

Finding the Contract in Contracts for Law, Forum and Arbitration

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Abstract

Contract provisions specifying the law or forum (either judicial or arbitration) have begun appearing in litigated cases, as businesses have pressed many courts for their enforcement against consumers. In at least some of the cases, enforcement of a choice of law provision results in the displacement of the consumer's home state protection by the lesser consumer protection of the State of the form drafter's choosing. This phenomenon raises serious problems of federalism and local control of consumer protection. But while considerable scholarly attention has been lavished on so-called "mandatory arbitration" in this context, much less has attempted to improve our understanding of the workings of choice of law and forum clauses, and of the important implications of their widespread enforcement. The cases reflect very little understanding of these provisions as *contract* provisions, and the literature tends to approach the provisions primarily as conflict of laws problems. This may have obscured the contract that is at the core of these provisions and thereby made a full appreciation of the contract law issues harder to come by. This article attempts to bring more clarity to the analysis. It does so first by building an analytical framework that separates the conflicts and contracts issues for analysis. After developing that framework, the article takes that expanded analysis to a very important recent California case. It concludes by suggesting areas for further study now that the contract issues within these provisions are more clearly evident.

*. Professor of Law, Temple University. © 2005 All rights reserved. Please do not quote or excerpt without written permission. Thanks to Jean Braucher, Jeff Dunoff, Bill Whitford, and particularly to my colleague Rick Greenstein for their helpful comments on this paper. Thanks also to my research assistants, Vinnie Gallo, Margaret Hunsicker, Adam Kerns, and Justin Rymer for their research help.

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INTRODUCTION

Pick up a conflict of laws text or most law review articles and you will find considerable attention lavished on both choice of law and choice of forum clauses in business dealings. Both are nearly ubiquitous in modern business relationships of all kinds, from carefully negotiated contracts among large businesses to mass market forms that businesses promulgate¹ *en masse* to consumers. Both kinds of clauses have received an extraordinary amount of attention in the conflict of laws literature and the attention heaped on them is probably well-earned.

Several different jurisdictions usually have the power to decide a given contract dispute.² Absent an enforceable choice of *forum* clause, a party can “shop” for the most beneficial forum in which to litigate (by simply filing suit there) when the contractual relationship has broken down. This can yield benefits for the plaintiff in the form of geographic advantage or local favoritism over the defendant or, in more subtle forms such as the law a tribunal will apply to the problem, or civil procedure limitations endemic to the chosen forum. Absent a binding choice of *law* clause, parties to a contract face the prospect of litigating under a set of legal rules that was not within their frame of reference when they made their underlying contract. In both cases, the commercial uncertainty can decrease the value of the exchange itself.

The well-earned attention to such provisions has generally come from the conflict of laws literature and has focused on the consequences of such purported agreements, once they are made. *Assuming a choice of forum agreement*, under what circumstances must a court enforce it and under what circumstances might a court refuse enforcement? What are the existing and optimal limitations to the parties’ contractual power to choose their law within their contract? Is the enforcement of

1. Professor Radin distinguishes between the kinds of contracts that are founded on true consent by the bound parties and the forms promulgated by businesses that purport to bind without any semblance of consent. Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 Ind. L.J. 1125 (2000). Because *whether* such forms bind consumers and small business people to choices of law, forum, and arbitration is one of the questions being examined here, I will try to avoid putting the rabbit into the hat by calling these business relationships “contracts.” See also Arthur Leff, *Contract as Thing*, 19 Am. U. L. Rev. 131 (1970).

2. See Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 Tul. L. Rev. 553, 554-55 (1989).

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choice of law clauses, *assuming they are agreements*, subject nonetheless to exceptions? These are questions that pit the autonomy of the parties to manage their own affairs (“party autonomy”) against the jurisdiction’s own power either to exercise jurisdiction over them despite their contrary agreement, or to use the law of *its* choosing to determine their dispute.

What has been largely missing from the work thus far is a focus on a preceding set of threshold questions: 1) *whether* the parties’ purported agreement to a choice of law or a choice of forum clause ought, *as a matter of contract law*, to be enforceable and 2) under whose contract law should that question be answered. These questions focus on an individual’s autonomy to contract or not to contract, and on the State’s legal recognition (typically, as a matter of economics or commerce) of private ordering. The conflict of laws scholarship and commentary have assumed the contract law questions were relatively settled in this context and proceeded from there; the contracts literature has, by and large, simply ignored the threshold contract questions which might demand different treatment in some contexts than in others.

The rapidly developing pace of globalization has made both choice of law and choice of forum clauses far more important economically than they were thirty years ago. These same forces have brought into sharp focus the need to consider sensible mechanisms to limit the uses to which such provisions might be put. Two recent developments show why a focus on the contracts questions is important.

First, we now see the aggressive use of choice of *law* clauses in consumer and small business settings to a degree unimagined in the late 20th Century and this development threatens to undermine the consumer law States have developed in the last 50 years. To give a simple example, unconscionability, a major tool in contract policing is most often put to work when a consumer or small business has received onerous terms through a vendor’s form. Very few would think that a vendor could avoid an unconscionability challenge by simply adding a “waiver of unconscionability” to that very form. Yet, a modern drafter might well accomplish the same thing by “choosing” the law of a place with weaker consumer protection and arguing that, as a matter of contract, the customer is bound by that “choice of law.” We now find businesses pressing this argument in litigation; at least one court (and, probably, countless arbitrators) have accepted the argument.

Because vendor forms are promulgated *en masse*, the effect of judicial decisions

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recognizing this power is the replacement of one State's set of unconscionability norms by another set, that of the State of the drafter's choosing. And if this can be done with unconscionability, it can probably be done with any State contract rules protecting consumers and small businesses. Some recent cases suggest that wholesale displacement of a State's consumer and small business protections may be a real danger.

If this is happening, the evidence suggests that it is taking place without either advocates or courts understanding the full range of possibilities that contract law might offer -- very few courts focus on the question *whether* the choice of law clause is itself enforceable as a matter of contract law. This, in turn, is due to the fact that these problems are thought of as conflict of laws problems, not as contract problems, and the intellectual complexity that comes with conflict of laws has effectively hidden the contract that is at the core of these provisions. We need to understand the law that applies to these provisions better: badly-analyzed judicial decisions will have ripple effects for years in unreported arbitration decisions and in negotiations that inevitably accompany dispute resolution. In addition, a better understanding of the workings of these provisions is essential for conscious, transparent policy making going forward.

The second development underscoring the importance of the contract questions in this area is connected to choice of *forum* clauses, again showing up increasingly in vendors' forms. Both a recent Hague Convention³ and the American Law Institute's *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute*⁴ address judgments entered in violation of agreements to litigate in an exclusive forum specified in the underlying contracts. In both cases, and with few exceptions, the contractual choice of forum provision will have a great impact on the enforceability of the resulting judgments.

Both of these statements of policy, while not the law anywhere yet, raise

3. Hague Conference on Private International Law, Convention on Choice of Court Agreements, http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=98 (last visited July 26, 2005).

4. The Am. Law Inst., *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute*, Proposed Foreign Judgments Recognition and Enforcement Act [hereinafter "ALI International Judgment Recognition Project"] § 5(b) cmt. f (April 11, 2005).

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complex issues related to, but distinct from, those raised by the widespread use of choice of law clauses in vendor forms. But they have this in common: choice of forum clauses, like choice of law clauses, have been analyzed as conflict of laws provisions and, once again, the analysis has tended to obscure the contract in the process. The new developments on the international front will make understanding the full richness of these provisions more essential than ever.

A discussion of choice of law and forum clauses in business forms could not be complete without also addressing, at least in summary form, binding mandatory arbitration (“BMA”).⁵ This is a form of forum selection⁶ but the Supreme Court’s expansive interpretation of the Federal Arbitration Act (“FAA”) makes focus on the contract questions essential. An arbitration clause triggers the FAA and, with it, a series of decisions interpreting the Act to broadly favor arbitration and to strongly preempt State law, even in adhesion contract settings. The Act, and the decisions interpreting it, specify, however, that State *contract* law defenses remain valid; only when a court finds there is an enforceable agreement to arbitrate does FAA preemption sweep away nearly all other challenges to BMA. Because of this, the contract law challenges to BMA are far better developed than they are to choice of forum clauses, and looking at them can inform a discussion of choice of forum clauses. In addition, the arbitration cases occasionally beg the question *whose* contract law decides the contractual validity of an arbitration clause? If the form that contains the arbitration clause also contains a choice of law clause, as it usually does, the analysis becomes complex and, judging by the decisions, inadequately understood.

That the increased use of choice of law, forum, and arbitration clauses can

5. Professor Speidel correctly observes that “binding mandatory arbitration” is a misnomer in that it conveys a sense that it is not based in assent but rather is imposed. Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-dispute (Mandatory) Arbitration Outlived its Welcome?*, 40 *Ariz. L. Rev.* 1069 (1998). But true assent is surely missing in most consumer arbitration agreements that are enforced by courts and, therefore, it’s no wonder that the popular sense is different from how arbitration works in theory. I use the term here because consumer advocates have begun using it as shorthand in efforts to use the market to change business behavior by urging consumers not to do business with vendors who use BMA and giving consumers information on those vendors who do not require it. See www.givemebackmyrights.com for a website that makes good use of this shorthand.

6. *Cf.* Eugene F. Scoles et al., *CONFLICT OF LAWS* § 11.3 at 481 (4th Ed. 2004).

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adversely affect the customers who receive them has been evident for many years. But these developments may also imperil State consumer and small business protections more generally. This may be cause for concern in those States that wish to maintain local control over the protections they offer to those customers who are on the receiving end of adhesion contracts.

The conflict of laws lens through which we have observed choice of law and forum clauses gives a very incomplete picture, one that limits the imagination both of lawyers and of legislatures. This article aims fix that, by improving our ability to see the legal doctrine under which these provisions work and showing how a better understanding can lead to better policy options for addressing them. The objectives here are very modest: simply to expose the contract that is at the core of all these provisions. This proves surprisingly complex because to see the contract issues, one has to untangle them from the conflict of laws issues. That, in turn, requires at least a summary understanding of the conflicts principles as well.

The Article will proceed in two main Parts and a short third one. Part 1 will introduce the provisions, begin to identify the contract issues that are beneath the surface, and suggest why it is important to understand them more fully. Part 2 will then advance a simple methodology for approaching the provisions. That Part will conclude by showing how the methodology can help us understand an important, recent case that raises many of the issues addressed here. Finally, Part 3 will conclude by suggesting that contracts scholars can and should play a far larger role in the development of our understanding of these provisions.

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Part I: The Contract Hidden in Contracts Choosing Law and Forum

Choice of Law Provisions

That the parties to a contract could dictate to a judge the law the court should use to make a judicial decision seems counterintuitive and, perhaps, lawless. It's no wonder, then, that the law has come to recognize this so-called "party autonomy" only recently. The history has been developed extensively elsewhere;⁷ a brief summary here will suffice.

The general background against which these contract provisions must be understood is the legal subject area known as conflict of laws, a complex and, for many, impenetrable tangle. Early on in the development of conflict of laws jurisprudence, long before widespread recognition of enforceable contract provisions choosing law, there was comparatively little complexity: courts originally proceeded from the idea that the applicable law in a given case was, simply, the law of the forum. The problem this presented in the United States, with its many state jurisdictions having differing views of appropriate legal norms, was forum shopping and the possibility that the outcome of a dispute would be governed not by broad, generally applicable legal principles but by the tactics of one party or the other in bringing the litigation into a "favorable" jurisdiction.

The classical conflict of laws system arose to neutralize this forum shopping.⁸ The conflicts rules that developed functioned as "pointers," ideally, pointing in a determinate direction to the applicable substantive law once the facts at hand were fed into the rule. If the system worked in an optimal way, it would not matter where a case were litigated because the conflicts rules everywhere would point to the same applicable law.

Of course, there were problems that caused reality to diverge from the ideal. First, many versions of these rules seemed sharp-edged but were, in fact, subject to

7. See Patrick J. Borchers, *The Internationalization of Contractual Conflicts Law*, 28 Vand. J. Transnat'l L. 421 (1995); Edith Friedler, *Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem*, 37 U. Kan. L. Rev. 471, 475 (1989); and Friedrich K. Juenger, *A Page of History*, 35 Mercer L. Rev. 419 (1981).

8. Juenger, *supra* note 2, 558-59.

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argument⁹ and those that were not sharp-edged, but required an exercise of judgment, also suffered from indeterminacy.¹⁰ Which types of rules are better for the job remains in dispute in the conflicts literature.¹¹ Second, as is typical in our Federal system, not all States agreed on the same rules.¹² Thus, a litigant could “shop” for a State with a conflicts rule that would point to law that will favor the client’s case—a more complicated reiteration of the original forum shopping problem the conflicts system was designed to solve. To exacerbate this problem, these State conflicts principles must, following *Erie*,¹³ be applied by Federal courts sitting in given States.¹⁴

9. For example, would the “place of contracting” in an interstate contract depend on the location of the offeror, the offeree, the place where the negotiation took place, or some other place? Cf. Eugene F. Scoles et al., CONFLICT OF LAWS § 18.14 (4th Ed. 2004).

10. See, e.g., BRAINERD CURRIE, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 128, 169 (1963) (advocating an interest analysis approach to conflict-of-laws questions but admitting that Congress should pass legislation to resolve conflicts that no conflict-of-laws method can resolve: that the forum often applies its own law at the expense of another state’s interests); Juenger, *supra* note 2, at 559 (noting that the First Restatement’s “rigid choice-of-law rules . . . did not prevent courts from indulging in home-town justice” with the use of “escape devices--such as characterization, renvoi, and the public policy reservation”); Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 Tex. Int’l L.J. 559, 564 (2002) (concluding that plaintiffs have the ability to choose pro-recovery fora based on non-choice-of-law factors because of the malleable nature of most state conflict systems).

11. See, e.g., Friedrich K. Juenger, *The Need for a Comparative Approach to Choice-of-Law Problems*, 73 Tul. L. Rev. 1309, 1316-17 (1999) (comparing the multilateralist and unilateralist approaches to choice-of-law problems); Larry Kramer, *Rethinking Choice of Law*, 90 Colum. L. Rev. 277, 320-22 (1990) (rejecting both the First Restatement and the ad-hoc, case-by-case approaches and advocating the development of canons to determine conflict-of-law questions based on shared policies among states); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 250-56 (1992) (approaching the conflict-of-laws question from a constitutional standpoint).

12. See Scoles et al., *supra* note 6, § 2.20; Symeon C. Symeonides, *Choice of Law in the American Courts in 2003: Seventeenth Annual Survey*, 52 Am. J. Comp. L. 9, 26-7 (2004).

13. 304 U.S. 64, 78-80 (1938).

14. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

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Calls to “federalize” the conflict of laws rules¹⁵ have gone largely unheeded, though this same problem largely stands behind the American Law Institute’s project for a Federal statute governing enforcement of international judgments.¹⁶

While this state of affairs presents serious problems for accident victims and their defendants, it is worse when contracts give rise to the controversy. This same indeterminacy can upset finely-tuned calculations of risk and benefits engaged in by those who do transactional work. This is most likely to be true in negotiated contracts between parties who both have much at stake in the deal. The value of any exchange is, in part, a function of the legal regime against which it is made. If that legal regime can be made to vary – long after the deal is struck, when a dispute has developed – through forum shopping, a party might lose – or win – benefits that were not part of the deal that was made. Whatever might be said of the need for a determinate set of pointers that will not vary by jurisdiction in non-contract cases, the need is considerably greater in negotiated contract cases when the value of the exchange is, in part, determined by assumptions about the law that will apply to it.

There is thus a substantial economic case to be made for giving contracting parties the ability to predict with greater accuracy the law that will apply to their transaction. Since the conflict of laws system cannot deliver that level of certainty, the case for permitting the parties themselves to settle the matter through a contract provision is great.¹⁷ What is surprising, historically, is that judicial recognition of the

15. See Laycock, *supra* note 11; Donald T. Trautman, *Toward Federalizing Choice of Law*, 70 Tex. L. Rev. 1715 (1992).

16. ALI International Judgment Recognition Project, *supra* note 4, *Introduction: National Law in the International Arena*.

17. It is very easy to recognize the predictive consequences of being able to choose law by contract. See Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 Ga. L. Rev. 363, 403 (2003) (arguing that parties prefer choice-of-law clauses because they reduce both uncertainty costs and the need for litigation). If such a provision is enforced, it eliminates litigation on the very broad question of “what jurisdiction’s law controls the contract.”

It is, however, very easy to overstate the benefits of eliminating this one issue in the context of real litigation. In that contentious setting, a choice of law clause could never be the panacea that some assume. An enforceable choice of law clause does *not* (and probably *cannot*) settle questions such as 1) what legal regime within a jurisdiction will apply (*e.g.*, U.C.C. Article 2A (true leases) or Article 9 (secured transactions) or U.C.C. Article 2 (goods) or general contract law (services)); 2) what rules will

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parties' power (and need) to settle the applicable law by contract took so long to develop.

It is clear that, despite the view that permitting parties to choose their law by contract was permitting them to do a "legislative act,"¹⁸ the idea that party intent ought to control the law to be applied to a contract had earned at least some judicial recognition in the United States in the 19th Century¹⁹ and at least some academic recognition by the 1930's.²⁰ While the first Restatement of Conflict of Laws did not recognize so-called "party autonomy,"²¹ courts increasingly accepted the idea and in 1952, Article 1 of the Uniform Commercial Code explicitly embraced contractual choice of law as a matter of state statute. U.C.C. § 1-105 provided that

[W]hen a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.

It is very likely that codification of this "party autonomy" principle accelerated both judicial recognition of contractual choice of law clauses and practitioners' use of them. The development was finally recognized in the RESTATEMENT (SECOND) OF

apply within that legal regime to the dispute (*e.g.*, rejection versus revocation of acceptance in U.C.C. Article 2); 3) how a trier of fact will see the facts; 4) who the judge will be and how she will interpret the law; and 5) (most importantly) what the dispute will eventually be about. Granted that enforcement of a choice of law clause reduces *some* uncertainty about the outcome in a future dispute (and thereby generates *some* economic value), in the context of litigation uncertainty, an enforceable choice of law clause remedies only a small part of the uncertain future for a planner.

18. See Joseph H. Beale, *What Law Governs the Validity of a Contract*, 23 Harv. L. Rev. 260, 260 (1910).

19. See Mathias Reimann, *Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century*, 39 Va. J. Int'l L. 571, 575 (1999). As will become evident, the image sketched by "party autonomy" becomes extremely unrealistic in settings where choice of law clauses are promulgated *en masse* to customers.

20. Joseph H. Beale, *A TREATISE ON THE CONFLICT OF LAWS* 1173 (1935).

21. Reimann, *supra* note 19. "Party autonomy" is something of a misnomer—parties have *never* had unlimited power to bind the court to their particular choice of law.

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CONFLICT OF LAWS, § 187 (hereinafter referred to as the “Conflicts Restatement”),²² a provision that a plurality of jurisdictions now follow,²³ but which, when it was developed, probably did not envision widespread enforcement of choice of law clauses in consumer and small business adhesion contracts.²⁴

Whatever the Restatement’s drafters may have had in mind, the use of choice of law clauses in consumer and small business settings carries similar advantages of

22. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971)(amended 1989) provides:

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

23. See Symeonides, *supra* note 12, at 28 (noting that 39 states have abandoned the *lex loci contractus* rule with the majority of these states and a few others adopting the Restatement (Second) Conflict of Laws § 187(2) approach).

24. Comment *b.* to the provision reads:

b. Impropriety or mistake. A choice-of-law provision, like any other contractual provision, will not be given effect if the consent of one of the parties to its inclusion in the contract was obtained by improper means, such as by misrepresentation, duress, or undue influence, or by mistake. *Whether such consent was in fact obtained by improper means or by mistake will be determined by the forum in accordance with its own legal principles. A factor which the forum may consider is whether the choice-of-law provision is contained in an "adhesion" contract, namely one that is drafted unilaterally by the dominant party and then presented on a "take-it-or-leave-it" basis to the weaker party who has no real opportunity to bargain about its terms. Such contracts are usually prepared in printed form, and frequently at least some of their provisions are in extremely small print. Common examples are tickets of various kinds and insurance policies. Choice-of-law provisions contained in such contracts are usually respected. Nevertheless, the forum will scrutinize such contracts with care and will refuse to apply any choice-of-law provision they may contain if to do so would result in substantial injustice to the adherent.* (emphasis supplied).

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certainty and predictability, particularly for the party who drafts the form. What is different is that their use there also raises problems that seriously threaten the complex limitations on contracting that state legislatures and courts have set into place to protect their residents against overreaching.²⁵ A simple example of how this might occur comes to us from an unreported decision²⁶ involving an unconscionability attack on an arbitration clause in the District Court in Tacoma, Washington.

*Sheifley v. Capitol One Bank*²⁷ was a class action suit where the court had before it, among other things, the bank's motion to stay the proceedings and compel arbitration pursuant to a contract with the bank. Ms. Sheifley sought to avoid the arbitration provision on the grounds of unconscionability, in part, because the arbitration clause also contained a class action waiver. Unfortunately for Ms. Sheifley, the form also contained a provision specifying that the law of Delaware controlled the contract, and a Delaware court had concluded in an earlier case²⁸ that a class action waiver did not render an arbitration clause unconscionable under Delaware law. Judge Ronald Leighton used Delaware law to conclude that the class action waiver before him was not unconscionable, acknowledging in the process that, while the result might be different under Washington law, having agreed to Delaware law, the plaintiff was bound by Delaware's approach to unconscionability.²⁹

Since Delaware had already settled the unconscionability issue, it should be obvious that a great deal rested on the choice of law clause. As to *that* provision

25. See generally Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 Wash. & Lee L. Rev. 697 (1990).

26. The decision is unavailable on Westlaw and is not in the Reporters. But it appears in the briefs of banks that cite it for the proposition that it is appropriate to use Delaware law to decide an out-of-state unconscionability question. How and why the decision (which the judge had already made the effort to write) disappeared from the public domain, whether this is evidence of a far wider phenomenon, and whether the phenomenon is one that structurally favors the repeat players through some form of "private" reporting system is a topic for another day.

27. No. CV 03-2801RBL (W.D. Wash. June 25, 2004).

28. *Edelist v. MBNA Am. Bank*, 790 A.2d 1249 (Del. Super. Ct. 2001).

29. *Sheifley*, No. CV 03-2801RBL, at *4 (citing *Edelist*, 790 A.2d at 1261).

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contained in the cardholder agreement, District Judge Ronald Leighton had only this to say:

As an initial matter, the substantive law of Delaware governs this dispute, including whether or not it must be arbitrated. The cardholder Agreement expressly so provides:

This agreement will be governed by the laws of the State of Delaware and applicable federal laws.

Plaintiff does not directly (and as a practical matter, cannot) attack this provision. . . . The court does not agree with plaintiff's implicit claim that Washington law must apply if it is more protective of consumer's [sic] rights than the law of the agreed upon state.³⁰

There is thus no discussion in the case of how the choice of law clause was presented to the plaintiff (and in particular, whether it was presented in such a way as to reduce the likelihood it would be seen or read), the plaintiff's understanding of the clause or its implications, or any of the other questions that might ordinarily accompany a challenge, on the basis of assent, to a clause in a contract. In short, while it is clear that the plaintiff was challenging whether she was bound by the arbitration provisions of the agreement, her specific focus on whether she was bound by the *choice of Delaware law clause* is not evident.

Scheifley nicely illustrates two interrelated problems which, together, may diminish the protection customers who live outside of Delaware would otherwise have. The first is the surprisingly difficult technical problem of applying both contracts and conflict of laws principles. There are a great many large credit card banks located in Delaware. It is very evident from the cases that banks have pressed, with some measure of success, the applicability of Delaware law in out-of-state litigation settings. It is very clear from the cases that there is confusion over the correct way to approach this threshold applicability issue.

The second problem goes far beyond the parties to a dispute like *Scheifley*. It is whether giving strong extraterritorial effect to the unconscionability decisions (or

30. *Scheifley*, No. CV 03-2801RBL, at *2-3.

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other important policy judgments in the consumer protection area) of one state (through enforcement of choice of law provisions) is sound policy. In this respect, Judge Leighton's use of Delaware's unconscionability law in that Washington dispute can stand as a surrogate for other kinds of consumer protection and *Schieffley* as a metaphor.

Many observers assert that unconscionability and similar doctrines are such sufficient policing tools that there is no need for other rules.³¹ Whether this is true or not, a State's unconscionability cases and doctrine constitute a central feature of its apparatus for protecting its consumers and small businesses -- perhaps as central or "fundamental," as a regulatory matter, as a State's contract policy can get. In *Schieffley*, without much discussion, the court imported Delaware unconscionability law and injected it into this controversy involving a resident of Washington. In so doing, the judge overrode whatever the Washington position on the matter might have been. Perhaps this was correct -- a main purpose of this article is to create a better framework for judging the question -- but this Federal Judge owed to the lawmakers and citizens of the State in which he sat (or at least to the parties) a better explanation of why this should be so. If a choice of law clause in an adhesion contract can displace the otherwise-applicable unconscionability law in a given case, little of a State's other (and mostly less important) law protecting consumers and small businesses is safe from this new form of adhesion contract waiver.

Choice of Forum Provisions

Parties who actually negotiate choice of forum clauses are motivated by a commercial need similar to that behind choice of law clauses, the main objective probably being to reduce the unpredictable variables that could accompany a

31. See, e.g., Robert A. Hillman & Jeffrey J. Rachlinski, *Standard Form Contracting in the Electronic Age*, 77 N.Y.U. L. Rev. 429, 456-60 (2002) (describing the three doctrines currently used to police contracts: unconscionability, Restatement (Second) of Contracts § 211(3), and reasonable expectations); Erin Ann O'Hara, *Choice of Law for Internet Transactions: The Uneasy Case for Online Consumer Protection*, 153 U. Pa. L. Rev. 1883, 1936 (2005) (arguing that substantive unconscionability provides a sufficient policing tool for online contracts); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 Ohio St. J. on Disp. Resol. 757, 841-45 (2004) (advocating that courts increase their use of the unconscionability doctrine for policing contracts).

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contractual dispute.³² Here, too, there is probably a perception that some fora are better than others for litigation³³ and setting the forum within the contract will reduce the natural—and costly—urge of one party or the other to “shop” for a forum once a problem arises. Though there is a superficial similarity to choice of law clauses, the law behind choice of forum clauses has a different complexity.³⁴ Here, the hard *non-contract* law question is whether, under a given set of facts, a court that would ordinarily have jurisdiction *must* refuse to exercise it if the parties have chosen another jurisdiction as the exclusive forum for resolving their dispute.

Until at least the 1950's, most courts refused to defer to the parties' agreement on the grounds that the parties lacked the power to “oust” the court of its own jurisdiction.³⁵ This changed dramatically with the Supreme Court's decision in *The Bremen v. Zapata Off-Shore Co.*³⁶ holding that an exclusive forum chosen by the parties

32. Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 Cornell Int'l L.J. 51, 51-2 (1992) (noting that choice-of-forum clauses create “orderliness and predictability in contractual relationships”).

33. *See generally* Juenger, *supra* note 2.

34. *See generally* Scoles, et al., *supra* note 6, §§ 11.2-11.7.

35. *See, e.g.*, *Ins. Co. v. Morse*, 87 U.S. 445, 451 (1874) (holding that “agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void”); *Carbon Black Exp., Inc. v. The SS Monrosa*, 254 F.2d 297, 300-01 (5th Cir. 1958) (applying the “universally accepted rule that agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced”); *Mut. Reserve Fund Life Ass'n. v. Cleveland Woolen Mills*, 82 F. 508, 510 (6th Cir. 1897) (holding that a “provision intended to oust the jurisdiction of all state courts is clearly invalid”); *U.S. v. Aetna Cas. & Sur. Co.*, 38 F.R.D. 418, 420 (N.D. Cal. 1965) (finding that a contract clause may not “oust the courts of their jurisdiction”); *Nute v. Hamilton Mut. Ins. Co.*, 72 Mass. 174, 184 (1856) (holding that “to allow them [jurisdictional rules] to be changed by the agreement of parties would disturb the symmetry of the law”).

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 reflects the history. It provides:

The parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable.

36. 407 U.S. 1 (1972).

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in an arms-length, negotiated agreement had to be enforced.³⁷ With *Carnival Cruise Lines, Inc. v. Shute*,³⁸ the Supreme Court applied the negotiated contract analysis in the form contract setting and thereby delivered choice of forum clauses to the masses, at least in admiralty settings.

Carnival Cruise involved a personal injury on a cruise ship that traveled from Los Angeles to Mexico and back. Mrs. Shute had ordered and paid for the ticket in Arlington, Washington; it was delivered with a clause specifying Florida as the exclusive jurisdiction for litigating all disputes.³⁹ The Supreme Court found that the clause was enforceable and that the District Court in Washington properly dismissed the case. Justifying this decision, the Supreme Court noted that the cruise line had a keen interest in keeping all its litigation in one place,⁴⁰ that such a clause could reduce uncertainty,⁴¹ and that passengers can actually benefit from such clauses in the form of lower prices.⁴² Because there was no specific District Court finding of fact, it rejected the Court of Appeals' position that Mrs. Shute would be physically and financially incapable of pursuing the litigation in Florida⁴³ and may have implied that one party's business location in the selected forum is enough to defeat such a showing in any event.⁴⁴ Finally, the Court noted that "respondents have conceded that they were given notice of the forum provision and, therefore, presumably

37. The Bremen was a case where the forum was unrelated either to the parties or their transaction and the underlying agreement arguably called for the application of unrelated law to the contract. 407 U.S. 1, 13 n. 15. See William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 SMU L. Rev. 697, 714-15 (2001).

38. 499 U.S. 585 (1991).

39. *Carnival Cruise*, *supra* note 38, at 587.

40. *Id.* at 593.

41. *Id.* at 593-94.

42. *Id.* at 594.

43. *Id.* The Supreme Court did *not* reject the proposition that there was record evidence to this effect, however. Cf. *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 389 (9th Cir. 1990), *rev'd* 499 U.S. 585 (1991).

44. *Id.*

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retained the option of rejecting the contract with impunity.”⁴⁵

It is reasonably clear that because *Carnival Cruise Lines* was an admiralty case, its analysis need not be adopted by State courts deciding whether they should dismiss a case where an adhesion contract specifies a different exclusive forum.⁴⁶ The case has been roundly criticized⁴⁷ and is at odds with the views expressed by Europeans in international conventions that are far more protective of consumers.⁴⁸

Choice of forum clauses in forms promulgated to consumers and small businesses do not represent a *collective* effort on the part of the parties to reduce the uncertainty of forum shopping; rather they reflect the drafter’s desire to prescribe where the non-drafter might file suit. While they are similarly adhesive, choice of forum clauses pose a threat of a different character in this context from that which accompanies choice of law clauses. The obvious effect is that the enforceable choice of forum clause commits the customer to a potentially distant jurisdiction either to pursue or defend a claim. As suggested by *Carnival Cruise*, this might be a jurisdiction where the form drafter is located, and has extensive business and legal ties. Limiting litigation to the forum chosen by the drafter will change the settlement value of the case in the drafter’s favor, perhaps dramatically, whomever turns out to be the plaintiff. There are several implications.

Unless the case is a large one or the “chosen” forum convenient, a choice of

45. *Id.* at 595.

46. See Scoles et al., *supra* note 6, § 11.5.

47. See, e.g., Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts after Carnival Cruise: A Proposal for Congressional Reform*, 67 Wash. L. Rev. 55, 74-8 (1992); Jean Braucher, *The Afterlife of Contract*, 90 Nw. U. L. Rev. 49, 62-7 (1995); Jeffrey A. Liesemer, *Carnival’s Got the Fun . . . and the Forum: A New Look at Choice-of-Forum Clauses and the Unconscionability Doctrine after Carnival Cruise Lines, Inc. v. Shute*, 53 U. Pitt. L. Rev. 1025, 1052-59 (1992); Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 Tex. Int’l L.J. 323, 342-44 (1992).

48. See Scoles et al., *supra* note 6, § 11.3 at 485; 1968 *Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, 1998 O.J. (© 27) 7-8; William W. Park, *Illusion and Reality in International Forum Selection*, 30 Tex. Int’l L.J. 135, 188-91 (1995) (highlighting European consumer protections with regard to the waiver of jurisdictional rights and noting that the United States lacks similar protections).

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forum clause can eliminate a customer's legal claim entirely. Only in theory can a customer make a cross-country trip to pursue a \$100 warranty claim. Moreover, inasmuch as effective legal redress for either breach of contract or torts creates incentives to product quality⁴⁹ or to reasonable care,⁵⁰ an enforceable choice of forum clause can alter those incentives for the drafter by either reducing the real costs of breach of contract or tort or eliminating them entirely. This, of course, can result in harm to other customers through breaches of contract or torts (or low quality products and low levels of care) that would not have occurred had the law's incentives been optimal. Finally, in the adhesive business form setting, one must question whether the market in fact operates to deliver price savings to the customer,⁵¹ an assumption made by the Supreme Court majority in *Carnival Cruise Lines*. This depends on many factors, including strong competition among businesses so that there might be some reflection of the business's cost savings due to these provisions in their prices.⁵²

The potential for a choice of forum clause to make litigation more expensive might occur to at least some of those who actually saw and read a choice of forum clause promulgated by a business. In this sense, choice of forum clauses seem to act in a somewhat more direct and potentially transparent way than do choice of law

49. See William M. Landes & Richard A. Posner, *A Positive Economic Analysis of Products Liability*, 14 J. LEGAL STUD. 535, 556 (1985) (stating that strict liability provides incentives for the manufacturer to improve inspection for component defects).

50. See Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32 (1972) (stating that the Hand Formula provides a quantifiable measure of the standard of reasonable care, which allows individuals to adjust their level of care accordingly).

51. See Braucher, *supra* note 47, 67-68.

52. If all the competitors have the same provisions, then their price competition is based on factors other than the clauses. This could, theoretically, bring prices down generally but the reasons would be based on a judgment that there is "too much liability" making the products too expensive as a matter of public policy. The most recent such judgment was made by Congress in the *Protection of Lawful Commerce in Arms Act*, S. 397, 109th Cong. (as passed in the Senate, as amended, July 29, 2005); *Protection of Lawful Commerce in Arms Act*, H.R. 800, 109th Cong. (as reported in the House, as amended, June 14, 2005). But the reasons for altering liability rules in the interests of protecting given industries from liability require complicated policy (and political) tradeoffs and economic judgments. Making them on the basis of purported "agreement" by recipients of forms to the reduced liability regime obscures and probably distorts sound policy analysis.

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clauses. Even this may, however, be illusory. While it would be difficult to come by empirical proof, it seems likely that customers who receive choice of forum clauses will be unaware of where they could bring a legal claim against the business absent the clause, or of whether the business could obtain jurisdiction over them in a distant place without the choice of forum clause.⁵³ Moreover, it's far more likely that the main features of the contract—the product description, price, and other features—will attract nearly all of their attention.⁵⁴ Of course, in the unlikely event they read the form, they might well understand that something is different given this clause and that, perhaps, the difference runs in the business' favor. But any full understanding of what a choice of forum clause means in rational choice terms is likely to be absent from the vast run of people who receive forms. This may have bearing on the way one views such clauses in contract terms.

Choice of forum clauses can have more subtle effects than the relatively obvious one of transplanting litigation from a home forum to somewhere else. Those effects are not communicated by the text of a choice of forum clause. The plaintiff in *America Online v. Booker*⁵⁵ brought a class action in Florida challenging AOL's practice of charging customers for the time they spent reading pop-up ads. The service terms promulgated by AOL contained both choice of law and choice of forum clauses specifying a Virginia forum and Virginia law to be applied. What the plaintiff or other subscribers likely could *not* have known was that Virginia had no class action device and, therefore, that AOL sought to remove, via its choice of forum clause, an important procedural device for vindicating subscribers' rights without even mentioning it.

As has been typical in these cases, the court did not address the *contract* question—whether there was agreement—and simply proceeded to the *Carnival Cruise Lines* part of the analysis: *assuming* agreement, should the provision nonetheless be unenforceable because it is unreasonable or unfair. Note the pivotal rhetorical role that the assumed agreement plays in the court's justification of its decision:

53. 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, 712 (1992).

54. See Braucher, *supra* note 47, 63-64.

55. 781 So. 2d 423 (Fla. Dist. Ct. App.).

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Here, the forum selection provision was obtained through a *freely negotiated agreement* which has not been shown by the plaintiffs to be either unreasonable or unjust. The unavailability of a class action procedure in the transferee forum is not sufficient, standing alone, to render an otherwise valid forum-selection clause unenforceable. Florida plaintiffs cannot defeat otherwise valid provisions requiring suit in other states simply by asserting a cause of action in the name of a putative class.⁵⁶

The centrality of free contract ideology in this analysis suggests that modern contract law itself may offer some promise to adherents in these settings.

Part 2: Getting the Contract into the Analysis: Working with Contractual Choice of Law and Forum

The cases reflect confusion in the bench and bar about the approach one should take when a choice of law or forum clause appears in an adhesive form.⁵⁷ Recognizing that the following structure is somewhat artificial, I advance it in the hope that it can bring clarity to the legal complexity involved in working with these clauses. With that caveat, I suggest that the analysis in these cases entails a 3-Step process—a conflicts analysis, followed by a contracts analysis, followed by a second conflicts analysis. For both choice of law and forum clauses (and for arbitration clauses as well, with a slight modification) Step 1 assumes that a jurisdiction will enforce *some* choice of law or forum provisions and asks a threshold conflicts question: which State's contract law determines whether the parties in fact have a contract for the specified law or forum. Having determined in Step 1 which jurisdiction's law controls that contract, Step 2 focuses on whether the promulgated provision is binding *as a matter of contract law*. Only when that question is answered affirmatively should the analysis proceed to Step 3—are there principles other than contract law principles that require that the potentially enforceable agreement found in Step 2 not be enforced. These steps are probably not independent of one

56. *Id.* at 425 (emphasis supplied).

57. See Hannah L. Buxbaum, *Forum Selection in International Contract Litigation: The Role of Judicial Discretion*, 12 Willamette J. Int'l L. & Disp. Res. 185, 196 (2004) (choice of forum); Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 Fordham L. Rev. 291, 347 (1988) (choice of law).

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another—contract law principles might properly inform and influence the conflicts principles and vice versa—but to understand what is implicated doctrinally, it is useful to treat them separately.⁵⁸ A discussion using this simplified framework will serve as a foundation for understanding the opportunities that contract law might provide in this context and then for considering the difficult policy questions that are implicated by widespread promulgation of these provisions.

Because the structure is simpler, we will begin with choice of forum provisions. Champions of contractual choice of law and contractual choice of forum in negotiated contract settings had to confront different obstacles in their efforts to obtain legal recognition for them. Traces of these obstacles are reflected in the limitations the law has placed on these agreements.

Choice of Forum Provisions—Domestic Limitations

The limitations on choice of forum agreements have historically proceeded directly from the jurisdictional power exercised by courts. Assuming jurisdiction over a given matter, what effect should a private agreement of the parties to “exclusive jurisdiction”⁵⁹ elsewhere have on the forum’s exercise of that jurisdiction? Courts have moved, since the 1972 *Bremen* decision⁶⁰ from outright hostility towards this challenge to their power, to widespread deference to party intent and, no doubt, the commercial utility of these clauses has played a role in their widespread recognition.

58. The majority and dissent in *Carnival Cruise Lines* illustrates this point. The majority seemed to assume contract formation and approached the case as one that was in the *Bremen* line of cases (a predominantly conflict of laws analysis). The dissent carefully looked at whether the parties ought to be bound contractually—the implications of standard terms, inability to bargain over them, etc. (a predominantly contract law analysis). Obviously, the majority and dissenting opinions were related. But it is hard to judge from the opinions whether they were aware they were talking about separate aspects of the same problem that had different policy determinants. I contend that more clarity (for the Justices and for readers) in the policy choices would have resulted from a more explicit awareness that *Carnival* implicated both contract law policy and jurisdictional policy.

59. The dynamics with non-exclusive choice of forum clauses are different because there is not, in those cases, the direct conflict between the forum’s exercise of jurisdiction and the parties’ exercise of their will. Put differently, exercise of jurisdiction by the forum is, in a non-exclusive case, (obviously) consistent with the parties’ intent. While such non-exclusive clauses can have commercial utility, see Scoles et al., *supra* note 6, § 11.2 at 478, they are beyond the scope of the discussion here.

60. *The Bremen*, *supra* note 36.

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But the proponents never succeeded in completely “ousting”⁶¹ the court’s preexisting jurisdiction through their contractual acts of will: there continue to be limitations articulated by the Court in *The Bremen* and later in *Carnival Cruise Lines* making clear that courts retain ultimate power to refuse enforcement of such agreements.

What choice of forum provisions require, in addition to a contract law analysis, is consideration of the forum’s jurisdictional power and of the potential conflict between the forum court’s power and the private ordering policies behind contract law. Because choice of forum provisions create conflicts between presumed party intent and the forum’s preexisting judicial power, it follows that the reconciliation of this conflict is jurisdiction-specific. Put differently, courts of different jurisdictions can, in theory, have diverse views about the appropriate balance between party autonomy and jurisdictional power.

Since it is the forum court’s judicial authority that is challenged by the parties’ choice of a different forum, the metes and bounds of party autonomy vis a vis the forum must be set by the law of the forum. But, assuming a given court allows *some* agreements to “oust” it of jurisdiction, this need not necessarily mean that the *contract* law governing whether the parties reached a permissible agreement should be the law of the forum.⁶² The analysis developed earlier can help to clarify this.

Consider this simple example involving three jurisdictions, the Forum, the Relationship State⁶³, and the Chosen State. Suppose the parties make a contract that contains within it a provision specifying Chosen State as the exclusive forum. Suppose further that among the jurisdictions that are connected to the contract, Relationship State has such a great deal to do with the contract’s formation, parties, and performance that we (and the parties) would normally imagine its law would

61. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 80, quoted *supra* note 35.

62. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80, quoted *supra* note 35, is the provision that states the *Bremen* rule. No mention is made in the black letter or comments as to whose contract law the court should apply in determining whether a valid contract for forum exists. No cases have been found to clarify whose contract law ought to apply to the purported contract for forum.

63. NOTE TO PRE-PUBLICATION READERS: This term reminds me of “Relationship George” in a Seinfeld episode and is distracting. Any suggestions for a better term would be most appreciated. BW.

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apply to control the parties' dealings. Finally, suppose that one party has disregarded the choice of Chosen State clause and brought suit in the Forum, a State with enough contacts that the court can exercise jurisdiction over the controversy. In the analysis suggested here, the court would first consider in Step 1 what State's contract law ought to determine the binding effect of the choice of forum clause. Under these facts, that law could be the law of Relationship State, at least if the likely frame of reference of the parties is an important factor in the determination.⁶⁴ Having done that, the Forum court would proceed to analyze that provision under the applicable contract law in Step 2. If the forum found no binding contract under that State's law, it would exercise its jurisdiction over the case. If it did find a binding contract, the court would then proceed to Step 3 to consider whether Forum State's own policies ought to override the contract it found in Step 2

One might object that it is unduly complex (and artificial) to apply the forum's party autonomy override in Step 3, *after* finding a contract, rather than at the outset in Step 1. After all, if the jurisdiction imposes some limit to party autonomy to choose an exclusive forum, why not simply assume a contract and face that question at the outset? Unfortunately, courts have done this all too often and, in the process, have missed important norms from contract law that could contribute to the analysis. The 3 Step process, artificial as it might be, provides for a much richer analysis and a greater awareness of the choices being made.

Moreover, this more complex analysis gives the forum court an opportunity to consider, when appropriate, the policy judgments of jurisdictions with a greater stake in the controversy than the forum. Suppose, for example, that Relationship State validated virtually all adhesion contracts with very few exceptions and that Forum State validated comparatively few of them. At the threshold Step 1, the court could use Relationship State's law or Forum law to determine whether to enforce the choice of forum. An emphasis on the likely frame of reference of the parties would lead to application of Relationship State's law and recognition in Step 2 of the parties' agreement to the choice of forum. The forum would then consider in Step 3 whether it should be overridden by Forum State's policies. If the Forum court chose not to enforce the contract for the Chosen State forum, the expanded analysis makes it clear that it would be on account of Forum State's jurisdictional principles, not Forum State's contract principles.

64. Cf. Scoles, *supra* note 6, 18.13, 18.16.

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Alternatively, the forum could apply forum law in Step 1 on the grounds that, given the contract at issue, there was no *collective* frame of reference of the parties, only the frame of reference of the drafter. If that were the perception, applying the law of Relationship State would be less compelling than before. If the court found forum law applicable in Step 1, it would refuse to find the choice of forum enforceable as a matter of contract in Step 2 and there would be no need to go to Step 3. The grounds for denying enforcement would be the absence of agreement rather than the conclusion that the forum's policies were entitled to more weight than Relationship State's.

Thus, the more complicated analysis would make clear whether refusal of enforcement were grounded in problems between the two parties or problems between the will of the parties and the willingness of the court to bend to them. While the court may have intuition that its refusal to enforce a choice of forum provision is grounded in one reason or the other, we cannot know which it is without a focus on which contract law is applicable in Step 1.⁶⁵

It should be obvious that if a choice of *law* clause is included with a choice of forum clause, the analysis gets far more complex, if not impenetrable.⁶⁶ Even courts that do an excellent job of analyzing the substantive issues may proceed to their decisions without considering the conflicts policies that deserve attention even if, ultimately, the agreement will be voided by the conflicts policies of the forum.

The analysis in *America Online, Inc. v. Superior Court*,⁶⁷ one of the few modern cases that does not contain an arbitration clause, shows the potential complexity of the issues. This was a California class action brought by AOL customers under, among other things, the California Consumers Legal Remedies Act (CLRA) claiming

65. The Supreme Court's majority in *Carnival Cruise Lines* refused to make a division based on contract type in its analysis. Once it assumed contractual obligation, the case became just like *The Bremen* despite the very obvious differences in the two settings. The majority clearly skipped Step 1 and probably skipped Step 2.

66. See generally Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 Fordham L. Rev. 291, 347-49 (1988).

67. 90 Cal. App. 4th 1 (2001).

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that AOL continued debiting their credit cards after they had terminated service. That Act gave consumers a right to seek class action relief and contained provisions voiding waivers of its provisions as contrary to California public policy. In the underlying service terms, AOL had promulgated choice of law and forum provisions designating Virginia as the applicable law and exclusive forum for disputes. AOL thus sought dismissal of the case pursuant to the choice of forum provision, a potential death blow to the class action.⁶⁸ In contrast to the approach in *Booker*,⁶⁹ the court in *American Online v. Superior Court* refused to enforce the contract provision, reasoning that enforcement would amount to a waiver prohibited by California policy and because enforcement would substantially diminish the consumers' rights in violation of California policy.⁷⁰

It should be obvious that, had the court applied Virginia law to the choice of forum problem, the case could have gone the other way: it is scarcely possible that Virginia law would refuse, on public policy grounds, to enforce a choice of forum clause because the chosen forum (Virginia) lacked a class action procedure! But Virginia law *could* have applied to form a contract for Virginia forum—AOL was located in Virginia and all of its customer contracts had that feature in common. But whether Virginia law was applicable to the choice of forum clause (Step 1) or formed a contract for forum (Step 2), the California legislature, by enacting CLRA to protect California residents, essentially stated an override that was applicable in the California forum. It is a basic conflict of laws tenet that a court “will follow a statutory directive of its own state on choice of law.”⁷¹

The Conflicts Restatement provision directs enforcement of a choice of forum agreement “unless it is unfair or unreasonable.”⁷² This Step 3 language comes directly from *The Bremen* where the court concluded that it was not “unfair, unjust, or

68. As noted earlier, Virginia has no procedure for class action relief. *See supra* text at note 55.

69. *America Online v. Booker*, *supra* note 55.

70. *America Online, Inc. v. Superior Court*, *supra* note 67, at 5.

71. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971)

72. Restatement (Second) Conflict of Laws, § 80 *quoted supra* in note 35.

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unreasonable”⁷³ to hold a party to the agreement, despite the substantial inconvenience it might present. The *AOL v. Superior Court* opinion is probably best understood as either a specific articulation of this rule by a California court or as a legislative addition to it (via the CLRA), as applicable by California courts, in Step 3. It doesn’t matter how the contract formed or under whose law, the legislature has directed California not to yield their jurisdiction to party autonomy in these situations.

Carnival Cruise Lines, discussed earlier,⁷⁴ gave meaning to the Conflicts Restatement’s standard for choice of forum clauses appearing in cruise ship tickets within Federal admiralty jurisdiction. The majority decision is clearly striking a balance between party autonomy and the power of Federal courts exercising Admiralty jurisdiction – a Step 3 decision relying on *The Bremen*, another Step 3 decision. But does *Carnival Cruise Lines* say anything useful about *contract* law and the policies of freedom to contract and (in this context, more importantly) freedom *from* contract underlying those policies?⁷⁵

That both majority and dissent were silent on whose contract law they were interpreting is telling. Was this the contract law of Washington, California, Florida, or, indeed, was it some form of federal contract law applicable in Admiralty cases? All would be possible, but this lack of clarity in the applicable contract law makes it even more plausible that *Carnival Cruise Lines* is simply not a contract case at all; contract law was not at the core of the majority’s analysis.⁷⁶ Rather, *Carnival Cruise Lines* is a decision where assumed, abstract, and perhaps idealized, party autonomy confronts the Federal admiralty courts’ exercise of their jurisdiction. Even as to that Step 3 question, its reach as a formal precedent is limited to Federal courts exercising

73. *The Bremen*, *supra* note 36, at 18. Earlier in the case, the Court states “The correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.” *Id.* at 15.

74. *See* text, *supra* note 38.

75. *See* Speidel, *supra* note 5, at 1070.

76. Contract law *was* at the core of Justice Stevens’ dissent but it is unclear there, as well, *which* contract law was his focus. The dissonance in the two opinions may well have resulted from the fact that the majority and dissent were talking about two different things. *See also* note 58, *supra*.

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admiralty jurisdiction. But the analysis here suggests that its broader reach, as stating a plausible view of contract policy (the Step 2 question), may also be quite limited.

Both *Carnival Cruise Lines* and *America Online* help to underscore that an important question in a choice of forum case—whether the provision is binding as a matter of contract—is easily missed within a conflicts analysis. Some commentators have lamented contract law’s displacement of constitutional and jurisdictional principles in this context.⁷⁷ It’s no wonder: potentially robust contract law is sandwiched within complex conflicts analysis where courts and commentators alike assume there is agreement and proceed from there. The very complexity of the conflicts-contract-conflicts analysis might lead one to underutilize – and perhaps underestimate – the State contract law devices that are actually available.

Choice of Forum Provisions—Potential International Limitations

The importance of the contract law question, whether a choice of forum clause is binding *as a matter of contract*, will become considerably more important if two major lawmaking efforts currently underway evolve into rules that become binding on courts. Both would strengthen the importance of choice of forum clauses in international settings. In that sense, they make an understanding of the contract law predicates to such agreements all the more important. Both aim at the courts’ exercise of their power *vis a vis* party autonomy (*i.e.*, Step 3); neither explicitly aims to substantially change the analysis of the preceding (Step 2) contract law question.⁷⁸ Both suffer from a degree of opaqueness as to what jurisdiction’s contract law (Step 1) the forum ought to bring to bear in Step 2 on the choice of forum clause.

77. See generally, Paul D. Carrington and Paul H. Haagen, *Contract and Jurisdiction*, 1996 Sup. Ct. Rev. 331 (1996); Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 Fordham L. Rev. 291 (1988).

78. The statement in the text may be an oversimplification. If either effort is designed to change the *contract law* analysis from State contract law to a Federalized version of contract law (a question that both efforts seem to leave open, *see infra* text at note 83), then they will have altered the analysis by unifying it.

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The *Hague Conference on Private International Law*⁷⁹ has a project underway that would result in a Convention (hereinafter the Draft Hague Convention) requiring parties to the treaty to enforce the “choice of court” agreements of one another’s citizens, and to enforce the judgments of courts chosen in “choice of court” agreements. The current effort is a remnant of a far more ambitious project that would have called for mutual enforcement of treaty-state judgments.⁸⁰

An extended discussion of the *Draft Hague Convention* is beyond the scope of this article. But briefly stated, the objective has been to obtain widespread international enforcement of choice of forum provisions and of the judgments that result from proceedings consistent with them. There are several aspects of the Draft Hague Convention of interest here. First, the Convention would exclude contracts involving a narrowly-defined “consumer,”⁸¹ a subset of contracts far narrower than

79. Special Commission on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (Work. Doc. No. 110 Revised, April 21-27, 2004).

80. See, e.g., Kevin M. Clermont, *An Introduction to the Hague Convention*, in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 3, 3-13 (John J. Barcelo III & Kevin m. Clermont eds., 2002) (detailing the Hague provisions); George A.L. Droz, *Preliminary Draft of the Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters: Provisions of Jurisdiction*, in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 15, 15-36 (John J. Barcelo III & Kevin M. Clermont eds., 2002) (detailing the Hague provisions); Matthew H. Alder, *If We Build It, Will They Come?—The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments*, 26 Law & Pol’y Int’l Bus. 79, 107-10 (1994) (describing the history of the Hague Conference in the early 1990’s); Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 Tul. L. Rev 309, 381-83 (2002) (discussing the 1999 Draft Hague Convention and its possible ramifications); Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 Law & Contemp. Probs., Summer 1994, at 271, 271-73 (describing the early history of the Draft Hague Convention).

81. *Supra* note 79, Article 2. The current draft provides:

1. The Convention shall not apply to exclusive choice of court agreements -
 - a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party

While this definition tracks the substance of the Uniform Commercial Code’s definition, see U.C.C. § 1-201 (11)(2003 Revision), it is narrower than that of other countries that are would-be parties to the Convention. See, e.g., Convention on the Law Applicable to Contractual Obligations, art.

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“form” or “adhesion” contracts. Second, it requires chosen courts to exercise jurisdiction and, essentially, forbids unchosen courts from exercising the jurisdiction they ordinarily would have;⁸² and third, it is at present indeterminate on the Step 1 analysis -- *whose contract law* will decide the question whether the choice of court provision is binding or not.⁸³ If the Convention becomes final and the United States becomes a party to it, both choice of forum clauses (and, obviously, the contract law governing their enforceability) will become more important than they are presently. The Convention would require State courts to limit their jurisdiction in Step 3 in ways they might otherwise not be inclined to do.

The second effort was recently concluded by a Drafting Committee of the American Law Institute whose Project, *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute* was ratified by the membership during its May, 2005 meeting.⁸⁴ This Project is aimed at unifying, in the interests of international trade, what is now a somewhat diverse State law approach to enforcement of foreign judgments.⁸⁵ If enacted, the Federal statute would preempt the Uniform Foreign Money Judgment Recognitions Act, enacted in some 30 states.⁸⁶ Section 5(b)(i) provides, in part:

5, § 1, 1980 O.J. (L 266) 23 (defining a consumer contract as “a contract the object of which is the supply of goods or services to a person...for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.”). The definition is also certainly not coextensive with the range of adhesion contracts. A dentist buying software for her practice is functionally no different from a “consumer” when it comes to being bound by a click-to-agree choice of forum clause contained within license terms that may or may not be available in advance. *See generally* Jean Braucher, *The Failed Promise of the UCITA Mass-Market Concept and Its Lessons for Policing Standard Form Contracts*, 7 J. Small & Emerging Bus. L. 393 (2003).

82. *Supra* note 79, Articles 5 and 7.

83. *Supra* note 79, Article 7, notes 3 and 4.

84. The American Law Institute Annual Proceedings May 16-18, 2005, <http://www.ali.org> (follow “Annual Meeting” hyperlink; then follow “Actions Taken on 2005 Annual Meeting Drafts” hyperlink).

85. ALI International Judgment Recognition Project, *supra* note 4.

86. *See* ALI International Judgment Recognition Project, *supra* note 4.

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[A] foreign judgment *shall* not be recognized or enforced in a court in the United States if the party resisting recognition or enforcement establishes that the judgment resulted from a proceeding undertaken contrary to an agreement under which the dispute was to be determined exclusively in another forum.⁸⁷

Whereas the Uniform Foreign Money-Judgments Recognition Act provides that a court “need not” enforce a judgment entered in violation of a choice of forum provision,⁸⁸ the Project’s Draft makes denial of enforcement of the judgment virtually mandatory. Moreover, unlike the *Draft Hague Convention*, the Project’s draft does not exclude “consumers” or adhesion contracts from its scope.⁸⁹

Comment *f* to the Project’s section 5(b) begs the Step 1 question of what contract law the foreign forum court would apply in Step 2 to a choice of forum clause.⁹⁰ Once decided (on whatever basis), that foreign court’s decision is entitled to substantial deference by the enforcing court in the United States. The proposed statute states Federal policy on the contest between party autonomy and State jurisdiction and would thus change and unify the rules States now use in a version of

87. ALI International Judgment Recognition Project, *supra* note 4, § 5(b)(i) (emphasis supplied). Section 5(b)(ii) provides complex exceptions for the case where the proponent of the choice of forum provision did not raise it in the “wrong” court and for the case where that proponent raised it but lost in the “wrong” court. In the latter case, the forum court’s determination that the choice of (a different) forum provision was not binding is entitled to deference by the enforcing court in the United States unless 1) that determination was “manifestly unreasonable” or 2) the original court rejects all choice of forum agreements. *Id.* § 5(b)(ii) and *Comment f*.

88. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(b)(5), 13 U.L.A. 43 (2002).

89. In this respect, it is the same as the Uniform Foreign Money Judgment Recognition Act which does not provide for such exceptions either. On the other hand, the Uniform statute was promulgated long before *Carnival Cruise Lines* made clear that choice of forum clauses in adhesion contracts might be enforceable.

90. ALI Recognition and Enforcement Project, *supra* note 4, *Comment f*, states in part “If the issue of validity of the forum-selection agreement was raised in the rendering court and that court has held it to be inapplicable or invalid after contest, that determination is not ordinarily open to challenge in a court in the United States”

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Step 3.⁹¹ The dynamics apparently change if the foreign judgment is rendered by default.

To illustrate how the Project's provision seems to work, suppose an American business were sued by a customer in a French court on a contract that included a choice of forum provision designating a United States forum. Suppose further that the business sought dismissal based on the choice of forum clause but the French court refused to enforce the provision and later entered judgment against the American business. The Draft's assumption seems to be that the French court will apply its own contract law to the problem; the Draft Project suggests that deference would be due to the French court's ruling⁹² on the choice of forum clause and the French judgment would be enforceable in the United States.

Now suppose, instead, the same case where the American business were properly within the jurisdiction of the French court and served with process, but refused to appear (on the basis of the choice of forum clause) and thereby permitted a default judgment to be entered against it. Suppose further that the default judgment eventually required enforcement in the United States. Now, presumably the enforcing court would be required to determine as an original matter⁹³ whether the choice of forum clause was binding.

Which *contract law* would determine this question in the enforcing court? No

91. Since this Proposal aims to unify the diverse State law governing the recognition and enforcement of foreign judgments, its mandate would operate not on deferring to party autonomy in choice of forum matters, but on deferring to it when that autonomy has matured into a foreign judgment. But, as with the choice of law and forum provisions that are the focus of this Article, the prerequisite to applicability of the Project's provision is a choice of forum agreement. As always, it is necessary to determine what law governs that contract question (Step 1) and what that law provides under the given facts (Step 2).

92. As likely as not, this deference is in the interests of furthering a policy of finality of judgments. It apparently makes no difference what jurisdiction's contract law the French court applies to the problem in Step 2.

93. The informed French plaintiff might want to obtain a specific finding by the French court that the choice of forum provision was not binding as a matter of French law. Although the question whether such a finding would later be recognized is an open question under the Project's draft, such a finding would surely complicate matters in the enforcing court.

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answer emerges from either the Draft's black letter or comments,⁹⁴ and the Draft may assume that the forum Court would apply its own contract law to the question if it were to decide the case. In both the forum and enforcing settings, the Draft thus reflects inadequate attention to the preceding Step 1 conflict of laws question. Once there is a focus on Step 1, several possibilities emerge.

The enforcing State court could apply its own contract law, it could use some form of Federal contract law, or it could engage in a more nuanced conflicts analysis that would consider the interests of France and the enforcing State in the contract issues.

The worst choice would probably be to apply the enforcing State's own contract law. A primary reason for the ALI Project is uniformity in enforcement of judgments, but our contract law, particularly in adhesive settings, varies among States. Allowing this State-to-State diversity to work its way into the enforcement mechanism would undercut the Project's goal of uniformity because the foreigner's success in enforcing the default judgment would now depend on the diverse contract law of the State where enforcement was sought. The Federal common law approach would be at odds with our history of leaving contract law to the States but would, at least in theory, supply uniformity across the decisions on the question whether the contract provision was enforceable (and therefore the default judgment not enforceable).

The problem with both of these approaches is that they would generate perverse forum shopping incentives. American law—whether State or Federal—is typically less protective of consumers than is European law. This means that the business will have good reason to sit out the French litigation and hope for a favorable decision once the judgment comes here for enforcement. Moreover, from the conflict of laws perspective, both approaches might not supply appropriate deference to the law of the State or Country having the best claim to govern the transaction with its law.

This leaves a third approach – a Step 1 conflict of laws approach – which, from

94. Comment h states in part “If the judgment debtor failed to appear in the rendering court, the issue of validity of the forum-selection agreement will be contested only in the court in the United States.” ALI International Judgment Recognition Project, *supra* note 4, *comment h*.

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a policy perspective, might be the best. At least in theory, if all jurisdictions agreed in Step 1 that the governing law should be that with the most substantial relationship with the transaction,⁹⁵ then the same law would apply in all courts in the US and in French courts, the Project's goals of uniformity in enforcement would be met, and the incentives for forum shopping would be reduced.⁹⁶ The problem we face with this solution is an old pervasive one: conflict of laws is State law and, as such, it varies from State to State. This means that the Step 1 rules might not, even in theory, point at the same applicable contract law and that, therefore, inconsistency in enforcement is again a problem. Moreover, while this third approach may be attractive at the theoretical level, it is sufficiently complex that it might well elude predictability.

Had the Project considered the contract law questions implicated in Step 2, it might have considered the conflicts questions that naturally precede those contract questions in Step 1. It could have specified the application of some version of Federal contract law in this situation or it could have stated a uniform conflict of laws rule for the States to follow in pursuing the more nuanced Step 1 conflicts analysis. Unless the Draft is revised or commentary added to it before it goes to Congress, we will have to await judicial decisions that, hopefully, will make clear the contract law that they are applying in Step 2 and the (Step 1) reasons that law should be applied.

The Special Case of Arbitration

Arbitration clauses present a special kind of choice of forum clause and, at first blush, one might expect them to be governed by similar principles. Early on, they

95. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 188 (1971).

96. These incentives probably cannot be eliminated in this context. Even under this third system, one can imagine an American business balancing likely defeat in France against a shot that the American court will misconstrue French law and find in its favor at the enforcement stage. The strategic incentives these examples suggest mean that foreign governments suspicious or hostile to choice of forum clauses in consumer contracts will have to take more direct regulatory action against American businesses doing business with their citizens. Without such regulation, we could expect many American businesses doing business abroad to include choice of (American) forum clauses in their consumer contracts, keeping their assets out of the customer's country, and not participating in legal actions brought by the foreign customers.

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were: like contract provisions calling for a different forum, arbitration clauses were seen by forum courts as attempts to “oust” the court of jurisdiction.⁹⁷ As such, the question was one of resolving the conflict between the forum’s power and the private parties’ power to “oust” it, the traditional conflicts inquiry in which collective party autonomy confronts the jurisdiction’s power.⁹⁸

The Federal Arbitration Act, enacted in 1923, changed all that. Section 2 provides:

A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.⁹⁹

This converts what was an analysis focused on the conflict between the private ordering (reflected in the choice of forum clause) and the court’s own jurisdictional power, into a simpler analysis that has removed the forum court’s inherent power from the analysis. It should be evident that the FAA addressed -- and may have simply eliminated -- the Step 3 analysis. But notwithstanding the strong federal policy favoring arbitration¹⁰⁰ enforced even in settings where the issues entail

97. *See, e.g.*, *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. 386, 390-91 (1868) (finding that an agreement to arbitrate “is held invalid, because it is an attempt to oust the courts of jurisdiction by excluding the assured from all resort to them for his remedy”); *Reed v. Wash. Fire & Marine Ins. Co.*, 138 Mass. 572, 575 (1885) (noting that an agreement to arbitrate will not be enforced because it “would oust the courts of their jurisdiction”); *Mach. Prods. Co., Inc. v. Prairie Local Lodge No. 1538 of Int’l Ass’n of Machinists, A.F.L.-C.I.O.*, 94 So. 2d 344, 348 (Miss. 1957) (holding a pre-dispute agreement to arbitrate voidable by either party because “private persons cannot . . . oust the jurisdiction of the legally constituted courts”); *Riley v. Jarvis*, 26 S.E. 366, 367-68 (W. Va. 1896) (noting that “parties could not, by agreement, oust the courts of the jurisdiction assigned them by law”).

98. *See cases, supra* at note 97.

99. 9 U.S.C. § 2 (2000).

100. The cases are legion reiterating a strong federal policy favoring arbitration in situations where a claimant is attempting to avoid a contractual arbitration clause in a judicial forum. For

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important public policy issues,¹⁰¹ the threshold question whether the challenging party is bound *as a matter of State contract law* survives.¹⁰² This implicates the Step 1 question: *which State's* contract law? The cases reflect confusion about that question, particularly when the inquiry is complicated by a choice of law clause within the same set of terms.

Choice of Law Provisions

Choice of law clauses bring with them far more potential for confusion than do choice of forum provisions. They may, of course, be binding terms of a contractual relationship arising under some jurisdiction's contract law. But layered on top of the Step 2 contract analysis, there are complex, potentially restrictive conflict of laws principles. Perhaps this complexity accounts for the fact that parties and courts usually fail to focus on the Step 2 contract law question (and, inevitably, on the Step 1 which-contract-law question) and, almost invariably, assume that the choice of law clause is binding *as a matter of contract law*. Courts, and apparently parties, take this leap of faith in virtually all circumstances, including adhesion contracts involving

representational samplings, see Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637, 638 (1996); Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute (Mandatory) Arbitration Outlived Its Welcome?*, 40 Ariz. L. Rev. 1069, 1071 (1998).

101. Many have thought that these issues were inappropriate for an arbitrator's decision. Perhaps the most important such case—and one that laid the foundation for the many that followed—was *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) where the Supreme Court required an American company's federal antitrust claim against a Japanese company to be heard by Japanese arbitrators. *Mitsubishi* involved an arbitration clause that was part of a negotiated contract. Such issues in the adhesion contract arena include claims of age discrimination in employment, see *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Truth in Lending*, see, e.g., *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002); claims of employment discrimination in the brokerage industry, see, e.g., *Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1470 (N.D. Ill. 1997).

102. *Badie v. Bank of America*, 79 Cal. Rptr.2d 273 (Cal. Ct. App. 1998) illustrates the contract analysis, uncomplicated either by a choice of law clause or the possibility of a different State's law applying to the contract. The question was whether an obligation to proceed with arbitration arose from the bank's forms. Finding that the arbitration clause was delivered by a "bill stuffer" after the accounts arose and were not properly parts of the underlying relationship, the court rejected the proposition that there was a contractual agreement to arbitrate. Compare *Edelist v. MBNA*, discussed *infra* beginning at note 112.

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consumers and small businesses where the dynamics of the situation and the contract law that applies to it might be very different.

Beyond that, the choice of law cases also reflect missed opportunities and lack of understanding at the third stage of analysis, the stage where one would consider whether a choice of law provision, already found binding under applicable contract law, may nonetheless be unenforceable because of conflict of laws principles that limit such contractual terms.

We may be at this underdeveloped and confused stage because of the peculiar way the law governing choice of law clauses developed. As indicated above, choice of law clauses were largely unenforceable before the 1950's and the limitations on those provisions came not from contract law but from conflict of laws jurisprudence. The recognition that such clauses served valuable commercial needs eventually produced a relaxation of restrictions, but how those restrictions would be relaxed and what limitations would remain continued to be conflict of laws questions. Although the 1952 U.C.C. provision permitting the parties to choose the applicable law was not very complex,¹⁰³ the analogous RESTATEMENT (SECOND) OF CONFLICT OF LAWS provision¹⁰⁴ was loaded with interesting issues. Thus, the pressure to recognize such clauses was coming from commercial interests, but the thinking that was triggered by this newly-recognized commercial need was occurring in the conflicts field.

Moreover, the early paradigm cases which made “news” on contractual choice of law issues were large, negotiated cases where there would be little doubt that an agreement, enforceable under applicable contract law, had been made.¹⁰⁵ Thus, there was little new material for contracts scholars to think about – the developments

103. U.C.C. § 1-105 (pre-2003 revision).

104. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187, *quoted supra* in note 22.

105. *See The Bremen*, 407 U.S. at 12 (“The choice of that forum was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts.”); *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1069 (11th Cir., 1987) (citing *The Bremen*, 407 U.S. at 12.); *Commerce Consultants Int'l, Inc. v. Vetrerie Riunite, S.p.A.*, 867 F.2d 697, 699-700 (D.C. Cir., 1989) (citing *The Bremen*, 407 U.S. at 12.).

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might well have been perceived and conceived of as purely conflicts developments.¹⁰⁶

The focus on these clauses in litigated consumer cases is a very recent phenomenon and it may well be that the habit of not asking *contract* questions about choice of law clauses might have generated a kind of inertia when those clauses began appearing in litigated adhesion contract cases. Tellingly, a caveat in a Comment to the Restatement provision suggests that choice of law provisions in adhesion contracts might be treated differently from those in negotiated contracts¹⁰⁷ but that opening seems to have fallen on deaf ears.

The Conflict of Laws Principles that Limit the Otherwise-enforceable Contract-for-Law

The conflict of laws principles, contained in the Conflicts Restatement¹⁰⁸ are extraordinarily cumbersome and nuanced but reasonably well-known. The methodology under the Restatement provision is succinctly expressed by the California court in *Nedlloyd Lines B.V. v. Superior Court*:¹⁰⁹

106. One very early work in this area is Albert A. Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 Colum. L. Rev. 1072 (1953), published just ten years after Frederick Kessler did his pioneering work on the adhesion contract. Frederick Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629 (1943). Professor Ehrenzweig expressed considerable skepticism about the propriety of enforcing choice of law clauses in adhesion contracts.

107. *Comment b* to Restatement (Second) of Conflicts of Law, § 187 states, in part:

A factor which the forum may consider is whether the choice-of-law provision is contained in an "adhesion" contract, namely one that is drafted unilaterally by the dominant party and then presented on a "take-it-or-leave-it" basis to the weaker party who has no real opportunity to bargain about its terms. Such contracts are usually prepared in printed form, and frequently at least some of their provisions are in extremely small print. Common examples are tickets of various kinds and insurance policies. Choice-of-law provisions contained in such contracts are usually respected. Nevertheless, the forum will scrutinize such contracts with care and will refuse to apply any choice-of-law provision they may contain if to do so would result in substantial injustice to the adherent.

108. The provision is quoted, *supra* note 22.

109. 834 P.2d 1148 (Cal. 1992).

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Briefly restated, the proper approach under Restatement section 187, subdivision (2) is for the court first to determine either: (1) whether the *chosen state* has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the *parties' choice of law*. If neither of these tests is met, that is the end of the inquiry, and the court need not enforce the parties' choice of law. If, however, either test is met, the court must next determine whether the chosen state's law is contrary to a fundamental policy of California. If there is no such conflict, the court shall enforce the parties' choice of law. If, however, there is a fundamental conflict with California law, the court must then determine whether California has a "materially greater interest than the chosen state in the determination of the particular issue...." (Rest., § 187, subd. (2).) If California has a materially greater interest than the chosen state, the choice of law shall not be enforced, for the obvious reason that in such circumstance we will decline to enforce a law contrary to this state's fundamental policy.¹¹⁰

As the provision, and the court's explanation make clear, the restrictions expressed in the Restatement operate only at Step 3, after the court has determined that the State is a "chosen state" and that the clause represents the "parties' choice of law." Those conclusions are predicated on the contract analysis that is not articulated and is probably not present in the cases. Moreover, when a court faces the contract law question whether to enforce a choice of law clause either in a negotiated contract or in a promulgated business form, it must first decide *whose* contract law to apply to the problem. A court has to start somewhere and, if the question at hand is *whether* a party agreed to be bound by chosen law, that chosen law itself cannot be brought to bear on the question¹¹¹ unless, of course, it would apply absent the contract choice of law clause at issue.

*Edelist v. MBNA*¹¹² illustrates the approach many courts take, one that reflects

110. *Id.* at 1152 (footnotes omitted and emphasis supplied).

111. Scoles et al. refer to this possibility as raising serious "bootstrapping" problems. *Scoles et al.*, supra note 6, § 18.2 at 956.

112. *Edelist*, 790 A.2d 1249.

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confusion over Steps 1 and 2 and rests largely on the conflict of laws restrictions. *Edelist* was a class action brought by a California resident in Delaware seeking damages for breach of the underlying contract. The bank's form contained each of the big three clauses that make their way into credit card cases:¹¹³ an arbitration clause, a class action waiver, and a choice of Delaware as the exclusive forum¹¹⁴ and this legal package was delivered via "bill stuffer"¹¹⁵ to the plaintiff.¹¹⁶ The form also specified Delaware law as the governing body of law and Delaware had precedent suggesting that neither arbitration clauses nor class action waivers in adhesion contracts with consumers were unconscionable.¹¹⁷

The court began with the Conflicts Restatement's Section 188, a provision that a forum might begin with in the absence of a choice of law by the parties. Briefly stated, that provision "points" to the law of the State with the most significant relationship to the transaction and parties.¹¹⁸ After looking at the respective relationships between California and the plaintiff on one hand and Delaware and the Bank on the other, the court cited two Delaware cases for the

113. See, e.g., *Mackey v. MBNA Am. Bank*, 343 F.Supp 2d 966, 968-69 (W.D. Wash. 2004) (no express class action waiver in arbitration clause); *Lloyd v. MBNA Am. Bank*, No. Civ.A. 00-109-SLR, 2001 WL 194300, at *1-2 (D. Del. Feb. 22, 2001) (opinion does not contain the entire credit card agreement-only arbitration clause and class action waiver included); *Discover Bank v. Superior Court*, 30 Cal. Rptr. 3d 76 (Cal. 2005) (no express Delaware choice-of-forum clause).

114. *Edelist*, *supra* note 28, at 1252-53. The choice of Delaware as a litigation forum was, apparently, superseded by the arbitration clause and class action waiver. While it is unclear from the opinion why the plaintiff brought the case in Delaware, the plaintiff's theory was that the bill stuffer was ineffective to amend the agreement. If that were true, then the choice of the Delaware forum clause would remain. Whatever the reason, bringing the case in Delaware was, it turned out, fatal to the claim both on the merits and from a conflict of laws perspective. As the text will develop, the case illustrates the centrality of choice of forum in a conflict of laws analysis and, in this context, to success in an unconscionability challenge.

115. This term makes its appearance in the earlier California case, *Badie v. Bank of America*, 79 Cal. Rptr. 2d 273, 275 (Cal. Ct. App. 1998).

116. *Edelist*, 790 A.2d at 1254.

117. Once the court concluded its conflict of laws analysis, it applied these precedents to find against the plaintiff. *Edelist*, 790 A.2d at 1260-61.

118. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 188(a) (1971).

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proposition that "Delaware courts will honor specific choice of law provisions so long as there is some material linkage between the chosen jurisdiction and the transaction."¹¹⁹ With that the court concluded that, by the parties' agreement, Delaware law controlled the dispute.

The articulated Delaware rule that Restatement Section 188 pointed to was the substance of the Restatement's Section 187(2) (that the parties could choose law that was "related"). Under *that* provision, there is no doubt that the *Edelist* parties *could* have contracted for the law either of California or of Delaware and a court, following that provision, would have enforced the agreement in Step 3. But this begs the questions, 1) *did* they so agree and 2) under what State's *contract* law did they do so? Presumably, it was Delaware contract law because the conflicts principle in Section 188 would have pointed to that law if, as the court may have silently concluded, Delaware had the most significant contacts with the parties and transaction. While there was no explicit focus on the restrictions Delaware *contract* law might have erected to a binding choice of law agreement in this context, had the court engaged in such an analysis, it would probably have found few obstacles under Delaware law in this banking context.¹²⁰

While this part of the opinion suffers from murkiness, the court reached its result perhaps in a more complicated way than contemplated under the Conflicts Restatement. Section 187, the provision addressing contractual choice of law questions, contemplates that the forum court will apply the *forum's* contract law to resolve the threshold question, whether the agreement to the choice of law is enforceable.¹²¹ In *Edelist*, because the forum was Delaware, its law was the appropriate contract law to begin the inquiry under the Restatement provision.

119. *Edelist*, 790 A.2d at 1256.

120. For example, Delaware makes "bill stuffers" binding as a matter of Delaware contract law by legislation. See 5 Del.C. § 952 (2005) which provides:

Any notice of an amendment sent by the bank may be included in the same envelope with a periodic statement or as part of the periodic statement or in other materials sent to the borrower.

Compare *Badie v. Bank of America*, 79 Cal. Rptr.2d 273 (Cal. App. Ct. 1998).

121. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. b (1989). The provision is quoted *supra* in note 24.

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The Restatement's position on whose contract law to begin with -- forum law -- is at odds with the more complicated analysis imagined in *Edelist*. The Restatement's approach may be predicated on a view that in contested contract formation settings, there is no collective legal frame of reference for "the contract" (a "substantial relationship" State), since one side maintains there *is* no contract.¹²² In these circumstances, forum law may have as good a claim to govern the situation as would the law to which Section 188 might point. Moreover, the Restatement's approach is far simpler and more determinate than is that which the *Edelist* court might have been using, and simplicity and predictability may be good reasons to embrace it.¹²³ But the tradeoff is that, partly because it is so determinate, this approach offers forum shopping opportunities that the conflict of laws system is designed to minimize. One could imagine courts in some States developing a *contract* law analysis that is more sensitive than that of other States to the implications of choice of law clauses in adhesion contracts. If the litigation lands in those States, its courts might refuse to enforce choice of law clauses, at least in some instances of perceived customer injustice. We have just that possibility crystallized -- but not resolved -- in an important recent California Supreme Court case. It can serve to illustrate how the contracts and conflicts principles might work together in a very difficult setting.

Some of the Conflicts (and Contracts?) Ideas at Work

*Discover Bank v. Superior Court*¹²⁴ was a class action brought by consumers in California against the bank arising out of a bank practice alleged to be deceptive¹²⁵ under the *Delaware* Consumer Fraud Act.¹²⁶ The bank sought arbitration pursuant to the mandatory arbitration provision in its forms, and these forms, as usual, included a class action waiver, and a clause specifying Delaware law as the controlling law for the relationship. In the appeal to the California Supreme Court, the customers

122. Cf. Scoles, *supra* note 6, PINPOINT CITE

123. Compare Scoles et al., *supra* note 6, § 18.2 at 955.

124. 30 Cal. Rptr. 3d 76 (Cal. 2005).

125. The alleged practice was a representation by the bank that late fees would not be assessed if payment were received by a certain date but charging late fees if the payment was received after 1:00 p.m. on that specified date. *Id.* at 78.

126. Del. Code Ann. tit. 6, §§ 2511-2527 (1999); *Discover Bank*, 30 Cal. Rptr. 3d at 80.

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challenged the class action waiver as unconscionable under *California* law¹²⁷ and sought class-wide arbitration of their claims. While much of the opinion was addressed to the court's conclusion that California law on the question before it was not preempted by the Federal Arbitration Act,¹²⁸ the Court eventually concluded that California law rendered the class action waiver unenforceable in this context and that class-wide arbitration would be ordered. But all of this was contingent on an assumption: that the Delaware choice of law provisions did *not* displace the court's use of California law in this context. It remanded that pivotal question – the effect of the choice of law clause – to the trial court.¹²⁹

A bird's-eye view of *Discover Bank* shows an intractable issue of federalism which will not likely be fully resolved on remand. One side of the issue is made possible by the widespread enforcement of choice of law provisions in consumer contracts: can a State's businesses, through choice of law clauses in their businesses' forms, project their (that is, their chosen State's) view of consumer protection into the other 49 States. Upholding the Delaware choice of law provision and Delaware's concomitant validation of class action waivers would effect such a result in California. The flip-side of that question is focused by the unusual way *Discover Bank* was framed by the plaintiffs—Delaware law for regulating the Bank's conduct, California law for regulating the class action waiver: can California customers, via California law, potentially applicable in the first instance to (or operable in spite of) these same contractual choice of law provisions, project their (California's) view of consumer protection from class action waivers into other States via a nationwide class action?

The class action side of this problem has a very short half-life: California's ability to project its class action policy is coextensive with consumers' ability to maintain nationwide state class actions. In view of recent Federal legislation,

127. While the plaintiffs maintained that the class action waiver was invalid under California law, they were careful to maintain their reliance on Delaware law for their challenge to the substance of the bank's practice. *Id.* at 85, n. 2.

128. *Id.* 86-95.

129. *Id.* at 96-97.

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consumers' ability to maintain such class actions has probably come to an end.¹³⁰

Choice of law clauses in adhesion contracts are, on the other hand, not likely to disappear soon and we can expect businesses ever more aggressively to argue that such provisions displace the State law of "unchosen" States that ordinarily would protect consumers. Moreover, in the current environment of widespread consumer arbitration, the effects of inadequately addressed choice of law clauses could be multiplied: arbitrators will "follow" the law, not "develop" it as common law courts have for centuries. If judicial precedent on these issues will, effectively, be "frozen," the precedential cases ought to be soundly reasoned and take account of all the issues triggered by choice of law clauses in business forms.

The concurring and dissenting opinion of Justice Baxter¹³¹ underscores the importance of the contract law underpinning that, at least in the first instance, lies behind the federalism question. Justice Baxter apparently thought that Delaware law controlled, primarily because of the choice of law clause, and that, therefore, the case was an inappropriate vehicle for articulating California law on class action waivers.¹³² Some of his rhetoric imagines a bargain in these adhesion contracts that, in the context of choice of law clauses in particular, is nearly breathtaking:

Here, the parties gave extensive and detailed contractual consideration to the "issues that would arise . . . if litigation [became] necessary." They specifically agreed that disputes would be resolved, upon either party's election, by mandatory arbitration, and that class treatment of the dispute would not be permitted. Further, they expressly provided that their agreement would be governed by the law of Delaware—a jurisdiction which, for policy reasons of its own, allows contractual provisions requiring nonclass arbitrationThe reasonable expectations of both Discover Bank and the State of Delaware [sic]

130. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (to be codified at 28 U.S.C. §§ 1332(d), 1453, 1711-1715). *Discover Bank* was not affected because the new law operates only prospectively. Pub. L. No. 109-2, § 9, 119 Stat. 4, 14.

131. Justice Baxter agreed with the majority that the Federal Arbitration Act did not preempt California law in this case, *if it applied*, which he believed it did not.

132. *Discover Bank*, 30 Cal. Rptr. 3d at 97.

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would thus be “unfairly disappointed” if a California rule banning class waivers were applied despite the parties’ agreement.¹³³

Surely, one could take some comfort with the applicability of Delaware law to the consumer protection problems if one thought that there were a full, knowing waiver of the California consumer protection law as the dissent seems to imply. But the possibility of such a knowing waiver, even through a far more robust provision than the terse sentence in the bank’s bill-stuffer form, seems extremely far-fetched. Moreover, the dissent’s idealized freedom-of-contract rhetoric should underscore that the opening questions on remand in *Discover Bank* are *contract* law questions and, to reach them, the court first has to decide what State’s law should control them.

As superb as they are in focusing the larger issues, the *Discover Bank*’s majority and dissenting opinions both reach beyond these threshold questions to the *conflicts* questions such as whether, *given agreement* to the choice of law clause, enforcement might violate California’s fundamental policy.¹³⁴ A richer, more informed analysis entails a consideration of the threshold questions that precede the conflicts analysis, whether the parties agreed, as a matter of contract, to the choice of law provision and the preceding conflicts question, under what jurisdiction’s law should the contract question be resolved.

As to that threshold conflict of laws question, the Restatement calls for the forum to apply its own contract law to the contract question¹³⁵ and California has embraced the Restatement provision as a general matter.¹³⁶ *Edelist* and cases like it may call for the contract law to which the forum’s conflict of laws principles point. Once the applicable contract law is found, the court will proceed to Step 2 and determine if the contract provision is binding under that law. Here, contract

133. *Id.* at 104. The supposedly contractual relationship was between Discover Bank and the cardholders, *not* between the Bank and Delaware. *That* relationship was not at the core of this dispute between the bank and its customers.

134. *Discover Bank* at 96 (majority) & at 101 (dissent).

135. *See supra* text at note 123.

136. *See* *Nedlloyd Lines B.V. v. Superior Court*, 854 P. 2d 1148 (Cal. 1992) discussed *supra* note 109.

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formation (*e.g.*, are provisions promulgated via bill stuffers binding), unconscionability (*e.g.*, is a choice of law in a business form that reduces consumer protection, at least without spelling out that fact, unconscionable), and the other rich tools of contract law can be fully deployed. If (and only if) the choice of law is enforceable under the appropriate State's contract law should the court reach the Step 3 conflict of laws question, whether California public policy should nonetheless override the agreement.

As recognized by both majority and dissent,¹³⁷ *Discover Bank* may trigger an alternate analysis, one that could prove useful to the plaintiffs in the case. Matters of procedure have always been the domain of the forum and subject to forum law.¹³⁸ Indeed, it is hard to imagine a reason *not* to apply the forum's law to a question of procedure since it directly implicates the power of the forum court to process disputes in the way its system has been designed.¹³⁹ If the *Discover Bank* matter is perceived as procedural—can an out-of-state bank's promulgated form limit the range of civil procedure a forum can engage in, then California will apply its own law to the question.¹⁴⁰ This could well be the right way to understand the problem: a number of courts that have sustained class action waivers over unconscionability attacks have

137. *Discover Bank* at 96 (majority) & at 103(dissent).

138. See Scoles et al., *supra* note 6, § 3.8 at 128 (4th Ed. 2004) (stating that courts will rely on forum law to deal with “procedural” aspects of litigation); Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 296 (1988) (stating that contractual choice of forum is effectively a choice of procedures by the parties); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971) (providing that “[a] court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.”).

139. See Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 Fordham L. Rev. 291, 296-97 (1988) (advocating for a more procedural based analysis when analyzing forum-selection and choice-of-law clauses as opposed to the current method based on contract law).

140. As articulated in the text, this would primarily be a *conflicts* question, do the parties collectively have the power through their contract to alter the preexisting civil procedure rules of the forum? In the analysis developed in this Article, this question would come at Step 3 as an override to a valid contract found through Steps 1 and 2 under applicable contract law. Much of the majority's analysis in *Discover Bank* would, by contrast, be better characterized as animated by contract law: does one party, through its business form, have the power to bind the other to a class action waiver.

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done so by maintaining that class actions are “mere” procedural devices, not matters of substance, and therefore provisions waiving them are not of such moment to trigger an unconscionability conclusion.¹⁴¹

Part 3: Conclusions—The Future of Contracts for Law, Forum, and Arbitration

For negotiated contracts, the future of contracts for law, forum, and arbitration is bright. The provisions make contract litigation more predictable and thereby add value to the underlying transactions. In international contracts particularly, such provisions are probably essential to a competently drafted contract. At this point in our economic development, such provisions are largely uncontroversial.

When these provisions appear on business forms distributed to customers, however, it is another story. Once again, *Discover Bank* is a good illustration in the context of choice of law. If one takes much of the *Discover Bank*'s dissent at face value, the bank's simple insertion of a choice of (Delaware) law clause in the customers' forms did (or ought to) transform what would have been an inquiry into unconscionability under California law into one under Delaware law where, as the dissent pointed out, class action waivers have been sustained. What is impermissible under California law becomes permissible if the bank simply adds a choice of Delaware law sentence to the form.

While the underlying issues and doctrine may be complex and elusive, most bystanders would probably consider this to be drafting slight-of-hand or even legal chicanery. We begin with a provision that is probably unenforceable in the customer's home state (say a class action waiver), and the home state's law says or implies that a waiver of the home state's protection is unenforceable. Direct waiver by form contract of the class action remedy being unavailable, the business instead finds and chooses a State's law that sees things the other way and promulgates that law through the form. Abracadabra! Without even mentioning the word “waiver” or

141. See, e.g., *Lloyd v. MBNA Am. Bank*, 27 F. App'x 82, 84 (3d Cir. 2002) (holding that an arbitration agreement barring classwide relief is not unconscionable because class actions are “merely” a procedural right); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000) (holding that an arbitration clause that may render class actions unavailable is enforceable because class actions are “merely” a procedural right); *Strand v. U.S. Bank Nat'l Ass'n ND*, 693 N.W.2d 918, 926-27 (N.D. 2005) (finding that a “no class action” provision is not unconscionable because class actions are “purely” a procedural right).

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“class action,” the business has converted a losing case into a winner, an almost-amazing result that probably does neither the law nor the reputation of lawyers any good. As long as contract law remains a system where obligation is imposed on the basis of assent,¹⁴² such a result should raise *some* questions.

But, as is evident from the cases that either the claimant concedes the application of the specified law,¹⁴³ or, as in *Scheifley*,¹⁴⁴ the court concludes there was agreement, as a matter of contract, to the other state’s law without any discussion. The legal tangle within which these contract provisions exist may well account for their summary treatment in the cases.

The dominant conflict of laws analysis has, similarly, tended to obscure the contract issues embedded in choice of forum clauses in business forms. Although such court-choosing provisions are important in both the ALI’s and the Hague’s efforts at international enforcement of judgments and related issues, both drafts paid very little attention to the contract issues implicated by their work. Once again, there are few controversial issues with negotiated contracts and both drafting bodies probably had negotiated contracts in mind when they developed their drafts. This is understandable in one sense; despite an occasional call to the contrary,¹⁴⁵ the law continues to lump adhesive business forms in with negotiated contracts and has, so far, failed to adequately differentiate the two on the basis of assent.¹⁴⁶ When business forms are choosing the law and forum and recipients cannot understand the provisions, even if they took the time to find and read them, one would hope that contract law might have something to offer on whether these are true commitments worth enforcing. At the minimum, we might learn what it is about these contract provisions that justifies their enforcement without any semblance of true assent of

142. *But see* Radin, *supra* note 1.

143. *See, e.g.*, Bohan v. Honeywell Int’l, Inc., 366 F.3d 606, 608 (8th Cir. 2004); Lloyd v. MBNA Am. Bank, 27 F. App’x 82, 84 (3d Cir. 2002); Discover Bank v. Superior Court, 30 Cal. Rptr. 3d 76, 97 (Cal. 2005) (Baxter, J., concurring and dissenting).

144. *Scheifley*, No. CV 03-2801RBL.

145. *See e.g.*, Arthur Leff, *Contract as Thing*, 19 Am. U. L. Rev. 131 (1970).

146. Restatement (Second) of Contracts § 211(3) and UCC § 2-207 are two exceptions. Together they offer strong evidence of the law’s failure here.

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the recipients, or how the widespread enforcement of these provisions affects the theoretical grounding of contract law in party assent. A better understanding of how the contract operates in these settings will surely help to improve advocacy involving these provisions in business form settings and thereby lead to richer judicial decisions.

When deployed by out-of-State businesses, widespread choice of law and forum clauses threaten the consumer and small business protection a State offers to its residents. This may be of concern to some State legislatures. If a choice of forum clause blocks a local suit, or drags the citizen to a distant jurisdiction, what began as an uneven playing field¹⁴⁷ became even more tilted. If a choice of law clause can replace the resident's consumer protection with that of a State that offers less, we are faced with a major issue of federalism and local control.¹⁴⁸ Legislative action may be

147. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc. Rev. 95 (1974).

148. The policy questions may well go to the core of our Federal system.

How much consumer protection a State supplies to its citizens vis a vis its businesses is, obviously, the product a very complicated political process. Delaware, which has prided itself on creating a favorable business environment, no doubt derives tax revenues from businesses that settle there and can thereby redistribute that revenue to its citizens in the form of lower taxes or other State benefits. One can imagine a political process that "trades" some level of consumer protection for a favorable business environment and the benefits to a State that come from that. A beauty of our Federal system is that another State could have a completely different "mix," choosing instead to offer citizens legal protections unavailable elsewhere even if the business environment is not so favorable. The system works the way it is designed so long as citizens of given places get the "mix" that their State delivers.

This Federal balance can be upset if part of the "mix" citizens get in one State is replaced with part of the "mix" developed in a different State. Assume, for purposes of illustration what many business lobbyists assert, that a State's consumer protection and its tax level are correlated, that is, people who live in "high" consumer protection States get "high" taxes as part of the tradeoff and people who live in "low" consumer protection States get "low" taxes as their tradeoff. Whether either hypothetical tradeoff is "good" is beside the point; both mixes are appropriate in our political system and, indeed, the system fosters such differences. Now suppose the citizens in the "high" consumer protection State can have their consumer protection replaced (through choice of law provisions) with the "low" State's level. Now, the citizens of the high tax State get a balance (low consumer protection and high taxes) that neither State legislature made. While the "low" regulation State might even foster such a result to make it even more attractive to businesses, cf. Del. Code Ann. tit. 6, §

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even more pressing inasmuch as a great deal of consumer law displacement could be occurring out of sight, in negotiations and arbitrations that leave no records. An undeveloped—or wrong—judicial decision can have influence in that “echo chamber” for years. In such a legal environment, clear statutory norms are probably the most effective vehicles for controlling the undesirable byproducts of the widespread recognition of these provisions.

With adhesive business forms, the issues are predominantly contract issues—the parties’ relationship to one another—rather than conflicts issues—the parties’ collective authority *vis a vis* the State. Contracts are *not* all the same and, while contract scholars have not done a great job of it, they have been focusing on what differentiates adhesion deals from negotiated contracts for many years. These adhesive contract provisions, too, deserve more attention than they have had from contracts scholars if we want full, rich policy development of appropriate limits (if any) to put on such provisions in given contexts. Can a choice of law or forum clause be considered “unconscionable” if its effect is to deprive a plaintiff of a class action remedy? Might the hidden effects of a choice of law provision violate a customer’s “reasonable expectations”?¹⁴⁹ Are choice of law or forum clauses binding if packed in with the product and seen, if at all, only after purchase?¹⁵⁰ Are they enforceable if they appear in browseware?¹⁵¹ What if they arrive in a bill stuffer after the initial relationship is established?¹⁵² None of these contract law questions is even asked if we simply assume that the contract for law or forum is binding and move to a conflicts analysis.

Put simply, contract law offers unrealized potential for understanding contracts for law, forum, and arbitration. Seeing the contract more clearly within these provisions is a first step; one can only hope that a better, richer policy

4.102(b)(1999) (requiring Delaware banks to use the law of Delaware in their transactions with customers in other States) such a result seems at odds with our Federal system.

149. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 211(3).

150. *Compare* Klocek v. Gateway, 104 F. Supp. 2d 1322 (D. Kan. 2000) with Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997), *cert. denied*, 522 U.S. 808, 118 S. Ct. 47, 139 L. Ed. 2d 13 (1997)).

151. *Cf.* Specht v. Netscape Communications, 306 F.3d 17 (2d Cir. 2002).

152. *Cf.* Badie v. Bank of America, 79 Cal. Rptr. 2d 273 (Cal. Ct. App. 1998).

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discussion will follow.

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