Expertise*

Similar considerations apply to the development of judicial expertise. As a general matter, there is reason to believe that the positive externalities in the form of judicial expertise will be particularly

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<sup>56</sup> See *infra* Part III.B.2.

great in cases in which the parties opt for extraterritorial litigation: A host-state judge who specializes in commercial contractual disputes may gain useful expertise at the margin from hearing a case involving novel law or facts—expertise that can be applied in related cases as they come before her. In contrast, a generalist judge in an origin state where such cases are rare may never hear another case like it.

But again, one can also imagine scenarios where extraterritorial litigation reduces rather than increases the positive externalities from judicial specialization. For example, the number of homegrown commercial cases decided in New York may be so great that New York's commercial division judges can develop most of the benefits associated with specialization even without foreign litigants. The ability of judges in origin states to specialize may, by contrast, suffer if a sizable percentage of litigants opt to litigate in New York, preventing origin state courts from hearing a critical mass of commercial cases.

### c. *Redistribution*

Setting aside the question of whether extraterritorial litigation will increase or decrease the positive externalities of judging in the aggregate, one must also address the question of redistribution. Might extraterritorial litigation be accompanied by an undesirable redistribution of wealth from (relatively poor) origin states to (relatively rich) host states? Quite likely not. Commercial actors in origin states—whether they litigate or simply contract in the shadow of contract law—should benefit substantially from the availability of host-state law and courts. And origin states may be able to save on some of the expenses of operating their own judicial system—though the amounts involved seem likely to be small. A judgment about likely distributional effects, however, also requires further consideration of the welfare of origin-state residents who cannot avail themselves of the law and courts of foreign host states; we turn to this issue next.

## 2. *Weakening Voice by Exit*

As Albert Hirschman famously observed, competition for local services, including particularly public services, can sometimes weaken incentives for consumers to press established local providers to improve their services.<sup>57</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 to reform local courts. Consequently, the quality of adjudication for

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<sup>57</sup> ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 26–29 (1970), available at <http://quod.lib.umich.edu/cgi/t/text/text-idx?c=acls;idno=heb04043>.

those types of cases that are not appropriate for litigation in foreign courts<sup>58</sup>—such as tort cases and perhaps consumer contract cases<sup>59</sup>—might even decline.

This tradeoff between “exit” and “voice” must be taken seriously. It is very difficult, however, to judge a priori how important a problem it might be, or whether it will in fact be a problem at all. This is a situation in which exit and voice could be complements rather than substitutes: access to foreign courts might actually *increase* political pressure for reform at home. Exposure to well-functioning foreign courts should make the weaknesses of local courts clearer, more salient, and less easily rationalized to local merchants. And those merchants will continue to be subject to local courts for a broad range of cases—such as those involving regulation, taxation, property, torts, and perhaps consumer and labor contracting. Indeed, as access to foreign courts helps make commercial contracting become more sophisticated, those other matters that must be litigated locally are likely to become more sophisticated as well and further increase the importance of strong local courts for local merchants. Moreover, nonmerchants who cannot use foreign courts to resolve their disputes may become, as a result of the invidious position in which they are placed vis-à-vis those who can litigate extraterritorially, more aware of the deficiencies of local courts and more impatient with them.

Courts are not infant industries that need protection to mature. On the contrary, in most countries they are well established. The problem, in fact, is that they are *too* well established and resistant to reform. Extending their monopoly on adjudication consequently seems a doubtful approach to stimulating their improvement.

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<sup>58</sup> A similar criticism has been raised against so-called bilateral investment treaties (BITs). Such treaties often provide foreign investors with a number of legal guarantees that are to protect them against opportunism on the part of the home state. For example, BITs often provide that foreign investors will be able to resolve contractual disputes with the host states through international commercial arbitration. Ronald J. Daniels, *Defecting on Development: Bilateral Investment Treaties and the Subversion of the Rule of Law in the Developing World* 1–2 (Draft Mar. 23, 2004), *available at* <http://www.unisi.it/lawandeconomics/stile2004/daniels.pdf>. According to Daniels, BITs have “have systematically subverted the evolution of robust rule of law institutions in the developing world.” *Id.* at 2. “This subversion,” he argues, “is the result of a complex dynamic in which foreign investors rationally refrain from championing good and generalized rule of law reforms in the developing state, preferring instead to protect their interests by relying on the BIT rule of law enclave.” *Id.*

<sup>59</sup> In tort cases, the parties often lack a prior contractual relationship and hence cannot select a foreign forum *ex ante* and will often have difficulty reaching an agreement regarding the forum *ex post*. And, as we have observed, even in some contracts cases—specifically those contracts, such as consumer contracts, in which strong informational asymmetries are to be expected—the law is well advised not to allow the free use of forum selection clauses. *Cf. infra* Part III.A.1 (addressing the problem of informational asymmetries).

### 3. *Burdening 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 keep secret for personal or business reasons. With global access to judicial services, the magnitude of these costs may grow. 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 do not have the capacity to force witnesses from other jurisdictions to cooperate.<sup>60</sup> To facilitate the emergence of a market for judicial services, however, it is 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 way 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.<sup>61</sup> For example, if, in a given case, the parties and the witnesses are located in Argentina, but the parties decide to litigate in London, then, under the rule suggested, the London court could not burden the witness beyond what Argentinean law would have allowed. In this way, increased externalities can be largely avoided.

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<sup>60</sup> This is true for the United States. See Rhonda Wasserman, *The Subpoena Power: Pennoyer's Last Vestige*, 74 MINN. L. REV. 37, 39 (1989) (noting that states uniformly refuse to exercise extraterritorial subpoena power). The same is true internationally. The relevant rules 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, 847 U.N.T.S. 231. Within the European Union, the situation is more complex. There, the issue is governed by the Council Regulation (EC) No. 1206/2001, Cooperation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters, 2001 O.J. (L 174) 1 [hereinafter Regulation 1206/2001]. According to that regulation, a court in one member state (the requesting court) can request the court of another member state to take evidence, and the requested court cannot, as a general rule, refuse to honor that request. *Id.* arts. 1, 10, 2001 O.J. (L 174) at 3, 5. Where necessary, the requested court even has to use coercive measures to fulfill the request. *Id.* art. 13, 2001 O.J. (L 174) at 6.

<sup>61</sup> As regards the European Union, Regulation 1206/2001 follows this approach at least in part. For example, the requested court will not execute a request for the hearing of a person when the law of the member state of the requested court grants a right to refuse to give evidence and the person concerned invokes that right. Regulation 1206/2001, *supra* note 60, art. 14, 2001 O.J. (L 174) at 6. Similarly, the requested court will only apply coercive measures to the extent that such measures are provided for by the law of the member state where the requested court is located. *Id.* art. 13, 2001 O.J. (L 174) at 6.

### C. Sovereignty, Dignity, and Protectionism

Litigation of domestic disputes in foreign courts is sometimes said to be inconsistent with the “sovereignty” of the state of origin.<sup>62</sup> The principled concern reflected in such statements is that the government of the origin state will lose some of its ability to govern its citizens’ affairs.

However, given the substantial degree of contractual freedom that most modern states already give to merchants and the widespread willingness to accept private arbitration of contractual disputes, the diminution in governmental control over commercial affairs should generally be modest. In this respect, as we discuss below,<sup>63</sup> contract law is quite different from fields such as tort law and criminal law, in which involvement by foreign courts raises much more serious problems. An alternative for a state that is concerned about maintaining close control over commercial contracting would be to permit its citizens to litigate domestic disputes in foreign courts but to require that their affairs be governed by the origin state’s own substantive contract law. This is, however, a distinctly second-best approach in any area of law; in a field such as contract law—in which canons of interpretation are a critical element in adjudication—it is particularly unsatisfactory. States unwilling to give contracting parties a choice of law are, then, unlikely participants in a regime of extraterritorial litigation—and would of course retain their freedom not to participate.

Expressions of concern about sovereignty may also reflect issues that are dignitary rather than substantive. Even if there is no meaningful difference in the substantive law involved, if a state’s citizens choose a foreign court over a domestic court, that choice is easily interpreted as a slight on the quality of the origin state’s ability to govern its own affairs. This perhaps explains why, as we explore below,<sup>64</sup> most nations recognized the validity of decisions by private arbitrators in international commercial disputes involving their citizens half a century ago, but have yet to commit themselves to grant similar recog-

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<sup>62</sup> Cf. Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 *FORDHAM L. REV.* 291, 303 (1988) (stressing that choice of forum has implications for sovereignty because “[t]he notion of forum access, regulated by subject matter jurisdiction, is a fundamental governmental attribute intricately tied to the power and authority of the state”); cf. also William W. Park, *Illusion and Reality in International Forum Selection*, 30 *TEX. INT’L L.J.* 135, 200 (1995) (noting, implicitly, that a statute allowing choice of court clauses would further erode the sovereignty of national courts). With respect to substantive corporate law, commentators have made a similar argument. See, e.g., Kent Greenfield, *Democracy and the Dominance of Delaware in Corporate Law*, 67 *LAW & CONTEMP. PROBS.* 101, 101 (2004) (“Even if Delaware’s dominance is a race to the top resulting in a corporate law framework that efficiently serves the interests of shareholders, it is still illegitimate.”).

<sup>63</sup> See *infra* Part IV.D.

<sup>64</sup> See *infra* Part V.B.

dition to the validity of judgments by foreign public courts in the same class of disputes. It is hard to explain this contrast on substantive grounds: Using private arbitrators located abroad to displace local courts seemingly involves greater loss of control than would result from displacing local courts by the public courts of other states. But, at a dignitary level, things could be just the reverse. It is one thing for a government to recognize that its citizens might prefer to have their commercial disputes handled by private arbitrators in a foreign country than by the local public courts; it is another thing to recognize that its citizens might prefer the foreign country's public courts to the local public courts. The latter looks more like conceding that foreign government might be superior to local government.

On top of such dignitary concerns, objections to loss of sovereignty may also serve as a stand-in for the protection of narrower interests. Origin-state judges, in particular, may fear that the availability of extraterritorial litigation will bring personal loss of power and status (and, for those that are corrupt, loss of income as well). And established local lawyers may fear loss of business to foreign lawyers or to local lawyers familiar with the law of host states.

Such threats to dignity and established interests are real and should not be ignored in the calculus of advantages and disadvantages of a more liberal regime of extraterritorial litigation. However, as demonstrated by the regular public outcry over the off-shoring of industries and the closing of firms that are national champions, similar costs are involved in letting local citizens obtain any good or service from foreign suppliers. And as with other goods and services, the gains to the local consumers—which here potentially include most merchants, and in turn their customers—seem very likely to swamp the losses. Of course, we are not blind to the fact that adjudication is, as a judicial service, of a specifically governmental nature in a way that most other products are not. Rather, we wish to stress that in the specific dimensions at issue here—the prospect of losing business to other countries and the damage to national self-esteem—judicial services are not fundamentally different from other highly visible products.

#### D. Extraterritorial Litigation in Other Fields of Law

The field in which access to foreign courts has previously gained the most attention is, of course, not contract law but corporate law.

In the United States, basic corporation law is state law,<sup>65</sup> and choice of law doctrine permits a corporation to be formed under the

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<sup>65</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, 553 (2002) (noting that “[i]n the United States, most corporate law issues are left for state law”).

corporation law of any state, whether or not the corporation has shareholders, employees, assets, or places of business in that state.<sup>66</sup> Recent decisions of the Court of Justice of the European Communities have extended this liberal choice of law doctrine as well to Europe;<sup>67</sup> previously a number of states had required a company to incorporate in the state of the company's principal place of business.<sup>68</sup>

The desirability of allowing corporations to choose the applicable corporate law has long been the subject of debate. The argument in favor of it parallels that offered here for permitting contractual relations to be governed by foreign law and foreign courts.<sup>69</sup> The contrary argument focuses principally on the agency conflict between managers and shareholders and reasons that corporations will end up in jurisdictions that benefit the former at the expense of the latter.<sup>70</sup>

Although there is good reason to believe that, on balance, shareholders benefit if corporations are allowed to choose the substantive law that governs corporate affairs,<sup>71</sup> one need not accept that judgment to conclude that broad access to extraterritorial litigation for commercial contracts is desirable. In the context of commercial contracts, an agency conflict comparable to that between managers and shareholders simply does not exist. Moreover, unlike in corporate law, where managers sometimes successfully obtain shareholder ap-

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<sup>66</sup> See, e.g., *id.* (pointing out that "corporations are free to choose where to incorporate and thus which state's corporate law system will govern their affairs").

<sup>67</sup> The relevant cases are Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, 2003 E.C.R. I-10155; Case 208/00, *Überseering BV v. Nordic Constr. Co. Baumanagement GmbH (NCC)*, 2002 E.C.R. I-9919; Case 212/97, *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*, 1999 E.C.R. I-1459. For an analysis of these cases and their importance to the freedom to choose the applicable corporate law, see Dammann, *supra* note 49, at 484–86; Christian Joerges, *The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline*, 14 DUKE J. COMP. & INT'L L. 149, 173–83 (2004).

<sup>68</sup> See Dammann, *supra* note 49, at 479 n.9 (listing member states that applied the law of the jurisdiction where the corporation's "real seat" was located rather than the law of the state of incorporation).

<sup>69</sup> Cf., e.g., ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 16 (1993) (asserting that state competition "benefits rather than harms shareholders"); Roberta Romano, *Competition for Corporate Charters and the Lesson of Takeover Statutes*, 61 FORDHAM L. REV. 843, 847 ("While state competition is an imperfect public policy instrument, on balance it benefits investors.").

<sup>70</sup> E.g., Lucian Arye Bebchuk & Allen Ferrell, *Federalism and Corporate Law: The Race to Protect Managers from Takeovers*, 99 COLUM. L. REV. 1168, 1199 (1999) ("There are strong theoretical reasons to expect that state competition will work to produce a body of corporate law that excessively protects incumbent managers. The development of state take over law, we have argued, is consistent with this view."); Lucian A. Bebchuk, *Letting Shareholders Set the Rules*, 119 HARV. L. REV. 1784, 1812 (2006) ("Overall, there is a strong basis for concluding that state law has been and continues to be distorted in management's favor.").

<sup>71</sup> As regards the United States, see the sources cited *supra* note 69. With respect to the situation in Europe, see Dammann, *supra* note 49, at 542 (arguing that "free choice is . . . [a] desirable policy choice for the European Community").

proval for decisions that benefit the managers at the shareholders' expense,<sup>72</sup> parties to commercial contracts do not run the risk that the initially agreed upon selection of a forum will later change to their detriment. Consequently, the argument for limits on the ability of (some of) the parties to a corporation to choose and change the law and courts by which they will be governed is weaker than in the case of commercial contracts.

Interestingly, outside of corporate law, the areas of law in which proposals for extraterritorial adjudication have drawn the most conspicuous attention involve torts<sup>73</sup> and crime.<sup>74</sup> However, when it comes to establishing a global market for judicial services,<sup>75</sup> these fields are clearly far less suitable than contracts for use of a foreign forum, much less for application of foreign law. The reason, of course, is that torts and crimes involve situations in which the persons involved generally cannot adjust their relationships privately before their litigation-inducing conflict arises. The expectations that govern their relationship must therefore be established by a social contract and not a private one. Generally, the role of government is to set the terms of this social contract, and the role of choice of law doctrine is to determine which government's law and courts will govern. If parties to a conflict can—either individually or collectively—change that determination, the ability to establish clear expectations will be diminished for all. Although litigation in foreign courts may sometimes be appropriate in other types of disputes, only in the area of commercial contracts is the case for making that option generally available strong.

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<sup>72</sup> See, e.g., Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 862–65 (2005) (describing ways in which directors can obtain the consent of shareholders to charter amendments that benefit directors at the expense of shareholders).

<sup>73</sup> Cf. Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 833 (2006) (noting that litigation under the Alien Tort Statute has included “suits by aliens against other aliens for torts committed abroad without any apparent connection to the United States”); Jeffrey Rabkin, Note, *Universal Justice: The Role of Federal Courts in International Civil Litigation*, 95 COLUM. L. REV. 2120, 2123–55 (1995) (analyzing the question to what extent federal courts have jurisdiction over torts committed outside U.S. territory).

<sup>74</sup> See, e.g., Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057, 1064–1134 (2004) (explaining how the prosecution of criminal acts committed in another country can be reconciled with the principle of democracy); Hari M. Osofsky, Note, *Domesticating International Criminal Law: Bringing Human Rights Violators to Justice*, 107 YALE L.J. 191, 193–226 (1997) (analyzing the extent to which human-rights violations that occurred outside the United States can be prosecuted under domestic U.S. criminal law); Beth Van Schaack, Note, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L.J. 2259, 2272–91 (1997) (arguing that national courts may exercise universal jurisdiction over the crime of genocide).

<sup>75</sup> The extent to which other good reasons are available for extraterritorial litigation in torts or for the prosecution of extraterritorial crimes is a question that lies beyond the scope of this article.

Viewed broadly, for any nation seeking to develop a market economy, the costs of facilitating merchants' access to extraterritorial litigation seem quite modest in comparison with the potential benefits. Indeed, the difficult issue is not whether it is a good idea, but rather how it can be made to work.

#### IV

##### PRACTICAL OBSTACLES

Whatever its attractions in principle, extraterritorial litigation might seem to face serious practical obstacles. There is reason to believe, however, that these obstacles are unlikely to prevent the emergence of a global market for judicial services: Although many individual litigants may find the obstacles insurmountable, the decisive point is that many other litigants will not.

##### A. Distance

First, there is the inconvenience of having to litigate in a forum that is geographically distant. Especially for lawsuits in which the stakes are small, travel to a foreign court will often be impractical. But, as we have already observed, there is every reason to believe that this obstacle can soon be eliminated in large part through the use of videoconferencing. Although it may be some time, if ever, before that technology is a perfect substitute for appearance in person, its deficiencies are soon likely to be reduced to the point where they are far smaller than the burdens of litigating in weak local courts.

##### B. Language

It is obviously burdensome to litigate in a foreign language. This said, language barriers are unlikely to prevent a sharp increase in extraterritorial litigation. Many nations share a common language. English, French, and Spanish, in particular, are each spoken in many countries around the globe. Our hypothetical merchants in Bangalore, for example, would have no trouble communicating with a judge in London or New York. Even the Italians might escape the weaknesses of their courts by crossing the border to the Italian-speaking courts of southern Switzerland. Moreover, once extraterritorial litigation becomes well established, leading jurisdictions could easily offer adjudication in other languages. Already, many judges in the United States speak Spanish, for instance, and it should not be difficult to find many more who speak Chinese or Russian.

##### C. Different Legal and Commercial Cultures

When parties litigate in a foreign court, there are several obvious alternatives for the choice of substantive law: the law of the origin

state, the law of the host state, a supra-national body of law such as the Convention on Contracts for the International Sale of Goods (CISG),<sup>76</sup> or the nonbinding UNIDROIT Principles of International Commercial Contracts.<sup>77</sup> The economies of scale and scope of adjudication discussed above, as well as current patterns of litigation,<sup>78</sup> suggest that the first of these (the law of the origin state) will be least favored and that the second (the law of the host state) will be most favored.

Will our hypothetical merchants in Bangalore find the burdens of learning English law and of adjusting their commercial practices to that law to outweigh the usefulness of English courts? Some surely will, but, quite likely, numerous others will not.

First, many countries—and particularly those that share a common language—share a common legal tradition. Consequently, the relevant differences in commercial law may sometimes be relatively modest. Second, only one, or at most a very few, jurisdictions are likely to emerge as important loci for extraterritorial contract litigation in any given language, just as Delaware has emerged as the single locus for corporate law and litigation in the United States and London has become the worldwide locus for admiralty disputes.<sup>79</sup> And, just as lawyers from all U.S. states (and an increasing number of other nations) have become familiar with Delaware law, lawyers in any given origin state can be expected to develop expertise in the law of the dominant host state for contract law. Third, some contracts will be governed by uniform law, such as the Convention on Contracts for the International Sale of Goods.<sup>80</sup> Accordingly, the courts of the host state will be just as expert as the courts of the state of origin when it comes to issues of substantive law. Fourth, many contracts cases turn less on intricate questions of substantive law than on factual issues and

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<sup>76</sup> United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. EXEC. DOC. NO. 98-9, 1489 U.N.T.S. 3.

<sup>77</sup> International Institute for the Unification of Private Law, UNIDROIT Principles of International Commercial Contracts 2004, available at <http://www.unidroit.org/english/principles/contracts/main.htm>. On the role of these principles, see Michael Joachim Bonell, *The CISG, European Contract Law and the Development of a World Contract Law*, 56 AM. J. COMP. L. 1, 16–26 (2008) (explaining the relevance of the UNIDROIT Principles); Alec Stone Sweet, *The New Lex Mercatoria and Transnational Governance*, 13 J. EUR. PUB. POL'Y 627, 633 (noting that the UNIDROIT Principles purport to be a comprehensive code for international commerce). Regarding their practical importance, see Bonell, *supra*, at 21 (noting that “recent experience shows that in practice, parties more and more often agree on the UNIDROIT principles as the law governing their contract”).

<sup>78</sup> See *infra* Part VII.A.

<sup>79</sup> Fred Konynenburg et al., *Shipping Dispute Resolution Forums: Competition and Cooperation*, H.K. LAW., Nov. 2006, at 78, 78 (noting that “London has enjoyed a traditional pre-eminence as an arbitration and court forum [in shipping dispute resolution], due to its imperial roots in the international shipping industry and commodity markets”).

<sup>80</sup> United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. EXEC. DOC. NO. 98-9, 1489 U.N.T.S. 3.

matters of contract interpretation. And fifth, commercial law, driven by the needs of expanding global commerce, is becoming increasingly homogeneous around the world, rendering cross-country differences in commercial law less important.

#### D. Availability of Legal Counsel

Extraterritorial litigation requires access to lawyers who can litigate contract disputes in the courts of the host state. To the extent that the parties combine their choice of the host state's court with the choice of that state's substantive law—a combination that may often maximize the benefits of extraterritorial litigation—the lawyers also need to be able to give advice on the law of the host state at the time of contract formation. It is likely to be most efficient if those lawyers are principally located in the origin state, close to the parties they serve. An important reason is that many of the legal relationships that a firm enters into—such as those involving public regulation, taxation, or ownership of property—will be governed by the law of its home jurisdiction. Accordingly, the firm will often want lawyers who are also familiar with local law and institutions.

Local lawyers who meet these requirements are not available in many parts of the world today. Even in Germany or France, much less in developing countries, most law firms have traditionally lacked lawyers who are licensed to litigate in a foreign country. However, this situation is quickly changing. Cross-jurisdictional law firms are rapidly emerging that can represent a client both in his state of origin and in the host state with offices or affiliates all over the world. Moreover, governments are removing restrictive legal practice rules that interfere with this evolution. Thus, in the United States, individual states can no longer demand a local residence as a precondition for admission to the local bar, because the Supreme Court has made clear that such residency requirements violate the Privileges and Immunities Clause.<sup>81</sup> Consequently, an attorney does not have to reside in New York State in order to be admitted to the New York bar.<sup>82</sup>

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<sup>81</sup> See *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 288 (1985) (concluding that a rule imposing an in-state residency requirement as a precondition for admission to the New Hampshire bar violated the Privileges and Immunities Clause).

<sup>82</sup> Furthermore, at least within the United States, admission to the bar of another jurisdiction is relatively simple. A law school graduate does not need a degree from an in-state law school, as long as her law school is ABA-approved. In many jurisdictions, admission to the local bar is possible without taking the bar exam as long as the candidate has practiced for a sufficient amount of time in another U.S. state. Moreover, even if a candidate must take the bar exam in order to be admitted to the bar, that hurdle should not be overestimated. Although the bar exam typically has a state law component, the relatively limited length of bar review courses (typically no more than two months), as well as the usually relatively high bar passage rates among first-time exam takers, suggest the bar exam is not an insurmountable hurdle for attorneys.

### E. Summing Up

All other things equal, litigating locally is superior to litigating at a distance. But in commercial litigation, all other things are not equal.

There seems every reason to believe that, for broad classes of commercial disputes in many jurisdictions, the burdens of extraterritorial litigation can be constrained sufficiently to make it a superior alternative to litigating locally in weak courts. The strong tendency of corporations from all over the United States and abroad—including not just publicly traded corporations but large privately held corporations as well<sup>83</sup>—to choose Delaware law and courts is evidence of this. The extensive use of international arbitration offers further evidence. Indeed, one might wonder whether the availability of arbitration obviates the need for extraterritorial litigation. We turn to that issue next.

## V

### THE INADEQUACIES OF ARBITRATION

Even if the public courts of foreign nations might often be superior to local courts in resolving commercial disputes for litigants from countries with weak judicial systems, one should also ask whether private arbitration might offer an even better alternative. There is strong reason to believe that the answer is no: Although arbitration will continue to play an important and perhaps growing role in dispute resolution, for the foreseeable future arbitration is unlikely to be an adequate substitute for public courts.<sup>84</sup>

### A. Empirical Evidence

The first reason for this conclusion is empirical. In practice, arbitration does not seem to compete strongly with well-functioning public courts.<sup>85</sup>

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<sup>83</sup> See Jens Dammann & Matthias Schündeln, *The Incorporation Choices of Privately Held Corporations* 5 (The Univ. of Tex. Sch. of Law, Law and Econ. Research Paper 119, 2007) (finding that only about half of those closely held firms that have more than 1000 employees are incorporated in the state where their primary place of business is located and that “of those that are incorporated elsewhere, about 80% are incorporated in Delaware”).

<sup>84</sup> Cf. Henry Hansmann, *Corporation and Contract*, AM. L. & ECON. REV. 1, 14–15 (2006) (arguing that states are superior to arbitrators at providing norms in part because they are more likely to adjust these norms to changing circumstances in a manner that is not biased toward any of the parties involved).

<sup>85</sup> Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in Publicly-Held Companies' Contracts* 29 (Cornell Legal Studies Research Paper Series, Paper No. 06-023, 2006), available at <http://ssrn.com/abstract=927423>. Interestingly, arbitration clauses appear to be more prevalent in consumer contracts which are, of course, beyond the scope of this analysis. See Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 MICH. J.L. REFORM 871, 876, 881

The best data available derive from Professors 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>86</sup> The relevant contracts were of sufficient importance to be deemed material to the relevant corporation's affairs and were therefore filed with the Securities Exchange Commission. Overall, only 11% of these contracts included binding arbitration clauses—10% of the domestic contracts and a still-small 20% of the international contracts (defined as those involving a non-U.S. party).<sup>87</sup> Of the 89% of the contracts 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>88</sup>

In short, the overwhelming majority of these contracting parties—who were sophisticated, well represented by legal counsel, and with 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 particular 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 other commercial contracts would be—in particular, those contracts of more modest value. But the sample itself provides no indication of this. The sample includes contracts dealing with a broad range of subjects, including mergers and acquisitions, sales of assets, commercial debt, and employment of senior executives. Moreover, the sample's more standardized contracts called for arbitration less often than the more idiosyncratic ones.

## B. International Arbitration

The Eisenberg and Miller data confirm the conventional wisdom that arbitration is more popular in international contracts than in domestic contracts—though they still only find arbitration clauses in 20% of the international contracts in their sample, despite anecdotal estimates that have often run much higher.<sup>89</sup> In any event, the rea-

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(2008) (examining a sample of 26 consumer contracts from large public corporations and finding that three quarters provided for mandatory arbitration).

<sup>86</sup> The construction of the sample, which Eisenberg and Miller explore in several essays, is most thoroughly described in *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in Publicly-Held Companies' Contracts*. Eisenberg & Miller, *supra* note 85, at 18–20.

<sup>87</sup> *Id.* at 21–23.

<sup>88</sup> Computed from figures in Theodore Eisenberg & Geoffrey Miller, *The Market for Contracts* 10, 17, 19 (N.Y.U. Ctr. for Law & Econ., Law & Econ. Research Paper Series Working Paper No. 06-45, 2006), available at <http://ssrn.com/abstract=938557>.

<sup>89</sup> *Cf.* Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279, 1281 (2000) (asserting that “most international contracts now

sons for choosing arbitration over courts in international disputes today need not extend to extraterritorial litigation in the future.

According to a broad survey of participants in international arbitration, the two dominant reasons for choosing arbitration over courts are neutrality of the forum and enforceability of judgments in other jurisdictions.<sup>90</sup> The advantage in neutrality can be explained by the fact that the alternative to arbitration is to have the dispute adjudicated in the courts of one of the parties' home countries because a judgment from the courts of a third state might not be enforceable. So the neutrality advantage is a derivative of the advantage in enforceability.

The advantage in enforceability is, in turn, largely a consequence of the present state of international law. The New York Convention of 1958,<sup>91</sup> which provides widespread international enforcement of arbitral decrees, has been signed by more than 140 countries.<sup>92</sup> By contrast, the Hague Convention on Choice of Court Agreements, which would guarantee similar advantages with respect to foreign court decisions, has still not entered into force. If, as we discuss below, this imbalance is rectified, then arbitration will lose its important enforceability advantage over courts and, as a consequence, its neutrality advantage as well.<sup>93</sup>

### C. Arbitration's Handicaps

Why do contracting parties seem to prefer public courts to private arbitration if—as in most of the contracts sampled by Eisenberg and Miller—the neutrality of the courts and the enforceability of their judgments is not in serious doubt? The principal answer, it appears, is that arbitration, as it is typically practiced today, is a rather different

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contain an arbitration clause, making arbitration, rather than court proceedings, the most common form of dispute resolution for these transactions"); *id.* at 1281 n.3 (citing Andreas F. Lowenfeld, *Can Arbitration Coexist with Judicial Review? A Critique of LaPine v. Kyocera*, ADR CURRENTS, Sept. 1998, at 1, 15 n.28, which provides an estimate that as much as 90% of certain types of large international transactions include arbitration clauses).

<sup>90</sup> CHRISTIAN BÜHRING-UHLE ET AL., *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 107–10 (2d ed. 2006).

<sup>91</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 on December 29, 1970).

<sup>92</sup> A list of the nations that are bound by the convention is available on the website of the United Nations Commission on International Trade Law (UNCITRAL), Status: 1958–Convention on the Recognition and Enforcement of Foreign Arbitral Awards, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited Sept. 7, 2008).

<sup>93</sup> See Linda Silberman, *International Arbitration: Comments from a Critic*, 13 AM. REV. INT'L ARB. 9, 10–11 (2002) (stressing that with respect to predictability, “court adjudication and arbitration might well look more balanced” if international law guaranteed the enforcement of choice of forum clauses in the same way that it now guarantees the enforcement of arbitration clauses).

service than that offered by courts.<sup>94</sup> Broadly speaking, arbitration serves primarily as a means of ex post dispute resolution, seeking to offer an acceptable settlement of a conflict once it has arisen. Adjudication in public courts, in contrast, is more focused on holding parties to the contractual commitments they made ex ante, before a conflict arose.

This view of arbitration is supported by survey data showing that participants find that courts have an advantage over arbitration in reaching predictable decisions.<sup>95</sup> An important reason for this advantage is that arbitrators are commonly chosen (directly or indirectly) and paid by the parties, giving the arbitrators 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.<sup>96</sup> Another rea-

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<sup>94</sup> Extensive references to the large literature on the relative advantages of arbitration and courts—albeit a literature that is scarce on systematic data—are provided in Eisenberg & Miller, *supra* note 85, at 2–9.

<sup>95</sup> BÜHRING-UHLE ET AL., *supra* note 90, at 108 (reporting that a majority of survey respondents find arbitration less predictable than courts); cf. David E. Bloom, *Empirical Models of Arbitrator Behavior Under Conventional Arbitration*, 68 REV. ECON. & STAT. 578, 585 (1986) (analyzing 55 arbitration decisions and finding a “systematic tendency” of conventional arbitrators to “split-the-difference between the parties’ final offers with little additional systematic reference to the facts of the cases”); Robert A. Baruch Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893, 989 n.204 (1984) (“To the extent the arbitrator follows a certain set of rules and makes them known, he decreases his business, since those who would stand to lose under his rules would never agree to use his services.”); G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623, 633 (1988) (“Research on this subject suggests that arbitrators do indeed ‘split the difference’ between the conflicting demands of the parties, though it is impossible to say with what frequency this occurs.”); Silberman, *supra* note 93, at 11 (claiming that a “basic flaw of international arbitration” is “its almost ‘lawless’ character as regards national law”); John V. O’Hara, Comment, *The New Jersey Alternative Procedure for Dispute Resolution Act: Vanguard of a “Better Way”?*, 136 U. PA. L. REV. 1723, 1743 (1988) (noting that “arbitrators frequently compromise on decisions rather than resolve the underlying dispute between the parties”); Michael A. Scodro, Note, *Arbitrating Novel Legal Questions: A Recommendation for Reform*, 105 YALE L.J. 1927, 1948 (1996) (noting that “arbitration’s exclusive focus on the resolution of the claim at issue may result in a compromise solution where a court would have resolved the claim more absolutely”).

<sup>96</sup> See, e.g., Henry S. Farber & Max H. Bazerman, *The General Basis of Arbitrator Behavior: An Empirical Analysis of Conventional and Final-Offer Arbitration*, 54 ECONOMETRICA 819, 822 (1986) (“[O]ne possible motivation for arbitrators is that they attempt to make awards that maximize the probability they will be hired in subsequent cases . . . . The process by which arbitrators are selected for cases varies across settings, but it is generally true that both parties have a limited veto power. . . . Clearly, selection procedures such as this provide the incentive for the arbitrator to avoid making awards that are unacceptable to either party.”); O’Hara, *supra* note 95, at 1743 (“Considering that the parties normally select the arbitrators, and that the arbitrators only derive income when they work, it does not require much imagination to realize that an arbitrator has a strong interest in keeping everyone as happy as possible. The best method of accomplishing this is compromise; thus, in the typical arbitration, neither side is as likely to prevail as in the ‘winner-take-all’ style of adjudication.”); cf. Bloom, *supra* note 95, at 578 (“[I]t might be the case that arbitrators often make

son for unpredictability is that, in keeping with the parties' ability to choose their own arbitrators and to reduce time and expense, arbitral decisions are generally not subject to appeal to the extent that judgments are.<sup>97</sup> And a third reason is that, in part to provide confidentiality to the parties, the transparency of arbitration awards still tends to be limited, frustrating both principled criticism of arbitral decisions and their use as precedents.<sup>98</sup>

Unprincipled and unpredictable decisions bring high costs. A fundamental reason for negotiating and drafting a contract is to constrain the parties' future behavior and render it predictable. Each party to a contract, at the time of its signing, benefits from being able to bond his performance of the obligations he has assumed and to rely on the other party being likewise bound. If third-party enforcement is to be effective in serving this end, it is important that, when a decision maker is called upon to resolve a dispute, the decision maker interprets and enforces the contract as the parties intended when it was written. Compromise judgments minimize collective offense to the parties *ex post*. But the expectation of such judgments weakens the parties' ability to structure their transaction *ex ante*.<sup>99</sup>

Evidence of the importance of this consideration is offered by the state of New York, which 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>100</sup>—including New York<sup>101</sup>—allow the use of

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decisions by reaching a mechanical compromise between the parties' final offers, without paying much attention to the merits of the case. This might be an optimal strategy for arbitrators who want to project an image of fairness so they are hired again by the parties.”).

<sup>97</sup> Cf. Jill I. Gross, *McMahon Turns Twenty: The Regulation of Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 493, 503 (2008) (noting that “judicial review of arbitration awards is extremely narrow”); Silberman, *supra* note 93, at 11 (noting “the lack of a genuine appeal” in arbitration proceedings). See generally Daniel M. Kolkey, *Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations*, 22 INT'L LAW. 693, 695–714 (1988) (discussing the pertinent rules in several countries including the United States and England).

<sup>98</sup> Silberman, *supra* note 93, at 11 (“By and large, arbitration remains confidential and even though one can now access published decisions by arbitrators, it would be unusual to find any dialogue about the underlying legal issues decided in an arbitration.”).

<sup>99</sup> On the importance of ensuring the enforcement of contractual commitments, see, e.g., Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 557–66 (2003) (explaining the conditions under which legal enforcement of contractual promises is necessary for welfare maximization).

<sup>100</sup> See, e.g., 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.9, at 286–87 (2004) (“Judges are fond of asserting that . . . the “plain and ordinary meaning” doctrine is at the heart of contract construction.” (quoting *Apponi v. Sunshine Biscuits*, 652 F.2d 643, 647 (6th Cir. 1981))).

<sup>101</sup> E.g., *S. Rd. Assocs. v. IBM*, 826 N.E.2d 806, 809–10 (N.Y. 2005); *Greenfield v. Philles Records, Inc.*, 780 N.E.2d 166, 170 (N.Y. 2002).

extrinsic evidence if 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 whether or not there is any ambiguity in the text.<sup>102</sup> Another more common approach continues to 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>103</sup> New York, by contrast, stubbornly adheres to the so-called “four corners” rule: Not only will courts interpret an unambiguous contract according to its terms, without recourse to extrinsic evidence,<sup>104</sup> but New York also refuses to consider extrinsic evidence to determine whether the writing is ambiguous.<sup>105</sup> And because the question of ambiguity is a matter of law for the court to decide,<sup>106</sup> the result is that New York law offers parties to a contract a high degree of control over the governance of their affairs through careful drafting of their contract. 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, New York courts are certainly 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>107</sup> In particular, we would add, it protects against the kinds of unprincipled—and hence *ex ante* unpredictable and uncontrollable—judgments to which arbitration is prone.

This is not to deny that there are types of commercial actors, and types of disputes, for which the advantages that arbitration has to of-

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<sup>102</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).

<sup>103</sup> *E.g.*, *Walls v. Bank of Prattville*, 575 So. 2d 1081, 1083 (Ala. 1991); *Dore v. Arnold Worldwide, Inc.*, 139 P.3d 56, 59–60 (Cal. 2006); *Royal Banks of Mo. v. Fridkin*, 819 S.W.2d 359, 362 (Mo. 1991); *C.R. Anthony Co. v. Loretto Mall Partners*, 817 P.2d 238, 242–43 (N.M. 1991).

<sup>104</sup> *E.g.*, *S. Rd. Assocs.*, 826 N.E.2d at 809; *Vt. Teddy Bear Co. v. 538 Madison Realty Co.*, 807 N.E.2d 876, 879 (N.Y. 2004); *Signature Realty, Inc. v. Tallman*, 814 N.E.2d 429, 430 (N.Y. 2004); *Greenfield*, 780 N.E.2d at 170.

<sup>105</sup> *E.g.*, *S. Rd. Assocs.*, 826 N.E.2d at 810; *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998); *W.W.W. Assocs. v. Giancontieri*, 566 N.E.2d 639, 642 (N.Y. 1990).

<sup>106</sup> *E.g.*, *S. Rd. Assocs.*, 826 N.E.2d at 810; *Greenfield*, 780 N.E.2d at 170; *Kass*, 696 N.E.2d at 180; *W.W.W. Assocs.*, 566 N.E.2d at 642.

<sup>107</sup> *W.W.W. Assocs.*, 566 N.E.2d at 642 (quoting EDITH L. FISCH, *FISCH ON NEW YORK EVIDENCE* § 42, at 22 (2d ed. 1977)).

fer—such as greater confidentiality,<sup>108</sup> procedural flexibility,<sup>109</sup> and preservation of ongoing commercial relations—will remain sufficiently important to assure continued demand for arbitration, even if the alternative is a highly efficient system of public courts. But, as the Eisenberg and Miller contract sample strongly suggests, this could well represent a relatively small fraction of all commercial contracts.

Of course, the handicaps of arbitration vis-à-vis public courts might still be acceptable to contracting parties if arbitration offered economies that made it much faster or less expensive than litigation in the public courts and hence compensated for the handicaps. But generally, this appears not to be the case. Commercial arbitrators are typically individuals who have other sources of employment and who are paid by the hour for their services. Both of those features are evidently important in giving parties the broad discretion in choice of decision makers that is among the important benefits of arbitration. The consequence, however, is a weak incentive to economize on time and cost. This helps explain why survey evidence suggests that cost is not generally considered an advantage of arbitration,<sup>110</sup> and many participants do not consider speed an advantage either.<sup>111</sup>

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

It remains to ask whether alternative forms of arbitration might be developed that avoid the handicaps just mentioned and that offer the principal benefits of public courts. What if, for example, a private dispute resolution service were to (1) employ salaried full-time decision makers 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? (Some arbitration services in fact already offer one or more of these features, at least as an option for the parties.<sup>112</sup>) Might such a

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<sup>108</sup> See, e.g., Gregg A. Paradise, Note, *Arbitration of Patent Infringement Disputes: Encouraging the Use of Arbitration Through Evidence Rules Reform*, 64 *FORDHAM L. REV.* 247, 248 (1995).

<sup>109</sup> See, e.g., Stefano E. Cirielli, *Arbitration, Financial Markets and Banking Disputes*, 14 *AM. REV. INT'L ARB.* 243, 244–45 (2003); Paradise, *supra* note 108, at 248.

<sup>110</sup> See BÜHRING-UHLE ET AL., *supra* note 90, at 109 fig.4 (noting that only 41% of respondents considered arbitration to be “generally less expensive” as opposed to 43% of respondents that found arbitration “generally not less expensive”); cf. Silberman, *supra* note 93, at 9 (expressing skepticism vis-à-vis the proposition that arbitration is cheaper for the parties than adjudication).

<sup>111</sup> See BÜHRING-UHLE ET AL., *supra* note 90, at 110 fig.5 (noting that although 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>112</sup> See Sweet, *supra* note 77, at 642–43 (describing the judicialization of international arbitration). See generally Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 *TUL. L. REV.* 39, 52–61 (1999) (describing the supply of “judicialized arbitration”); Richard C. Reuben, *Process Purity and Innovation: A Response to Professors Stempel*,

private service serve as a superior alternative, for residents of nations with weak courts, to extraterritorial litigation?

There is good reason to be skeptical.<sup>113</sup> Governments have natural advantages in establishing effective judicial systems. The governments of likely host states are large, long-established, and durable entities with worldwide reputations. Their courts already have track records built up over scores, or even hundreds, of years. It could take a very long time for private services to establish equivalent renown and credibility.

Moreover, a court cannot easily vary the quality of adjudication that it provides for nonresidents 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. A private arbitration service, regardless of its mode of organization, could have difficulty allaying the suspicion that it tempers its judgments to avoid offending firms or industries that are important repeat customers.

Sovereign states can also signal the integrity of their judges by harshly punishing corruption with stiff criminal sanctions. Given that criminal sanctions cannot easily be mimicked by contractual means, arbitrators have no comparable advantage.

Finally, 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. One obvious step—and one that many jurisdictions have already taken—is to create special business programs or commercial divisions that ensure that judges can develop the expertise that comes with specialization.<sup>114</sup> Another is to develop better case management and streamlined procedures.<sup>115</sup>

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*Cole, and Drahozal*, 8 NEV. L.J. 271, 277 (2007) (noting that “[i]n some contexts, such as securities and complex commercial cases, arbitration has become highly formalized, with routine discovery and motion practice, the application of substantive legal rules, and written and reasoned awards”).

<sup>113</sup> Beyond the difficulties, noted here, that arbitration faces in mimicking the attributes of courts, there is the fact that “the more arbitration mimics litigation, the more costly the system will become to run.” Sweet, *supra* note 77, at 642.

<sup>114</sup> Cf. Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 BUS. LAW. 147, 152–202 (2004) (describing the commercial divisions and business programs set up in various U.S. states).

<sup>115</sup> The aims of the business programs and commercial divisions that U.S. jurisdictions have created over the course of the last decade typically include better case management and the avoidance of delays. Cf. *id.* at 152–53 (noting that the goals behind the creation of

In sum, although private arbitration services can be expected to continue to grow and to offer more diverse styles of adjudication, for the foreseeable future the public courts of prominent host states will likely be in a position to offer a superior alternative to domestic litigants faced with weak local courts. If public courts are to realize their full potential in this respect, however, it will first be necessary to remove some legal obstacles. We turn to those obstacles next.

## VI

### LEGAL OBSTACLES: JURISDICTION AND ENFORCEMENT

For parties to litigate extraterritorially, two basic conditions must be met. First, the parties must be able to select the forum in which they wish to litigate. Second, they must be able to have the resulting judgment recognized and enforced in their home state. At present, neither of these elements is widely established at the international level.

Our principal concern here is with litigation in which the origin state and the host state are entirely independent of each other, apart from treaties and conventions to which they are both signatories. The most extensive experience with extraterritorial litigation, however, is found—not surprisingly—within federated systems of states such as the United States and the European Union. For perspective, therefore, we begin by focusing on developments in these two systems and turn afterward to the fully international context.

#### A. The United States

Within the United States, contracting parties from one state may commit themselves to litigate in the courts of another state with relative ease. The means to do so are forum selection clauses. Following the lead of the U.S. Supreme Court,<sup>116</sup> most state courts now enforce such clauses provided that they are reasonable and do not deprive a litigant of his day in court.<sup>117</sup> To be sure, in some states the chosen

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New York's Commercial Division "included expediting cases, reducing expense, creating consistency in case management, and creating judicial expertise in business and commercial matters"); *cf. also* Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 676 (1997) ("Litigation reform efforts in the United States have sounded a consistent theme of the need to reduce expense and delay.").

<sup>116</sup> See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (holding that forum selection clauses are enforceable unless enforcement is unreasonable); see also *In re Fireman's Fund Ins. Cos.*, 588 F.2d 93, 95 (5th Cir. 1979) (holding that a forum selection clause is enforceable unless shown to be unreasonable, unfair, or unjust).

<sup>117</sup> This is true, first, for the courts of the jurisdiction that the parties have selected. *E.g.*, *Capital Group Cos. v. Armour*, C.A. No. 422-N, 2004 Del. Ch. LEXIS 159, at \*23 (Del. Ch. Oct. 29, 2004) (holding that a court will generally enforce a forum selection clause unless it denies one of the parties their day in court or places them at a substantial and

court theoretically has the power to use the forum non conveniens doctrine to decline jurisdiction despite the presence of a valid forum selection clause.<sup>118</sup> However, courts rarely invoke that power.<sup>119</sup>

Just as importantly, once a host-state court has rendered a judgment, it is relatively easy for the judgment creditor to have that judgment recognized and enforced in the defendant's home state. Under the Full Faith and Credit Clause of the U.S. Constitution, each state

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unfair disadvantage); *Aon Corp. v. Utley*, 863 N.E.2d 701, 707 (Ill. App. Ct. 2006) (holding that a forum selection clause will be enforced unless it deprives one of the parties of their day in court). *But see Vanier v. Ponsoldt*, 833 P.2d 949, 959 (Kan. 1992) (insisting on the need for a "reasonable relationship" between the transaction and the selected forum); *In re Marriage of Yount*, 122 P.3d 1175, 1179 (Kan. Ct. App. 2005) (same); *Aylward v. Dar Ran Furniture Indus.*, 87 P.3d 341, 344 (Kan. Ct. App. 2004) (same). Courts that are asked to dismiss the case because a different forum has been chosen typically enforce forum selection clauses also. *See, e.g., Ex parte Soprema, Inc.*, 949 So. 2d 907, 912 (Ala. 2006) (holding that an outbound forum selection clause will be enforced unless unfair or unreasonable); *Société Jean Nicolas et Fils, J.B. v. Mousseux*, 597 P.2d 541, 543 (Ariz. 1979) (holding that in the absence of fraud, Arizona courts will enforce a forum selection clause if the parties fairly bargain for it, it is reasonable, and it does not deprive a litigant of his day in court); *Parsons Dispatch, Inc. v. John J. Jderue Truck Broker, Inc.*, 199 S.W.3d 686, 690 (Ark. Ct. App. 2004) (holding that a forum selection clause will be enforced unless "unreasonable and unfair"); *Terry v. Student Transp. of Am.*, No. 557488, 2001 Conn. Super. LEXIS 3664, at \*5 (Conn. Super. Ct. Dec. 14, 2001) (holding that a forum selection clause is enforceable unless unreasonable); *Dexter Axle Co. v. Baan USA, Inc.*, 833 N.E.2d 43, 48 (Ind. Ct. App. 2005) (holding that a forum selection clause is enforceable if "reasonable and just under the circumstances" and "no evidence of fraud or overreaching" is shown); *Prezocki v. Bullock Garages, Inc.*, 938 S.W.2d 888, 889 (Ky. 1997) (holding that clause is enforceable unless "unfair or unreasonable"); *Forrest v. Verizon Commc'ns., Inc.*, 805 A.2d 1007, 1010 (D.C. 2002) (holding that a forum selection clause is enforceable unless unreasonable). Even in states that consider "outbound" forum selection clauses invalid, courts sometimes deem these clauses relevant to the application of the forum non conveniens doctrine. *E.g., Davenport Mach. & Foundry Co. v. Adolph Coors Co.*, 314 N.W.2d 432, 437 (Iowa 1982); *see also Roberta Romano, Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2411 (1998) (noting that "most states enforce forum selection clauses").

<sup>118</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 Entm't*, 42 Cal. Rptr. 3d 268, 274 (Cal. Ct. App. 2006). *But see e.g., Terry*, 2001 Conn. Super. LEXIS 3664, at \*8, \*12 (declaring the forum non conveniens standard inapplicable in forum selection-clause cases); *Aon Corp.*, 863 N.E.2d at 708 (finding that the defendant had waived forum non conveniens arguments by agreeing to a forum selection clause).

<sup>119</sup> *See, e.g., Olinick*, 42 Cal. Rptr. 3d at 274 (noting that "[c]laims that the previously chosen forum is unfair or inconvenient are generally rejected" (quoting *Berg v. MTC Elec. Techs.*, 71 Cal. Rptr. 2d 523, 529-30 (Cal. 4th 1998)). As regards federal courts, the forum non conveniens doctrine has largely been replaced with 28 U.S.C. § 1404(a). Under that provision, a federal district court may, "[f]or the convenience of parties and witnesses[,] . . . transfer any civil action to any other district where it might have been brought." 28 U.S.C. § 1404(a) (2000). However, the court will typically refuse to invoke this power to override the parties' choice in the presence of a valid forum selection clause. *Cf. 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"); *In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989) (noting that a forum selection clause is "rarely . . . outweighed by other 1404(a) factors").

must recognize and enforce final judgments from other states.<sup>120</sup> While states can refuse to enforce a judgment if the court that handed down the judgment lacked jurisdiction,<sup>121</sup> the Supreme Court has held that forum selection clauses are a sufficient basis for the exercise of jurisdiction.<sup>122</sup>

As a practical matter, too, the enforcement of judgments from other states is not problematic, at least if money judgments are concerned. Most states only require that a party file an authenticated copy of another state's judgment in a domestic court in order for that judgment to become enforceable.<sup>123</sup>

## B. The European Union

The European Union's legal framework makes it even easier than in the United States for contracting parties to commit to litigate in a foreign forum. However, the resulting judgment can be more difficult to enforce.

A European Council Regulation adopted in 2000<sup>124</sup> provides that forum selection clauses in contracts between merchants 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 partic-

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<sup>120</sup> U.S. CONST. art. IV, § 1. No public policy exemption to the Full Faith and Credit Clause exists. See *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233 (1934).

<sup>121</sup> *E.g.*, *Bd. of Pub. Works v. Columbia Coll.*, 84 U.S. (17 Wall.) 521, 528 (1873).

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

<sup>123</sup> All U.S. states except California, Indiana, Massachusetts, and Vermont have adopted the Uniform Enforcement of Foreign Judgments Act (UEFJA), 13 pt. I U.L.A. 155 (1986). See Nat'l Conf. of Comm'rs on Unif. St. Laws, A Few Facts About the Uniform Enforcement of Foreign Judgments Act, [http://www.nccusl.org/Update/uniformact\\_fact\\_sheets/uniformacts-fs-uefja.asp](http://www.nccusl.org/Update/uniformact_fact_sheets/uniformacts-fs-uefja.asp) (last visited Sept. 6, 2008). Under the UEFJA, the procedure prescribed for the enforcement of sister-state judgments is very simple. First, the judgment creditor must file an authenticated copy of the foreign judgment in a domestic court. UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT § 2. This requires the judgment creditor to pay a filing fee in the state in which the enforcement action will take place. However, these fees are modest in most states. In Texas, for example, the judgment creditor usually has to pay a flat fee of \$50. See TEX. CIV. PRAC. & REM. CODE ANN. § 35.007(a) (Vernon 2008) (declaring that the fee to be paid is the regular fee for filing suit); TEX. GOV'T CODE ANN. § 51.317 (Vernon 2005) (setting the regular filing fee at \$50). Once the copy has been filed, the foreign judgment has the same effect as a judgment of the court in which it is filed. UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT § 2. Admittedly, the judgment debtor can seek to vacate or stay the judgment on the ground that the foreign judgment is not entitled to full faith and credit. *Id.* However, such an attack is governed by the same procedures and rules that govern an attack on the judgment of a domestic court. *Id.* Moreover, the burden of proof in such an action is borne by the judgment debtor. *Id.* § 4.

<sup>124</sup> Council Regulation No. 44/2001, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 (EC) [hereinafter Council Regulation].

ular member state, shall have jurisdiction to the exclusion of all other courts.<sup>125</sup> The designated court cannot invoke the forum non conveniens doctrine.<sup>126</sup> Moreover, unless the parties have agreed otherwise, the forum selection clause prevents other courts from exercising jurisdiction over the case.<sup>127</sup>

As regards enforcing the resulting judgments, the same Council Regulation requires member states to recognize and enforce judgments handed down by courts in other member states.<sup>128</sup> However, the practical obstacles that European litigants have to overcome are considerably greater than those faced by their U.S. counterparts.<sup>129</sup>

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<sup>125</sup> See *id.* art. 23(1), 2001 O.J. (L 12) at 8.

<sup>126</sup> Hannah L. Buxbaum, *Forum Selection in International Contract Litigation: The Role of Judicial Discretion*, 12 WILLAMETTE J. INT'L L. & DISP. RESOL. 185, 208 (2004) (observing that where parties have negotiated a forum in advance, "as between courts in Europe, there is no role for discretionary dismissal in contract cases").

<sup>127</sup> See Council Regulation, *supra* note 124, art. 23(1), 2001 O.J. (L 12) at 8. Admittedly, even this seemingly clear framework has one important loophole. Either party can breach the agreement by filing suit in a member state other than the one designated in the forum selection clause. The court in which the suit was filed, in violation of the forum selection clause, has to respect the forum selection clause and must therefore rule the suit to be inadmissible. However, under the Council Regulation, if proceedings involving the same cause of action are brought in the courts of different member states, any court but the one first seized has to stay its proceedings until the court that was seized first has determined whether it has jurisdiction. *Id.* art. 27, 2001 O.J. (L 12) at 5. Accordingly, the European Court of Justice has made it clear that the court selected via a forum selection clause has to stay proceedings brought there until the court first seized in the matter has declared that it has no jurisdiction. Case C-116/02, *Erich Gasser GmbH v. MISAT Srl.*, 2003 E.C.R. I-14693 ¶ 54 (holding that "Article 21 of the Brussels Convention [now article 27 of the Council Regulation] must be interpreted as meaning that a court second seized whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seized has declared that it has no jurisdiction"). For an analysis and criticism of this case, see, e.g., ADRIAN BRIGGS, *AGREEMENTS ON JURISDICTION AND CHOICE OF LAW* 221-23 (2008) (stressing the potential for abuse that the *Gasser* decision creates). The resulting delay will often be unwelcome to the party that wishes to adhere to the forum selection clause. Regarding the more flexible approach that U.S. law takes with respect to this issue, see, e.g., Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L L. 1003, 1062 (2006) (describing the various options that the contractually designated court has when the plaintiff breaches the forum selection agreement by bringing suit in another court).

<sup>128</sup> Moreover, the grounds for denying recognition, while slightly more numerous than under U.S. law, are very limited. Council Regulation, *supra* note 124, arts. 34-35, 2001 O.J. (L 12) at 10 (providing that grounds for non-recognition include: irreconcilability with an existing judgment from any member state's courts; certain cases of deficient jurisdiction; in the case of default judgments, inadequate service of process; or a manifest conflict with the public policy of the state where enforcement is sought).

<sup>129</sup> A simpler procedure can apply in those cases in which the claim is uncontested, e.g., because the debtor has never objected to the claim in the course of the court proceedings. The enforcement of uncontested claims is governed by EC Regulation No. 805/2004. See Parliament & Council Regulation No. 805/2004, *Creating a European Enforcement Order for Uncontested Claims*, 2004 O.J. (L 143) 15 (EC). According to that regulation, the court that adjudicated the case can, under certain conditions, certify uncontested judgments using a so-called "European Enforcement Order." *Id.* art. 6, 2004 O.J. (L 143) at 18-19. Once a judgment has been thus certified, it "shall be recognised and enforced in

The Council Regulation provides that a judgment from a foreign member state will be enforced once it has been declared enforceable,<sup>130</sup> which in turn requires that the judgment creditor apply to a domestic court.<sup>131</sup> The domestic law of the member state where enforcement is sought governs the relevant procedure.<sup>132</sup> Community law goes to some length to ensure that this procedure is neither overly time-consuming nor unduly complicated or expensive. Most importantly, the Council Regulation requires that the member state's court declare the foreign judgment enforceable "immediately" upon completion of certain formalities set forth in the regulation.<sup>133</sup> Moreover, as in the United States, the judgment debtor can attempt to show that the foreign judgment is not entitled to recognition, but the judgment debtor cannot do so before a court declares the judgment enforceable.<sup>134</sup> Finally, to limit the amount of fees that member states levy, the Council Regulation prohibits the member states from charging fees in reference to the value of the matter.<sup>135</sup> This means that the member

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the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition." *Id.* art. 5, 2004 O.J. (L 143) at 18. Obviously, this regulation, although it may be useful in practice, is only a limited step toward a better legal framework for extraterritorial litigation. This is because potential litigants do not know in advance whether their claims will remain uncontested and therefore cannot be sure that they will be able to avail themselves of this regulation.

It should also be noted, for the sake of completeness, that special rules will soon apply in the case of judgments involving small claims. On July 11, 2007, the European Community adopted Regulation 861/2007, which will govern rules for suits over relatively modest sums of money. *See* Parliament & Council Regulation (EC) No. 861/2007, Establishing a European Small Claims Procedure, 2007 O.J. (L 199) 1. By January 1, 2009, all of Regulation 861/2007 will be applicable. *Id.* art. 29, 2007 O.J. (L 199) at 9. At the Regulation's core is the rule that "[a] judgment given in a Member State in the European Small Claims Procedure shall be recognised and enforced in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition." *Id.* art. 20, 2007 O.J. (L 199) at 7. However, in order to qualify for the small claims procedure, the value of the claim must not exceed €2,000 "at the time when the claim form is received by the court or tribunal with jurisdiction, excluding all interest, expenses and disbursements." *Id.* art. 2, 2007 O.J. (L 199) at 4.

<sup>130</sup> Council Regulation, *supra* note 124, art 38(1), 2001 O.J. (L 12) at 11.

<sup>131</sup> *Id.* art. 39(1), 2001 O.J. (L 12) at 11.

<sup>132</sup> *Id.* art. 40(1), 2001 O.J. (L 12) at 11.

<sup>133</sup> *Id.* art. 41(1), 2001 O.J. (L 12) at 11.

<sup>134</sup> *Id.* art. 41, 2001 O.J. (L 12) at 11. Rather, the judgment debtor can appeal the decision only to declare the foreign judgment enforceable. *Id.* art. 43(1), 2001 O.J. (L 12) at 11. And, as in the United States, the grounds for appeal are very limited. The Council Regulation specifically prohibits domestic courts from reviewing the foreign judgment as to its substance. *Id.* art. 45(2), 2001 O.J. (L 12) at 11. Instead, the reviewing court may refuse to enforce a judgment only if one of a limited number of specified defects is present. *Id.* art. 45(1), 2001 O.J. (L 12) at 11; *see also id.* arts. 34, 35, 2001 O.J. (L 12) at 10 (listing grounds for non-enforcement).

<sup>135</sup> *Id.* art. 52, 2001 O.J. (L 12) at 12.

states are limited to imposing flat fees, which tend to be quite modest.<sup>136</sup>

Nonetheless, the formalities that a judgment creditor must follow are more burdensome under European law than under U.S. law.<sup>137</sup> Moreover, and more importantly, the Community procedure for having sister-state judgments declared enforceable is more likely to engender delay. In most member states, the mere act of filing is insufficient for the foreign judgment to become enforceable. Rather, the domestic court of the state where enforcement is sought must render a decision. What is more, the Council Regulation allocates the decision-making responsibilities in a manner that can engender 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>138</sup> The presiding judge cannot delegate the decision.<sup>139</sup> To be sure, because of its formal character, this procedure does not have to be time-consuming. Yet, unlike in the United States, the creditor cannot be sure that delay will be avoided.<sup>140</sup>

### C. Internationally

Between independent nations, the enforceability of forum selection clauses has traditionally been governed by a mixture of multilateral conventions, bilateral treaties, and national law.<sup>141</sup> Accordingly,

<sup>136</sup> For example, in Germany, a flat 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>137</sup> The judgment creditor must produce “a copy of the judgment which satisfies the conditions necessary to establish its authenticity.” Council Regulation, *supra* note 124, art. 53(1). The judgment creditor must also provide the court with 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. *Id.* art. 53(2), 2001 O.J. (L 12) at 12. The domestic court can demand a certified translation of the relevant documents, though it is not required to do so. *Id.* art. 54(2), 2001 O.J. (L 12) at 12.

<sup>138</sup> *Id.* Annex II, 2001 O.J. (L 12) at 19.

<sup>139</sup> Reinhold Geimer, *Anh. III AVAG, in ZIVILPROZESSORDNUNG* [CODE OF CIVIL PROCEDURE], 2829 (Richard Zöller ed., 25th ed. 2005).

<sup>140</sup> Cf. Francisco Ramos Romeu, *Litigation Under the Shadow of an Exequatur: The Spanish Recognition of U.S. Judgments*, 38 INT'L LAW. 945, 951 n.38 (2004) (noting that it takes “less than six months” to have a judgment from another Brussels Regulation member state declared enforceable in Spain).

<sup>141</sup> The United States is not bound by any multilateral conventions regarding the recognition of foreign judgments. Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 10 ROGER WILLIAMS U. L. REV. 1, 6 (2004). With respect to bilateral treaties, the situation is more complex. The United States has concluded treaties on Friendship, Commerce, and Navigation (FNC) with various countries. See, e.g., Treaty of Friendship, Commerce and Navigation, U.S.-F.R.G., Oct. 29, 1954, 7 U.S.T. 1839; Treaty of Friendship, Commerce and Navigation, U.S.-Japan, Apr. 2, 1953, 4 U.S.T. 2063; Treaty of Friendship, Commerce and Navigation, U.S.-Isr., Aug. 23, 1951, 5 U.S.T. 550. Among other things, these treaties typically provide

parties' capacity to litigate before a court of their choice depends on exactly which jurisdictions are involved.<sup>142</sup> In general, although courts are often willing to hear cases involving foreign litigants, the ability of the litigants to get the resulting judgments enforced in their home state is frequently fraught with uncertainty.<sup>143</sup>

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that the nationals of each contracting party shall enjoy equal access to the other contracting party's courts of law. Treaty of Friendship, Commerce and Navigation, U.S.-F.R.G., arts. 3-5, Oct. 29, 1954, 7 U.S.T. 1839; Treaty of Friendship, Commerce and Navigation, U.S.-Japan, arts. 3-5, Apr. 2, 1953, 4 U.S.T. 2063; Treaty of Friendship, Commerce and Navigation, U.S.-Isr., arts. 3-5, Aug. 23, 1951, 5 U.S.T. 550. The Third Circuit and the Eleventh Circuit have interpreted these provisions to require that U.S. courts accord foreign judgments the same treatment as sister state judgments. *Daewoo Motor Am. v. GMC*, 459 F.3d 1249, 1259 (11th Cir. 2006) ("Under The Treaty of Friendship, Commerce and Navigation Between the United States of America and The Republic of Korea . . . a Korean judgment is elevated to the status of a sister state judgment."); *Choi v. Kim*, 50 F.3d 244, 248 (3d Cir. 1995) (same); *Vagenas v. Continental Gin Co.*, 988 F.2d 104, 107 (11th Cir. 1993) (holding that the FNC treaty between the United States and Greece "mandates foreign country judgments be treated the same as sister state judgments"). These decisions seem to imply that U.S. courts must recognize and enforce foreign judgments under the same rules governing the recognition and enforcement of sister state judgments. *Cf.* Russell J. Weintraub, *How Substantial Is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get it?*, 24 *BROOK. J. INT'L L.* 167, 167-68 (1998) (mentioning the FNC treaties as an exception to the rule that the United States has not entered into treaties calling for the recognition and enforcement of foreign judgments). We are skeptical, though, whether the U.S. Supreme Court, which has not yet ruled on the matter, would embrace such a view. It is not obvious that a nation's promise to grant nondiscriminatory access to its own courts can be interpreted as a promise to recognize and enforce foreign judgments. *Cf.* Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 *DEPAUL L. REV.* 319, 321 (2002) ("The United States is not a party to any bilateral judgments convention.")

Other countries have shown themselves more willing to use bilateral treaties and multilateral conventions to govern the recognition of foreign judgments. For example, the members of the European Free Trade Association (EFTA)—Norway, Switzerland, Liechtenstein, and Iceland—are not part of the European Community and therefore are not subject to the Council Regulation discussed *supra* text accompanying note 124. In 1988, however, three of the four EFTA countries, namely Switzerland, Norway, and Iceland, as well as the member states of the European Community concluded the so-called Lugano Convention, the content of which almost literally matches that of the Council Regulation. *Compare* Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 28 *I.L.M.* 620, *with* Council Regulation, *supra* note 124, 2001 *O.J.* (L 12) 1.

<sup>142</sup> It is especially noteworthy, in this context, that the U.S. Supreme Court has indicated that it has considerable reservations regarding the reasonableness of forum selection clauses in which two U.S. parties designate a foreign court as the forum for their dispute. *See* *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17 (1972) ("We are not here dealing with an agreement between two Americans to resolve their essentially local disputes in a remote alien forum. In such a case, the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause.")

<sup>143</sup> The enforcement of U.S. judgments in foreign countries is a case in point. In some countries, courts recognize U.S. judgments relatively easily. For example, German courts will generally recognize and enforce U.S. judgments that do not involve punitive damages. *See e.g.*, Wolfgang Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 *BERKELEY J. INT'L L.* 175, 200 (2005). By contrast, Belgian courts will only do so after reviewing the relevant judgments on the merits. *See* Nicole van Crombrughe, *Belgium, in*

At first glance, these problems may seem to be transitory. This is because the Hague Convention on Choice of Court Agreements of 30 June 2005 (Hague Convention)<sup>144</sup> explicitly provides for the recognition and enforcement of judgments in commercial matters in the presence of a forum selection clause.<sup>145</sup> There is, however, ample rea-

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PROCEDURES TO ENFORCE FOREIGN JUDGMENTS 9, 13 (Paul J. Omar ed., 2002); The Committee on Foreign and Comparative Law, *Survey on Foreign Recognition of U.S. Money Judgments*, 56 THE RECORD 378, 399 (2001), available at <http://www.nycbar.org/Publications/record/summer01.pdf> [hereinafter Committee, *Survey*]; 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). Even assuming that a court of another jurisdiction will eventually recognize and enforce a U.S. judgment, there is the question of how much delay will result. There, too, the situation differs drastically from country to country. For example, one commentator has estimated that having a U.S. money judgment declared enforceable takes six months to one year in Spain. Romeu, *supra* note 140, at 951 n.38. In South Africa, it reportedly takes between one and two years to enforce a U.S. judgement. Committee, *Survey, supra*, at 409; cf. Silberman, *supra* note 141, at 321 (“[E]nforcement of U.S. judgments abroad is often resisted . . .”). For a survey of the law governing the recognition and enforcement of foreign judgments in various countries, see RONALD A. BRAND, ABA SECTION OF INTERNATIONAL LAW, ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND UNITES STATES JUDGMENTS ABROAD 53–192 (1992); INTERNATIONAL EXECUTION AGAINST JUDGMENT DEBTORS *passim* (Dennis Campbell ed., 1993).

<sup>144</sup> Hague Convention, *supra* note 7. See generally Andrea Schulz, *The 2005 Hague Convention of Choice of Court Clauses*, 12 ILSA J. INT'L & COMP. L. 433, 435–41 (2006) (summarizing the provisions of the Hague Convention); Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 AM. J. COMP. L. 543, 550–56 (2006) (same). For a discussion of the best way to implement the Hague Convention in the United States, see Stephen B. Burbank, *Federalism and Private International Law: Implementing the Hague Choice of Court Convention in the United States*, 2 J. PRIVATE INT'L L. 287 (2006).

<sup>145</sup> The Hague Convention applies to exclusive choice of forum agreements in civil and commercial matters—agreements that designate “the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts.” Hague Convention, *supra* note 7, art. 3(a). With respect to the validity and effect of forum selection clauses, the Hague Convention distinguishes between the two following situations.

The first situation is that in which one of the parties brings suit in the courts of the state chosen in the parties' agreement. In such a case, the validity of the forum selection clause is determined according to the law of that state. 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. *Id.* art. 5(1). In other words, assuming the choice of forum clause is valid, there is no rule, such 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 one designated in the contract. In that case, the validity of the forum selection clause still has to be judged according to the law of the state of the contractually selected court. Accordingly, the court the plaintiff seizes 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 state of the contractually selected court. *Id.* art. 6(a). While a number of exceptions to this rule are available, none are unreasonable. In particular, a court in which suit is brought, in violation of the forum selection clause, does not have an 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 contrary to the public

son to doubt that the Hague Convention will in fact remove the principal legal obstacles to extraterritorial litigation. To begin with, it remains uncertain whether the Convention will enter into force. To date, none of the states involved in the negotiation of the Convention has ratified it.<sup>146</sup>

Moreover, the Convention only governs “international cases.”<sup>147</sup> In determining what constitutes an international case, the Convention distinguishes between two situations. The first is that in which a foreign judgment exists and the judgment creditor seeks to enforce that judgment. The case then automatically qualifies as international regardless of where the parties are from and where the events giving rise to the litigation took place.<sup>148</sup> The second situation, in which a foreign court has not yet handed down a judgment, is 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>149</sup> Consequently, the Convention does not require respect for forum selection clauses in cases that only have ties to one country: The chosen host state does not have a duty to hear the case, nor does the Convention impose a duty on other courts to abstain from hearing the case. As a result, the Convention provides little assurance that courts will respect a choice of forum clause in a purely domestic contract. The chosen court may refuse to hear the case, or one of the parties may, once a dispute has arisen, successfully renege on the contractual 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 apparently not the case. As the text of the Convention makes clear,<sup>150</sup> the mere choice of a foreign forum in the contract is insufficient to create an international case. Moreover,

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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 contractually selected court has refused to hear the case. *Id.* art. 6.

Once the contractually selected court has handed down a judgment, the Convention generally requires the authorities in other jurisdictions to recognize and enforce the judgment. *Id.* art. 8. There are very few exceptions to this rule. *See id.* art. 9 (listing situations in which other jurisdictions can refuse recognition and enforcement).

<sup>146</sup> However, one country that was not involved in negotiating the Convention was Mexico, and it has since acceded to the Convention. *See* Hague Conference on Private International Law, Status Table 37: Convention of 30 June 2005 on Choice of Court Agreements, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=98](http://www.hcch.net/index_en.php?act=conventions.status&cid=98) (last visited Sept. 7, 2008).

<sup>147</sup> Hague Convention, *supra* note 7, art. 1(1).

<sup>148</sup> *Id.* art. 1(3).

<sup>149</sup> *Id.* art. 1(2).

<sup>150</sup> *See id.*

although the Convention is—apparently intentionally—vague on the issue, one can also interpret it to provide that the choice of foreign substantive law does not suffice to turn an otherwise domestic case into an international one.<sup>151</sup>

In sum, the Hague Convention is an important step in the right direction. Yet, even if it were ratified by a significant number of countries, which remains problematic, it would still be insufficient to ensure that extraterritorial litigation becomes generally available at the global level.

We will suggest below some reforms to remedy this situation, after examining the extent of extraterritorial litigation in current practice.

## VII

### EVIDENCE OF DEMAND AND PRACTICE

It is difficult to find systematic data on the extent to which parties are currently choosing foreign forums to decide otherwise domestic commercial disputes. The available evidence suggests two conclusions, however. First, the potential demand for extraterritorial litigation is strong. Faced with a choice of different states' public courts, sophisticated contracting parties prefer courts with a conspicuously strong reputation for high quality adjudication, even if the alternatives are other systems of public courts that are themselves reasonably strong. Second, despite this potential demand, the actual amount of

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<sup>151</sup> Under the text of the Convention, a court should only deny the international character of a case if "all other elements to the dispute" are connected with the state where the parties reside. *Id.* On the one hand, the word "element" is certainly broad enough to encompass a choice of law clause. On the other hand, the apparent purpose of the provision in question is to ensure that the chosen court is under no obligation to hear a case that is completely internal to a third country and 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, this restriction would lose much of its practical importance. Consequently, 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 because they are no clearer than the text. On the contrary, the Draft Report on an earlier version contains the following passage:

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?

Hague Conf. on Private Int'l Law, Prelim. Draft Convention on Exclusive Choice of Court Agreements, Explanatory Report: Prelim. Doc. No. 25 of March 2004, Drawn up for the Attention of the Special Comm'n of April 2004 on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters para. 85 (Masato Dogauchi & Trevor C. Hartley eds., March 2004), *available at* [http://www.hcch.net/upload/wop/jdgm\\_pd25e.pdf](http://www.hcch.net/upload/wop/jdgm_pd25e.pdf). In other words, the drafters were fully aware of the vagueness of the Convention with respect to the issue at hand yet abstained from clarification.

pure extraterritorial litigation is extremely modest, even among the federated states of the United States and the European Union.

### A. The United States

Again, by far the most comprehensive data on choice of forum clauses in the United States—and perhaps in the world—are in Professors Eisenberg and Miller’s study of roughly 2800 contracts filed with the U.S. Securities and Exchange Commission.<sup>152</sup> For 47% of these contracts, the reporting firm was incorporated in Delaware, reflecting that state’s overwhelming dominance in choice of law (and, implicitly, choice of forum) for internal corporate affairs. No other state accounted for as much as 4% of the reporting firms.<sup>153</sup> Yet Delaware did not similarly dominate choice of law or choice of forum for the contracts themselves. Rather, New York law and courts were the clear favorites in those roles. Virtually all of the contracts specified choice of law, and 46% of them chose New York law, while Delaware law—the second most frequent choice—was specified in only 15% of the contracts.<sup>154</sup> Only 39% of the contracts stated an explicit choice of forum (which generally coincided with choice of law), but of those that did, 41% chose New York, while Delaware again ran a distant second with only 11% of the contracts.<sup>155</sup>

In light of these numbers, there can be little doubt that New York is the leading forum for commercial dispute resolution in the United States. Moreover, as Professors Eisenberg and Miller observe:

New York’s choice of law dominance likely does not stem from contract-specific contacts with New York. New York accounts for only about 12 percent of the reporting firms’ places of business, three percent of the reporting firms’ places of incorporation, and eleven percent of the attorney locales.<sup>156</sup>

Evidently, parties are attracted to New York because of the perceived quality of its law and its courts.

New York has clearly sought this prominence. We have already remarked that New York has self-consciously developed contract law doctrine that appeals to commercial actors.<sup>157</sup> Moreover, in 1995 New York—whose judges are elected—established a special Commercial Division staffed by judges chosen for their expertise in commercial matters and utilizing case management techniques designed to im-

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<sup>152</sup> See *supra* text accompanying note 86.

<sup>153</sup> Eisenberg & Miller, *supra* note 41, at 27 tbl.8.

<sup>154</sup> *Id.* at 19 tbl.2.

<sup>155</sup> *Id.* at 34 tbl.11.

<sup>156</sup> *Id.* at 27.

<sup>157</sup> See *supra* text accompanying notes 100–07.

prove their efficiency.<sup>158</sup> And New York law explicitly guarantees recognition of jurisdiction conferred on New York courts by forum selection clauses in contractual disputes involving amounts in excess of \$1 million, even in the absence of other contacts with New York that might confer jurisdiction.<sup>159</sup>

Professors Eisenberg and Miller report that in 66.5% of the contracts in their sample that provide for the application of New York law, New York is neither the reporting party's principal place of business or state of incorporation nor the seat of the reporting party's attorney. They do not, however, report the percentage of contracts designating New York as a forum without *either* party having its corporate domicile or principal place of business in New York. More specifically, they do not report how many contracts involve a purely domestic transaction between two parties that reside 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 principal focus here. Moreover, it must be kept in mind that the contracts examined by Professors Eisenberg and Miller are important enough to be deemed material to the relevant corporation's affairs, and it is not clear whether more ordinary commercial contracts are equally likely to specify New York as a forum.

To gain insight into these issues, we examined cases filed in New York state courts between January 1, 2006 and December 31, 2006 and heard by one of the judges in the Commercial Division.<sup>160</sup> We fo-

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<sup>158</sup> Cf. Bach & Applebaum, *supra* note 114, at 152–60 (describing the creation of the commercial division and the motives behind that reform); Eisenberg & Miller, *supra* note 88, at 39–44 (describing the role of the Commercial Division in explaining New York's popularity as a forum for litigation).

<sup>159</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. N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 2001). 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 relates to a contract involving at least \$1,000,000. *Id.* § 5-1402. 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. DEL. CODE ANN. tit. 6, § 2708 (2007).

<sup>160</sup> We included only those cases for which a Request for Judicial Intervention has already been filed. Cf. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.6(a) (2007) ("At any time after service of process, a party may file a request for judicial intervention."). The Request for Judicial Intervention is a procedural device, a filed form through which the matter enters the court system database and is generally a precondition to the matter being assigned to a Justice of the Supreme Court.

To identify the cases filed in New York courts as well as the parties involved, we relied on "WebCivil Supreme," the official database that the New York court system provides. WebCivil Supreme, <http://iapps.courts.state.ny.us/webcivil/FCASMain> (last visited Aug.

cused on those cases in which both the plaintiff and the defendant were, based on their names, recognizable as legal entities such as corporations or limited liability companies. A total of 431 cases fit these criteria. Of those, 21 cases—or about 5% of the total—could be shown to involve two parties that were neither incorporated nor headquartered in New York. Five of these 21 cases—or about 1% of the total sample—involved a plaintiff and a defendant that were both from the same foreign jurisdiction.<sup>161</sup> Evidently, then, New York courts are attracting some extraterritorial litigation from other U.S. states despite the generally high quality of courts throughout the United States. At the same time, the overall amount of extraterritorial litigation is generally quite small.

Given that New York law and courts are evidently appealing to sophisticated commercial actors, why New York is not attracting a

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31, 2008). Our dataset includes all cases (1) that were filed in 2006, (2) that were handled by one of the judges who worked for the commercial division in 2006, and (3) in which the two parties shown in the database were clearly recognizable as legal entities. A party was deemed to be clearly recognizable as a legal entity if its name contained the words “company,” “corporation,” “incorporated,” “limited,” “association,” or abbreviations or translations thereof. The total number of cases fitting these criteria was 431. (This relatively low number is explained by the fact that the database sometimes appears to enter only part of the name of the parties and appears to leave out elements that are necessary to identify the entity type.)

To determine the place of incorporation as well as the principal place of business, we have relied on a number of different databases in the following order:

(1) New York State Dep’t of State, Div. of Corps., Corp. & Business Entity Database, available at [http://appsext8.dos.state.ny.us/corp\\_public/corpsearch.entity\\_search\\_entry](http://appsext8.dos.state.ny.us/corp_public/corpsearch.entity_search_entry) (last visited Sept. 7, 2008);

(2) Corporation Filings on Lexis, <http://www.lexis.com/research> (follow “Public Records”; then follow “Corporation Filings”) (last visited Sept. 7, 2008) (contains filing information from secretaries of state across the United States). In addition, because the Delaware data is not available on Lexis, we accessed Delaware information using the database provided by the Delaware Division of Corporations., Del. Dep’t of State, Div. of Corps., Gen. Info. Name Search, available at <https://sos-res.state.de.us/tin/GINameSearch.jsp> (last visited Sept. 7, 2008);

(3) Hoover’s Company Records on Lexis, <http://www.lexis.com/research> (follow “Find a Source”; then enter “Hoover’s” into the search field) (last visited Sept. 7, 2008);

(4) Standard and Poor’s Corporate Register on Lexis, <http://www.lexis.com/research> (follow “Find a Source”; then enter “Standard and Poor’s”) (last visited Sept. 7, 2008).

(5) Other company databases available on Lexis (e.g., U.S. Business Directory).

<sup>161</sup> Admittedly, this data has an important limitation: the judges of the Commercial Division often have dockets that include non-commercial cases as well. Hence, the mere fact that a Commercial Division judge has handled a case does not necessarily indicate that the Commercial Division handled the case. However, we have also examined the case-type classifications provided by the New York court system’s case database. These case-type classifications are typically taken from the Request for Judicial Intervention forms, so the information contained therein may not always prove to be accurate. Keeping this in mind, an analysis of the relevant case-type data shows that seventy-five cases were explicitly classified as Commercial Division cases. Out of these seventy-five cases, only one case could be shown to involve two parties that were neither incorporated nor headquartered in New York, whereas the other seventy-four cases involved at least one party that was incorporated or headquartered in New York.

larger amount of purely extraterritorial litigation is unclear. We suspect that a variety of factors are responsible. The costs of litigating at a distance may remain a deterrent. Moreover, New York's Commercial Division, which is the most popular venue for important commercial litigation, was created only slightly more than a decade ago.<sup>162</sup> Local lawyers serving non-New York clients may as yet be insufficiently familiar with New York law and practice to feel confident about choosing it over the local law and courts with which they have greater familiarity. (Delaware's dominance of corporate law in the United States has taken a century to build up and remains incomplete.<sup>163</sup>) Finally, as we emphasize below, New York presently has only limited incentives to seek to attract purely extraterritorial litigation if the stakes are not large.<sup>164</sup> We expect that these obstacles will diminish with time, however, and that New York will continue to expand its role as a locus for commercial litigation from all over the United States and ultimately from abroad as well.

## B. The European Union

Neither anecdotal nor systematic empirical evidence suggests substantial amounts of extraterritorial litigation within the European Union. Rather, the hard data that does exist suggests that it is at most a marginal phenomenon.

Data from Belgium is instructive in this context. Under Belgian law, the judgment creditor who seeks to enforce a foreign judgment generally needs to initiate legal proceedings to have the judgment declared enforceable.<sup>165</sup> Although we have not been able to obtain the number of proceedings of this type,<sup>166</sup> the losing party may appeal the decision to declare a foreign judgment enforceable to the *cour d'appel*.<sup>167</sup> In 2005, such cases constituted 0.1% of all appellate cases,

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<sup>162</sup> A pilot program was initiated in 1993. Bach & Applebaum, *supra* note 114, at 152. Due to the success of that pilot program, the Commercial Division was created in 1995. *Id.* at 153. The Commercial Division was expanded in 1998 and again in 2002. *Id.* at 154.

<sup>163</sup> Cf. Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1571 (2002) (noting that Delaware's market share of IPO charters amounts to 56%).

<sup>164</sup> See *infra* Part X.A.1.

<sup>165</sup> Loi portant le Code de droit international privé [Law Containing the Code of Private International Law], art. 23(1)–(5), July 16, 2004, Le Moniteur belge 57344, 57348 (July 27, 2004), art. 23(1)–(5).

<sup>166</sup> The relevant proceedings are governed by sections 1025–34 of the Code Judiciaire. Loi portant le Code de droit international privé, July 16, 2004, art. 23(3). While official statistics are available for the number of decisions handed down in such procedures, these statistics do not distinguish between exequatur and other proceedings. See SERVICE PUBLIC FÉDÉRAL JUSTICE, LES STATISTIQUES ANNUELLES DES COURTS ET TRIBUNAUX. ANALYSE DES STATISTIQUES DE LA PÉRIODE 1999–2005, at 18 (2006) (on file with authors).

<sup>167</sup> See CODE JUDICIAIRE, art. 1031 (Belg.)

or less than 19 in total.<sup>168</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 a foreign court in purely domestic transactions is minimal. Data from Germany<sup>169</sup> and Italy<sup>170</sup> paint a similar picture.

We suspect that the factors, just discussed, that have been responsible for inhibiting further extraterritorial use of New York courts in the United States are also at work in Europe. In addition, language is a barrier in Europe. And European lawyers with whom we have spoken indicated that potential delays and complications in enforcement were a major obstacle to using courts from other member states.

### C. Among Fully Sovereign 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. In part, this can be explained by practical obstacles of the sort described above with respect to the United States and the European Community. In addition, however, the legal framework regarding both jurisdiction and enforcement is hardly favorable to ex-

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<sup>168</sup> Decisions handed down in exequatur proceedings amounted to 0.1% of all civil court of appeal decisions in 2005. SERVICE PUBLIC FÉDÉRAL JUSTICE, *supra* note 166, at 16. In the same year, the total number of decisions handed down by the civil branches of the courts of appeal was 18,420. *Id.* at 3. It follows that less than 19 decisions must have been rendered in exequatur proceedings.

<sup>169</sup> In Germany, the total number of proceedings seeking enforcement of a foreign judgment in 2004 was below 8,883. STATISTISCHES BUNDESAMT, FACHSERIE 10 REIHE 2.1: RECHTSPFLEGE ZIVILGERICHTE 2004, at 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. It is telling that the 8,883 proceedings in question constitute less than 0.3% of the overall total of 3,155,482 enforcement proceedings. *Id.* at 12. And, as in the case of Belgium, these 0.3% include cases in which the parties are from different countries, meaning that extraterritorial litigation in purely domestic cases must be extremely rare.

<sup>170</sup> The court responsible for declaring judgments from other member states enforceable is the corte d'appello. Council Regulation, *supra* note 124, Annex II, at 1, 2001 O.J. (L 12) at 19. Unfortunately, no statistics seem to be available regarding the exact number of relevant proceedings. This said, in the judicial year 2005–06, 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 other of the listed categories. See Ministero della Giustizia, Movimento dei procedimenti civili – Anno giudiziario 2005/2006: Dati nazionali, [http://www.giustizia.it/statistiche/statistiche\\_dog/2006/agcivile/nazionaleciv.xls](http://www.giustizia.it/statistiche/statistiche_dog/2006/agcivile/nazionaleciv.xls) (last visited Sept. 7, 2008). 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.

traterritorial litigation at the international level. The potential for reform of that framework is our next topic.

## VIII NECESSARY LEGAL REFORMS

How would the legal system have to change to allow for more extraterritorial litigation? Based on our earlier analysis, the specific steps that need to be taken are clear.

First, the jurisdiction conferred by forum selection clauses should be respected—both by the court that has been chosen and by other courts. As pointed out above, this condition is met within the European Community and is largely met within the United States but is not yet generally satisfied at the international level.<sup>171</sup>

Second, parties should be able to have a host-state judgment recognized and enforced in the origin state without incurring substantial delay or costs. That condition is clearly met within the United States. By contrast, as explained above, there is much room for improvement in the European Community, and the need for reform at the international level is even stronger.

Third, parties should be able to litigate in foreign courts without being forced to incur the inconvenience of having to travel there. The easiest way to do so is for courts to allow the liberal use of videoconferencing technology during judicial proceedings. At present, some countries—including the United States—are taking steps in that direction. However, no jurisdiction currently seems to offer the parties the assurance that they will not have to appear physically in court.

Fourth, parties should be able to litigate, to the extent feasible, in the state of destination without incurring substantial additional legal expenses due to the need to employ an attorney in the host state. The easiest way to achieve this aim is for host states to go yet further in facilitating access to the bar by foreign lawyers and to keep to a minimum the requisite involvement in litigation by members of the host-state bar.<sup>172</sup>

Countries could take large steps toward accomplishing the first and second of these reforms by (a) widely adopting the Hague Convention on Choice of Court Agreements and (b) amending the Hague Convention to remove its limitation to international cases so that its provisions extend as well to cases that are, except for choice of forum,

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<sup>171</sup> See *supra* Part VII.

<sup>172</sup> In the extreme, host states might permit origin-state lawyers to litigate in host-state courts without demonstrating knowledge of host-state substantive law in cases where parties chose the origin state's law—something that governments might achieve by providing foreigners with limited admission to host-state courts if they can demonstrate familiarity with host-state procedural law.

purely domestic. At present, however, even the first of these steps—let alone the second—seems politically remote. Consequently, the more practical route may be for potential host states to negotiate bilateral treaties with potential origin states that provide for mutual recognition of choice of forum clauses in commercial cases and for expeditious enforcement of judgments issuing from each other's courts.

Might such bilateral treaties—much less a multinational agreement like the Hague Convention—seem objectionable to potential host states on the grounds that they would compel the host state to enforce judgments governing host state citizens that are issued by weak and perhaps corrupt courts in other countries? So long as the treaties are limited to cases involving merchants and do not cover consumer contracts or other contracts with unsophisticated individuals, there seems little reason for serious concern here. There is no reason to expect U.S. merchants to choose the courts of, say, India as a forum for contractual disputes if those courts are inferior to those of the United States. Conversely, if the courts of Bangalore should develop to the point where they offer an attractive alternative to those of New York, they should surely be permitted to compete for the business of New York merchants.

## IX

### ASIDE: SUPRANATIONAL AND EXTRATERRITORIAL COURTS

We have been focusing here on extraterritorial litigation as the means for giving residents of origin states access to the courts of host states. There is, however, an alternative means to that end—namely, extraterritorial courts. That is, rather than bringing origin-state litigants (physically or virtually) to the host state's courts, a host state can bring its courts to the litigants by establishing courts in origin states.

At least in principle, extraterritorial courts are nothing new. Indeed, such courts were widespread in the nineteenth century, when western nations imposed them on countries that they dominated.<sup>173</sup> As a consequence of this historical experience, the notion of extraterritorial courts has the bad odor of imperialism.<sup>174</sup> But there is noth-

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<sup>173</sup> Cf., e.g., Teemu Ruskola, *Colonialism Without Colonies: On the Extraterritorial Jurisprudence of the U.S. Court for China* (June 19, 2008) (unpublished manuscript, on file with authors) (analyzing the role of the "United States Court for China," which sat in Shanghai, had civil and criminal jurisdiction over U.S. citizens in China, and was abolished only in 1943).

<sup>174</sup> For a dramatic illustration of the perceptions underlying extraterritorial courts, see *In re Ross*, 140 U.S. 453, 463 (1891) (noting that in the past "[t]he intense hostility of the people of Moslem faith . . . particularly to Christians . . . and . . . the barbarous . . . punishments inflicted in those countries, and the frequent use of torture to enforce confession from parties accused [made it] . . . a matter of deep interest to Christian govern-

ing necessary about this connection. Extraterritorial courts can be designed to serve the interests of the state where they are located as much or more as those of the exporting state that creates them.

A variant of this approach is to establish new systems of supranational courts on a federal or regional basis. The European Union, for example, could establish a system of commercial courts, located in member states, that would accept purely intra-state litigation (and presumably interstate litigation as well). Or the African Union could establish a system of special commercial courts, under its aegis, dispersed among the Union's member states.

We expect that extraterritorial litigation has much greater promise than extraterritorial or supranational courts as a means of alleviating the problems created by weak judicial systems. One reason is that the same institutional and political obstacles that frustrate judicial reform may cause potential origin states to block the establishment of extraterritorial courts on their soil, particularly federal or supranational courts. Another reason is that host states may find it difficult to assure litigants that extraterritorial courts offer the same quality adjudication as do courts located in the host state. A third reason is that it would be difficult, using only extraterritorial courts, to give litigants substantial choice among alternative judicial systems, because economies of scale necessarily limit the number of courts that can serve a given location.

But we will not explore extraterritorial courts in detail here. We simply note that they can be perfectly consistent with, and complementary to, extraterritorial litigation of the type we are focusing on, and that they merit more extensive consideration.

## X

### CREATING THE RIGHT INCENTIVES

Knowing which steps need to be taken is only of limited practical value if the chances that these measures will actually be adopted are slim. And at present, as we have noted, not just inertia but strong protectionist forces in both host states and origin states inhibit reform. Consequently, it is essential to consider how jurisdictions can be motivated to take the measures needed to promote extraterritorial litigation.

#### A. Potential Motives to Attract Foreign Litigants

To address this question, we focus first on the existing incentives that states might have to attract foreign litigants.

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ments to withdraw the trial of their subjects . . . from the arbitrary and despotic action of the local officials").

### 1. *Procuring Business for Lawyers and Other Local Services*

An obvious motivation for making local courts attractive to foreign litigants is to procure business for the local bar and for other purveyors of services in the host state, such as restaurants and hotels. Indeed, this incentive seems to be at work in New York. Although that state's self-conscious efforts to make its substantive contract law and its courts attractive to commercial litigants<sup>175</sup> might be, at least in part, designed to make New York State an attractive place for businesses to locate, New York's statutory guarantee to accept the jurisdiction conferred by a choice of forum clause in any contract with more than \$1 million at stake<sup>176</sup> is clearly intended to attract litigation from outside the state. And the incentive for that is, in turn, presumably to obtain business for New York lawyers and other local service providers. Evidently New York believes that if the stakes are over \$1 million, the costs of providing state-subsidized<sup>177</sup> judicial services are more than balanced by the revenue to local professionals and merchants (and tax revenues to the state) that the litigation throws off. Similarly, the corporate law literature has long argued that one incentive for jurisdictions to compete for corporate charters is to increase the volume of litigation before local courts, thereby generating business for local lawyers.<sup>178</sup>

Although this incentive has the desirable effect of moving some jurisdictions to open their courts to foreign litigants, it also has serious drawbacks.<sup>179</sup> To begin with, it is not clear how powerful the incentive really is. The fact that New York law only guarantees the recognition of choice of forum clauses if the contract is worth at least \$1 million suggests that the desire to attract business for local services only offers an incentive to attract extraterritorial litigation in which the stakes are conspicuously high. A similar conclusion is suggested by experience with corporate litigation in Delaware. Delaware is currently the preeminent forum for high-stakes corporate litigation,<sup>180</sup> and Delaware

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<sup>175</sup> See *supra* Part VII.A.

<sup>176</sup> See *supra* note 159.

<sup>177</sup> On the fact that U.S. courts are subsidized with state funds, see *infra* note 185.

<sup>178</sup> E.g., Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1443 (1992); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 240–41 (1985).

<sup>179</sup> See *infra* Part VI.C.

<sup>180</sup> See Maurice A. Hartnett, III, *The History of the Delaware Court of Chancery*, 48 BUS. LAW. 367, 370 (1992) (calling Delaware “a nationally recognized forum for the trial of corporate litigation”); Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation*, 9 YALE J.L. & TECH. 193, 229 (2006) (noting that the Delaware Chancery Court “has become a preeminent forum for corporate litigation”); William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 354 (1992) (noting the “national preeminence [of the Delaware state-court system] in the field of corporation law”); cf. ROMANO, *supra* note 69, at 41 (reporting that twenty-nine

law ensures that local lawyers are involved in such litigation through a number of means—for example, by requiring that a member of the Delaware bar sign off on all filings.<sup>181</sup> Yet Professors Kahan and Kamar find that the additional income Delaware attorneys derive from Delaware's leading position in the charter market is relatively limited compared to the income that Delaware derives from franchise fees.<sup>182</sup>

Moreover, host states seeking to procure business for the local bar have every reason to insist that plaintiffs who use their courts make extensive use of lawyers in the host state. The result is a disincentive to ease bar admission requirements for foreigners or to adopt virtual courtrooms and other technologies that will obviate the need for parties, witnesses, and origin-state lawyers to travel to the host state for consultations, depositions, and appearances in court.

A corresponding problem arises with origin states. Their cooperation is central to the success of extraterritorial litigation since they will eventually have to recognize and enforce the judgment. Yet to the extent that the host state forces parties to use its attorneys and other services, extraterritorial litigation comes at the expense of lawyers and other service providers in the origin states. Consequently, origin states have incentives to minimize the amount of extraterritorial litigation they permit.

It follows that, if the market for extraterritorial litigation is to succeed, litigants must be able to rely chiefly on lawyers in the origin states. That goal is unlikely to be reached if the desire to generate services for the host-state's bar is the principal reason why host states compete for litigants.

## 2. *Altruism*

Some jurisdictions might also be led to open their courts to wholly foreign cases by altruistic motives.<sup>183</sup> More generally, leading

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out of a sample of thirty-five shareholder lawsuits that involved Delaware law and could have been filed either in Delaware or in federal courts were filed in Delaware).

<sup>181</sup> DEL. SUP. CT. R. 12(a); DEL. CH. CT. R. 170(d).

<sup>182</sup> Cf. Kahan & Kamar, *Myth*, *supra* note 30, at 697–98 (estimating that Delaware's lawyers earned an additional \$227 million in 2001 as a result of Delaware's preeminence in the charter market and noting, by way of comparison, that “[a]ll of Delaware's additional legal business is thus equivalent to that of a single large non–New York law firm”). In the same year, Delaware took in around \$586 million in franchise taxes. U.S. Census Bureau, State Gov't Tax Collections: 2001 (Revised April 2003), <http://www.census.gov/govs/statetax/0108destax.html> (last visited Sept. 7, 2008).

<sup>183</sup> Altruistic motives may be part of the reason why the United Kingdom still maintains the Privy Council, which functions as the highest court of appeal for certain Commonwealth countries. For a description of the role of the Privy Council, see Stefan Voigt et al., *Improving Credibility by Delegating Judicial Competence—The Case of the Judicial Committee of the Privy Council*, 82 J. DEV. ECON. 348, 355–58 (2007). Of course, another potential expla-

commercial nations could reasonably conclude that an effective way to aid developing countries is to assist merchants from those countries in gaining access to the donor nation's domestic commercial courts. Altruism seems, however, too thin a reed to support major efforts by potential host countries.

### 3. *Court Fees*

A third motive to attract foreign litigants is to obtain revenues for the state by charging fees that equal or exceed the cost of providing judicial services.

State revenues, in the form of annual franchise fees for registering corporations, have long been the conspicuous motive for the state of Delaware to maintain a body of corporate law and specialized courts that attract out-of-state firms.<sup>184</sup> In theory a similar approach could be taken to contracts: A host state could require, as a condition for granting jurisdiction under a choice of forum clause in a purely foreign case, that the parties register the underlying contract in the host state and pay an appropriate fee at the time they enter into the contract. Yet this seems impractical. It would require a transaction and associated costs even for the overwhelming majority of contracts that never end up in court; a workable formula for setting registration fees would be extremely elusive; and—because the fee structure would inevitably be imperfect—there would surely be room for substantial adverse selection, with parties registering only those contracts that they believe have the greatest potential for litigation. Rather, the most workable source of state revenue from extraterritorial litigation consists of ordinary court fees—that is, user fees charged to the litigants in the course of litigation. At present, however, court fees in

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nation lies in the desire to create a certain uniformity of law across Commonwealth countries—a uniformity from which the United Kingdom, too, stands to profit.

<sup>184</sup> It is generally recognized that the quality of Delaware's judiciary is an important factor in attracting corporations to Delaware. See, e.g., Bebhuk & Hamdani, *supra* note 65, at 580–81 (pointing out that Delaware's institutional infrastructure, including its Chancery Court, "is an important component of the quality of the system offered by Delaware"); McDonnell, *supra* note 11, at 106 (noting that the Chancery Court constitutes an "important advantage of Delaware" in the market for corporate charters); cf. Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1911 (1998) (noting that the proficiency of Delaware courts is widely acknowledged to be a competitive advantage). Further, there is widespread agreement that franchise taxes are the main incentive for Delaware to compete for corporate charters. For example, for the year 2001, Marcel Kahan and Ehud Kamar have estimated that the additional revenues that Delaware lawyers received as a result of Delaware's leading position in the charter market amounted to around \$227 million. Kahan & Kamar, *Myth*, *supra* note 30, at 684 n.24 (noting that "most private firms incorporate in their respective home states or seek an alternative organizational form"). By contrast, the income that the state of Delaware derived from franchise taxes in the same year was around \$600 million. U.S. Census Bureau, Del. State Gov't Tax Collections: 2001 (Revised April 2003), <http://www.census.gov/govs/statetax/0108destax.html> (last visited Sept. 7, 2007).

potential host states often fail to cover the state's costs. Although determining the exact size of costs and revenues is difficult, there is widespread agreement that U.S. courts are subsidized.<sup>185</sup> Consequently, court fees currently provide an incentive against rather than in favor of attracting foreign litigants.<sup>186</sup> Nor is this situation idiosyncratic to the United States. Although some countries charge higher court fees than the United States,<sup>187</sup> the general tendency is to either subsidize courts or, at most, to provide judicial services at cost.<sup>188</sup>

There is of course a justification for subsidizing courts. Litigation creates positive externalities in the form of precedents that benefit third parties.<sup>189</sup> Moreover, the presence of an effective court system that will enforce obligations creates an incentive to honor those obli-

<sup>185</sup> See, e.g., Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 115 n.158 (2005); Arturo Bris et al., *Who Should Pay for Bankruptcy Costs?*, 34 J. LEGAL STUD. 295, 330 n.18 (2005) (pointing out that “[i]n the real world, the government subsidizes the court system”); Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1, 51 (1987) (“Courts are subsidized . . . .”); Larry A. DiMatteo, *A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 AM. BUS. L.J. 633, 689 (2001) (“The court system is subsidized by society.”); William S. Dodge, *The Case of Punitive Damages in Contracts*, 48 DUKE L.J. 629, 675 (1999) (referring to “the publicly subsidized court system”); Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 736 (2006) (pointing out that the court system is subsidized by the government); Michael H. LeRoy, *Getting Nothing for Something: When Women Prevail in Employment Arbitration Awards*, 16 STAN. L. & POL’Y REV. 573, 583 (2005) (“The public subsidizes courts.”); Frederick L. Miller, *Arbitration Clauses in Consumer Contracts: Building Barriers to Consumer Protection*, 78 MICH. B.J., March 1999, at 302, 303 (“Courts are subsidized . . . .”); Jaime Pieras, Jr., Commentary, *Judicial Economy and Efficiency Through the Initial Scheduling Conference: The Method*, 35 CATH. U. L. REV. 943, 943–44 (1986) (referring to “[o]ur present system of subsidized courts, in which the fees paid by the litigants do not cover the cost of the service provided to them”); Eric J. Conn, Note, *Hanging in the Balance: Confidentiality Clauses and Postjudgment Settlements of Employment Discrimination Disputes*, 86 VA. L. REV. 1537, 1575 n.118 (2000) (noting that courts “are subsidized by public revenues”).

<sup>186</sup> Indeed, one scholar has pointed out that one of the functions of the law on jurisdiction is to protect states from having to subsidize foreign litigants. See Michael Whincop, *Three Positive Theories of International Jurisdiction*, 24 MELB. U. L. REV. 379, 383 (2000) (“States subsidize litigation by funding the justice system . . . . Thus, the law on jurisdiction functions to ration access to that system where the costs to the state of trying a suit are high.”).

<sup>187</sup> See, e.g., Mathias Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?*, 51 AM. J. COMP. L. 751, 816 (2003) (noting that “[i]n most other countries, beginning a lawsuit is much more costly” than it is in the United States).

<sup>188</sup> Cf. Robert Dingwall & Emilie Cloatre, *Vanishing Trials?: An English Perspective*, 2006 J. DISP. RESOL. 51, 67 (2006) (noting that “successive U.K. governments have, since the early 1980s, determined that the full costs of providing a civil justice system should be met by its users through court fees” and that “[t]his policy appears to be unique among major developed countries, including the rest of Europe and the U.S.”); Christopher R. Drahozal, *Enforcing Vacated International Arbitration Awards: An Economic Approach*, 11 AM. REV. INT’L ARB. 451, 465 (2000) (noting that “governments ordinarily subsidize court systems, with the plaintiff paying only a small filing fee”).

<sup>189</sup> 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 51, at 236.

gations without litigation. In particular, as we have observed above, the presence of effective contract enforcement creates great benefits for merchants by permitting them to make and receive credible commitments. Indeed, the more effective a judicial system is, the less likely it is to be used. For these reasons, many jurisdictions will continue to find it attractive to subsidize their courts out of general tax revenues.

It is not possible, however, to charge taxes to potential litigants who have no other contacts with the host state. If a state is to have an incentive to accept such litigants, it must therefore be able to charge them court fees that are higher than those charged to litigants from the host state—preferably, in fact, fees high enough to generate a positive return for the state.<sup>190</sup>

## B. Restrictions on Differentiated Court Fees

At present, law and legal culture commonly prevent courts from imposing higher fees on foreign litigants than on local litigants. This is, we believe, a mistake as it applies to extraterritorial litigation and calls for reform.

Though we are most concerned with the fully international context, the law in this area is, as in other respects, most clearly developed within the federated systems of the United States and the European Union. For this reason, we focus most intensely on those federations. We also focus on them because they include some of the most prominent potential host states and possess legal cultures with substantial influence throughout the world. Only if the United States and the European Union accept differentiated systems of court fees are such fee structures likely to achieve broad international acceptance.

### 1. *The United States*

We consider first the situation within United States. While there are no U.S. statutes or cases that are directly controlling, one can read existing precedent as precluding the states, on constitutional grounds, from imposing higher fees on litigants from other states within the United States.

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<sup>190</sup> Delaware charges all publicly traded corporations the same highly remunerative franchise fees, regardless of whether their headquarters are located in- or out-of-state and thus avoids discrimination based on the location of the corporation's headquarters. This practice of making a profit on in-state as well as out-of-state consumers of Delaware corporation law might not be workable if there were more publicly traded corporations headquartered in Delaware.

a. *The Commerce Clause*

To begin with, existing case law suggests that differentiated fees might be found to violate the (dormant) Commerce Clause, which “directly limits the power of the States to discriminate against interstate commerce.”<sup>191</sup>

Admittedly, the Supreme Court has long held that this stricture does not apply if states themselves enter the market<sup>192</sup> as a seller<sup>193</sup> or buyer<sup>194</sup> of goods or services. In that context, states are free to favor their own citizens.

However, the Supreme Court has indicated that the market participant exemption does not apply if a state acts “in its distinctive governmental capacity” rather than “in the more general capacity of a market participant.”<sup>195</sup> And state courts’ judicial work may well be viewed as a distinctly governmental activity.<sup>196</sup> This stands in clear contrast to, for example, higher education, where state universities

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<sup>191</sup> *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988).

<sup>192</sup> *Id.* at 277; *W. Oil & Gas Assoc. v. Cory*, 726 F.2d 1340, 1342 (9th Cir. 1984).

<sup>193</sup> *E.g.*, *Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980) (sale of cement).

<sup>194</sup> *See, e.g.*, *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (holding that under a plan to pay a bounty for the destruction of vehicles formerly titled in that state, Maryland discriminated between in- and out-of-state processors of scrap vehicles).

<sup>195</sup> *New Energy Co.*, 486 U.S. at 277.

<sup>196</sup> Thoughtful analysis might, however, support the conclusion that adjudication involves several functions, some more governmental than others. In particular, if contracts are involved, deciding who is “in the right”—basic dispute resolution—is arguably not a distinctly governmental activity; arbitrators can easily do it too. On the other hand, enforcement is ultimately something that only the state, with its monopoly on force, can do effectively. Thus, arbitrators must rely on courts to enforce their decisions. When a foreign court decides a domestic contract dispute, the foreign court is acting like an arbitrator, largely limiting its role to declaring which party is in the right. Hence, one might argue, the foreign court is not acting in its distinctive governmental capacity. Rather, the courts of the origin state must enforce the judgment, and origin-state courts are performing a distinctly governmental function.

However, even if states are thought to act as market participants when providing judicial forums for the adjudication of commercial disputes because of the growing private dispute resolution industry, it still does not necessarily follow that discrimination against out-of-state litigants would be permissible. The Supreme Court has long held that the Commerce Clause bars discrimination against nonresidents in user fees. *See, e.g.*, *Nw. Airlines v. County of Kent*, 510 U.S. 355, 369 (1994) (government-owned airport); *Aero Mayflower Transit Co. v. Bd. of R.R. Comm’rs*, 332 U.S. 495, 501–03 (1947) (state highway); *Guy v. City of Baltimore*, 100 U.S. 434, 443 (1880) (state waterway). Professor Dan T. Coenen suggests that user fee jurisprudence be treated as an exception to the market participant doctrine. *See* Dan T. Coenen, *State User Fees and the Dormant Commerce Clause*, 50 *VAND. L. REV.* 795, 840–41 (1997). According to this view, user fee jurisprudence is properly understood as meaning that even if the state is acting as a market participant, it may not impose discriminatory user fees for the use of the “infrastructure of interstate trade.” *Id.* at 805–23, 840. Under this interpretation, one might consider courts functionally part of the infrastructure for interstate trade and hence barred from charging foreigners differentiated fees.

have long charged out-of-state students substantially higher fees than are charged to in-state students.<sup>197</sup>

Assuming that differentiated court fees in the area of commercial contracting are subject to scrutiny under the Commerce Clause, the question remains whether the states can justify them. This would require states to show that differentiated fees “advance[ ] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”<sup>198</sup> In the context at hand, one might be tempted to argue that the host state has to impose differentiated fees in order to protect itself from having to subsidize judicial services for foreigners at the expense of local taxpayers. However, it is unlikely that this reasoning is consistent with existing precedent. To be sure, the Supreme Court has acknowledged 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>199</sup> Yet 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>200</sup> And according to the Court, that condition is not met if a state imposes a differentiated fee to compensate for the fact that certain services are partially financed via the general taxes imposed on residents.<sup>201</sup> Accordingly, it is unlikely that differentiated court fees can be justified by pointing out that the court system is at least to some degree financed by the jurisdiction’s residents via taxes. A fortiori, there is no reason to believe that the Supreme Court would accept differentiated fees that allow the host state to turn a profit at the expense of foreign litigants.

One might be tempted to make the following objection: Most states recognize the forum non conveniens doctrine,<sup>202</sup> which allows courts to decline to exercise jurisdiction if the forum is inconve-

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<sup>197</sup> 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.” Coenen, *supra* note 196, at 806 n.60 (collecting lower federal court cases upholding tuition discrimination against Commerce Clause challenges and Supreme Court cases upholding tuition discrimination against other constitutional challenges).

<sup>198</sup> *Or. Waste Sys., Inc. v. Dep’t of Envtl. Quality*, 511 U.S. 93, 101 (1994).

<sup>199</sup> *Id.* at 102 (quoting *W. Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)) (second alteration in original).

<sup>200</sup> *Id.* at 103 (citing *Armco, Inc. v. Hardesty*, 467 U.S. 638, 643 (1984)).

<sup>201</sup> *Id.* at 104.

<sup>202</sup> *E.g.*, Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT’L L. 41, 87 n.15 (1998); Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1617 (1992); James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769, 836 (1999); Walter W. Heiser, *Forum Selection Clauses in State Courts: Limitations on Enforcement after Stewart and Carnival Cruise*, 45 FLA. L. REV. 361, 372 n.63 (1993).

nient.<sup>203</sup> Moreover, the Supreme Court has made it clear that the states do not, as a general matter, violate the U.S. Constitution by invoking the forum non conveniens doctrine.<sup>204</sup> But if the courts of the host state can entirely refuse to adjudicate cases that have no connection with the host state, does this not imply that host states must be all the more able to take the much less drastic step of charging the parties higher fees in such cases?

The answer is no.<sup>205</sup> The goals of the forum non conveniens doctrine are to protect the defendant from having to litigate in an inconvenient forum as well as to promote certain public interests.<sup>206</sup> The public interest concerns include avoiding administrative difficulties, making it easier for interested third parties to follow the unfolding of the trial, and ensuring that a state's residents are not burdened with jury duty for cases that have no ties to the state.<sup>207</sup> The forum non conveniens doctrine can potentially serve all of these goals, yet none of them can be invoked to justify differentiated fee structures. Moreover, the forum non conveniens doctrine is rarely invoked if, as in the cases at issue, the parties have used a forum selection clause to specify the forum *ex ante*.<sup>208</sup> Thus, recognition of the forum non conveniens doctrine, as it has been deployed, is not necessarily inconsistent with barring higher fees for foreign litigants.

Despite unfavorable precedent, however, the dormant Commerce Clause is not an insuperable obstacle to differentiated fee structures. Rather, Congress may always exercise its power to authorize

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<sup>203</sup> See, e.g., George, *supra* note 202, at 821 (pointing out that “forum non conveniens allows a forum to dismiss an action that is significantly inconvenient for a defendant”); Heiser, *supra* note 202, at 394 (noting that the forum non conveniens doctrine “permits a court to decline to exercise its jurisdiction if the forum chosen by the plaintiff is a seriously inconvenient place to conduct the litigation”).

<sup>204</sup> Broderick v. Rosner, 294 U.S. 629, 642–43 (1935) (noting that a state “may in appropriate cases apply the doctrine of forum non conveniens”).

<sup>205</sup> The consensus is that the argument is not valid. See, e.g., Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at “The Greater Includes the Lesser,”* 55 VAND. L. REV. 693, 710 n.60 (2002) (citing commentators). Of course, that does not mean that the argument is not frequently or presumptively sound: if the state has constitutional authority to regulate in a particular way, it *usually* will have authority to enact a similar but less intrusive or less onerous regulation. But, as other scholars have argued, the conclusion is particularly apt to be mistaken in those cases in which a seemingly less intrusive measure fails to be justified by the factors that justify the more far-reaching measure. Cf. *id.* at 795–96 (suggesting that “a power to withhold legal authority to engage in a particular sort of commercial transaction entails the power to permit such transactions on the condition that the participants not promote the transaction in specified ways, so long as the purpose for imposing the speech-restrictive condition is the same as the purpose the state would have for barring the transaction entirely, and so long as imposing the speech-restrictive condition does not unduly harm interests of the speech’s audience”).

<sup>206</sup> Cf. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

<sup>207</sup> *Id.* at 508–09.

<sup>208</sup> See *supra* Part VIIA.

such fee structures by statute. The dormant Commerce Clause doctrine 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>209</sup> We expand further on the case for authorization below.<sup>210</sup>

b. *The Privileges and Immunities Clause*

Differentiated court fees also face a second constitutional hurdle in the form of the Privileges and Immunities Clause,<sup>211</sup> which “secures citizens of one State the right to resort to the courts of another, equally with the citizens of the latter State.”<sup>212</sup> Yet with respect to differentiated fee arrangements in particular, the Court has made it clear that 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>213</sup> Hence, higher court fees for non-residents are consistent with the Privileges and Immunities Clause so long as they are necessary to protect against 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>214</sup> The Privileges and Immunities Clause does not protect corporations,<sup>215</sup> however, and thus would allow differentiated fees for the litigants who would benefit the most from extraterritorial litigation.

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<sup>209</sup> *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 653 (1981).

<sup>210</sup> See *infra* Part IX.C.

<sup>211</sup> Federal legislation allowing differentiated court fees presumably would not violate the Equal Protection Clause. When federal law discriminates between U.S. residents and non-residents, it does not implicate any of the constitutionally significant suspect classifications. Moreover, the desire to create a workable market for judicial services would presumably qualify as a sufficient reason for the discrimination.

<sup>212</sup> *Mo. Pac. R.R. Co. v. Clarendon Boat Oar Co.*, 257 U.S. 533, 535 (1922); accord *McKnett v. St. Louis & S.F. R.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>213</sup> *Toomer v. Witsell*, 334 U.S. 385, 398–99 (1948); see also *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 298 (1998) (“[A] State may defend its position by demonstrating that ‘(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State’s objective.’” (quoting *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 284 (1985))).

<sup>214</sup> In *Toomer*, the Court ruled that a State may charge residents and non-residents different license fees only if there is “a reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced upon them.” 334 U.S. at 399. Failure to make a profit might be hard to justify as a “danger” sufficient to justify such discrimination. *Id.*

<sup>215</sup> *E.g.*, *Phila. Fire Assoc. v. New York*, 119 U.S. 110, 117 (1886); *Liverpool Ins. Co. v. Massachusetts*, 77 U.S. (10 Wall.) 566, 573 (1870); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1868).

## 2. *The European Union*

Among the member states of the European Community, the constitutional obstacles to differentiated court fees are similar, though more severe. Article 12 of the Treaty Establishing the European Community contains a general prohibition of discrimination on the basis of nationality<sup>216</sup>—a prohibition that also comprises covert forms of discrimination, such as discrimination on the basis of residence.<sup>217</sup>

Although the European Court of Justice has not directly addressed the issue,<sup>218</sup> there is little reason to believe that member state rules providing for differentiated court fees would be sustained. To be sure, the relevant prohibitions on discrimination are not absolute. At least when it comes to those cases where the law discriminates on the basis of residence rather than explicitly discriminating on the basis of nationality, it is generally recognized that the relevant measures will pass muster if they can be justified on objective grounds.<sup>219</sup> Hence, one might once again be tempted to argue that the need to avoid free-riding as well as the benefit of encouraging jurisdictions to compete as providers of judicial services justifies the imposition of a differentiated fee structure.

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<sup>216</sup> Treaty Establishing the European Community (consolidated version), Dec. 29, 2006, art. 12, 2006 O.J. (C 321 E) 37, 48 [hereinafter EC Treaty].

<sup>217</sup> *E.g.*, Case C-65/03, *Comm'n v. Belgium*, 2004 E.C.R. I-6427 ¶ 28.

<sup>218</sup> The Court of Justice has repeatedly dealt with discriminatory national provisions in the area of civil procedure, but these cases did not concern discriminatory court fees. *See, e.g.*, Case C-323/95, *Hayes v. Kronenberger GmbH*, 1997 E.C.R. I-1711 ¶ 2 (furnishing of security for court costs and attorneys' fees); Case C-43/95, *Data Delecta Aktiebolag v. MSL Dynamics Ltd.*, 1996 E.C.R. I-4661 ¶ 3 (furnishing of security for cost of legal proceedings); Case C-398/92, *Mund & Fester v. Hatrex Int'l Transp.*, 1994 E.C.R. I-467 ¶ 2 (seizure orders); Case C-20/92, *Hubbard v. Hamburger*, 1993 E.C.R. I-3777 ¶¶ 3-4 (furnishing of security for court costs).

<sup>219</sup> This is true, first, for the general prohibition of discrimination on grounds of nationality enshrined in article 12 of the EC Treaty. *See, e.g.*, Case C-29/95, *Eckehard Pastoors & Trans-Cap GmbH v. Belgium*, 1997 E.C.R. I-285 ¶¶ 18-19 (noting that national legislation discriminating based on residence, although having "the same practical result as discrimination on grounds of nationality," is not sufficient for a court to hold legislation incompatible with the general prohibition of discrimination and that for a court to find a violation "it would also be necessary for the legislation in question to be incapable of being justified by objective circumstances"); *Mund & Fester*, 1994 E.C.R. I-467 ¶¶ 14-17 (noting that the general prohibition of discrimination on grounds of nationality "forbids not only overt forms of discrimination based on nationality, but also all covert forms of discrimination," but holding that a violation of the prohibition of discrimination occurs only in those cases where "the provision in question [is] not . . . justified by objective circumstances"). Within the context of the fundamental freedoms, the treaty makes clear that even overtly discriminating measures are sometimes justifiable. *See, e.g.*, EC Treaty, *supra* note 216, art. 30, 2006 O.J. (321 E) at 53 (listing grounds that justify restrictions of the free movement of goods). Moreover, concerning those measures that do not overtly discriminate on the basis of nationality, the Court of Justice of the European Communities has held that such measures can be justified by objective circumstances. *See, e.g.*, Case C-204/90, *Bachmann v. Belgium*, 1992 E.C.R. I-249 ¶¶ 9, 28 (finding de-facto discrimination, yet concluding that the national measure at issue is nonetheless justified).

However, in the past, the Court of Justice of the European Communities has shown little appetite for this type of reasoning. Although it has not yet addressed differentiated court fees, its case law on discriminatory fees for educational services is telling: As a general rule, the Court has held that higher fees for university students from other member states are unlawful.<sup>220</sup> Admittedly, the Court has indicated that discrimination might be permissible to avoid extreme financial burdens.<sup>221</sup> However, it is not apparent that extraterritorial litigation would ever reach that level. Moreover, there is nothing to suggest that the Court would approve higher fees for litigants from other member states that are intended to yield a profit.

In the European Union, however, as in the United States, it seems well within the realm of possibility that federal intervention could—in the form of an EC directive allowing differentiated court fees—suffice to solve the problem. To be sure, the EC Treaty prohibits not only the States, but also the Community itself from discriminating on the grounds of nationality.<sup>222</sup> However, that does not mean that Community legislation of the type at issue would necessarily be

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<sup>220</sup> The leading case on discriminatory fees is *Gravier v. City of Liège*, 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. Case 293/83, *GRAVIER v. CITY OF LIÈGE*, 1985 E.C.R. 593. 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 that imposes a fee on foreign students but fails to impose the same fee on students that are citizens of the relevant member-state amounted to an illegal discrimination on the basis of nationality. *Id.* ¶ 26; see also Case C-147/03, *Comm'n v. Austria*, 2005 E.C.R. I-5969 ¶ 75 (holding that despite Austria's claim that the resulting free-rider problems would overburden its educational system, Austria must grant all individuals with a secondary education diplomas the same access to higher and university education, regardless of whether they earned their secondary education diploma in Austria or in another country).

<sup>221</sup> See Case C-209/03, *The Queen v. London Borough of Ealing*, 2005 E.C.R. I-2119 ¶¶ 56–57. In this case, the Court upheld a U.K. residency requirement for government-subsidized student loans, reasoning that without the residency requirement, the subsidies could become an unreasonable burden and reduce the overall level of assistance granted by the state. *Id.* At the same time, the Court stressed that the government could not deny loans to students who had been residing in the U.K. long enough to achieve the relevant level of integration into U.K. society—even if they had lived there only in their capacity as students.

<sup>222</sup> This is particularly true for the general prohibition of discrimination on grounds of nationality that is enshrined in article 12 of the EC Treaty. See Case 313/86, *O. Lenoir v. Caisse d'allocations familiales des Alpes-Maritimes*, 1988 E.C.R. 5391 ¶¶ 14–15 (making it clear that the principle of non-discrimination applies to Community legislation). In addition, though, it should be noted that the so-called fundamental freedoms (the free movement of goods, the free movement of workers, the free movement of capital, the freedom of establishment, and the freedom to provide services) are also interpreted to contain prohibitions of discrimination. This matters because the free movement of goods has long been held to apply not only to measures taken by member states, but also to acts of the European Community. *E.g.*, Case C-169/99, *Hans Schwarzkopf GmbH & Co. KG v. Zentrale zur Bekämpfung unlauteren Wettbewerbes eV*, 2001 E.C.R. I-5901 ¶ 37; Case C-284/95, *Safety Hi-Tech Srl v. S. & T. Srl.*, 1998 E.C.R. I-4301 ¶ 63; Case C-51/93, *Meyhui NV v.*

held to violate the Treaty. The European Court of Justice, in applying the principle of nondiscrimination, tends to be much more lenient if EC legislation, rather than member-state legislation, is concerned.<sup>223</sup>

Against this background, it does not seem inconceivable that Community legislation allowing higher court fees in purely foreign cases—i.e., cases involving two parties domiciled outside the forum state—would pass muster under the EC Treaty. After all, as noted above, even when it comes to member state legislation, the Court has indicated that it sees certain limits on the duty of member states to provide public services to nonresidents. Moreover, as we also discussed above, there are very sound reasons for giving the member states an incentive to compete for litigants by allowing them to charge higher fees in purely foreign cases. Accordingly, given the more generous standard of scrutiny that applies to Community legislation, a directive that allows for higher court fees in case of purely foreign cases ought to escape a verdict of illegality.

### 3. *Globally*

Even at the global level, differentiated court fees face hurdles of two types. First, bilateral treaties often prohibit discrimination vis-à-vis foreign litigants. For example, the United States has concluded so-called Treaties on Friendship, Navigation, and Commerce with dozens of countries.<sup>224</sup> These treaties typically contain provisions granting the nationals of the other country a right to access courts on the same terms as the relevant country's own nationals.<sup>225</sup> This does not lead to problems if the U.S. Constitution permits fee discrimination among states within the United States. If the New York courts can charge higher fees for litigants from Texas, then doing the same thing for litigants from India does not involve discriminatory treatment. If, however, fee discrimination within the United States is unconstitutional, existing treaties would have to be amended to permit U.S. states to establish differentiated fees. This is not a trivial obstacle, but neither should it be insuperable.

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Schott Zwiesel Glaswerke AG, 1994 E.C.R. I-3879 ¶ 23; Case 15/83, Denavit Nederland BV v. Hoofdprodukschap voor Akkerbouwprodukten, 1984 E.C.R. 2171 ¶ 15.

<sup>223</sup> Cf. MIGUEL POLARES MADURO, *WE, THE COURT: THE EUROPEAN COURT OF JUSTICE & THE EUROPEAN ECONOMIC CONSTITUTION* 77–78 (1998); TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EC LAW* 98–109 (1999) (analyzing differences in the standards of scrutiny).

<sup>224</sup> See, e.g., Treaty of Friendship, Commerce and Navigation, U.S.-F.R.G., Oct. 29, 1954, 7 U.S.T. 1839; Treaty of Friendship, Commerce and Navigation, U.S.-Japan, Apr. 2, 1953, 4 U.S.T. 2063; Treaty of Friendship, Commerce and Navigation, U.S.-Isr., Aug. 23, 1951, 5 U.S.T. 550.

<sup>225</sup> 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, 1845 (imposing a duty to grant “national treatment with respect to access to the courts of justice”).

Second, federal law also sometimes prevents states from discriminating vis-à-vis alien litigants. To be sure, the EU antidiscrimination rules do not prohibit unequal treatment of persons from non-member states.<sup>226</sup> And, as regards the U.S. Constitution, it is well established that the Privileges and Immunities Clause does not protect aliens.<sup>227</sup> However, the Commerce Clause is not restricted to commerce “among the several states.” Rather, the Commerce Clause also extends to commerce “with foreign nations.”<sup>228</sup> Accordingly, the Supreme Court has made it clear that the dormant Commerce Clause Doctrine also applies to state regulation interfering with foreign commerce.<sup>229</sup> Indeed, the relevant case law suggests the standard of review to be applied in this context is even stricter than in cases that concern commerce between U.S. states.<sup>230</sup> Yet here, just as among the states within the United States, a federal statute will suffice to permit differentiated fees.

### C. A Change in Legal Culture

Globalization of commercial litigation can and will continue to expand even if host state courts are constrained to charge foreign litigants fees no greater than those charged domestic litigants. As explained above, however, differentiated fees are indispensable if jurisdictions are to make themselves hospitable to foreign litigants in more than just the largest and financially most profitable cases. Is that objective worth limiting the constitutional principle of formal non-

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<sup>226</sup> See Case T-333/00, Rougemarine SARL v. Comm’n, 2002 E.C.R. II-2983 ¶ 38.

<sup>227</sup> 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. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1868) (“The term citizens as there used applies only to natural persons, members of the body politic, owing allegiance to the State . . .”).

<sup>228</sup> Accordingly, the Supreme Court has repeatedly held that the states “cannot by legislation place burdens upon commerce with foreign nations or among the several States.” *Sherlock v. Alling*, 93 U.S. 99, 102 (1876); see also *Smith v. Alabama*, 124 U.S. 465, 473–74 (1888).

<sup>229</sup> E.g., *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 310–11 (1994); cf. J.T. Hutchens, Note, *The Market-Participant Exception and the Dormant Foreign Commerce Clause*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 445, 445 (2007) (noting that “the Court has imposed the strictures of the Dormant Commerce Clause on state regulation of foreign trade”).

<sup>230</sup> The Supreme Court has held that that the protection afforded to international commerce is even “broader than the protection afforded to interstate commerce.” *Kraft Gen. Foods v. Iowa Dep’t of Revenue & Fin.*, 505 U.S. 71, 79 (1992). Similarly, the Court has invoked the need for federal uniformity to explain why, when it comes to foreign rather than interstate commerce, “a State’s power is further constrained.” *Barclays Bank PLC*, 512 U.S. at 311.

discrimination in access to the courts? In our view it is, and the reasons are straightforward.

To begin with, there is little risk that such a step would make foreign litigants worse off. Or at least this is true if, as we suggest, differentiated fees are permitted only in what we have called purely foreign cases—that is, cases that are litigated between foreign litigants and that do not have any substantial ties to the forum beyond the parties' contractual choice of the forum or its law. The existing regulatory framework *de facto* precludes most such cases from being tried extraterritorially. If, as we expect, the ability to charge competitive court fees motivates at least some jurisdictions to compete vigorously for foreign litigants, then it should become much simpler for those litigants to engage in extraterritorial litigation than it is now. Consequently, foreign litigants have little to lose and much to gain from the reforms we suggest.<sup>231</sup>

The present system essentially reserves the ability to litigate in foreign courts to parties involved in cases with extremely high stakes. They alone, for example, have guaranteed access to New York courts. And only for them is it worthwhile to overcome the various obstacles that render extraterritorial litigation impractical for the great majority of litigants. Allowing differentiated court fees can give states the incentive to make extraterritorial litigation feasible for more than just the elite. In other words, the reforms we suggest, although allowing *de jure* discrimination, are an important step toward creating *de facto* equality in access to justice between different classes of litigants.

Constitutional doctrines on nondiscrimination in judicial services have developed primarily among the federated states of the United States and the European Union, places where a substantial degree of reciprocity among the member states can be relied upon both because of the homogeneity of those states and because they interact within an overarching framework of governance. We believe that constraints on differentiated fees are counterproductive and should be relaxed even within those federations. The constraints are less costly there than in the fully international setting, however. Consequently, constitutional constraints on court fees that courts have developed within the United States and the European Union should not be taken as a guide to the principles that should apply among fully independent nations. And if either or both of those federations are not

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<sup>231</sup> In particular, there seems little risk that, to avoid higher court fees, contracting parties will inefficiently try to create artificial contacts with the desired host state—for example, by opening an office in the host state or negotiating their contract there. Because few commercial contracts end up in court, the expected cost of higher court fees should generally be modest by comparison with the costs of the tactics necessary to avoid them. Moreover, host states could render such efforts even more unattractive by disregarding contacts with the state that were created with the sole aim of avoiding court fees.

prepared to relax their own internal constraints on differentiated court fees, they should nonetheless refrain from extending those constraints to their member states' treatment of litigation that comes from outside the federation.

#### CONCLUSION

Good courts are central to sustained economic development. Yet, in many jurisdictions around the world, courts are slow, inept, or corrupt. In this Article, we suggest that one way of mitigating this problem is to let parties from countries with weak courts litigate in jurisdictions where the courts are much stronger. Important technological developments, including rapid advances in transportation and telecommunications, are creating an environment in which such a global market for judicial services seems entirely feasible. There are compelling reasons to believe that the benefits of facilitating the emergence of that market would far outweigh the costs. Although private arbitrators will continue to play an important role, commercial dispute resolution will likely long remain dominated by public courts, which have important advantages in offering the type of principled adjudication that is needed to support contractual relations.

Global access to commercial adjudication will require reforms in the granting and recognition of jurisdiction based on choice of forum clauses, as well as reforms in the enforcement of foreign judgments. Nations can undertake these reforms through a multinational convention, such as an appropriately amended version of the Hague Convention of 2005. Perhaps more feasibly, nations can also undertake the needed reforms through bilateral treaties and even by acting on their own.

These legal reforms, as well as the practical reforms that host jurisdictions must take to accommodate extraterritorial litigation, are far more likely to be forthcoming if host jurisdiction courts can charge remunerative fees for adjudicating foreign cases that otherwise lack substantial ties to the forum. In some nations—and particularly among the federated states of the United States and the European Union—this may require an important adjustment in the legal culture. That adjustment is well worthwhile, however. Only by abandoning formal equality in court fees is it likely that real global equality in access to judicial services can be accomplished.

