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## THE MARKET FOR CONTRACTS

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### ABSTRACT

*Recent empirical work has established that New York supplies the law and forum in nearly half the material commercial contracts of public firms. In this respect New York plays a role for commercial contracts analogous to the role played by Delaware with respect to corporate charters. Is the revealed preference for New York law and forum merely the result of choices made by the contracting parties, or does New York actively compete for this business? This paper describes ways in which New York seeks to attract and retain corporate contracts in competition with other potential providers of law and forum. More generally, the paper demonstrates the existence of a robust market for choices of law and forum in major corporate contracts.*

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Recent empirical work has established that New York State is the dominant provider of law and adjudicatory services for large commercial contracts.<sup>1</sup> New York law is chosen in over 45 percent of the material contracts of public companies, with Delaware exercising an important but secondary influence. New York also dominates forum-selection clauses, being selected in 41% of the contracts that specified a forum for resolving disputes.

What accounts for New York's importance in this area? This paper demonstrates that New York actively competes in an interstate market for corporate contracts. New York attracts contracts by offering a menu of substantive rules that are desired by the contracting parties

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<sup>1</sup> 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*, 30 CARDOZO L. REV. 1475 (2009).

and by providing prompt, efficient, and reliable procedures and institutions for resolving disputes. Attracting contracts serves the state's economic interests and increases demand for the services of New York attorneys. The features of the market for contracts resemble those of the much better-known interstate market for corporate charters.<sup>2</sup>

This Article is structured as follows. Part I describes how changes in legal doctrine opened up the possibility of a market for contracts—specifically, the reversal of rules that once disfavored recognition of choice-of-law and forum selection clauses. Part II examines evidence that New York actively competes to attract commercial contracts. We end with a brief conclusion.

## I. ENFORCEABILITY OF CHOICE OF LAW AND FORUM SELECTION CLAUSES

A key precondition for any market is that purchasers have a choice of vendor. In the case of corporate charters, the conditions for such a market were in place by the early twentieth century. The rule had long been that the state of incorporation governed a company's internal affairs.<sup>3</sup> This did not in itself confer party autonomy over corporate law

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<sup>2</sup> For recognition of the similarity between these two issues, see Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. LAW 245, 270 (1993); Erin O'Hara, *Opting Out of Regulation: A Public Choice Analysis of Contractual Choice of Law*, 53 VAND. L. REV. 1551, 1570 n.98 (2000). The vast literature on this issue goes back to William L. Carey, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974). Questions of whether and to what extent states compete for corporate charters, and whether such competition represents a socially desirable phenomenon, continue to perplex corporate law theory today. For a partial sampling of recent work, see, e.g., Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525 (2001); Lucian Arye Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J. L. & ECON. 383 (2003); Lucian Arye Bebchuk & Allen Ferrell, *Federalism and Corporate Law: The Race to Protect Managers from Takeovers*, 99 COLUM. L. REV. 1168 (1999); Lucian Bebchuk, Alma Cohen & Allen Ferrell, *Does the Evidence Favor State Competition in Corporate Law?*, 90 CAL. L. REV. 1775 (2002); Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795 (2002); William J. Carney, *The Political Economy of Competition for Corporate Charters*, 26 J. LEGAL STUD. 303 (1997); Randall A. Heron & Wilbur G. Lewellen, *An Empirical Analysis of the Reincorporation Decision*, 33 J. FIN. & QUANT. ANALYSIS 549 (1998); Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205 (2001) [hereinafter Kahan & Kamar, *Price Discrimination*]; Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003); Edward M. Iacobucci, *Toward a Signaling Explanation of the Private Choice of Corporate Law*, 6 AM. L. & ECON. REV. 319 (2004); Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679 (2002) [hereinafter Kahan & Kamar, *The Myth of State Competition*]; Guhan Subramanian, *The Disappearing Delaware Effect*, 20 J.L. ECON. & ORG. 32 (2004); Roberta Romano, *The States As A Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209 (2006).

<sup>3</sup> See Jens Dammann & Henry Hansmann, *Extraterritorial Courts for Corporate Law 1* (Eur. Corp. Governance Inst. Working Paper Series in Law, Working Paper No. 43/20058m 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=724165](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=724165).

because entrepreneurs needed the power to pick the chartering state. Over the course of the nineteenth century they gradually acquired such power. Charters became available as of right early in the century, thus relieving promoters from the need to seek special legislative authorization to do business in the corporate form.<sup>4</sup> Firms gained authority to operate nationwide as a result of the Supreme Court's 1910 decision denying states the power to exclude foreign corporations.<sup>5</sup> Final liberation came when states ceased requiring a nexus with a firm's activities as a condition to granting a charter.<sup>6</sup> By the early twentieth century incorporators could (a) readily obtain charters; (b) know that internal affairs would be governed by the law of the chartering state; (c) operate in states other than the chartering state; and (d) refrain from operating in the chartering state. The result was that by the beginning of the twentieth century entrepreneurs enjoyed broad ability to select the law governing their firm's internal affairs.

The parties' ability to influence the forum was more limited. The state of incorporation would always be open to litigation in which the corporation was a defendant. But states other than the chartering states began to assert jurisdiction over out-of-state corporations during the nineteenth century.<sup>7</sup> If the corporation was a plaintiff or co-defendant, moreover, it would be necessary for the court to obtain jurisdiction over out-of-state defendants, making it more likely that suit would be brought in some other court where these defendants could be found.<sup>8</sup> Ironically, therefore, as entrepreneurs became more capable of selecting the law governing their firms' internal affairs, they lost assurance as to jurisdiction. Nevertheless, the selection of a state for chartering purposes continued (and continues) to have an important influence on the forum that resolves disputes under the charter.<sup>9</sup>

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<sup>4</sup> Henry N. Butler, *Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 J. LEGAL STUD. 129, 135, 138-58 (1985).

<sup>5</sup> See *Western Union Tele. Co. v. Kansas ex rel Coleman*, 216 U.S. 1, 27 (1910) ("[A] corporation of one State, authorized by its charter to engage in lawful commerce among the states, may not be prevented by another State from coming into its limits for all the legitimate purposes of such commerce.").

<sup>6</sup> See Butler, *supra* note 4; Christopher Grandy, *New Jersey Corporate Chartermongering, 1875-1929*, 49 J. ECON. HIST. 677, 681 (1989) (describing how New Jersey granted general permission for New Jersey corporations to operate outside the state).

<sup>7</sup> See Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 577-86 (1958).

<sup>8</sup> While chartering states had means for coercing corporate directors to submit to their jurisdiction (for example by requiring consent to jurisdiction as a condition for becoming directors), such efforts were not always undertaken and when undertaken were not always successful. See *Shaffer v. Heitner*, 433 U.S. 186 (1977).

<sup>9</sup> Even in recent years, corporate litigation involving Delaware firms has tended to be brought in Delaware, notwithstanding the theoretical availability of other courts to resolve the dispute. See ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 41 (1993) [hereinafter ROMANO, GENIUS]. For a critique of the impact of the state of incorporation doctrine

The conditions for the development of a market for contracts took longer to develop. Throughout much of the history of American law, such a market was impracticable due to the interaction of two factors: courts often refused to enforce choice-of-law and forum-selection clauses; and even if the courts enforced them, these clauses offered only limited benefits.

Parties seeking to enforce choice-of-law clauses were required to convince the court that their choice was *bona fide*.<sup>10</sup> This meant that the designated law had to have some reasonably close relationship with the contract itself, indicating that the parties had not sought to avoid the authority of an otherwise applicable law. In practice the parties were limited to place of contracting or place of performance.<sup>11</sup> Underlying the hostility towards choice-of-law clauses was the sense that they represented an impermissible usurpation of state power. This was the objection of Joseph Beale, the reporter for the First Restatement of Conflicts of Laws, who condemned choice-of-law clauses as conferring the equivalent of legislative power on the contracting parties.<sup>12</sup>

Even if courts had enforced choice-of-law clauses, moreover, the parties would have obtained only limited benefit. Then-applicable conflict of laws rules sought to impose clear standards for identifying the substantive law to be applied in contract cases.<sup>13</sup> Thus any court's application of choice of law rules was reasonably likely to result in the same state's law being applied. Even if conflict of law principles would select different laws the effect was likely to be slight, given the prevailing view that contracts were governed by general common law.<sup>14</sup> Residual variation among states was checked by the principle of *Swift v.*

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in subjecting the firm to litigation in the chartering state, see Jens Dammann, *A New Approach to Corporate Choice of Law*, 38 VAND. J. TRANSNAT'L L. 51 (2005).

<sup>10</sup> See Joseph H. Beale, *What Law Governs the Validity of a Contract: III. Theoretical and Practical Criticisms of the Authorities*, 23 HARV. L. REV. 260, 261-62 (1910).

<sup>11</sup> See *id.* at 262.

<sup>12</sup> *Id.* at 260.

<sup>13</sup> Under the First Restatement of Conflicts of Laws, issues of contract validity were to be governed by the place of execution of the contract while issues going to the details of performance were to be governed by the place of performance. *E.g.*, RESTATEMENT OF CONFLICT OF LAWS § 346 (1934) (law of place of contracting determines extent of contractual obligations); *id.* § 358 (law governing performance is that of the place of performance); *id.* § 362 (time of performance determined under law of the place of performance); *id.* § 370 (breach determined under the law of place of performance). In practice, these categories were sometimes difficult to apply to contracts involving contacts with multiple states. O'Hara, *supra* note 2, at 1560 n.40. Nevertheless, these rules provided some degree of predictability—certainly more than is offered by the Second Restatement approach. See *id.* at 1560 n.41.

<sup>14</sup> See LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* 24, 186 (1965). The concept of a uniform body of contract law was an implicit premise of Williston's influential treatise. See 1 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* iii (1920) (deeming it desirable "to treat the subject of contracts as a whole, and to show the wide range of application of its principles").

*Tyson*,<sup>15</sup> which made general law applicable in diversity of citizenship cases involving commercial questions. If in a case involving adversaries from different states the contract law of one state deviated from prevailing norms, the litigation was likely to be brought into federal court and there decided under general law. Accordingly, there was typically little benefit to selecting the law of any particular state because the case would be decided according to the same rules regardless of which state was chosen. Choice-of-law clauses would neither increase predictability nor opt into more desirable legal rules.

Forum-selection clauses also provided only limited benefits to contracting parties. Such clauses were usually effective to confer personal jurisdiction on the court selected by the parties, on the theory that the party consented to the court's authority.<sup>16</sup> And courts would enforce judgments or awards entered by tribunals to whose power the parties submitted.<sup>17</sup> But most courts refused to enforce forum-selection clauses which purported to vest exclusive jurisdiction elsewhere. The theory was that such clauses represented an "ouster" of judicial power.<sup>18</sup> Efforts to circumvent this rule by making submission to the selected tribunal a condition precedent to a suit were generally unavailing.<sup>19</sup> Even if a court enforced forum-selection clauses, moreover, the effect would often be slight for reasons already mentioned: the selected tribunal would usually apply the same principles of substantive law as would have been applied in the original forum.

The current salience of choice-of-law and forum-selection clauses is due to changes in background rules. Courts became increasingly receptive to choice-of-law clauses. The drafters of the Second Restatement of Conflicts of Law<sup>20</sup> and the Uniform Commercial Code<sup>21</sup> endorsed them. Courts today enforce choice-of-law provisions unless they bear no reasonable relationship with the state, violate an important public policy, or are otherwise unenforceable under ordinary contract principles.<sup>22</sup>

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<sup>15</sup> 41 U.S. (16 Pet.) 1 (1842), *overruled by* *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

<sup>16</sup> See Joseph Henry Beale, *The Jurisdiction of Courts Over Foreigners*, 26 HARV. L. REV. 193, 199 (1913).

<sup>17</sup> For judgments of courts in other states, recognition is required under the Full Faith and Credit Clause. U.S. CONST. art. IV, § 1. Judicial enforcement of arbitration awards was sometimes qualified with conditions that the arbitration process must be procedurally fair and not clearly erroneous. See Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J.L. ECON. & ORG. 479, 484 (1995).

<sup>18</sup> See Michael Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 138-40 (1982); Glenda Burke Slaymaker, *The Legality of Contracts Affecting the Jurisdiction of Courts*, 58 CENT. L. J. 64, 64 (1904).

<sup>19</sup> *Meacham v. Jamestown, F. & C. R. Co.*, 105 N.E. 653 (N.Y. 1914).

<sup>20</sup> See RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §§ 6(2)(d), 187 (1971).

<sup>21</sup> See U.C.C. § 1-105 (1) (1999).

<sup>22</sup> For an example of how far courts will go towards recognizing party choice of law, a

Concomitantly with the increasing legal recognition of choice-of-law clauses, courts and legislatures dismantled the framework which previously had provided a degree of certainty and predictability as to applicable law in the absence of party choice. *Erie Railroad v. Tompkins*<sup>23</sup> rejected the notion of general common law in diversity of citizenship cases, thus removing the safety valve of federal jurisdiction. The number of courts potentially capable of adjudicating disputes multiplied with the expansion of personal jurisdiction under *International Shoe v. Washington*.<sup>24</sup> Principles of conflicts of law became less predictable as states adopted standard-based approaches such as that contained in the Second Restatement. Thus at around the same time choice-of-law clauses achieved legal recognition, the rationale for adopting them became more compelling. These factors, working in tandem, resulted in the widespread practice of including choice-of-law clauses in major commercial contracts.<sup>25</sup>

Forum selection clauses also achieved legal recognition during the past century. The first change came in the context of pre-dispute arbitration clauses, rendered enforceable by state statutes beginning in 1920 and federal law in 1925.<sup>26</sup> Such clauses are now routinely enforced.<sup>27</sup> Outside the arbitration context, the enforceability of forum selection clauses remained in doubt until the Supreme Court's 1972 decision in *The Bremen v. Zapata*<sup>28</sup> declaring a forum-selection clause "prima facie valid."<sup>29</sup> *Bremen* left open the possibility that a party

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number of federal circuits have recognized the power of parties to international contracts to opt out of the United States securities laws, at least when the foreign law selected to govern the transaction provides some protections. See *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1292-99 (11th Cir. 1998); *Richards v. Lloyd's of London*, 135 F.3d 1289, 1292-96 (9th Cir. 1998); *Haynsworth v. The Corp.*, 121 F.3d 956, 962-70 (5th Cir. 1997); *Allen v. Lloyd's of London*, 94 F.3d 923, 928-30 (4th Cir. 1996); *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156, 159-62 (7th Cir. 1993); *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1360-66 (2d Cir. 1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 956-58 (10th Cir. 1992). However, courts still decline to enforce choice-of-law clauses in unusual cases. See, e.g., *Bush v. Nat'l Sch. Studios, Inc.*, 407 N.W.2d 883 (Wis. 1987) (refusing on public policy grounds to enforce choice-of-law clause in franchise agreement); *Application Group, Inc. v. Hunter Group, Inc.*, 72 Cal. Rptr. 2d 73 (Cal. Ct. App. 1998) (refusing to enforce choice of law clause in covenant not to compete); *J.S. Alberici Constr. Co. v. Mid-West Conveyor Co.*, 750 A.2d 518 (Del. 2000) (refusing to enforce choice-of-law clause that would have permitted contractor to avoid liability for negligence).

<sup>23</sup> 304 U.S. 64 (1938).

<sup>24</sup> 326 U.S. 310 (1945).

<sup>25</sup> See Eisenberg & Miller, *supra* note 1.

<sup>26</sup> For an account of how the law shifted towards making pre-dispute arbitration clauses enforceable, see *infra* notes 35-86 and accompanying text.

<sup>27</sup> See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *United Steelworkers of Am. v. American Mfg.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

<sup>28</sup> *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

<sup>29</sup> *Id.* at 10.

could contest the clause as unreasonable. However, if a commercial party knowingly and voluntarily agreed to a forum it is hard to see why holding the party to the bargain would be unreasonable. The Supreme Court left little doubt on that score when, in *Carnival Cruises*, it upheld a forum-selection clause in a consumer contract of adhesion.<sup>30</sup> Most state courts have followed the Supreme Court's lead in enforcing forum-selection clauses,<sup>31</sup> but several still refuse to enforce them, or do so only with significant limitations and qualifications.<sup>32</sup>

These developments in choice-of-law and forum-selection clauses created opportunities for contracting parties to select the law and forum to govern their affairs. Limitations remained, however, by virtue of the requirement that there be a relationship between the transaction and the chosen law and forum. This nexus requirement has not yet broken down for ordinary commercial contracts. However, several states have enacted statutes assuring that their law and forum will be available for major contracts regardless of the parties' other connections with the state.<sup>33</sup> Although these statutes do not guarantee results (other states may not respect them), they go a long way towards making choice of law and forum just as discretionary for commercial contracts as chartering is for incorporations.

## II. THE APPEAL OF NEW YORK LAW

The upshot of the foregoing analysis is that the preconditions for a market for contracts are now in place. The empirical evidence mentioned above establishes that such a market is, in fact, in place, at least on the demand side: parties to major commercial contracts routinely select a forum to govern disputes under the contract, and often, although less frequently, select a forum.<sup>34</sup> But is there also a supply side to the market for contracts? Do states affirmatively seek to attract party choices of law and forum? This section presents evidence that states do compete for commercial contracts. In particular, this section demonstrates that New York—the most successful provider of law and forum for major contracts—in fact has, for the better part of a century, engaged in vigorous efforts to attract this business.

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<sup>30</sup> *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

<sup>31</sup> Enforcement is generally favored under the RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 80 (1971), providing that the parties' agreement as to the place of the action is to be given effect unless it is unfair or unreasonable. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421, cmt. H (1987) (generally requiring enforcement of forum selection clauses even if the defendant is not otherwise amenable to suit in the jurisdiction).

<sup>32</sup> *See infra* notes 111-119 and accompanying text.

<sup>33</sup> *See* discussion *infra* notes 127-131 and accompanying text.

<sup>34</sup> Eisenberg & Miller, *supra* note 1.

### A. *Arbitration Clauses*

Through most of American history New York City was the nation's leading venue for commercial arbitration,<sup>35</sup> with services offered both by trade associations<sup>36</sup> and by the New York Chamber of Commerce, an association of merchants which had offered general arbitration services since 1768.<sup>37</sup>

But New York's ability to attract general arbitration business was significantly limited by the doctrine of revocability: pre-dispute arbitration agreements were considered to be revocable at will and thus were not specifically enforceable in court. When a dispute arose one party was likely to perceive advantages in going to court, either because he could benefit from delay or because he believed that general law offered a greater chance of success than principles of commercial usage.<sup>38</sup> The rule of revocability allowed a party to avoid arbitration by refusing to participate (if a defendant) or filing a lawsuit (if a plaintiff).<sup>39</sup>

The rule of revocability was not a significant handicap for industry-specific arbitration tribunals because social pressure within the industry could substitute for the lack of legal enforceability of a pre-dispute arbitration agreement.<sup>40</sup> But the New York Chamber of Commerce, as a general arbitration tribunal, could not rely on extra-legal sanctions to ensure compliance.<sup>41</sup> Denied either specific

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<sup>35</sup> See, e.g., IAN MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 25-31 (1992); JULIUS HENRY COHEN, *COMMERCIAL ARBITRATION AND THE LAW* 10 (1918) [hereinafter COHEN, *COMMERCIAL ARBITRATION*].

<sup>36</sup> By the first decades of the twentieth century arbitration tribunals were well established in the rubber, silk, produce, dried fruit, lumber, building trades, printing, and clothing industries, among others. See FRANCES KELLOR, *AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS* 6-8 (1948) [hereinafter KELLOR, *AMERICAN ARBITRATION*] (building trades, printing, and clothing); Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 280 (1926) (rubber, silk, produce, dried fruit, and lumber).

<sup>37</sup> FRANCES KELLOR, *ARBITRATION AND THE LEGAL PROFESSION: A REPORT PREPARED FOR THE SURVEY OF THE LEGAL PROFESSION* 7 (1952) [hereinafter KELLOR, *ARBITRATION AND THE LEGAL PROFESSION*]; Benson, *supra* note 17, at 482.

<sup>38</sup> Cohen & Dayton, *supra* note 36, at 270.

<sup>39</sup> See *Arbitration of Interstate Commercial Disputes: Joint Hearings On S. 1005 And H.R. 646 Before The Subcommittees of The Committees of The Judiciary, 68th Cong., 1st Sess. 14* (1924) (hereinafter "Joint Hearings") (testimony of Julius Cohen) ("the difficulty is that men do enter into such agreements and then afterwards repudiate the agreement").

<sup>40</sup> See Cohen & Dayton, *supra* note 36, at 266 ("Systems of arbitration depending for their effectiveness wholly upon the moral suasion of the business community have grown up in the past decades in many lines of American business. Usually the most successful are to be found in the ranks of thoroughly organized trade associations which can exercise an effective discipline . . .").

<sup>41</sup> *Id.* at 270 ("business has become so used to the doctrine of revocability of arbitration agreements that these clauses are not regarded in the same light as other contractual obligations").

performance or an effective extra-legal sanction, the disappointed party would be remitted, at best, to the inadequate remedy of damages for breach of the agreement to arbitrate.<sup>42</sup> These difficulties placed the Chamber at a distinct disadvantage in competition with specialized tribunals for the provision of arbitration services.<sup>43</sup>

Developments elsewhere presented even greater threats to the Chamber's arbitration business. England had made pre-dispute arbitration agreements enforceable by statute in 1886,<sup>44</sup> resulting in an increase in the caseload of the London Court of Arbitration<sup>45</sup>—no doubt at the Chamber's expense.<sup>46</sup> The Chamber also faced domestic competition. The Pennsylvania Supreme Court ruled in 1913 that pre-dispute arbitration clauses were enforceable notwithstanding a statute which purported to nullify them.<sup>47</sup> The result was that parties might opt for a Pennsylvania arbitrator in order to enhance prospects that arbitration agreements would be effective.<sup>48</sup> If other states followed

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<sup>42</sup> See, e.g., *Hamilton v. Home Ins. Co.*, 137 U.S. 370, 385 (1890); *Union Ins. Co. v. Central Trust Co.*, 52 N.E. 671, 674 (N.Y. 1899); *Miller v. Junction Canal Co.*, 41 N.Y. 98, 100 (N.Y. 1869); *Haggart v. Morgan*, 5 N.Y. 422, 426 (N.Y. 1851). The remedy was inadequate because, given the unenforceability of agreements to arbitrate, courts would not award damages based on the expected arbitral award.

<sup>43</sup> Bruce L. Benson provides evidence that the Chamber of Commerce was losing increasing business to these specialized arbitration tribunals during the course of the nineteenth century. Benson, *supra* note 17, at 486-87.

<sup>44</sup> See English Arbitration Act of 1889, 52 & 53 VICT., c. 49 (Eng.); *Manchester Ship Canal Co. v. S. Pearson & Son*, 2 Q.B. 606 (1900); *Austrian Lloyd Steamship Co. v. Gresham Life Assurance Soc.*, 1 K.B. 249 (1903); see also *Conference of Bar Association Delegates*, 5 A.B.A. J. 48 (1919) (remarks of Charles L. Bernheimer) (noting New York's competitive disadvantage compared with England).

<sup>45</sup> Contracts between English and American parties frequently included agreements to arbitrate disputes in England. *U.S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006 (S.D.N.Y. 1915) (describing such a clause as "very ordinary"); A.W. Brian Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships Peerless*, 11 CARDOZO L. REV. 287, 293-314, 321 (1989) (describing arbitration of cotton contracts in England); Cohen, *Commercial Arbitration*, *supra* note 35, at 20-21 (noting that by the early twentieth century England had developed a well-established system of commercial arbitration in many industries). While specifying arbitration in England increased the probability that the parties would arbitrate their dispute, it did not guarantee that result because the aggrieved party could bring preemptive litigation in a jurisdiction such as New York that refused on public policy grounds to enforce pre-dispute arbitration agreements. See *Trinidad Lake*, 222 F. at 1006.

<sup>46</sup> The two tribunals clearly competed for business. In 1919 the London Court of Arbitration asked the New York Chamber of Commerce to promulgate a model arbitration clause which would submit all disputes under the contract to arbitration in London. The Chamber declined the invitation and instead recommended a model clause submitting the dispute to arbitration before the Committee on Arbitration of the New York Chamber of Commerce. See *Conference of Bar Association Delegates*, *supra* note 44.

<sup>47</sup> *Adinolfi v. Hazlett*, 88 A. 869, 870 (Pa. 1913). The decision, overturning a statute enacted in 1907, restored the authority of a line of Pennsylvania cases that had recognized the enforceability of arbitration clauses. See *Snodgrass v. Gravit*, 28 Pa. 221 (1857). Virginia had also recognized the enforceability of pre-dispute arbitration clauses. *Condon v. Southside R.R. Co.*, 55 Va. (14 Gratt.) 302 (Va. 1858). See generally Benson, *supra* note 17, at 486.

<sup>48</sup> This would not guarantee arbitration, but would significantly increase the chance that the clause would be enforced. Arbitration was not assured because the aggrieved party might sue in a

Pennsylvania's lead the Chamber's pre-eminence in domestic arbitration would be jeopardized.<sup>49</sup>

The Chamber of Commerce responded to these threats to its business. In 1911 it appointed a committee on arbitration under the leadership of Charles L. Bernheimer, a cotton trader, with the apparent objective of modernizing and improving the Chamber's arbitration services. Aply assisted by the Chamber's General Counsel Julius Henry Cohen,<sup>50</sup> Bernheimer revamped procedures and upgraded the arbitrator list.<sup>51</sup> But these efforts provided only partial protection. The Chamber could not maintain its dominant position in commercial arbitration, over the long run, unless New York abandoned the rule of revocability.

The Chamber's hopes in this respect were disappointed in 1914 when the New York Court of Appeals decided *Meacham v. Jamestown*.<sup>52</sup> This was a lawsuit brought in New York by a Pennsylvania contractor against a Pennsylvania railroad for work done in Pennsylvania. The contract required the parties to submit disputes to the chief engineer before bringing suit. The trial court, in a decision affirmed by the Appellate Division, dismissed the case on the ground that under Pennsylvania law submission to the arbitrator was a mandatory precondition to suit. But the Court of Appeals rejected the clause on public policy grounds, thus allowing the litigation to go forward in New York. Judge Cardozo's concurring opinion made it clear that even if New York courts might defer to forum-selection clauses that called for adjudication, the same was not true for arbitration: "[i]f any exceptions to the general rule are to be admitted, we ought not to extend them to a contract where the exclusive jurisdiction has been bestowed, not on the regular courts of another

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jurisdiction that refused to enforce such agreements—as happened the following year. *Meacham v. Jamestown*, F. & C. R. Co., 105 N.E. 653 (N.Y. 1914).

<sup>49</sup> The possibility of loss of business if Pennsylvania's innovation were followed elsewhere was not lost on New York judges: Judge Cardozo commented that if New York courts were to enforce arbitration agreements valid under Pennsylvania law, "jurisdiction over controversies arising under such contracts may be withdrawn from our courts and the litigation remitted to arbitrators in distant states." *Meacham*, 105 N.E. at 656 (Cardozo, J., concurring).

<sup>50</sup> IAN MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 28 (1992). Cohen served as general counsel of the New York State Chamber of Commerce and later the New York Port Authority. See JAMESON W. DOIG, *EMPIRE ON THE HUDSON: ENTREPRENEURIAL VISION AND POLITICAL POWER AT THE PORT OF NEW YORK AUTHORITY* 17-18, 31, 39, 66, 190-93 (2001). Cohen had been an attorney for clothing manufacturers during the New York garment workers strike of 1910, and had in that capacity advocated arbitration as a method for the communal resolution of the dispute. See Yankl Stillman, *Edward Filene: Pioneer of Social Responsibility*, *JEWISH CURRENTS*, Sept. 2004; *Obituary, Julius Cohen, 77, Lawyer for 53 Years*, *N.Y. TIMES*, Oct. 7, 1950, at 12.

<sup>51</sup> See Conference of Bar Association Delegates, *supra* note 44, 45-46 (1919); COHEN, *COMMERCIAL ARBITRATION*, *supra* note 35, at viii; JULIUS HENRY COHEN, *THEY BUILT BETTER THAN THEY KNEW* 152-53 (J. Messner, Inc. 1971) (1946) [hereinafter COHEN, *BUILT BETTER*].

<sup>52</sup> *Meacham*, 105 N.E. 653.

sovereignty, but on private arbitrators.”<sup>53</sup>

The possibility remained that federal courts would reach a different result. But those prospects too were crushed in *U.S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*<sup>54</sup> A South Dakota corporation had chartered vessels from a British owner and used them for transporting goods between the United States and Trinidad. The chartering agreement provided that disputes would be resolved by arbitration in London. It was undisputed that the agreement to arbitrate was valid under English law. When war broke out in 1914 the British owner reclaimed the ships, resulting in the American company filing a lawsuit for damages in New York federal court. The owner moved to dismiss for failure to comply with the arbitration agreement. The trial court criticized the rule of revocability, finding it to be based on unsound reasoning, but reluctantly declared the matter settled: “[i]nferior courts may fail to find convincing reasons for it; but the rule must be obeyed.”<sup>55</sup>

The *Meacham* and *Trinidad Lake* cases were not wholly catastrophic. By refusing to enforce clauses specifying arbitration under the laws of New York’s principal competitors, these cases undermined the competitive advantage England and Pennsylvania would otherwise have enjoyed.<sup>56</sup> But overall the cases were a setback. They made it clear that the New York courts were not going to enforce arbitration clauses no matter where the proceedings were to be conducted. New York arbitrations would fail along with the rest. If recourse was to be had against the “deadly rule”<sup>57</sup> of revocability, it had to be through legislation.<sup>58</sup>

Two groups joined to lobby for repeal.<sup>59</sup> The New York business community supported arbitration as a low-cost alternative to litigation as a means for resolving disputes.<sup>60</sup> Arbitration also received support

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<sup>53</sup> *Id.* at 655 (Cardozo, J., concurring).

<sup>54</sup> 222 F. 1006 (S.D.N.Y. 1915).

<sup>55</sup> *Id.* at 1012.

<sup>56</sup> London merchants were alarmed enough at the result of the *Trinidad Lake* case that they remonstrated with the New York Chamber of Commerce. See Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 YALE L.J. 147 (1921).

<sup>57</sup> COHEN, BUILDED BETTER, *supra* note 51, at 153.

<sup>58</sup> The defendant did not take an appeal in the *Trinidad Lake* case.

<sup>59</sup> See KELLOR, AMERICAN ARBITRATION, *supra* note 36, at 10 n.4 (those two groups were the New York State Bar Association and the Chamber of Commerce of the State of New York).

<sup>60</sup> Cohen & Dayton, *supra* note 36, at 265 (describing arbitration as a “movement which commands an unusually widespread support in the business world”). The United States Chamber of Commerce reported in 1925 that “the substantial element of the American business public is overwhelmingly in favor of arbitration in the settlement of commercial disputes in both domestic and foreign trade.” *Id.* at 285. Hundreds of trade associations and businessmen supported the work of the American Arbitration Association. *Id.* at 280; KELLOR, AMERICAN ARBITRATION, *supra* note 36, at 186-98 (listing more than 500 individual businessmen in various industries who had committed to promoting arbitration); *id.* at 199-203 (listing hundreds of trade associations

from attorneys,<sup>61</sup> although their attitude was more ambivalent.<sup>62</sup> Here the leading figure was Julius Henry Cohen, whose work with Bernheimer had convinced him that commercial arbitrations were a natural extension of a lawyer's business.<sup>63</sup> England's repeal of the rule of revocability had resulted in a new and lucrative practice for attorneys there;<sup>64</sup> Cohen believed that similar benefits could be captured by New York lawyers. He argued that lawyers would be called to represent clients in arbitration just as much as in litigation.<sup>65</sup> Lawyers' business would even increase because clients would be induced to enforce their rights if given access to speedy and inexpensive procedures.<sup>66</sup> Satisfied clients would pay as much for arbitration as for litigation, no questions asked.<sup>67</sup> Even if the attorney's fee were slightly lower this would not matter because he also had lower expenses.<sup>68</sup> Overall the attorney would earn a better return.<sup>69</sup>

Between 1915 and 1920 Cohen and others worked on three fronts, attempting to persuade business interests to accept attorneys as party representatives and arbitrators, to persuade lawyers to support arbitration as an alternative to litigation and to persuade the New York legislature to repeal the rule of revocability.<sup>70</sup> Their efforts eventually

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and their local subdivisions which agreed to promote arbitration).

<sup>61</sup> For an account noting the role of attorneys in lobbying for arbitration reform, see Benson, *supra* note 17, at 491-92.

<sup>62</sup> In fact, attorneys were responsible for the demise of a formal arbitration court authorized by the New York legislature in 1874 and abandoned in 1878. COHEN, *BUILDING BETTER*, *supra* note 51, at 152-53; *see also* Benson, *supra* note 17, at 491-92; KELLOR, *ARBITRATION AND THE LEGAL PROFESSION*, *supra* note 37, at 19 (resistance among lawyers to arbitration attributed to fear of "adverse effect upon the livelihood of bench and bar").

<sup>63</sup> Arbitrations before the Chamber of Commerce were adversarial proceedings intended for the benefit of the broader business community. KELLOR, *ARBITRATION AND THE LEGAL PROFESSION*, *supra* note 37, at 9. Lawyers could often play a role in these proceedings as representatives of the parties or as paid arbitrators. In contrast, arbitrations before trade organizations rarely included attorneys and thus offered few benefits to lawyers and some costs, if disputes that would otherwise be tried in court were routed to an industry tribunal. *Id.* at 8. Some trade organizations even prohibited attorney participation. *Id.*

<sup>64</sup> *Id.* at 20.

<sup>65</sup> Harris Jay Griston, *The Substitution of Arbitration for Litigation*, 2 N.Y.U. L. REV. 107, 109 (1925) ("lawyers are no more dispensable in a Tribunal of Arbitration than they are in a court of law").

<sup>66</sup> *Id.* at 116.

<sup>67</sup> *Id.* ("the lawyer's fees are in no wise diminished by having his clients resort to Arbitration"); Cohen & Dayton, *supra* note 35, at 283 (arbitration produced satisfied clients).

<sup>68</sup> Griston, *supra* note 65, at 116.

<sup>69</sup> Cohen & Dayton, *supra* note 35, at 283.

<sup>70</sup> In 1916 Cohen persuaded the New York State Bar Association to form a Committee on Prevention of Unnecessary Litigation, headed by Cohen, which was charged with enhancing attorney involvement in arbitration. COHEN, *BUILDING BETTER*, *supra* note 51, at 155. A principal task of this committee was to seek common ground with the New York Chamber of Commerce for the coordinated provision of arbitration services. Common ground was not hard to find, given that Cohen was also General Counsel of the Chamber and a close associate of Bernheimer's. *See* Conference of Bar Association Delegates, 5 A.B.A. J. 45 (1919) (remarks of

paid off: the New York legislature enacted a statute in 1920,<sup>71</sup> heralding a “new era in American arbitration.”<sup>72</sup>

The New York statute survived the inevitable constitutional challenge.<sup>73</sup> But it did not provide complete protection for pre-dispute arbitration clauses. When the disputants were of diverse citizenship either could prevent enforcement, notwithstanding the New York statute, simply by taking the dispute to federal court, which continued to adhere to the rule of revocability. Given the *Trinidad Lake* case it was evident that protection from this risk could only come from Congress. The arbitration reform interests in New York therefore sought enactment of a federal law.<sup>74</sup> The campaign culminated in the Federal Arbitration Act of 1925,<sup>75</sup> which, among other things, made pre-dispute arbitration agreements enforceable in federal court.

Another problem with the New York statute was that it did nothing to affect the laws of other states. Thus if a contract called for arbitration in New York City, the aggrieved party might avoid arbitration by suing the defendant in the courts of some state that did not enforce arbitration clauses. This problem was mitigated by the federal statute, since if the parties were of diverse citizenship either could ensure the clause was enforced by bringing the action into federal court. But even after 1925 the problem remained, albeit in reduced form, where the parties were not diverse and the plaintiff could obtain jurisdiction over the defendant in a state that preserved the doctrine of revocability. New York

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Charles L. Bernheimer, Chairman of the Committee of Arbitration of the New York Chamber of Commerce). Eventually the Chamber and the bar committee agreed on uniform rules for arbitration. COHEN, COMMERCIAL ARBITRATION, *supra* note 35, at 11. The groups also worked for repeal of the revocability rule. Recognizing that any such law would face a constitutional challenge, they sought to obtain a constitutional amendment authorizing the legislature to act in the area, but were informed that no such amendment was needed. *Id.* at ix. In 1918, at the behest of the New York Chamber of Commerce, Cohen published a monograph which promoted the case for judicial enforcement of arbitration clauses. *Id.* at vii-xii (introduction of Charles L. Bernheimer).

<sup>71</sup> 1920 N.Y. Laws, Ch. 275.

<sup>72</sup> KELLOR, AMERICAN ARBITRATION, *supra* note 36, at 9.

<sup>73</sup> *Berkovitz v. Arbib & Houlberg, Inc.*, 130 N.E. 288 (N.Y. 1921).

<sup>74</sup> Cohen worked to persuade the American Bar Association of the benefits of repealing the revocability rule, even bringing Bernheimer to address the Conference of Bar Association Delegates on the subject. Bernheimer's remarks failed to generate a very positive reception, however, after he admitted that, in his experience, arbitration cases handled without the assistance of attorneys are disposed of “more quickly and in the long run more satisfactorily.” Conference of Bar Association Delegates, 5 A.B.A. J. 15, 56 (1919). On Cohen's prompting, the American Bar Association prepared a draft of federal legislation modeled on the New York law (also written by Cohen). KELLOR, ARBITRATION AND THE LEGAL PROFESSION, *supra* note 37, at 38; Joint Hearings, *supra* note 39, at 10 (testimony W.H.H. Piatt). Cohen and Bernheimer testified in favor of the legislation before a joint hearing of the House and Senate judiciary committees. *Id.* at 5-9 (testimony Charles L. Bernheimer); *id.* at 13-19 (statement of Julius Henry Cohen). The New York-based Arbitration Society of America also lobbied for federal legislation. *Id.* at 25-28 (testimony Alexander Rose).

<sup>75</sup> Codified as 9 U.S.C. §§ 1-16 (2006).

arbitration advocates thus sought to “spread the benefits of [the New York statute] to all States, all trades and all industries compassed within our national life.”<sup>76</sup> Repeal of the revocability rule in other states threatened New York interests to some extent because it meant that parties could specify other states as forums for arbitration; but the potential loss of business was more than offset by the increased custom expected to flow from assurance that contracts specifying New York as the forum for arbitration would be enforced elsewhere.

Lobbying by arbitration advocates achieved a few early results: New Jersey enacted a statute in 1923<sup>77</sup> and Massachusetts and Oregon followed in 1925.<sup>78</sup> California, Pennsylvania, and Wyoming fell into line in 1927.<sup>79</sup> In general, however, state legislatures proved resistant to enforcing pre-dispute arbitration clauses. The American Bar Association backed off its support<sup>80</sup> and the Conference of Commissioners of Uniform State Laws declined to propose a law advocated by Cohen,<sup>81</sup> endorsing instead a provision that did not include enforcement of agreements to arbitrate.<sup>82</sup> Only 15 states had modern arbitration clauses on the books in 1945.<sup>83</sup> This resistance to arbitration reflected concerns of attorneys outside New York that nationwide enforcement of arbitration clauses would benefit New York lawyers at their expense.<sup>84</sup> In the words of one opponent,

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<sup>76</sup> See Griston, *supra* note 65, at 107.

<sup>77</sup> 1923 N.J. Laws 291.

<sup>78</sup> See Sabra A. Jones, *Historical Development of Commercial Arbitration in the United States*, 12 MINN. L. REV. 240, 250-51 (1927); Richard C. Curtis, *A Comparison of the Recent Arbitration Statutes*, 13 A.B.A. J. 567, 567-70 (1927); KELLOR, AMERICAN ARBITRATION, *supra* note 36, at 172.

<sup>79</sup> Jones, *supra* note 78, at 250-51; Curtis, *supra* note 78, at 567-70.

<sup>80</sup> KELLOR, ARBITRATION AND THE LEGAL PROFESSION, *supra* note 37, at 19.

<sup>81</sup> See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING 63 (1925) (referring to the proposal as Cohen’s “pet child”).

<sup>82</sup> KELLOR, ARBITRATION AND THE LEGAL PROFESSION, *supra* note 37, at 19 (noting that opposition from commission on uniform laws had been “instrumental in retarding further progressive statutory legislation in this direction”).

<sup>83</sup> *Id.* at 20.

<sup>84</sup> In retrospect, it appears that arbitration did in fact serve as a valuable source of business for New York lawyers in the wake of the statutory reforms. Lawyers, especially New York lawyers, continued to play a leading role in the activities of the American Arbitration Association, formed in New York in 1926 in a merger between the Arbitration Society of America and the Arbitration Foundation, an affiliate of the New York State Chamber of Commerce. KELLOR, AMERICAN ARBITRATION, *supra* note 36, at 17-18 (describing active role played by lawyers in New York arbitration organizations). The American Arbitration Association, although officially a body of nationwide scope, was dominated in the early years by New York interests. *Id.* at 18. The early participants in the activities of the American Arbitration Association confirm the overwhelming dominance of New York City in the Association’s activities and management. The Association appointed a board of industry leaders whose task was to promote arbitration across the country; 497 of the 520 members came from New York City itself, with several of the others from nearby towns. See *id.* at 186-98.

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Now, in Alabama, Illinois, West Virginia, or California, do you want to take a written contract in which there is a little clause sneaked in the middle there that any disputes in this contract shall be submitted to arbitration, and another little clause, “All arbitration shall take place in New York and New Jersey?” [T]hat’s what the net result of [other states’ adopting the New York approach] will be.<sup>85</sup>

The foregoing history shows that the campaign for modern arbitration laws was heavily concentrated in New York City.<sup>86</sup> The New York Chamber of Commerce lobbied for reform in order both to expand its status as the leading provider of general arbitration services and also to respond to competitive threats from London and other American states. Assisting or even leading this lobbying effort were New York attorneys who perceived a potentially valuable source of future business if arbitration agreements became enforceable in the state. The New York arbitration law of 1920 served the purpose of attracting arbitrations to New York (and avoiding losses of business to competitor jurisdictions). The subsequent campaign to project the New York statute to the federal government and other states, which was also spearheaded by New York interests, also can be understood as part of a competition for contracts. These laws were needed to assure contracting parties that their choice of a New York arbitral forum would be respected even if a party wishing to avoid arbitration was able to direct litigation into some other forum. New York legal and commercial interests worked together to maintain and enhance the attractiveness of New York as a forum for arbitration chosen by parties to commercial contracts.

#### B. *Assurance of Law and Forum*

Further evidence that New York competes for commercial contracts can be found in that state’s treatment of contracts that select New York law or a New York forum. As would be expected of a state that competes for this business, New York is extraordinarily receptive to enforcing contracts that select New York as the provider of law or forum, even in cases where there are few or no other connections between New York and the contract or the parties.

New York courts presume that the law selected by the parties will

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<sup>85</sup> HANDBOOK, *supra* note 81, at 77 (remarks of Mr. Miller).

<sup>86</sup> See MACNEIL, *supra* note 35 (noting that the arbitration reform movement had its “first flowering” in New York); *see also* HANDBOOK, *supra* note 81, at 63 (remarks of Mr. O’Connell) (characterizing advocacy of irrevocable arbitration agreements as being characteristic of “the school coming out of New York City”); *id.* at 75 (remarks of Mr. Miller) (discussing the “the new cult down in New York”).

be applied.<sup>87</sup> If otherwise enforceable under contract law principles, choice-of-law clauses will be respected unless they lack a reasonable relationship to the state or violate a fundamental public policy.<sup>88</sup> These exceptions are rarely (if ever) dispositive in New York commercial litigation. The “reasonable relationship” standard is satisfied if there are some contacts between the contract and the state, even if the contacts with another jurisdiction are greater.<sup>89</sup> Indeed, the parties’ decision to select New York law in itself may constitute the requisite contact.<sup>90</sup>

New York courts in commercial cases also strictly construe the principle that the parties’ choice of law may be ignored if it violates a fundamental public policy. In applying this exception New York courts appear to consider the public policy of New York only.<sup>91</sup> Thus contracts selecting New York law appear to be immune from public policy challenge in New York. As to contracts selecting another state’s laws, New York will refuse enforcement only when the chosen law would infringe some “fundamental principle of justice.”<sup>92</sup> It is difficult to imagine that a New York court would often conclude that a decision by sophisticated commercial parties to subject themselves to the law of another state would fail this test. Indeed, because respecting the parties’ choice of law is itself a policy of New York,<sup>93</sup> it may be doubted that such a choice would ever be considered against public policy.<sup>94</sup> Overall, therefore, it appears that choices of law in commercial cases will receive nearly absolute respect in New York courts.<sup>95</sup>

Most states follow New York in generally enforcing choice-of-law

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<sup>87</sup> See, e.g., *Hartford Fire Ins. Co. v. Orient Overseas Containers Lines*, 230 F.3d 549, 556 (2d Cir. 2000).

<sup>88</sup> *Finucane v. Interior Constr. Corp.*, 695 N.Y.S.2d 322, 324-25 (N.Y. App. Div. 1999); *Radioactive, J.V. v. Manson*, 153 F. Supp. 2d 462, 469-70 (S.D.N.Y. 2001).

<sup>89</sup> See *Cap Gemini Ernst & Young, U.S., LLC v. Nackel*, 2004 U.S. Dist. LEXIS 4492 (S.D.N.Y. 2004); *Radioactive*, 153 F. Supp.2d 462.

<sup>90</sup> Cf. *Mechanic v. Princeton Ski Shop, Inc.*, 1992 WL 397576, at \*3 (S.D.N.Y. 1992) (noting that the parties’ decision to select a particular law to govern their contract is given “heavy weight” in determining the jurisdiction with the most significant contacts with a transaction).

<sup>91</sup> *Home Ins. Co. v. Appleton Papers, Inc.*, 2002 WL 22024 (S.D.N.Y. 2002). Courts applying New York conflicts of law rules are not completely in accord on this issue however. See, e.g., *DCMR v. Trident Precision Mfg.*, 317 F. Supp. 2d 220 (W.D.N.Y. 2004) (fundamental policy of a jurisdiction other than New York may provide a basis for New York courts refusing to enforce a choice-of-law clause).

<sup>92</sup> *Cooney v. Osgood Mach. Inc.*, 612 N.E.2d 277 (N.Y. 1993).

<sup>93</sup> *Babcock & Wilcox Co. v. Control Components*, 614 N.Y.S.2d 678, 681 (N.Y. Sup. Ct. 1993) (“public policy favors New York courts retaining lawsuits where New York is the designated forum”) (citation omitted).

<sup>94</sup> The public policy limitation on enforceability of choice-of-law clauses appears to be principally, if not exclusively, relevant to cases involving consumer contracts or other contexts where the parties are deemed to possess significant inequality of bargaining power. See, e.g., *Cap Gemini Ernst & Young, U.S., L.L.C. v. Nackel*, 346 F.3d 360 (2d Cir. 2003) (employment agreement).

<sup>95</sup> See *Hackett v. Milbank, Tweed, Hadley & McCloy*, 654 N.E.2d 95, 100 (N.Y. 1995).

clauses.<sup>96</sup> Where differences exist, however, they tend to be in the direction of giving less effect to these clauses. The public policy exception to enforcement of choice-of-law clauses, for example, is interpreted in many jurisdictions to include the fundamental policy of states other than the forum.<sup>97</sup> This increases the likelihood that a court will reject the parties' choice on public policy grounds. States other than New York may also apply a more demanding concept of their own public policy: Texas<sup>98</sup> and California<sup>99</sup> are examples. Some courts interpret choice-of-law clauses more narrowly than other contract terms,<sup>100</sup> reject them for particular classes of contracts,<sup>101</sup> disapprove them as not reflecting the real intent of the parties,<sup>102</sup> or refuse to recognize them if another state is found to have a materially greater interest in the matter.<sup>103</sup>

New York also favors party autonomy in forum selection. Arbitration agreements are vigorously enforced in New York, even when they foreclose class actions<sup>104</sup> or add nonstandard procedures.<sup>105</sup> New York is also receptive to judicial forum-selection clauses. New York courts routinely enforce such clauses absent a "strong showing"<sup>106</sup> that they result from fraud or overreaching, are unreasonable or unfair, or contravene some strong public policy.<sup>107</sup> Such clauses are

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<sup>96</sup> See Symeon C. Symeonides, *Choice of Law in the American Courts in 1997*, 46 AM. J. COMP. LAW 233, 273 (1998).

<sup>97</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

<sup>98</sup> See, e.g., *Access Telecom v. MCI Telecomm. Corp.*, 197 F.3d 694, 705-06 (5th Cir. 1999) (refusing to enforce parties' choice of Mexican law on the ground of the "fundamental policy" of Texas to "make valid export contracts in Texas for the sale of U.S. services").

<sup>99</sup> See *Govett Am. Endeavor Fund Ltd. v. Trueger*, 112 F.3d 1017, 1021 (9th Cir. 1997) (refusing to apply parties' choice of law to preclude enforcement of civil RICO statute); *ABF Capital Corp. v. Grove Properties Co.*, 23 Cal. Rptr. 3d 803, 813 (Cal. Ct. App. 2005) (refusing to respect New York choice of law on grounds it would violate fundamental state policy of requiring reciprocal treatment of contracting parties with respect to attorneys fees).

<sup>100</sup> See *Thompson & Wallace of Memphis, Inc. v. Falconwood Corp.*, 100 F.3d 429 (5th Cir. 1996) (applying Texas law).

<sup>101</sup> See LA. REV. STAT. ANN. 23:921(A)(2) (2009) (declaring choice-of-law clauses in certain employment agreements unenforceable).

<sup>102</sup> See, e.g., *Fairfield Leasing Corp. v. Techni-Graphics, Inc.*, 607 A.2d 703 (N.J. Super. Ct. Law Div. 1992) (refusing to accept an explicit and unambiguous choice-of-law provision in a consumer contract on the ground that it did not reflect the "real intent" of the parties).

<sup>103</sup> See *Rosenmiller v. Bordes*, 607 A.2d 465, 468 (Del. Ch. 1991).

<sup>104</sup> See, e.g., *Ranieri v. Bell Atl. Mobile*, 759 N.Y.S.2d 448, 449 (N.Y. App. Div. 2003).

<sup>105</sup> See Michael H. LeRoy & Peter Feuille, *The Revolving Door of Justice: Arbitration Agreements that Expand Court Review of an Award*, 19 OHIO ST. J. ON DISP. RESOL. 861 (2004).

<sup>106</sup> *DiRuocco v. Flamingo Beach Hotel & Casino, Inc.*, 557 N.Y.S.2d 140 (N.Y. App. Div. 1990). A test of New York's commitment to enforcing forum selection clauses may be presented in the controversy surrounding "portable" choice of forum clauses contained in various agreements entered into by Norvergence Inc., a commercial leasing firm. See *Sterling Nat'l Bank v. Kings Manor Estates LLC*, 2005 WL 2464167, at \*7, n.7 (N.Y. Civ. Ct. Oct. 6, 2005) (collecting cases); *IFC Credit Corp. v. Aliano Bros. Gen. Contractors*, 2006 WL 230179 (7th Cir. 2006) (enforcing clause).

<sup>107</sup> *DiRuocco*, 557 N.Y.S.2d 140.

enforceable in New York even if they operate unilaterally to bind only one of the parties.<sup>108</sup> They are defeated by claims of fraud in the inducement only if the fraud alleged relates to the forum selection clause itself rather than to the contract generally.<sup>109</sup> Conclusory allegations of fraud or duress are insufficient; the complaining party must allege facts setting forth a strong showing that the complaining party was induced to agree to the forum-selection clause by fraud.<sup>110</sup>

Most other states enforce forum-selection clauses. But many do not provide the same level of assurance to the parties. Some courts retain jurisdiction over cases in which the parties have selected another state's forum if they conclude that their own tribunals would be more convenient.<sup>111</sup> Some are more willing to reject forum-selection clauses on grounds that they contravene public policy,<sup>112</sup> are unreasonable,<sup>113</sup> fail to establish personal jurisdiction in the forum,<sup>114</sup> or fail to accomplish "substantial justice."<sup>115</sup> Some approve forum-selection clauses only grudgingly,<sup>116</sup> reject them in particular types of cases,<sup>117</sup> exercise discretion over whether to enforce them,<sup>118</sup> or refuse to enforce them at all.<sup>119</sup>

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<sup>108</sup> See *Karl Koch Erecting Co. v. N.Y. Convention Ctr. Dev. Corp.*, 838 F.2d 656, 660 (2d Cir. 1988) (holding that a forum selection clause binding only one party is enforceable).

<sup>109</sup> *Stamm v. Barclays Bank of N.Y.*, 960 F. Supp. 724, 729 (S.D.N.Y. 1997).

<sup>110</sup> *Nat'l School Reporting Servs., Inc. v. Nat'l Schools of Cal., Ltd.*, 924 F. Supp. 21, 24 (S.D.N.Y. 1996). This is also the federal rule. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972).

<sup>111</sup> See MICH. COMP. LAWS ANN. § 600.745(d)(3) (West 2009) (permitting Michigan courts to retain jurisdiction, despite forum selection clause, if the state chosen by the parties would be a "substantially less convenient place" for trial).

<sup>112</sup> Compare *Kubis & Perszyk Associates, Inc. v. Sun Microsystems Computer Corp.*, 680 A.2d 618 (N.J. 1996) (declaring forum selection clauses for agreements subject to the state's franchise protection law to be "presumptively invalid"), with *Hellex Car Rental Sys., Inc. v. Dollar Sys., Inc.*, 2005 WL 3021963 (E.D.N.Y. 2005) (holding that New York franchise law does not preclude forum-selection clause). California has been particularly active in rejecting forum selection clauses on public policy grounds. See, e.g., *Am. Online v. Superior Ct.*, 108 Cal. Rptr. 2d 699 (Cal. Ct. App. 2001) (enforcement of the contractual forum selection and choice-of-law clauses in defendant's service agreements held to be unenforceable because they were the functional equivalent of a contractual waiver of the consumer protections under the California Legal Remedies Act); *Hall v. Super. Ct.*, 197 Cal. Repr. 757 (Cal. Ct. App. 1983) (California Blue Sky law); *GMAC Commer. Fin. LLC v. Super. Ct.*, 2003 WL 21398319 (2003) (California Finance Lenders Law).

<sup>113</sup> *Churchill Corp. v. Third Century, Inc.*, 578 A.2d 532, 536 (Pa. Super. Ct. 1990).

<sup>114</sup> *Johns v. Taramita*, 132 F. Supp. 2d 1021, 1029 (S.D. Fla. 2001); *Ex parte Kenco Signs & Awning Div., Inc.*, 732 So. 2d 1019, 1024 (Ala. Civ. App. 1999).

<sup>115</sup> *GMAC Commer. Fin.*, 2003 WL 21398319.

<sup>116</sup> For example the Texas Supreme Court has upheld such a clause, but only by a 5-4 decision that left considerable uncertainty as to the applicable law. See *In re AIU Ins. Co.*, 148 S.W.3d 109 (Tex. 2004).

<sup>117</sup> See LA. REV. STAT. ANN. 23:921(A)(2) (2009) (employment contracts).

<sup>118</sup> See *Smith, Valentino & Smith, Inc. v. Super. Ct.*, 551 P.2d 1206, 1209 (Cal. 1976) (forum selection clauses may be given effect "in the court's discretion").

<sup>119</sup> See, e.g., IDAHO CODE ANN. § 29-110 (2009); *McCarty v. Herrick*, 240 P. 192 (Idaho 1925); MONT. CODE ANN. § 28-2-708 (2009); *State ex rel. Polaris Indus. v. Dist. Ct.*, 695 P.2d

In the early 1980s the New York Bar Association became active in attempting to provide even greater assurances that party choices of law and forum will be respected in New York State. The committee deliberations were explicitly tied to the self interest of the state. A report of the Association's Committee on Foreign and Comparative Law recognized several advantages that flowed from New York's proven ability to attract contracts from other jurisdictions. Parties "not otherwise having substantial connections with New York" may be induced to conduct business in the state if they could be assured of a New York forum and New York law.<sup>120</sup> New York's "legal and business communities" would benefit "if significant agreements are governed by New York law and if significant commercial litigation is conducted in the state."<sup>121</sup> "New York's stature as a preeminent financial and commercial center" would be "preserved and ultimately enhanced."<sup>122</sup>

Also salient to the committee's deliberations was a concern that New York's dominance in the market for contracts could be threatened if the state failed to offer enhanced assurances that forum-selection and choice-of-law clauses would be respected. The committee warned that questions about the enforceability of New York choice-of-law and forum-selection clauses could deter parties from selecting New York law or forum.<sup>123</sup> The problem had become critical because "other international business centers" had taken "affirmative measures to attract foreign business by providing ready access to a competent forum for dispute resolution."<sup>124</sup> The committee recommended, therefore, that "parties to significant commercial contracts should be encouraged to submit to the jurisdiction of the New York courts and to choose New York law as their governing law."<sup>125</sup>

The New York legislature adopted the committee's recommendations in 1984. Section 5-1401 of the General Obligations Law, added in that year, provides that the parties to any contract for more than two hundred fifty thousand dollars may "agree that the law of [New York] shall govern their rights and duties in whole or in part, whether or not such contract . . . bears a reasonable relation to this state." Section 5-1402 provides that any person may sue a foreign party

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471 (Mont. 1985); *Davenport Mach. & Foundry Co. v. Adolph Coors Co.*, 314 N.W.2d 432 (Iowa 1982); *Bartlett v. Union Mut. Fire Ins. Co.*, 46 Me. 500 (Me. 1859).

<sup>120</sup> Committee on Foreign and Comparative Law, *Proposal for Mandatory Enforcement of Governing-Law Clauses and Related Clauses in Significant Commercial Agreements*, 38 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 537, 537 (1983).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 538.

<sup>124</sup> *Id.* at 548-49.

<sup>125</sup> *Id.* at 549.

in New York courts where the lawsuit relates to any contract for more than a million dollars for which a choice of New York law has been made under section 5-1401 and which contains a provision submitting to New York jurisdiction. A provision of the Civil Practice Law and Rules, also added in 1984, prohibits New York courts from dismissing actions on *forum non conveniens* grounds where the action arises out of a contract, agreement, or undertaking to which section 5-1402 applies and the parties have selected New York law.<sup>126</sup>

The upshot of these intertwining provisions is that parties to major commercial contracts received a guarantee that New York courts will respect clauses selecting New York as the law or forum, regardless of whether they have any other connections with the state. New York's innovation has been emulated by other states, including California (1986),<sup>127</sup> Florida (1989),<sup>128</sup> Delaware (1993),<sup>129</sup> Ohio (1991),<sup>130</sup> and Texas (1993).<sup>131</sup>

### C. Superior Adjudicative Services

A prominent theory of Delaware's success in the market for corporate charters is that the Delaware courts, and especially the Delaware Chancery Court, offer expert, prompt, and reliable judicial services for adjudicating corporate disputes.<sup>132</sup> Does a similar phenomenon exist in the case of the market for contracts? This section will illustrate how New York and other states compete for litigation (and forum selection clauses) by offering upgraded judicial services to major commercial parties.

Because of their location in the nation's most important commercial city, state and federal courts in Manhattan enjoy a natural advantage over other courts as preferred forums for the adjudication of business disputes. Even so, New York has labored under certain deficits as compared with Delaware in establishing its courts as national leaders in its chosen fields. Delaware Chancery Court judges are appointed for lengthy terms (twelve years) from a list submitted by a judicial advisory council.<sup>133</sup> They tend to be persons with experience in business law matters and good reputations among other lawyers and

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<sup>126</sup> N.Y. C.P.L.R. 327(b) (McKinney 2009).

<sup>127</sup> CAL. CIV. CODE § 1646.5 (West 2009).

<sup>128</sup> FLA. STAT. ANN. § 685.101 (West 2009).

<sup>129</sup> DEL. CODE ANN., tit. 6, § 2708 (2000).

<sup>130</sup> OHIO REV. CODE ANN. § 2307.39 (West 2009).

<sup>131</sup> TEX. BUS. & COM. CODE ANN. § 35.51 (Vernon 2009).

<sup>132</sup> See, e.g., ROMANO, GENIUS, *supra* note 9, at 39-40; Kahan & Kamar, *The Myth of State Competition*, *supra* note 2, at 708.

<sup>133</sup> ROMANO, GENIUS, *supra* note 9, at 40.

judges in the small world of the Delaware bar. New York trial court judges, on the other hand, have been selected by politicians whose interests are not necessarily consonant with identifying persons with extensive business law experience or sensitivity to the needs of international finance.<sup>134</sup> And while most New York state court judges are public servants of sterling character and outstanding reputations, this is not true for all.<sup>135</sup>

The problem faced by New York in supplying credible judicial services to contracting parties was not limited to unpredictable judges. Docketing practices employed in New York Supreme Court moved matters from judge to judge as the case progressed.<sup>136</sup> Backlogs were an issue. Businesses had to wait in line with all other civil litigants. Moreover, unlike the Delaware Chancery Court, which operates without a jury, an action for breach of contract for money damages would ordinarily be tried to a jury in New York.<sup>137</sup> Commercial interests frequently express dismay at the prospect of having their cases tried to a jury, on the theory that people drawn at random from a jury pool are unpredictable, unlikely to understand the complexities of a commercial case, and prone to deciding cases on the basis of extraneous factors.<sup>138</sup> Other things equal, the prospect of submitting a case to a New York jury might be considered a detriment to selecting New York as a forum. These and other problems resulted in substantial dissatisfaction among the business community with the judicial services provided in the New York state court system.<sup>139</sup> Given a choice, business litigators were likely to prefer to go to New York federal courts,<sup>140</sup> to the courts of

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<sup>134</sup> See Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431 (2004) (Brooklyn Democratic Party leadership reportedly sold judgeships for \$50,000, with the bribes being distributed up and down the party food chain.).

<sup>135</sup> See *id.* (describing alleged pattern of systematic criminality, favoritism and malfeasance in the Brooklyn, New York court system).

<sup>136</sup> See Tamara Loomis, *High-Profile Case Casts Spotlight on Well-Regarded Court*, N.Y. L.J., June 20, 2002, at 5.

<sup>137</sup> See *Motor Vehicle Mfrs. Assn. of the U.S. v. State of N.Y.*, 550 N.E.2d 919, 922 (N.Y. 1990) (cause of action seeking money damages for breach of contract is quintessentially an action at law).

<sup>138</sup> See, e.g., John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEGOT. L. REV. 1, 32-35, 51-52 (1998). Contracting parties in New York can opt out of jury trials simply by including a well-drafted waiver in their agreements. See *Sherry Assoc. v. Sherry-Netherland, Inc.*, 708 N.Y.S.2d 105, 106 (N.Y. App. Div. 2000). Somewhat surprisingly, however, sophisticated parties frequently omit such clauses from their agreements. See Theodore Eisenberg & Geoffrey 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).

<sup>139</sup> See Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 BUS. LAW. 147, 152 (2004) (commercial courts created at a "time of failing confidence in the state trial courts' ability to address business litigation").

<sup>140</sup> See *Bar Council Supports Commercial Divisions*, N.Y. L.J., Nov. 20, 1995, at 5 (A committee of attorneys practicing in federal court predicted that the commercial divisions would help end the state courts' status as the "less-favored forums for commercial and other complex

another state such as Delaware, or to arbitration.<sup>141</sup> The bad repute of the New York state court system posed an obvious threat to New York's ability to compete for contracts.<sup>142</sup>

New York addressed these problems in the 1990s under the leadership of Chief Judge Judith Kaye<sup>143</sup> and Robert L. Haig, a prominent New York attorney.<sup>144</sup> In 1993 the state instituted a pilot commercial court program in the New York County (Manhattan) Supreme Court.<sup>145</sup> The program designated a single judge for assignment to all aspects of a case, thus eliminating the revolving-door approach to judicial assignments that had characterized the New York system. Judging the experiment a success, the state established a permanent Commercial Division of the Supreme Court in 1995.<sup>146</sup> In addition to continuing the policy of assigning one judge to a case, the commercial division initiative enlisted judges and court personnel who were experienced in business law, implemented new case management techniques, and offered enhanced opportunities for court-annexed alternative dispute resolution.<sup>147</sup> The judges assigned to the commercial division serve fourteen-year terms. They are selected by the Chief Judge, and thus can be picked for their business law experience.<sup>148</sup> They develop a reputation for expertise that enhances their stature and also may improve their prospects for reelection.<sup>149</sup> Chief Judge Judith Kaye explained that the purpose of the commercial division is to give the New York business community a level of judicial service "commensurate with its status as the world financial capital."<sup>150</sup>

The commercial division has been deemed a success, at least by its

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litigation, resulting in the increasingly frequent resort by commercial litigators to federal courts whenever a choice of forum is available.").

<sup>141</sup> Bach & Applebaum, *supra* note 139, at 152 n.12 (citing Legal Opinion Letter from Robert L. Haig, Esq., to Washington Legal Foundation (Jan. 9, 1998)).

<sup>142</sup> See Michael Bobelian, *Rewriting the Rules: A Group of Judges and Lawyers Seeks to Bring More Consistency to Commercial Courts*, N.Y. L.J., July 8, 2004, at 5 (describing fear of losing litigation business).

<sup>143</sup> Bach & Applebaum, *supra* note 139, at 153 n.20 (Robert L. Haig described "Chief Judge Kaye as the only truly indispensable person in creating the Commercial Division.").

<sup>144</sup> *Id.* at 153 n.20, 159 & n.73 (documenting Mr. Haig's role in promoting commercial courts in New York and across the country).

<sup>145</sup> *Id.* at 152.

<sup>146</sup> See Daniel Wise, *Supreme Court Commercial Division Set Up: Crane, Rochester's Stander Added to Handle Disputes*, N.Y. L.J., Oct. 11, 1995, at 1. For a comprehensive account of the creation of this and other business courts, see Bach & Applebaum, *supra* note 139.

<sup>147</sup> See Bach & Applebaum, *supra* note 139, at 158-59.

<sup>148</sup> Gary Craig, *Three Vie For Two State Judicial Seats: Supreme Court Race Features Rivals With a Range of Experience*, ROCHESTER DEMOCRAT & CHRON., Oct. 9, 2004, at 3B (citing the "extensive tax and business law experience" of Commercial Division judge).

<sup>149</sup> See Editorial, *Our Recommendations*, ROCHESTER DEMOCRAT & CHRON., Oct. 20, 2004, at 8A (endorsing judge of the Commercial Division for reelection on the ground that the judge had become an "expert jurist on contractual matters").

<sup>150</sup> See Wise, *supra* note 146 (quotation omitted).

promoters. The average time to resolve a contract action has reportedly been reduced.<sup>151</sup> Jury pools are said to be improved as a result of more intensive supervision by the commercial division judges.<sup>152</sup> Chief Judge Kaye reported that judges of the commercial division are contributing to a “growing body of commercial law once again being generated by the New York State courts.”<sup>153</sup> The court has “helped to stem the flight of commercial litigants from New York’s courts, and to maintain New York’s status as the premier state for the conduct of business.”<sup>154</sup>

Other states have followed New York’s lead in creating specialized business courts,<sup>155</sup> including Pennsylvania,<sup>156</sup> Massachusetts,<sup>157</sup> Maryland,<sup>158</sup> Colorado,<sup>159</sup> Florida, North Carolina,<sup>160</sup> Nevada,<sup>161</sup> and Oklahoma.<sup>162</sup> An ad hoc committee of the American Bar Association has also endorsed the idea.<sup>163</sup> Even staid Delaware has entered the competition as a result of the expansion of Chancery Court jurisdiction to include technology disputes.<sup>164</sup>

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<sup>151</sup> NEW YORK STATE JUDICIAL INSTITUTE, COMPREHENSIVE CIVIL JUSTICE PROGRAM 2005: STUDY & RECOMMENDATIONS 19 (2005), [http://www.nycourts.gov/reports/civil\\_justice\\_program\\_2005.pdf](http://www.nycourts.gov/reports/civil_justice_program_2005.pdf).

<sup>152</sup> Tommy Fernandez, *Lawyers Mine Differences In Boroughs’ Courtrooms; Jury Pools Prove Anything But Equal; Official Attempts At Reform Fall Short*, CRAIN’S NEW YORK BUSINESS, Oct. 25, 2004, at 19; Interview, *The Honorable E. Leo Milonas Urges Support Of Court Reform*, THE METROPOLITAN CORPORATE COUNSEL, Aug. 1999, at 50.

<sup>153</sup> Judith S. Kaye, *New York’s Commercial Division Celebrates Four Years Of Solid Progress*, THE METROPOLITAN CORPORATE COUNSEL, Nov. 1999.

<sup>154</sup> The Council on Judicial Administration, *Report on the Chief Judge’s Court Restructuring Plan*, 52 THE REC. OF THE ASS’N OF THE BAR OF THE CITY OF N.Y. 929, 948 (1997).

<sup>155</sup> See Kahan & Kamar, *The Myth of State Competition*, *supra* note 2, at 708-15 (contrasting business courts with Delaware Chancery Court).

<sup>156</sup> See Interview, Marc J. Sonnenfeld, *Partnering With Outside Counsel for a Philadelphia Business Court*, THE METROPOLITAN CORPORATE COUNSEL, Mar. 2000, at 1 (describing how Philadelphia’s business court initiative was explicitly modeled on the New York approach); Melissa Nann Burke, *Abramson Joining Commerce Court*, THE LEGAL INTELLIGENCER Jan. 14, 2005, at 1 (commerce court judges must be “willing to work hard” and have “business sense”); Asher Hawkins, *Bevilacqua Reflects On Time In Charge Of Phila. Bar Association*, THE LEGAL INTELLIGENCER, Jan. 10, 2005, at 3 (commerce court now a permanent separate division).

<sup>157</sup> See Bach & Applebaum, *supra* note 139, at 159.

<sup>158</sup> MARYLAND BUSINESS AND TECHNOLOGY COURT, MARYLAND BUSINESS AND TECHNOLOGY COURT TASK FORCE REPORT app. B, at 24-25 (2000), <http://www.courts.state.md.us/finalb&treport.pdf>.

<sup>159</sup> GOVERNOR’S TASK FORCE ON CIVIL JUSTICE REFORM, COMMITTEE ON BUSINESS COURTS, FINAL REPORT OF GOVERNOR’S TASK FORCE ON CIVIL JUSTICE REFORM 14-15 (2000), <http://www.state.co.us/cjrtf/report/download/reportl.doc>.

<sup>160</sup> 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, 375 n.63 (2002); see also North Carolina Business Court, <http://www.ncbusinesscourt.net> (last visited Feb. 7, 2008).

<sup>161</sup> Bach & Applebaum, *supra* note 139, at 184.

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

<sup>163</sup> A.B.A. Ad Hoc Committee on Business Courts, *Business Courts: Towards A More Efficient Judiciary*, 52 BUS. LAW. 947 (1997).

<sup>164</sup> See Bach & Applebaum, *supra* note 139, at 151-52.

#### D. *Substantive Law*

Delaware's success in the market for corporate charters is often attributed to its responsiveness to the concerns of corporate managers.<sup>165</sup> Does a similar phenomenon occur in the case of commercial contracts? A detailed analysis of substantive law is beyond the scope of this paper. We can, however, examine several rules applicable to one industry—finance—which is a particularly prominent consumer of New York choice-of-law and forum selection clauses.

New York courts and lawmakers do not disguise their concern to serve the interests of global finance.<sup>166</sup> New York law has, in fact, been accommodating to the interests of financial firms.<sup>167</sup> For example, New York has an unusual procedure in its Civil Practice Law and Rules that permits plaintiffs, in actions “based upon an instrument for the payment of money only,” to jump the litigation queue by filing a motion for summary judgment against the defendant in lieu of complaint.<sup>168</sup> Although this statute has been used by a variety of plaintiffs, among its principal beneficiaries are financial institutions seeking to enforce defaulted loans.

Similarly, when the introduction of the Euro raised uncertainty about the enforceability of contracts calling for settlement in outmoded currencies, New York was in the vanguard of states acting to correct the problem, enacting a statute in July 1997 declaring the Euro a commercially reasonable substitute for the currency designated in the contract.<sup>169</sup>

New York has also been generous to financial institutions in the

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<sup>165</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 (2002); Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987) (Delaware likely to favor the interests of corporate managers over those of the public on questions going to management entrenchment).

<sup>166</sup> See *Bluebird Partners, L.P. v. First Fid. Bank, N.A.*, 731 N.E.2d 581, 589 (N.Y. 2000) (describing New York as the “financial capital of the world”); *Credit Francais v. Sociedad Financiera*, 490 N.Y.S.2d 670, 676 (N.Y. Sup. Ct. 1985) (New York law is to global commerce what the dollar is to international finance: the internationally accepted legal standard.).

<sup>167</sup> New York's receptive attitude towards commercial interests extends back at least to the 1920s. See WILLIAM E. NELSON, *THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920-1980*, 80-92 (2001) (judges of the Court of Appeals—a majority of them from the New York City area—crafted a set of rules tailored to suit the needs of mercantile and commercial interests of New York City during the 1920s and 1930s).

<sup>168</sup> N.Y. C.P.L.R. 3213 (McKinney 2009).

<sup>169</sup> N.Y. Gen. Oblig. Law § 5-1603 (McKinney 2009). Illinois acted almost simultaneously with New York, 815 ILL. COMP. STAT. ANN. 617 (West 2009), and several other states soon followed suit. See James H. Fries, Jr., *Continuity of Contracts After the Introduction of the Euro: The United States Response to European Economic and Monetary Union*, 53 BUS. LAW. 701 (1998).

area of lender liability. Actual rather than constructive knowledge is the standard in New York for proof of aiding and abetting a breach of fiduciary duty.<sup>170</sup> Thus lenders will typically enjoy a defense against claims by shareholders that they facilitated breaches of trust by corporate managers. Similarly, New York law is unfriendly to the tort of deepening insolvency, under which a lender can be held responsible for actions that permit an insolvent firm to continue in operation while losses mount.<sup>171</sup> Under New York law, lenders can generally avoid liability for extending credit to a firm in the zone of insolvency even if the loans are ill-considered and contribute to creditor losses.<sup>172</sup>

The state's approach to traded financial contracts provides another example of efforts to meet the needs of the finance industry.<sup>173</sup> New York's Statute of Frauds had long required that certain widely used financial contracts had to be signed by the party to be bound in order to represent enforceable obligations.<sup>174</sup> This presented a problem because such contracts were typically made orally. Although commercial usage was to treat them as legally binding at the time of the agreement, the law technically allowed either party to avoid the transaction. Even though it appears that social norms among traders prevented people from relying on this avenue to escape their obligations, there was always the possibility of breakdown in the event of market disruptions. In response to this problem, New York revised its Statute of Frauds in 1994 to provide alternative means for establishing the enforceability of agreements for the purchase and sale of currencies, commodities, foreign exchange, deposits and options, indexes and similar instruments.<sup>175</sup> The New York Legislature expanded the provision in 2002 to include institutional sales of commercial loans by means of telephone or oral communications.<sup>176</sup>

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<sup>170</sup> *Lesavoy v. Lane*, 304 F. Supp. 2d 520, 524 (S.D.N.Y. 2004). Thus even if a secured lender knew of the fraud and received the proceeds of corporate looting in satisfaction of their claims, this in itself is not sufficient to establish liability on an aiding and abetting theory. *In re Sharp International Corporation*, 403 F.3d 43, 54 (2d Cir. 2005).

<sup>171</sup> See Paul Rubin, *New Liability Under "Deepening Insolvency": The Search for Deep Pockets*, 23 AM. BANKR. INST. J. 50 (2004); Jonathan M. Landers, *Outside Counsel: Deepening Insolvency Comes of Age*, N.Y. L.J., Oct. 5, 2006, at 4.

<sup>172</sup> *In re Global Service Group LLC*, 316 B.R. 451 (Bankr. S.D.N.Y. 2004).

<sup>173</sup> We thank Roberta Romano for bringing this to our attention.

<sup>174</sup> See Denis M. Forster, Comment, *Standard Swaps Agreements Don't Insulate Users from Risk*, 159 AM. BANKER 20 (1994).

<sup>175</sup> Codified as N.Y. Gen. Oblig. Law § 5-701 (McKinney 2009).

<sup>176</sup> Codified as N.Y. Gen. Oblig. Law § 5-701(b)(1)(i) (McKinney 2009). See Letter from Michael P. Smith, President, N.Y. Bankers Ass'n to The Hon. James M. McGuire, Counsel to the Governor, July 3, 2002, N.Y. Bill Jacket, 2002 S.B. 5669, 225th Leg. Reg. Sess (2002).

## CONCLUSION

This paper documents the evidence of a market for contracting with particular focus on the role of New York as the leading provider of law and forum. New York law is the most frequently selected by sophisticated parties to govern important agreements. Its courts, too, are designated far more frequently than any other state's as forums for resolving disputes. The paper demonstrates that New York's dominance is not accidental. For the better part of a hundred years the state has engaged in affirmative and successful efforts to induce parties to select New York as the provider of law and forum for large commercial contracts.