SAVING THE HAGUE CHOICE OF COURT CONVENTION

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ABSTRACT

Developing an international regime that would require some level of international recognition or enforcement of the judgments of courts of other countries has been a goal for international lawyers, particularly those in the United States, for many years. Concluded in 2005, the Hague Choice of Court Convention ("the Convention") may not be the gold ring, but it promises to make substantial improvements in international judicial dispute resolution and thereby add immensely to international economic well-being. Through the Convention, states will agree to recognize or enforce the judgments of other state parties when those judgments follow valid "choice of court agreements" defined (and also regulated) in the treaty. Since most international trade begins with a contract, and since most of those contracts already contain dispute resolution provisions, the Convention may have delivered a great advance in this area. But it is obvious from the nature of the Convention that its success depends critically on widespread international acceptance; if only a few states join it, the international system will not have become much better than it is now.

Unfortunately, only Mexico has ratified the Convention in the more than two years since the Convention was concluded and it seems in danger of dying a slow death for lack of interest. Leadership by the United States, a primary advocate for an international accord, may be in order.

The problem is that the Convention, as drafted, will not find uniform and reliable enforcement within the United States. In two

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particular kinds of contracts covered by the Convention, franchise contracts and what I call “mass market contracts,” some choice of forum provisions are difficult or impossible to enforce in several U.S. states under current law. Some of this law has developed very quickly. The state of domestic law presents a compliance problem for the United States in the first instance if it joins the Convention, but that problem may be dwarfed by the very practical problem of leading other countries to join the Convention thereby ensuring its success. This will be very difficult if other states perceive the United States, owing to these developments, and the diversity in its state commercial law, making less of a commitment under the Convention than other states will make if they join the Convention.

After examining the case law in the United States that will cause the problems, this Article considers alternative solutions, concluding that the Convention itself supplies the best approach, one that the United States should embrace in its efforts to lead other countries in improving the international dispute resolution system.

1. INTRODUCTION

In our newly globalized world, an American litigator’s nightmare might run something like this. A foreign corporation doing limited business in the United States breaches its contract with the domestic client, causing serious damages. The lawyer manages to serve process properly on the defendant in a reliable local jurisdiction, and over the course of many months, prepares and tries the case to a substantial victory that would make any client proud. But, before the festivities end, the litigator (or the client) realizes that the game is not over: there is still the matter of collecting the judgment. In our nightmare, of course, the defendant has very few assets in the United States. It is here, if she is lucky, that the lawyer will wake up before she faces one of the grim realities of globalization: there is no international system that requires states to honor each others’ judicial decisions. Collection in a foreign jurisdiction will never be easy in the current environment; in the worse case, the lawyer will have to go to the jurisdiction with the assets and try the case all over again, this time in all likelihood in a far less sympathetic forum. The nightmare apparently is far more real for Americans seeking enforcement
abroad than it is for those seeking the recognition or enforcement of foreign judgments in American courts.¹

Even if peculiarly American, this nightmare is, of course, a little unrealistic. Few competent lawyers would begin substantial litigation without considering the prospects for enforcing any resulting judgment. By the same token, few sophisticated traders will make an international contract without considering the difficulties dispute resolution might present if the contract goes bad. Thus, while it is an obstacle to efficient trade, the absence of reliable international recognition and enforcement of judgments works its way into the thinking of those who initiate litigation and negotiate contracts, and they work around it. Probably the most common solution at the contracting stage might be to include an arbitration clause in the contract. Since at least the 1970s, states have agreed to mutually enforce arbitral awards through their joining the New York Convention.² If our lawyer began an arbitration proceeding instead of a lawsuit, she would have vastly enhanced confidence that enforcement would not be blocked by the lack of cooperation among states.

The absence of an international regime for enforcing judgments makes for hard strategic decisions in deciding where to bring a lawsuit. Many states recognize or enforce foreign judgments. But they are not required to, and high levels of uncertainty here may be endemic: international enforcement depends on many factors, including the nature (and perhaps the size) of the resulting judgment itself. This uncertainty of eventual enforcement surely influences the decisions that plaintiffs' lawyers make at the outset of litigation—they will be more likely to bring their litigation in the


state with jurisdiction over the defendant's assets, even if witnesses and evidence may be elsewhere.

This uncertainty about how—and whether—the outcome of judicial dispute resolution will be recognized in other jurisdictions raises risk and retards efficiency, and (which is much the same thing) an uncertain system of mutual recognition and enforcement makes dispute resolution far more cumbersome. Defendants face a very similar problem: if a defendant cannot get recognition of its victory in other jurisdictions that might exercise jurisdiction over the plaintiff's claims, the defendant faces the prospect of fighting twice—or more—for the same victory.

It is thus easy to understand why, since the 1950s, there has been substantial interest in developing international cooperation in recognizing and enforcing foreign judgments. Since the problem is perceived to affect the United States more than other states, it is also easy to see why the United States has taken a leadership role in these efforts.

The latest attempt to establish an international system dates to 1992 in the Hague Conference on Private International Law ("the Conference"). Perhaps this ambitious effort was doomed to failure. An implication of recognizing or enforcing the judgment of another sovereign is that the enforcing or recognizing court takes the other judgment as its own without questioning the underlying process or rules. Both can be problematic: will a state that believes in the adversarial system for finding the truth trust in a more inquisitorial system? Will the rules developed for a different regulatory climate—punitive damages or class actions, for example—be accepted without question in a different legal culture that prefers ex ante regulation? At a slightly different level, the courts of each state are instruments of sovereignty; accepting without question the judgments of other states is, to some extent, a surrender of sovereignty. To defer to the judgments of another

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5 Id. at 271.
state is to forego local judgment and the possibility of inserting local values into a dispute resolution process. In a world where legal cultures remain very diverse, creating a system where each state defers to the judgment of the courts of other states is no small task. It is no wonder the latest effort to create a multilateral system for mutual recognition and enforcement failed to accomplish that objective.

But the Hague Conference did not fail entirely. Instead, it shifted its focus from mutual enforcement of judgments generally to the mutual enforcement of that subset of judgments that follow from "choice of court" agreements. In so doing, the negotiators changed the entire project from an effort to reconcile the many differences in legal systems that produce judicial decisions, to one of reaching consensus on the enforceability (and the implications of enforceability) of a particular kind of contract term commonly found in commercial contracts. By shifting the focus from the deeply divisive questions of jurisdiction and sovereignty implicated in mutual recognition and enforcement of judgments, to the more comfortable regime of contract enforcement, the Conference managed to conclude a Convention on choice of court agreements that may carry much of the potential for improvement of international trade promised by the original project.

The scheme, obviously, does not cover all judgments—a defendant in a tort action is not likely to agree to litigate with the plaintiff in a particular court—but it probably covers most judgments that will matter to international trade. After all, international trade is largely based on initial contractual relations among the traders and it is a simple matter, in any contract, to include a provision specifying how disputes will be resolved. Indeed, international traders probably include dispute resolution provisions in most of their contracts already; given the complexities that are implicated in resolving a business dispute at the international level, including such provisions is simply good business practice.

In many respects, changing the subject from judgments to agreements was a brilliant move. By replacing the thorny and

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6 In the United States, "choice of court" is an unusual term; provisions choosing courts are typically referred to as "choice of forum" provisions and, broadly interpreted, would include contractual provisions choosing arbitration. I will use the Hague's "choice of court" term when referring to provisions choosing judicial fora and the broader term "choice of forum" when referring to provisions that select either a court or arbitral forum for dispute resolution.
intractable questions of the original project with the more comfortable regime of contract, the negotiators managed to hide many of the difficult issues under the umbrella of consent. If the parties have agreed to an adversarial system, to a jurisdiction that allows punitive damages, or to an adjudication system that has no juries, the resulting judgment seems less controversial and seems to raise fewer issues that might be of concern to the recognizing or enforcing court. Of course, the court receiving the judgment is still lending sovereign force to the judgment of the court of a different sovereign, but the intervening agreement removes much of the pressure of scrutiny from the receiving court. “If the parties agreed to this, why should we intervene?”

In addition, while these agreements can result in enforceable judgments, there is surely less international diversity in view about enforcing contracts (even choice of court contracts) than there is about enforcing judgments. Traders ranging from individuals selling trinkets on a Beijing street to multinational corporations selling other corporations in New York all work with a common core of contract principles that is much the same around the world. Thus, by making the shift from judgments to choice of court agreements, the Conference changed the subject to one that carried far more potential for international accord. Moreover, by moving the discussion from the public realm of judgments to the quintessentially private realm of contracts, the Conference might also have successfully dodged hard public law questions that were more evidently present when the focus of the discussions was judgments.8

While the considerable effort of drafting the Convention is

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7 Hard questions and conflicts of principle can be buried beneath choice of forum agreements. For example, courts often closely scrutinize express contractual provisions waiving a jury trial or a right to punitive damages. See, e.g., Bell Helicopter Textron, Inc. v. Abbott, 863 S.W. 2d 139, 141 (Tex. App. 1993) (stating that restrictions on right to a jury trial “will be subjected to the utmost scrutiny”); Pardee Constr. Co. v. Super. Ct., 123 Cal. Rptr. 2d 288, 293 (Ct. App. 2002) (holding that a provision waiving the rights to a jury trial and to punitive damages in a contract of adhesion was unconscionable under California law). By contrast, in the United States a customer’s agreement to an arbitration provision in an adhesion contract—a provision that, by definition, denies the customer the right to a jury determination—seldom receives anywhere near that same level of scrutiny.

8 See generally Perez, supra note 3 (developing a few “hard public law questions” and recommendations for a process that would explicitly address them).
over, what remains is the work of persuading states to join the Convention and, for the states that join, the work of implementing the Convention's rules. This follow-through may have stalled. The Convention's text was concluded in 2005 and it requires at least two states to deposit instruments of ratification, acceptance, approval, or accession in order for it to enter into force.\textsuperscript{9} After two years, only Mexico has joined the Convention and the Convention has not yet entered into force.\textsuperscript{10} The situation seems to call for strong leadership. As the leading proponent of the original judgments project and this successor convention on choice of court agreements, one would hope that the United States is taking a leading role in this effort. Assuming that the United States still supports the Convention, the effectiveness of its leadership may well depend on how it approaches the Convention domestically and, in particular, on how other states perceive the Convention will operate in courts within the United States. In short, what the United States \textit{does} may be as—or more—important than what it \textit{says}.

This article addresses some of the issues that the United States may have to confront in its follow-through efforts to make the Convention a success. Section 2 gives a short introduction to the Convention and its workings. Section 3 will argue that, despite the best efforts of the negotiators, there remain under the Convention areas where contract enforcement will inevitably be uncertain in all states, but that the problems will be exacerbated within the United States in part because of its federal system's legal diversity. Section 4 develops in more detail the subject areas where choice of court agreements, covered by the Convention, will nonetheless encounter uncertain enforcement in the United States. Section 5 then considers different options the United States might consider in order to gain more certain domestic enforcement of Convention-covered agreements. Finally, Section 6 looks at another option: for the United States to join the treaty subject to specific qualifications that would avoid anticipated domestic enforcement problems and perhaps pave the way for other states to join the treaty.


2. THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

The Hague Convention, concluded in 2005, is a scaled-down version of a far more ambitious project aimed at mutual enforcement of judgments. Briefly, the Convention makes contractual "choice of court" provisions in international contracts enforceable both in the court designated by the agreement, and in any unchosen court of a state party that might obtain jurisdiction over a dispute covered by the choice of court agreement. The court designated in the agreement (the "chosen court") obtains jurisdiction over the dispute "unless the agreement is null and void under the law of that State." Correspondingly, a "court not chosen" (the "seised court" in Convention terminology) is, with limited exceptions, directed to give effect to the choice of court agreement by dismissing or suspending its own

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11 Hague Convention, supra note 9.
12 See id.; see also Adler & Zarychta, supra note 1, at 2-10 (discussing at length the history and negotiations leading to the current Convention).
13 See supra note 6 and accompanying text.
14 "International contract" is broadly defined in Article 1. It provides in part:

For the purposes of Chapter II [Jurisdiction], a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.

For the purposes of Chapter III [Recognition and Enforcement], a case is international where recognition or enforcement of a foreign judgment is sought.

Hague Convention, supra note 9, art. 1, para. 2-3 (explanatory brackets added).
15 Id. art. 5, para. 1. The Convention also provides that a Contracting State may enter a reservation to the effect that it may refuse to enforce a judgment otherwise covered by the Convention "if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, were connected only with the requested State." Id. art. 20. This would ordinarily cover a judgment entered by a chosen court that took jurisdiction despite the lack of other elements (i.e., parties, subject matter, performance, etc.) that would give the underlying contract an international character.

16 Those exceptions include: a) the agreement is "null and void" under the chosen court's law; b) one of the parties lacked capacity under the unchosen court's law; c) giving effect to the agreement would be "manifestly contrary to the public policy" of the unchosen court's State; d) "for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed"; or e) "the chosen court has decided not to hear the case." Hague Convention, supra note 9, art. 6.
proceedings. More importantly, given the impetus for the Convention, judgments obtained pursuant to choice of court agreements covered by the Convention become enforceable in contracting states, again with limited exceptions.

Obtaining international consensus on enforcing agreements is easier than on enforcing judgments, but there remain subject areas where an international consensus on the desirability or appropriateness of enforcing choice of court agreements is lacking. The Convention attempts to reach common ground by excluding many important subject areas from its reach. Thus, family matters, antitrust, wills and succession, and personal injury, to name a few, are excluded from the Convention. These are areas where there is

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17 Id. art. 6.
18 Article 9 of the Hague Convention states that recognition or enforcement of a judgment may be refused if:
   a) the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid;
   b) a party lacked the capacity to conclude the agreement under the law of the requested State;
   c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim,
      i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or
      ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;
   d) the judgment was obtained by fraud in connection with a matter of procedure;
   e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State;
   f) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or
   g) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfills the conditions necessary for its recognition in the requested State.

19 The full list in art. 2, para. 2 is:
   a) the status and legal capacity of natural persons;
   b) maintenance obligations;
disagreement as to the appropriate norms or where the perceived need for local control is strong. The Convention also preserves a measure of local judicial autonomy for unanticipated situations by explicitly authorizing a seised court both to decline to enforce a choice of court agreement at the outset, or to recognize or enforce the judgment resulting from it, for reasons of "public policy." 20

The Convention also separately excludes altogether two important categories of contracts: employment contracts, and contracts "to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party." 21

It is obvious, but worth emphasizing nonetheless, that the courts involved—both chosen and not chosen—must be courts of

c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;
d) wills and succession;
e) insolvency, composition and analogous matters;
f) the carriage of passengers and goods;
g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage;
h) anti-trust (competition) matters;
i) liability for nuclear damage;
j) claims for personal injury brought by or on behalf of natural persons;
k) tort or delict claims for damage to tangible property that do not arise from a contractual relationship;
l) rights in rem in immovable property, and tenancies of immovable property;
m) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;
n) the validity of intellectual property rights other than copyright and related rights;
o) infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract;
p) the validity of entries in public registers.

Id. art. 2, para. 2.

20 An unchosen court can decline to give effect to the agreement if it "would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised." Id. art. 6(c). A "requested court" may decline to enforce a covered judgment if "recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with the fundamental principles of procedural fairness of that State." Id. art. 9(e).

21 Id. art. 2, para. 1.
"Contracting States." By its very nature, the Convention imposes absolutely no obligation on non-contracting states either to honor a Convention-covered judgment or to enforce a Convention-covered choice of court agreement. This, of course, means that the Convention has no effect if only the United States ratifies it, and that its intended effect depends critically on widespread ratification. While needed attention has been given to domestic legislation, either at the state or federal level, that may be necessary in order for the United States to implement the Convention, the focus here will be on the earlier, and related, question: what reservations, if any, should the United States include in its ratification of the Convention? As will be seen, the conditions under which the United States ratifies the Convention may have an impact on how other states perceive its fairness when both they and the United States are parties to it.

This discussion is related to implementing legislation because, given developments in domestic law related to choice of court

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22 See id. art. 5, para. 1 (declaring that the court of a contracting state shall have jurisdiction); id. art. 6 (declaring that a court of a contracting state which is not the chosen court generally must dismiss or suspend proceedings when an exclusive choice of court agreement applies).

23 See generally id. art. 31 (describing the various requirements and stages through which the Convention must pass in order to gain force).

24 See generally id. art. 27, para. 4 ("Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depository of the Convention.").

25 See, e.g., Curtis R. Reitz, Globalization, International Legal Developments, and Uniform State Laws, 51 LOY. L. REV. 301, 301 (2005) ("The only feasible way to create laws on a global scale is through the use of the ordinary legislative machinery of nations, and this is the path of modern international legal developments."); Stephen B. Burbank, Federalism and Private International Law: Implementing the Hague Choice of Court Convention in the United States 20-22 (Univ. of Pa. Law Sch. Pub. Law & Legal Theory Research Paper Series, Research Paper No. 06-27, 2006), available at http://papers.ssrn.com/abstract=921200 (examining "the domestic process that should be used to implement, and the domestic law that should be used to supplement, the Hague Convention," as well as the interplay between federal and state law in filling the interstices of whichever process is selected).

26 The obligations the United States assumes through a treaty can be limited by reservations, understandings, and declarations. See generally Duncan B. Hollis, Executive Federalism: Forging New Federalist Constraints on the Treaty Power, 79 S. CAL. L. REV. 1327 (2006) (discussing the alternative visions of the U.S. treaty power (under the nationalist, new federalist, and "Executive Federalism" models), examining the domestic implications of the executive's current practice for federalism as a principle, and lastly analyzing the effect of the executive's interpretation on U.S. foreign affairs.).
agreements, general legislation to implement the obligations of the
treaty as drafted may not be feasible and, therefore, the situation
may call for narrowing the United States' obligations under the
treaty at the outset. To understand why, it is necessary to review
features of our commercial law system that will complicate our
implementation of the Convention.

While the impetus for the Convention is international
enforcement of judgments, the shift in focus to agreements draws us
into the complex nature of our federal judicial system for resolving
contract and commercial law disputes. It is this system that is at
the core of the problems we confront here. International
businesses who face our commercial law and related judicial
dispute resolution systems encounter a set of substantive and
procedural rules that is difficult even for domestic businesses to
navigate. Because most domestic commercial law, and the
regulation that accompanies it, is made at the state level, rather
than federal, contracting parties face a level of uncertainty about
the applicable rules that contracting parties do not face in unified
systems. On top of that, most commercial law disputes are
adjudicated at the state level and state courts may vary in the
procedural rules they may use in resolving such disputes.

It is true that much of our substantive commercial law has
become reasonably uniform owing largely to the efforts of the
National Conference of Commissioners on Uniform State Laws and
its uniform laws projects, most significantly, the Uniform
Commercial Code. But there are important residual differences in
the substantive commercial law from one state to the next, and also
in the procedural rules that control the litigation process at the
state level. To make matters much worse, most litigants can
choose from a number of different jurisdictions where to file suit,
and there is no uniform conflict of laws rule applicable in all states.
This means that some outcomes can be controlled by ex post forum
shopping, something that cannot easily be controlled at the initial
contracting stage.

Because forum shopping can be reduced by enforceable choice
of court (or forum) agreements, strong rules mandating their
enforcement can assist in achieving commercial certainty. The
Hague Convention thus has the potential to improve the status quo
for international transactions with respect to forum shopping and,
of course, it carries the substantial bonus of promising
international enforcement of covered judgments. But choice of
court agreements, at a foundational level, are controlled by local
contract and conflict of laws rules. And, as will be developed below, in the United States, important differences at the state level in the enforceability of choice of court agreements will remain untouched by the Convention. The result will be a level of uncertainty in enforcement under the Convention that will reduce or limit its usefulness for international businesses doing business in the United States. To the extent the United States can, through implementing legislation or other means, ameliorate or reduce this systemic uncertainty as it joins the Convention, it will, in the process, make joining the Convention more attractive to others and thereby improve the odds that the Convention will be a success.27

The commercial importance of widespread ratification of the Hague Convention has been underscored by recent empirical work focused on fully-negotiated business contracts. Researchers have uncovered the surprising finding that, given their choice, most businesses that negotiate contracts would prefer a judicial dispute resolution system over arbitration.28 Whether the results come from differences in cost, the potential for error correction through a sophisticated appellate process, or from other reasons, these findings have particular relevance in the international business arena where the widely-ratified New York Convention,29 requiring international enforcement of arbitral awards, contrasts sharply with the absence of any treaty-based requirement to enforce international judgments. The New York Convention probably provides strong incentives for arbitration in international agreements.30 If, by contrast, businesses prefer judicial resolution

27 Other federal states such as Germany and Mexico may face analogous problems in their joining the Convention and may also need to constrain their obligations slightly at ratification. A discussion of the analogous problems of other federal states is far beyond the scope of this Article. It is important, however, to note that the United States is unique in its desire for such a Convention and its corresponding need to lead other states in ratifying and implementing the Treaty.


29 New York Convention, supra note 2.

30 Cf. Teitz, supra note 1, at 546–48 (describing the New York Convention and the Choice of Court Convention as analogues in that the former provided an
for their disputes, this status quo artificially alters their preferences and is inefficient. If these research findings hold for international agreements, one could expect a treaty that facilitated international judicial dispute resolution, even one as scaled back as the Hague Convention, to contribute significantly to international economic well-being.

3. RESIDUAL UNCERTAINTY UNDER THE CONVENTION

By attacking the problem of mutual enforcement of judgments through a focus on choice of court agreements, the Convention generates the important benefit of making the location and process of judicial dispute resolution in international business settings more predictable from the outset. Ideally, contracting parties would agree to litigate in a particular legal system\(^\text{31}\) and find enforcement of their agreement both where they agreed to litigate (by the chosen court's assuming jurisdiction) and where they did not (by the non-chosen court's dismissing or suspending proceedings). Later, once a judicial resolution was reached, that judgment would be recognized or enforced in other contracting states. In these respects, the Hague Convention resembles the New York Convention\(^\text{32}\) which operates in a similar way with respect to international arbitration agreements and awards entered by arbitrators. In mandating enforcement of domestic arbitration agreements, the far older Federal Arbitration Act (FAA)\(^\text{33}\) is another set of rules whose object and structure are much the same.

All three sets of rules—the Hague Convention, the New York Convention, and the Federal Arbitration Act—were drafted to address the same kind of problem: judicial resistance to being "ousted" of jurisdiction by a mere contract of the parties.\(^\text{34}\) All

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\(^{31}\) The Convention permits the parties to select "the courts of one Contracting State or one or more specific courts of one Contracting State . . . ." Hague Convention, \textit{supra} note 9, art. 3. Party agreement cannot, however, override local jurisdictional rules such as subject matter or value in controversy. \textit{Id.} art. 5, para. 3.

\(^{32}\) New York Convention, \textit{supra} note 2, art. 3 ("Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . . .").


\(^{34}\) In \textit{Bremen v. Zapata Off-Shore Co.}, 407 U.S. 1 (1972), the U.S. case that began a domestic trend towards enforcement of choice of forum provisions, Chief Justice Burger wrote:
three validate executory contracts that select one dispute resolution regime to the exclusion of others, all three specify narrow grounds for avoiding the effects of the contractual dispute resolution provision, and all three address the enforcement of the resulting decision. Both the New York and the Hague Conventions have exceptions that recognize an overriding strong public policy in the enforcing court.35 The Federal Arbitration Act has no such public policy exception but public policy enters through Section 2 which provides that such provisions "shall be valid, irrevocable, and

The argument that such clauses are improper because they tend to "oust" a court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals. No one seriously contends in this case that the forum-selection clause “ousted” the District Court of jurisdiction over Zapata’s action. The threshold question is whether that court should have exercised its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause.

Id. at 12. In older cases, the courts maintained that, because a court’s jurisdiction was set by law, the mere agreement of the parties was not strong enough to displace it. See, e.g., Nashua River Paper Co. v. Hammermill Paper Co., 111 N.E. 678, 680 (Mass. 1916) ("Attempts to place limitations by contract of the parties upon the powers of courts as to actions growing out of the particular contract, or to oust appropriate courts of their jurisdiction, have been regarded with disfavor and commonly have been held invalid."); Benson v. E. Bldg. & Loan Ass’n., 66 N.E. 627, 628 (N.Y. 1903) (holding that jurisdiction is determined by state constitution and statute and “[i]t can neither be added to nor subtracted from by the agreement of the parties”). All three regimes also address the enforceability of the resulting awards or judgments. The Hague Convention is unique among the three in that its genesis was the problem of international enforcement of judgments rather than a refusal of courts to enforce choice of court agreements. See Adler & Zarychta, supra note 1, at 2-10 (tracing the history of the Hague Convention as an agreement designed to remedy the lack of uniformity in international enforcement of arbitration judgments).

35 See Hague Convention, supra note 9, art. 9 ("Recognition or enforcement may be refused if... recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State."); New York Convention, supra note 2, art. V, para. 2 ("Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that... [t]he recognition or enforcement of the award would be contrary to the public policy of that country.").
enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."\textsuperscript{36}

There can be no doubt that the FAA and the New York Convention have improved the certainty of enforcement of arbitration provisions, by simply countering the tendency of courts to see their own jurisdiction over a controversy as sacrosanct despite contractual wishes to the contrary. The Hague Convention will, if widely ratified, bring the same improvement in certainty to international choice of court agreements and provide that elusive bonus of creating an initial framework for international recognition and enforcement of judgments.\textsuperscript{37} But a good deal of residual uncertainty remains despite the substantial improvements achieved under all three sets of rules.

3.1. Uncertain "Public Policy"

Both the Hague Convention and the New York Convention permit "public policy" of the seised court to override enforcement\textsuperscript{38} and it should be obvious that no one can know for sure what different courts will view as "public policy" in all given contexts. Thus these explicit escape clauses invite courts in at least some cases to refuse to recognize the specified choice of forum, or the resolution reached in that forum. These uncertainty problems are exacerbated in the United States because the "public policy" a court might embrace could be a matter of either state or federal law or both.\textsuperscript{39} Because state law can be implicated (and can differ) and

\textsuperscript{36} 9 U.S.C. § 2.

\textsuperscript{37} There is no statutory analog to the FAA in the United States with respect to choice of court agreements; the Convention will be the first set of uniform rules governing such agreements in the United States. Historically, the recognition of such agreements has been a matter of state or federal law, and, while they are widely enforced in many contexts, there is state diversity. For examples of the diversity relevant to the discussion here, see infra Section 3.2. At the enforcement stage, the Full Faith and Credit Clause of the U.S. Constitution eliminates the problem of multijurisdictional recognition and enforcement of domestic judgments.

\textsuperscript{38} Hague Convention, \textit{supra} note 9, art. 9; New York Convention, \textit{supra} note 2, art. V.

\textsuperscript{39} \textit{Cf.} FOREIGN JUDGMENTS RECOGNITION AND ENFORCEMENT ACT § 5(a) (proposed 2005), in AM. LAW INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (2006) [hereinafter ALI JUDGMENTS PROJECT]. "Public policy" could be brought at least partially under a uniform federal domain. \textit{Cf.} Burbank, \textit{supra} note 25, at 23 (noting the Supreme Court's warning that "both due process and state law might be unreliable sources of 'fundamental principles of procedural fairness' for international purposes.").
because no contract provision can entirely control the plaintiff and the location of her lawsuit, one cannot be completely certain that a given choice of forum provision will prevail over some asserted "public policy" to the contrary. The uncertainty that differing local policy brings was obviously recognized by the drafters and built into the Hague Convention. Inasmuch as a main thrust of the Convention is improved certainty, the exception is intended to be narrowly construed.\textsuperscript{40}

3.2. Uncertain Contract Enforcement

The Federal Arbitration Act has no public policy exception; avoidance is limited to "such grounds as exist at law or in equity for the revocation of any contract."\textsuperscript{41} Perhaps because this is the only available escape hatch,\textsuperscript{42} there has been a great deal of litigation in the United States about whether the parties actually agreed to arbitration in the first place, or whether the purported agreement to arbitration was unenforceable because it was "unconscionable" (both general contract defenses). A growing number of courts have been concluding, for one reason or another, that contract provisions that select arbitration—particularly arbitration that forecloses aggregate claim treatment (class actions)—are invalid as a matter of local contract law.\textsuperscript{43}

While it may not be readily apparent, the rulings in domestic cases addressing FAA-covered arbitration clauses in contract law terms will apply to arbitration provisions covered by the New York Convention and to choice of court agreements covered by the Hague Convention. Under both the New York Convention and the

\textsuperscript{40} Teitz, \textit{supra} note 1, at 552-53.
\textsuperscript{41} Federal Arbitration Act, \textit{supra} note 33, § 2.
\textsuperscript{42} A recent article implies that the contract law analysis used under § 2 of the Federal Arbitration Act by California courts is actually a smoke screen for the courts' aversion to arbitration. Stephen A. Broome, \textit{An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act}, 3 HASTINGS BUS. L.J. 39, 39-41 (2006).
Hague Convention, it is a contract—and the assent one infers from a contract—that gives the arbitral panel its power, that makes the Convention applicable, and that may give the chosen court its jurisdiction. Both the New York Convention and the Hague Convention make repeated references to the “agreement” and, in the case of the Hague Convention, the “chosen court.” In a contested case, neither will exist absent the finding that the parties in fact made an “agreement” or “chose” a court. The threshold contract law that will determine the existence of an agreement to arbitrate or to litigate in a chosen court will likely be the forum’s own contract law. While most U.S. courts enforce choice of forum clauses most of the time, some have regularly refused in

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44 The Convention provides: “This Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters.” Hague Convention, supra note 9, art. 1, para. 1 (emphasis added).

45 Many chosen courts will probably have jurisdiction without reference to a choice of court agreement. But an implication of the Convention is that a court that would not otherwise have jurisdiction may obtain it through the choice of court agreement. Hague Convention, supra note 9, art. 5. See also supra note 15.

46 It is unlikely that the Convention’s drafters intended that reified words in a document in the form of a “choice of court agreement” by themselves would establish jurisdiction or commit both parties to some meaning attributed to those words. Such an approach would add certainty, of course, but would undercut the entire thrust of the Convention—real agreement as a predicate to enforcement of judgments. The notion of agreement (consent to be bound, willingness to submit to jurisdiction, and similar implications) is the magic that removes the thorny questions behind the lack of consensus on judgments and what makes a widely ratified Convention far more plausible than the original project. See supra Section 1. In any event, unless the Convention were absolutely clear that a formal, seal-like approach to this set of questions were intended (it is not clear at all that the drafters intended such a medieval approach), it is very unlikely that an American court would, in a competently litigated case, embrace such a talismanic approach to “agreement” and the Convention concepts related to it.

There seems to be nothing in the record of the negotiating history of the Convention suggesting an awareness of the threshold contract law questions that come directly from now-abundant case law addressing challenges to purported arbitration agreements under the Federal Arbitration Act. This may be understandable since much of the judicial action is very recent. See supra note 43.

47 See William J. Woodward, Jr., Constraining Opt-Outs: Limiting the Reach of Adhesive Choice of Law and Forum Provisions, 40 Loy. L.A. L. Rev. 9, 16–18 (2006) [hereinafter Constraining Opt-Outs] (describing a three step analysis for segregating the contract and conflict of law principles). Compare RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. b (1971) (amended 1989) (providing in pertinent part: “A choice-of-law 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.... 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”).
some settings relevant here. Unless these outcomes are altered through legislation or those subject areas excluded, there will be less than full, uniform enforcement of covered agreements under the Convention within the United States.

3.3. The Additional Problem of Multiple Available Fora

There is an additional, related problem that goes to commercial certainty. In the United States, conflict of laws rules are matters of local state law, “public policy” is, in any event, partly a matter of state law, and for any given dispute covered by the Convention, the plaintiff can likely find several state courts (other than the “chosen court”) that will have jurisdiction. This offers multiple opportunities for differing views on the enforceability of a choice of forum agreement. To bring this problem back to the contract planning stage, since one can never predict with certainty at the contract formation stage where a dissatisfied partner will choose to file suit, one initially confronts some level of uncertainty with respect to the enforceability of these dispute resolution provisions.

The general problem of “forum shopping” within a “Contracting State” is very much exacerbated in countries with multiple lawmaking jurisdictions, such as the United States. The Hague Convention refers to these as “non-unified legal systems” and the United States is probably the most important example of such a system. Because “unified” legal systems have but one set of rules to govern choice of forum agreements, forum shopping for better rules simply cannot exist in the same way that it does in non-unified systems.

There are well-known solutions to the general problem of

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48 As a former litigator, I recognize a softer version of forum shopping that is available in any legal system, unified or not—shopping for the right kind of court, shopping for the right judge, shopping for a forum that is inconvenient to one’s adversary. Perhaps because these forms of forum shopping are largely impossible to regulate, forum shopping is usually recognized as a problem that might be addressed by legal rule when the shopping will change one’s actual legal entitlements. For a wonderful treatment of the broader subject, see Frederich Juenger, Forum Shopping, Domestic and International, 63 TUL. L. REV. 553 (1989).

49 See Hague Convention, supra note 9, art. 25 (explaining that a contracting state in which two or more systems of law apply in different territorial units with respect to matters dealt with by the Convention is a “non-unified legal system”).

50 As indicated above, supra note 48, forum shopping may well exist in any jurisdiction where one could file suit in more than one court. But in unified legal systems the rules are not diverse across different units and the procedure (at least for a given level of original jurisdiction) will be the same.
forum shopping within non-unified systems. Forum shopping for more advantageous rules can obviously be reduced, if not eliminated, by unifying the law of the different constituent jurisdictions. In the United States, the Uniform Commercial Code ("UCC") can be seen, at one level, as an effort to unify the law and thereby reduce the significance of legal advantage-seeking through forum shopping. Federal legislation in the United States is an even better approach. *Ex ante* predictability simply follows from knowing what law a court will apply to one's transaction (or a choice of forum provision within it); if (as with federal legislation or truly uniform UCC provisions) the law is the same everywhere, the prospects for prediction increase and some of the primary reasons for forum shopping decrease.

Alternatively, one can substantially reduce legal uncertainty by creating a uniform choice of law rule so that wherever suit is brought the substantive law to be applied to the problem will be the same. Some have advocated this for the United States but with little success so far.

We have neither unified the law in the United States on important issues that bear on the enforceability of choice of forum clauses nor have we created a uniform choice of law rule that will reliably point to the same law controlling them regardless of where suit is filed. States continue to differ substantially on important matters that may affect the enforceability of choice of forum provisions and choice of law rules (which, if uniform, might all point to a given jurisdiction's law governing a choice of forum provision) are themselves matters of state law and can vary. This means that the potential for forum shopping for law is present in

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51 This is the approach of the Rome Convention, which created a uniform choice of law rule for all member states. European Communities Convention on the Law Applicable to Contractual Obligations, opened for signature June 19, 1980, art. 7, 1980 O.J. (L 266) 1 [hereinafter Rome Convention].

52 Distinguished commentators have called for a federal choice of law rule. See e.g., Douglas Laycock, Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law, 92 COLUM. L. REV. 249, 250-56 (1992) (listing three constitutional principles for choice of law determinations, plus the corollary proposition that allows for federal enforcement of choice of law rules); Donald T. Trautman, Toward Federalizing Choice of Law, 70 TEX. L. REV. 1715 (1992) (arguing that the inherently federal nature of choice of law questions in the U.S. needs to be acknowledged and cultivated).

53 As testament to this point, the revisors of Article 1 of the Uniform Commercial Code did not take the opportunity to create a uniform state law rule to govern choice of forum provisions despite their obvious importance to commercial transactions.
the United States in a way that it does not exist in unified legal systems. This offers the possibility that the enforceability of a given choice of forum provision can depend on where suit is brought. This complexity makes it particularly difficult for businesses to rely on the enforceability of choice of forum provisions in their contracts with people and entities in the United States. What is important here is that this difficulty may extend to those choice of forum provisions to which the Convention is directed.

The simplest example (to be developed in more detail below) involves franchises. In the United States, some states simply do not permit the parties (or, more realistically, the drafter or franchiser) to choose by contract the law or a forum different from that of the location of the franchisee. As drafted, the Convention does not exclude franchise agreements and, as drafted, will unlikely yield enforcement of contract provisions choosing (foreign) courts in those particular states if the franchisee is located there. The Convention's public policy exceptions are certainly broad enough for a domestic court to use in refusing to honor a choice of court agreement in such a case at the outset or to recognize or enforce a resulting judgment at the end. This means that unless the United States takes corrective steps at ratification or implementation, it is very unlikely that choice of court agreements in covered franchise contracts will be enforced uniformly throughout the United States. Put differently, the Convention's goal of widespread, near-uniform enforcement of covered agreements in a given contracting state will not be met in the United States under the Convention as drafted.54

Two important areas, covered by the Convention as drafted, will present substantial enforcement problems in the United States: franchise agreements, as suggested above, and what I will describe below as "mass market agreements."55

54 To be sure, in the United States, this particular problem is a narrow one. But it is not an insignificant one. Given common legal ancestry and history in the United States and the categories of contracts excluded from the Hague Convention, the state law governing choice of forum provisions that will operate within the Convention is remarkably uniform and tends strongly toward enforceability.

55 The two areas identified below are those in which our courts have actively scrutinized choice of forum provisions and have divided in their approaches. While there may be other Convention-covered subject areas where there could be disagreement among the courts, none is evident from the modern cases.
4. **SUBJECT AREAS COVERED BY THE HAGUE CONVENTION WHERE U.S. LAW VARIES**

The need for widespread ratification of the Hague Convention has, no doubt, played a very substantial role in the list of excluded contract areas\(^{56}\) that, in turn, contributes to the Convention’s narrowed scope of coverage. Rules and attitudes governing employment and the protection of workers, for example, vary widely from state to state and we can expect the rules governing choice of court agreements in the employment area to vary widely as well. Some potentially-contracting states wish to protect their employees from choice of court agreements in employment matters or may not trust the courts of other states to adjudicate claims involving their employees fairly or competently. Were the Convention to include such contracts and thereby require enforcement of choice of court agreements within them, states might refuse to ratify the Convention on that account or might ratify the Convention with reservations.\(^{57}\) Exclude employment contracts (or other contracts or matters on which there are predictably diverse policy views) and the prospects for ratification increase.\(^{58}\) Time will tell whether the balance between reducing Convention coverage and attracting states to join the Convention was set correctly.

But eliminating contract areas that vary from one potentially-contracting state to another from the coverage of the Hague Convention may solve only part of the ratification problem. If there are diverse enforcement views within a contracting state the Convention will not operate uniformly in such a state without some action either at the ratification or implementation stages.\(^{59}\)

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56 The long list of excluded subject areas is quoted *supra* note 19.  
57 *See supra* note 20 (stating that it seems unlikely that the “manifest public policy” exceptions are designed to address entire categories of contracts that a ratifying State is unwilling to enforce). *But see* Teitz, *supra* note 1, at 552-53 (explaining that states may choose to remove an entire area of contracts, such as those pertaining to asbestos, for example, from the scope of the Convention).  
58 This is not unlike the dynamics that underlie the drafting of the Uniform Commercial Code. The drafters of those provisions tend not to include provisions on which there are differing views lest broad “enactability” be imperiled. *See* William J. Woodward, Jr., *The Realist and Secured Credit: Grant Gilmore, Common Law Courts, and the Article 9 Reform Process*, 82 Cornell L. Rev. 1511 (1997) (describing the debate over secured-debt primacy in the UCC).  
59 As noted above, the state of the law in other federal states is beyond the scope of the discussion here. *See* text accompanying *supra* note 27. Because the United States has assumed a leadership role in the effort to create a system of
To make this more concrete, if it is harder for a drafter to rely on an international choice of court agreement involving a U.S. party than it is to rely on one involving a non-U.S. party, the treaty will be perceived as lopsided in the benefits it delivers. Those trading with U.S. parties have a burden of lower-predictability not shared by U.S. parties dealing with other systems. In the United States, at least, the public policy exceptions in the Convention and local contract law operating through the Convention will ensure diverse outcomes in the enforcement of some covered agreements, a result likely at odds with the thrust of the Convention. If the treaty is perceived as lopsided in favor of the United States or its businesses, it will be yet more difficult to get broad ratification. Fixing the problem requires first that we identify more specifically those areas covered by the Hague Convention where U.S. state law is divergent.

In the United States, much of the developing law comes to us in situations where the contract provision designates arbitration panels or processes rather than courts. These cases arise in the United States under the Federal Arbitration Act and form, at present, the vast bulk of the modern cases where the parties litigate a contractual choice of forum provision. Indeed, these cases seem to represent a disproportionate amount of contemporary U.S. litigation in the contract and consumer law areas.60 While the FAA cases are, for reasons suggested above,61 analyzed under local contract law principles, their volume may be a sign that the law (either of arbitration, forum selection, or both) is in flux, or that there is a wide diversity in views within the United States as to appropriate policy. Whichever is the case, the existence of substantial litigation suggests that there is enough uncertainty in predicting outcomes to make the cases worth litigating. What follows is a preliminary treatment62 of the two particular areas of contract law, currently covered by the Hague Convention, that

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61 See supra text beginning at note 42.

62 See supra text accompanying note 55. If other areas of divergence are identified, the approach advocated in this Article can be applied to those as well.
stand out as having vast diversity in state law across the United States.

4.1. Franchise Cases

Franchise contracts are not excluded from the Convention's coverage. Yet in the United States, there are diverse strongly-held views about the appropriate treatment of franchisees. Local statutes sometimes make choice of forum provisions unenforceable and some courts have taken a strong hand in implementing statutory schemes. This spells trouble for uniform enforcement, within the United States, of choice of forum provisions in international franchise contracts covered by the Convention.

In November 2006, the en banc 9th Circuit Court of Appeals decided Nagrampa v. MailCoups, Inc., a case that brings together in one place California's law of contracts and that state's underlying public policy of strong franchisee protection. In Nagrampa, the franchisee had her franchise business in California. The relationship eventually deteriorated and in 2001 the franchiser, pursuant to an arbitration provision in the contract, began arbitration proceedings to recover allegedly unpaid fees. Negotiations failed to settle the location of the arbitration and the franchiser eventually went forward, under the contract provision, with the arbitration proceeding in Boston. The franchisee refused to participate and, eventually, an arbitration award of over $160,000 was entered against her. Meanwhile, in 2002, the franchisee brought her own suit for fraud and for violations of California's Legal Remedies Act and California's laws governing franchises and unfair competition in a California state court. The case was eventually removed to a federal district court which dismissed her case on the basis of the arbitration provision in the contract. That decision was affirmed by a panel of the 9th Circuit and a rehearing en banc granted.

Because the Federal Arbitration Act limits defenses to an arbitration provision to "such grounds as exist at law or in equity for the revocation of any contract," the argument, of necessity,

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63 469 F.3d 1257 (9th Cir. 2006).
64 Id. at 1295 (O'Scannlain, J., dissenting).
65 Id. at 1295–96.
66 Id. at 1295.
67 Id. at 1267 (majority).
centered on whether the arbitration provision was binding as a matter of ordinary California contract law. While a major focus of both majority and dissenting opinions was the important (and likely decisive) question whether enforceability should be determined by the (Boston) arbitrator or the (California) court, the majority concluded that the plaintiff's unconscionability challenge was valid and thereby rejected the arbitration provision (and by implication, the Boston arbitration award).

The Federal Arbitration Act complicates an analysis that refuses enforcement of a choice of forum provision that selects arbitration. Where the choice of forum term is a choice of court, rather than an arbitration provision covered by the Federal Arbitration Act, many state courts in the United States have little trouble refusing to enforce it in the franchise context. *Kubis & Perszyk Associates v. Sun Microsystems Inc.*, was a case brought by a New Jersey franchisee against a California franchiser. It implicated the New Jersey Franchise Practices Act, a state

69 The analysis proceeded under California law despite the fact there was an obvious connection as well with Massachusetts and that, indeed, the contract specified the application of Massachusetts law. See *supra* note 63, at 1267 (explaining the court's decision to proceed under California law in contravention of a Massachusetts law provision because the conduct of the parties implicitly waived said provision). Had the franchiser pressed the choice of law clause, it seems likely that the California court would have rejected it in any event. See *Coady v. Cross Country Bank*, 729 N.W.2d 732 (Wis. Ct. App. 2007) (summarizing the choice of law issues); *cf. Woodward*, *supra* note 47, at 8-10 (discussing the values which motivate the degree to which choice of law clauses are enforced); see also *Firchow v. Citibank*, No. B187081, 2007 WL 64763 (Cal. Ct. App. Jan. 10, 2007) (rejecting both the contract's choice of South Dakota law and the contention that the arbitrator is the person to decide such issues).

70 *Nagrampa*, 469 F.3d. at 1268-80 (majority), 1297-1301 (O'Scannlain, J., dissenting). In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), the contract at issue containing the arbitration provision had been challenged as illegal (and therefore unenforceable in its entirety) under Florida's criminal usury statutes and was so found by the Florida courts including the Florida Supreme Court. *Id.* at 442. But the Florida courts had no business deciding the issue because, said the U.S. Supreme Court, the challenge was not to the arbitration provision specifically but to the contract as a whole. The question of illegality was for the arbitrator. *Id.* at 445. *Firchow* is a recent, unreported case that shows a plaintiff avoiding *Buckeye's* tilt toward arbitrator decision making by articulating a different theory for challenging the arbitration provision. *Firchow*, 2007 WL 64763.

71 While the four dissenting judges wrote in three separate dissents, they agreed that, for one reason or another, the arbitration provision was not unconscionable under California law.


statutory scheme designed to protect New Jersey franchisees. The
franchise contract declared that litigation was to be conducted in
California under California law and, when suit was brought in
New Jersey, the franchiser maintained that the New Jersey act was
inapplicable and that litigation should proceed in California.
Concluding that New Jersey law applied to the controversy,\textsuperscript{74} the
court had this to say about choice of forum provisions in franchise
contracts:

\begin{quote}
[W]e hold that forum-selection clauses in franchise
agreements are presumptively invalid, and should not be
enforced unless the franchisor can satisfy the burden of
proving that such a clause was not imposed on the
franchisee unfairly on the basis of its superior bargaining
position. Evidence that the forum-selection clause was
included as part of the standard franchise agreement,
without more, is insufficient to overcome the presumption
of invalidity.\textsuperscript{75}
\end{quote}

At least thirteen states hold, one way or the other, that choice of
forum provisions will be unenforceable in franchise agreements.\textsuperscript{76}
Some courts hold the contrary.\textsuperscript{77} This diversity of views on the
subject creates uncertainty of enforcement, depending on the U.S.
jurisdiction where the litigation takes place. As matters now stand,
whether excepted as a matter of local contract law (Nagrampa) or as
a matter that easily fits within the "manifest public policy"
exception in the Hague Convention, choice of court agreements
under a U.S.-ratified Convention will have difficulty finding
reliable, uniform enforcement in the United States when one party
is a U.S. franchisee.\textsuperscript{78}

\textsuperscript{74} In so doing, the court invalidated the choice of law provision in the
contract. For a discussion of this closely-related aspect of the case, see
Woodward, \textit{supra} note 47, at 38.

\textsuperscript{75} Kubis, 680 A.2d at 627.

\textsuperscript{76} See James Zimmerman, \textit{Restrictions on Forum-Selection Clauses in Franchise
759, 773 (1998) (arguing that the Federal Arbitration Act should not pre-empt state
franchise laws).

\textsuperscript{77} \textit{E.g.}, Horner v. Tilton, 650 N.E.2d 759, 763 (Ind. Ct. App. 1995) (stating that
"forum-selection provisions are not \textit{per se} invalid").

\textsuperscript{78} A franchiser can, of course, predict whether its choice of forum provision
will be enforced for a given franchise; the question simply depends on where the
franchisee is located. But, by covering franchises, the Convention seems to
contemplate that \textit{all} international choice of forum provisions will be enforceable,
4.2. Mass-market Cases

The Hague Convention on Choice of Court Agreements excludes from its reach "consumer contracts," narrowly defined as those "to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party." The distinction between "consumer" and "non-consumer" contracts thus essentially depends on the use to which the customer intends to put the product or service. While this is the construct used in the Uniform Commercial Code, it is a narrow definition relative to similar constructs here and abroad. European law defines "consumer" by exclusion, as someone not acting in her professional capacity. Under the Federal Fair Debt Collection Practices Act, "consumer" means "any natural person obligated or allegedly obligated to pay any debt." The Federal Electronic Funds Transfer Act defines "consumer" merely as a "natural person." The Texas Deceptive Trade Practices Act defines "consumer" as:

[A]n individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of $25 million or more, or that is owned or controlled by a corporation or entity with assets of $25 million or more.

Other states may define its "consumer protection" in various contexts with similar breadth.

One can anticipate problems enforcing choice of court agreements under the Convention (both at the jurisdictional and the recognition/enforcement stages) in those cases that are protected under broader "consumer" definitions or under other,
comparably-broad, constructs in U.S. state law, yet not excluded as "consumer contracts" from coverage in the Convention. In some of those cases, at least, one can anticipate the domestic court refusing to recognize the choice of court agreement either under local contract law (a prerequisite to "agreement" in the Convention) or on public policy grounds (an explicit Convention exception). A first step to addressing this potential problem is identifying those more specific situations covered by the Convention where the choice of court agreement might encounter difficulty.

In what could be regarded as an avalanche in the normally glacial process of common law change, the courts in at least eight jurisdictions in the last two years have rejected or limited, generally on contract law grounds, arbitration provisions that had the effect of depriving the buyer of a mass-distributed product or service the right to class action relief. Owing, no doubt, to the long shadow cast by the Supreme Court's expansive interpretations of the Federal Arbitration Act, these cases are generally analyzed as contract law cases, with the courts concluding that an arbitration provision that denies class action relief is, as a contract matter, unenforceable. As in the franchise area, there is a diversity of viewpoints: there are also modern cases that hold a class action waiver to be no impediment to the enforcement of a choice of forum provision.

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86 See supra text accompanying note 41.
87 See supra text accompanying note 38.
88 In some of the cases, the court severed the class action waiver, effectively giving the bank the choice of class arbitration or no arbitration. Banks apparently opt for the latter.
90 An excellent treatment of this area is Paul D. Carrington & Paul H. Haagen, Contract and Jurisdiction, 1996 SUP. CT. REV. 331 (1996) (discussing five commercial arbitration cases from the 1994 and 1995 Terms of the Supreme Court).
91 See, e.g., Jenkins v. First Am. Cash Advance of Georgia, LLC, 400 F.3d 868 (11th Cir. 2005) (holding that waiver of class action right did not render arbitration agreement unenforceable); Randolph v. Green Tree Fin. Corp.—Alabama, 244 F.3d 814, 819 (11th Cir. 2001) (holding that a borrower could
While it may not be readily apparent, these are not necessarily "consumer cases," as they are defined in the Hague Convention, because the underpinning of the cases has little or nothing to do with the use to which the customer will put the product or service. A defendant engaging in "swapping agreements" in violation of the antitrust laws, charging customers for services before the services begin, or imposing an illegal service termination fee has precious little to do with the character of the use the customer makes of the product. Two issues, unrelated to intended product use but related to one another, generate these cases. The more obvious one is the "small claim problem," that is, the injustice that results if the plaintiff, owing to the expenses and burdens of individual litigation, cannot afford to litigate her valid, but tiny, individual claim. The other issue is less connected to awarding a plaintiff relief than to policing defendant's business practices. Without the class action mechanism, a mass-market business has a tremendous incentive to bill customers for small amounts that, over thousands or millions of transactions, add up to very substantial financial gain. The trial court, as quoted by the Pennsylvania Superior Court in Thibodeau v. Comcast, expresses both rationales that appear in these cases:

contract away right to class action relief); Snowden v. CheckPoint Check Cashing, 290 F.3d 631, 638 (4th Cir. 2002) (finding arbitration agreement to be enforceable in purported class action); Johnson v. West Suburban Bank, 225 F.3d 366, 369 (3d Cir. 2000) (holding that neither Truth in Lending Act (TILA) nor Electronic Funds Transfer Act (EFTA) provides a bar to arbitration).

92 See Kristian, 446 F.3d at 30 (concerning antitrust violations whereby defendant corporations were accused of trading customers with competitors via "swapping agreements.").

93 See Aral, 36 Cal. Rptr. 3d at 231 (involving an internet service provider that allegedly charged customers for service before they received equipment to utilize the service).

94 See Kinkel, 857 N.E.2d at 276 (regarding an action against a cellular telephone service provider, alleging that early-termination fee constituted an illegal penalty and that imposition of the fee was both a breach of the service agreement and statutory fraud under state Consumer Fraud and Deceptive Business Practices Act).

95 In Muhammad, the Court was focused on "payday lending" and the violation of the local racketeering and consumer fraud laws. While unlikely, the plaintiff could have used the borrowed money for a business venture. What the money was used for (personal or household use or business use) had nothing to do with the holding in the case. Muhammad v. County Bank of Rehoboth, 912 A.2d 88, 103 (N.J. 2006).

Mr. Thibodeau and [his] class members are claiming minimal damages . . . . Mr. Thibodeau and each of his class members allege they were unlawfully overcharged $9.60 per month. Everyone knows that these claims will never be arbitrated on an individual basis, either by the named plaintiffs or by any other of the millions of class members they represent. No individual will expend the time, fees, costs and or other expenses necessary for individual litigation or individual arbitration for this small potential recovery. If the mandatory individual arbitration and preclusion of class action provisions are valid, Comcast [is] immunized from the challenges brought by Mr. Thibodeau, brought by any class member, or effectively from any minor consumer claims. It is clearly contrary to public policy to immunize large corporations from liability by allowing them to preclude all class action litigation or arbitration.97

In Szetela v. Discover Bank,98 a much earlier case that can be viewed as a shot that triggered the avalanche, the court responded to the familiar99 yet counterintuitive argument that a class action waiver could actually be of benefit to customers:

While the advantages to Discover are obvious, such a practice contradicts the California Legislature’s stated policy of discouraging unfair and unlawful business practices, and of creating a mechanism for a representative to seek relief on behalf of the general public as a private attorney general. (See, e.g., Bus. & Prof.Code, § 17200 et seq.) It provides the customer with no benefit whatsoever; to the contrary, it seriously jeopardizes customers’ consumer rights by prohibiting any effective means of litigating Discover’s business practices. This is not only substantively unconscionable, it violates public policy by

97 Id. at 885–86.
granting Discover a "get out of jail free" card while compromising important consumer rights.\textsuperscript{100}

Thus, in some cases, class action waivers can deprive customers of all remedy simply owing to the realities of litigation, even through arbitration proceedings are touted as less expensive than court litigation. Second, requiring the customers to litigate individually, knowing that most will not, means that the vendor might be unfairly advantaged—$9.60 per month across millions of customers\textsuperscript{101} builds up to real money fairly quickly. It is the lack of remedy on the vendee side and the aggregation of unearned benefit on the vendor side that drives these cases.\textsuperscript{102} The cases have to do with the mass distribution of goods and services to ultimate customers, not the use to which the customers intend to put the products or services they are buying.

Of course, not all jurisdictions see things this way. The older cases have enforced class action waivers within arbitration clauses.\textsuperscript{103} They have typically asked whether the class action waiver made relief unavailable to the plaintiff and, if it did not, they have upheld the waiver. The policy of deterring unlawful business practices through the class action mechanism is not a factor in these cases. In \textit{Gipson v. Cross Country Bank}\textsuperscript{104}, for example, the court held that, because the Fair Credit Billing Act\textsuperscript{105} provided for the plaintiff to recover attorney fees in a successful

\begin{thebibliography}{9}
\bibitem{Szeta} Szetela, 118 Cal. Rptr. 2d at 868.
\bibitem{Thibodeau} Thibodeau, 912 A.2d. at 886.
\bibitem{Issacharoff} See, e.g., Samuel Issacharoff & Erin F. Delaney, \textit{Credit Card Accountability}, 73 U. CHI. L. REV. 157, 166–67 (2006) (discussing how democratization of markets gives rise to the misbehavior of sellers that are not worth the "transactional headaches for the consumer to challenge.").
\bibitem{Jenkins} See, e.g., Jenkins v. First Am. Cash Advance of Ga., 400 F.3d 868 (11th Cir. 2005); Randolph v. Green Tree Fin. Corp.–Alabama, 244 F.3d 814, 819 (11th Cir. 2001); Snowden v. CheckPoint Check Cashing, 290 F.3d 631, 638 (4th Cir. 2002); Johnson v. West Suburban Bank, 225 F.3d 366, 369 (3d Cir. 2000). See also Alan S. Kaplinsky, \textit{A Scorecard on Where Federal and State Appellate Courts and Statutes Stand on Enforcing Class Action Waivers in Pre-Dispute Consumer Arbitration Agreements}, in \textit{PRACTISING LAW INSTITUTE (PRACTISE COURSE HANDBOOK SERIES No. 11165, 2007} 9 (highlighting the many cases, reported, unreported, published, and unpublished that enforce class action waivers); Alan S. Kaplinsky, \textit{Arbitration and Class Actions: A Contradiction in Terms}, in \textit{PRACTISING LAW INSTITUTE (PRACTISE COURSE HANDBOOK SERIES No. 11165, 2007} 427 (outlining section 4 of the Federal Arbitration Act and the split in court on whether an arbitrator may certify a class in arbitration).
\bibitem{Szeta1} 294 F.Supp. 2d 1251, 1263 (M.D. Ala. 2003).
\end{thebibliography}
action, the plaintiff was not precluded by the small size of her claim from recovering. The area remains extremely contentious and one can expect mass-market businesses to respond to these new developments both through their contract forms and through their lobbyists. A particularly glaring example comes from Utah, where the legislature has enacted a statute that declares class action waivers enforceable in consumer loan agreements. Alternatively, a vendor might choose a forum that lacks a class action device, thereby hiding the class action waiver in a "choice of forum" provision. It works, at least sometimes. For example, a Florida court sent the Florida plaintiff off packing to Virginia by enforcing a choice of forum provision, despite the argument that the provision was unconscionable because Virginia lacked a class action device.

It is easy to imagine a choice of court agreement, covered by the Hague Convention, being denied enforcement at the initial stage or at the recognition and enforcement stages because the effect of enforcement would be to deny the customer a class action remedy in the designated court. A case nearly directly on point is Dix v. ICT Group. In Dix, the plaintiff brought a class action suit under Washington's Consumer Protection Act alleging that America Online illegally charged customers for secondary membership accounts. They were met with AOL's forum selection

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106 UTAH. CODE ANN. § 70C-3-104 (2006).
107 See, e.g., Dix v. ICT Group, 161 P.3d 1016 (Wash. 2006) (en banc) (rejecting such a choice of forum provision as unconscionable).
108 America Online, Inc. v. Booker, 781 So. 2d 423 (Fla. Dist. Ct. App. 2001); But see Dix, 161 P.3d at 1024 (holding that a forum selection clause specifying Virginia was unenforceable because the lack of a class mechanism left the plaintiff with "no avenue for relief").
109 Richard B. Cappalli & Claudio Consolo, Class Actions for Continental Europe? A Preliminary Inquiry, 6 TEMP. INT'L & COMP. L.J. 217, 218 (1992) ("The class action is a unique American legal institution. The procedure is not found in Italy, Spain, France, Germany, South America, other civil law countries or, to our knowledge, anywhere else in the world."). Other States may lack the robust class action remedies of the United States in part because they take a more aggressive approach to ex ante business regulation. But if that foreign regulation does not extend to a foreign business's dealings with U.S. customers (which it might well not), the rationale of the recent cases would apply to a choice of court agreement designating a Contracting State's court that lacked the class action procedure, regardless of the effectiveness of its ex ante regulation for its own residents.
110 Dix, 161 P. 3d at 1024.
clause that selected Virginia, a state with no class action device, as the forum for litigation. In concluding that the forum selection provision is unenforceable, the court said:

We affirm the Court of Appeals' holding that the forum selection clause in the AOL contract at issue is unenforceable on public policy grounds if the lack of a class action procedure leaves the plaintiff with no feasible avenue for seeking relief for violations of the CPA.112

Part of the problem is that the law in the United States is diverse, and, in this setting, it makes predicting outcomes very difficult. Moreover, the Convention seems to contemplate across-the-board enforcement however, such uniform enforcement throughout the United States, is unlikely, given the case law. Unlike the franchise decisions, these cases are not neatly gathered under an identifiable, preexisting legal category. It seems clear, however, that the Hague Convention's narrow "consumer" exclusion will not exclude many of these cases and, therefore, a U.S. ratification of the Hague Convention as it was drafted will not, without more, represent its commitment to reliably enforce choice of court agreements in these kinds of cases.113

A prerequisite to any effort to address the problem that these class action waiver cases represent is adequately defining them. The first legislative attempt to do so came within the much-maligned Uniform Computer Information Transactions Act

112 Dix, 161 P. 3d at 1024.
(UCITA). The UCITA advanced a characteristically unwieldy definition of this to-be-protected class of transactions. The maturation of this classification may be found in the American Law Institute's recently-concluded Project, *Intellectual Property: Principles Governing Jurisdiction, Choice-of-Law, and Judgments in Transnational Disputes*. That Project eloquently defines "mass-market contract" as one "that (a) is prepared by one party for repeated use; (b) is presented to another party or parties (the "nondrafting party") by the party on behalf of whom the draft has been prepared; (c) does not afford the nondrafting party a meaningful opportunity to negotiate its terms." The contracts where class action waivers have been rejected are all "mass-market contracts," as the ALI Project would define the term. Class actions clearly have no real role to play in the enforcement of either negotiated or custom-made contracts. They probably have little role to play when the contract is large, whether it is adhesive or not, since the size of the transaction will generally support the

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(44) "Mass-market transaction" means a transaction that is:

(A) a consumer contract; or

(B) any other transaction with an end-user licensee if:

(i) the transaction is for information or informational rights directed to the general public as a whole, including consumers, under substantially the same terms for the same information;

(ii) the licensee acquires the information or informational rights in a retail transaction under terms and in a quantity consistent with an ordinary transaction in a retail market; and

(iii) the transaction is not:

(I) a contract for redistribution or for public performance or public display of a copyrighted work;

(II) a transaction in which the information is customized or otherwise specially prepared by the licensor for the licensee, other than minor customization using a capability of the information intended for that purpose;

(III) a site license; or

(IV) an access contract.

Id.

115 *Intellectual Prop.: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes*, § 101(3) (Proposed Final Draft 2007). *See also Principles of the Law of Software Contracts*, § 101(j) (Discussion Draft 2007) (defining "Standard-Form Transfer of Generally Available Software" as "a transfer of (1) small quantities of software to an end user; or (2) the right to access software to a number of end users; if the software is generally available to the public under substantially the same standard terms.").

https://scholarship.law.upenn.edu/jil/vol29/iss3/4
litigation necessary to remedy its breach, and a plaintiff with such a claim is likely to proceed individually. But importantly, the contracts underlying these recent cases may or may not be "consumer contracts" of the kind the Hague Convention would exclude from its coverage. Indeed, the Hague's consumer exclusion in this respect is both under and overbroad. This will make for less-than-uniform enforcement of choice of forum provisions covered by the Convention in a "mass market" contract in the United States.

5. **Potential Solutions to Legal Diversity in the United States**

It is reasonably clear that choice of court provisions in most of the transactions covered by the Hague Convention on Choice of Court Agreements will be enforced without difficulty in all courts in the United States. This is probably true with or without the Convention. Ever since the Supreme Court's decision in *Bremen*, choice-of-forum provisions have been widely enforced in the United States, most particularly in business contracts. Even in non-business contexts, the Supreme Court's extension of *Bremen* in *Shute*, an admiralty case involving an adhesive consumer contract, has resulted in broad enforcement of choice of forum provisions. Additionally, while commercial law in the United States remains the province of state legislatures and courts and is therefore open to diversity, the fact is that the commercial and business law across the United States is remarkably uniform in nearly all respects. Our common heritage, together with the uniform laws process, has delivered us contract and commercial

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116 Among other things, a claimant proceeding individually (rather than as a class representative in a class action) will retain far more control over the litigation and will probably retain more proceeds of any settlement or judgment.


118 A billionaire purchasing a yacht for "personal use" through a contract drafted and negotiated by her own lawyer would be engaged in a "consumer contract" as that term is defined in the Hague Convention. It would be difficult to articulate a rationale for extending protection to such a "consumer" in this kind of transaction.


121 See generally Carrington, supra note 90, at 356 ("the savings resulting from the enforcement of the clause went straight to the bottom line of Carnival Lines. In offering its unrealistic analysis of economic effects, the Court did on this one occasion pay its respects to neo-Spencerian law-and-economics.").
law that differs only at the margins and is largely uniform both in articulation and implementation in most business areas.122

But, as developed above, there are important areas now covered by the Convention where the law in the United States is diverse, and predictably so. In the mass-market area, the developments have taken place so quickly that they likely occurred after the Convention’s “consumer” definition jelled; the domestic “trend,” if there is one, is such that we might anticipate more of the same from other courts in the coming years. These cases are decided under state contract law that, at least with respect to the contract law issues,123 has been left untouched by the Convention. It is unlikely that the Supreme Court can easily step in to unify the area, at least without some form of federal legislation. Such unification, if it were possible, would certainly be a long time coming.124

Thus we face two related problems in leading other states to join the Convention. The first is the problem of formal compliance. What reservations, understandings, or declarations and/or implementing legislation are needed as the United States joins the Convention? The second is the practical problem of joining the Convention in a way that is not perceived to give the United States less of a commitment to choice of court enforcement than will be the case elsewhere.

We will consider below the alternatives of strong implementing

122 But see F. Stephen Knippenberg & William J. Woodward, Jr., Uniformity and Efficiency in the Uniform Commercial Code: A Partial Research Agenda, 45 Bus. LAW. 2519 (1990) (showing the hundreds of “non-uniform amendments” to the UCC ensure that the text is not completely uniform from state to state). Judicial interpretations of given UCC provisions can differ by state as well. But the bulk of the texts are uniform and courts are attentive to the importance of uniformity in their interpretations. The longevity of the UCC and the absence of strong calls for something even more uniform testifies to its workability in most modern business settings.

123 As developed earlier, the Convention did not address the threshold contract law question, whether there is agreement to the choice of court agreement or, put another way, whether a court has, in fact, been “chosen.” This issue remains controlled by domestic contract law, and in the United States, state law. Even if the Convention were self-executing, see Burbank, supra note 25, it would not likely reach this important threshold question on which, in mass-market cases, U.S. courts are developing considerable diversity. To the extent that contract defenses are raised to challenge choice of court agreements in franchise situations, the Convention does not purport to control those cases either.

124 Professor Burbank develops the question of whether there is a need for legislation to implement the Convention in Burbank, supra note 25, at 4–8.
legislation for the Convention as written and scaling back the U.S. commitment to the treaty at ratification. But before attempting to address these questions, however tentatively, the private, contractual choice of law solution to the problem requires consideration. If the parties to the choice of court provision could, through a choice of law provision, fix in advance the law to be applied to their choice of court provision, they could provide in advance for enforcement and eliminate the uncertainty that comes in a multijurisdictional setting. The Convention then might be ratified by the United States as-is and contracting parties would, through their judicious selection of courts for their choice of court provisions, address the problems identified here. The Convention may facilitate such an approach.

5.1. Choice of Law Provisions as Possible Solutions

The Hague Convention has provisions addressing the law to be applied by courts at the beginning of the litigation and after a judgment has been entered. Articles 5, 6, and 9 provide for enforcement by both chosen and unchosen courts unless the agreement is “null and void under the law” of the state of the chosen court.125 Of particular interest to the discussion here is the provision in Article 6 providing that an unchosen court “shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless the agreement is null and void under the law of the State of the chosen court.”126 Since the “chosen court” is determined by the drafters of the choice of court agreement, the Convention awkwardly seems to say that the parties choose the law to be applied to this foundational question of agreement by simply selecting the right court. Put differently, it seems to imply that the law of the chosen court determines the enforceability of the purported choice of court agreement that chose that court in the first place. If this is true, then the Convention—in what seems like a bootstrap approach—seems to have put into the parties’ hands a drafting solution to the problems identified here. If the drafter simply designates in the agreement a court whose law she knows will enforce a choice of court agreement in the given context (here, franchise or mass-market areas), the

125 Hague Convention, supra note 9, arts. 5(1), 6(a) & 9(a).
126 Id. art. 6(a) (emphasis added).
Convention seems to say that the parties' agreement will find enforcement in chosen and unchosen courts alike.\textsuperscript{127}

Such an affirmative reading would surely address a core uncertainty problem whose solution is a legitimate aim of the Convention, but it is an expansive reading of these provisions that may not be warranted. As developed below, such a reading is also at odds with the approach taken by courts in the United States that have questioned the enforcement of choice of forum agreements. The more obvious reading of these provisions is far narrower, and more modest, and shows them to be "savings provisions," absolutely essential to save dispute resolution agreements from inadvertent collapse.

Suppose the parties chose a court that (for whatever reasons) would not entertain their dispute. Absent these savings provisions in Articles 5, 6, and 9, they would be truly out of luck. This is because, \textit{absent the savings provisions}, Article 6 of the Convention (requiring the unchosen court to dismiss or suspend its own proceedings)\textsuperscript{128} would require all unchosen courts in contracting states \textit{not} to hear a dispute that has a choice of court agreement in it, even though not enforceable in the chosen court. If the chosen court would not hear it either (because it was "null and void" under the law of that chosen court) then the parties' dispute would

\textsuperscript{127} See \textit{Intellectual Prop.: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnat'L Disputes} § 202 (Proposed Final Draft 2007) (containing a provision analogous to that in the Hague Convention in section 202). Section 202 may well have been drafted to conform to an aggressive reading of the Hague Convention's provision. Subsection 2(a) provides (far more directly than does the Hague Convention) that "a choice-of-court agreement is valid as to form and substance if it is valid under the law of the designated forum State." But the section begs the question by using the term "agreement" (rather than "purported agreement" or "alleged agreement") and goes on to provide in subsection 3 special rules for a court called on to determine the enforceability of a choice of court agreement in a mass-market contract. Among the criteria the court in that context should consider are the parties' location, interests, and resources, and "the interests of any States connected to the dispute or to the parties." \textit{Id.} § 202(3)(b). Even if these Principles had the force of law, it seems likely that courts antagonistic to choice of court agreements in both the franchise and mass-market contexts discussed here would not look to the law of the court chosen by the drafter but, rather, would (1) use their own law to determine whether there \textit{was} an agreement that would trigger the application of the Principles or (2) find under subsection 3 that domestic policy would render the choice of court agreement unenforceable in any event. By the same token, local courts sympathetic to choice of court agreements under the Principles could easily find them enforceable, even in mass-market settings under section 202. \textit{See generally Constraining Opt-Outs, supra note 47, at 69} (discussing the Principles' treatment of mass-markets).

\textsuperscript{128} Hague Convention, \textit{supra} note 9, art. 6.
not, absent these saving provisions, be resolvable in any of the courts of contracting states. Non-chosen courts could not hear the dispute because the parties chose a different court, and the chosen court could not hear it because the agreement was "null and void" under its own law. Without the savings provisions of Article 6, the Convention would produce the anomalous result that the dispute would be subject to resolution only in a non-contracting state. Even worse, the extent of the parties' bad luck would correlate directly with the number of countries that joined the Convention— the more successful the Convention, the fewer non-contracting states there would be, and the worse the parties' luck would have become. The savings provisions in Articles 5, 6, and 9 fix this ironic outcome by permitting the parties in such rare cases to litigate anywhere they might have litigated before, including courts of contracting states. 129

The foregoing easily explains why these particular provisions are essential to the sensible operation of the Convention. But could they be extended and read affirmatively, as Convention-based choice of law rules applicable to the choice of court agreements covered by the Convention? 130 While this would place the rules governing enforceability into the hands of the parties and enhance certainty, this reading would also have the effect of making choice of court agreements enforceable, as a matter of contract law, in fora where they otherwise would not be. In the franchise context, for example, the franchiser-drafter would choose a distant court that enforced choice of court agreements in franchise cases. When the franchisee sued in her unchosen home jurisdiction that was inhospitable to such provisions, the franchiser would point to the Hague Convention's Article 6(a) and demand dismissal, arguing that the Convention points to the chosen court's (not the seized court's) law as the applicable law governing the enforceability of the choice of court agreement. Since the agreement would not be "null and void" in the chosen court, the argument would go, the unchosen court would be duty bound to dismiss the litigation. Read aggressively, the provision permits a drafter to select a forum

129 In this respect, the provisions would broadly resemble the rules that "save" a contractual choice of law provision by projecting the assumption that the parties could not have intended to choose the law of a jurisdiction that would render their agreement unenforceable.

130 Cf. Teitz, supra note 1, at 552-53 (describing specific components of the Convention that were created with the idea of consensus among various legal systems in mind).
whose law welcomes choice of court agreements and then bind the other party to that law—and to the choice of court agreement—whatever her local jurisdiction thinks about the matter. One could imagine that a local court, in a case where local law was inhospitable to choice of court agreements in the case before it, might be quite resistant to such a reading, however “certain” choice of court agreements might become as a result.

In the analogous domestic setting where the drafter adds a separate choice of (hospitable) law clause to the contract to bolster its choice of forum provision, domestic courts have taken a negative view of this bootstrap effort to change the otherwise applicable rules. Some examples will make this clearer. In *Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc.*, the contract chose California both as the forum for disputes and as the applicable law for the New Jersey franchisee who (without the choice of law clause, at least) enjoyed the legal protection of the New Jersey Franchise Practices Act. The New Jersey Supreme Court predicated its rejection of the choice of California courts on its rejection of this choice of California law. New Jersey law governed. And while the underlying franchise contract in *Nagrampa v. MailCoups* chose the law of Massachusetts to govern the California franchise (and the choice of forum provision within the franchise contract), the franchiser apparently conceded that California law governed, despite the fact that California law was predictably inhospitable.

While there is some difference of opinion, the same approach is true for mass-market contracts, at least in those places where challenges to arbitration provisions have been successful. In *Aral v. Earthlink, Inc.*, the court concluded that California law applied to

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133 *Kubis*, 680 A.2d at 627 (holding that forum-selection clauses in contracts subject to the New Jersey Franchise Act are presumptively invalid). *See supra* text accompanying note 74.
134 *See Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1267 (9th Cir. 2006) (en banc) (“[B]oth parties have proceeded throughout the district court and on appeal on the assumption that the franchise agreement is governed by California law.”).
136 36 Cal. Rptr. 3d 229 (Ct. App. 2005).
the California class action despite a choice of Delaware law provision in the service agreement.\(^\text{137}\) Similarly, in rejecting the contract’s choice of Delaware law, the Wisconsin court in Coady v. Cross Country Bank, Inc.\(^\text{138}\) stated the applicable Wisconsin rule: “parties are generally free to contract for choice of law, although not ‘at the expense of important public policies of a state whose law would be applicable if the parties[‘] choice of law provision were disregarded.’”\(^\text{139}\)

If the Convention were self-executing,\(^\text{140}\) Articles 5, 6, and 9 might be read aggressively to create a federal choice of law rule, binding on states under the Constitution’s Supremacy Clause. But a court would have to so conclude, and such a conclusion seems dubious at least in some jurisdictions.

For the Convention’s purported choice of law rule to apply, a court would first have to conclude that the Convention itself applied to the transaction. But the Convention itself doesn’t apply unless there is a covered choice of court agreement\(^\text{141}\) and some choice of law rule other than the Convention’s must be employed at the threshold in order to find the agreement that is a prerequisite to the Convention’s applicability. Unless a court can conclude that such an agreement exists, the Convention—and its rules in Articles 5, 6, and 9 (whatever they may mean)—simply don’t apply. The domestic precedents arising under the Federal Arbitration Act, which of necessity are contract law precedents, will be applicable in the first instance to cases that may be within the reach of the Convention; the Convention’s purported choice of law provision

\(^{137}\) This decision followed an exhaustive analysis of the problem in Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005). See Aral, 36 Cal. Rptr. 3d at 242 (“The possibility of redress in small claims court does not persuade us that a patently unreasonable forum selection clause should be enforced.”).

\(^{138}\) 729 N.W.2d 732 (Wis. Ct. App. 2007).


\(^{140}\) “At a general level, a self-executing treaty may be defined as a treaty that may be enforced in the courts without prior legislation by Congress, and a non-self-executing treaty, conversely, as a treaty that may not be enforced in the courts without prior legislative ‘implementation.’” Carlos Manuel Vázquez, The Four Doctrines of Self-Executing Treaties, 89 AM. J. INT’L L. 695, 695 (1995).

\(^{141}\) The “Convention shall apply in international cases to exclusive choice of court agreements . . . .” Hague Convention, supra note 9, art. 1(1) (emphasis added).
should not change that because "agreement" is a prerequisite to the Convention's applicability. In any event, since the provisions in Articles 5, 6, and 9 can sensibly be read as savings provisions, as discussed above, there would be no need for the local court to take a contrary, expansive view of the provisions.

Finally, even if the Convention's provisions were aggressively read as choice of law rules for deciding the underlying contract questions, any unchosen court could easily avoid enforcement using the Convention's public policy exception. Local public policy is, after all, partly behind the accumulating domestic decisions that avoid choice of forum provisions in certain situations. Thus, even if an unchosen court were to interpret Articles 5, 6, and 9 as requiring it to apply the law the parties purportedly agreed to in order to determine whether that agreement itself exists, it seems extremely unlikely that this would prompt the unchosen court to recognize a choice of court agreement that it would not otherwise enforce. Thus, it is difficult to conclude that the Convention itself reliably solves this uncertainty.

5.2. Affirmative Legislative Solutions

Since the Convention's conflict of law rules can only operate on a purported agreement covered by the Convention, and since the public policy exception is wide enough to accommodate judicial hostility to choice of court agreements in the franchise and mass-market areas, one must look elsewhere to generate the certainty and uniformity of enforcement within the United States to which the Convention seems to aspire. Construing the Convention's public policy exceptions as broad enough to cover all these cases and jurisdictions is at odds with the narrow construction of public policy intended by the drafters in the interests of certainty. If a contracting state has "unruly courts" that will not enforce the choice of court agreements that a state, by joining the Convention, has committed to enforce, an obvious solution is for the contracting

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142 See generally Constraining Opt-Outs, supra note 47, at 16-17 (describing the contract and choice of law analyses necessary to determine whether the Convention's provisions apply).

143 The public policy to be recognized at the contract stage is that of the state of the "seised court" and at the judgment stage is that of the state of the "requested court." Hague Convention, supra note 9, art. 6(c) & art. 9(e). No choice of law analysis will overcome the clear intent of the Convention on this issue.
state to bring the courts into line. In the United States, implementing legislation is a direct solution. This can occur either at the state or federal level though it is most often accomplished at the federal level.

It is important to recognize the character of the legislative solutions needed to address the problems identified here. In the franchise area, the legislation would have to change the state law in those jurisdictions that refuse to enforce choice of court agreements, at least for international franchise cases. In the mass-market area, the legislation would have to essentially overrule the developing precedents that refuse to enforce choice of forum clauses when they deprive the customer of a class remedy. Legislative solutions such as these will be very difficult to achieve either at the state or federal levels.

5.2.1. The Uniform State Laws Solution

The National Conference of Commissioners on Uniform State Laws ("NCCUSL") has developed a uniform law designed to harmonize state law and thereby advance the underlying goals of the Convention.\textsuperscript{144} Professor Curtis Reitz has pointed to this modern uniform draft in the context of the Hague Convention.\textsuperscript{145}

The draft Uniform Act is directed to domestic recognition of foreign money judgments generally and is a successor to a similar uniform law\textsuperscript{146} promulgated by NCCUSL and currently enacted in some thirty states.\textsuperscript{147} The draft statute is not directed specifically to the enforcement of judgments arising out of choice of court agreements, although it does address them in passing.

\begin{footnotes}
\item[145] Reitz, supra note 25, at 307.
\item[147] Teitz, supra note 1, at 547.
\end{footnotes}
Among the many reasons a court "need not" recognize a foreign money judgment (including, of course, an exception based in the forum's public policy), is an exception in Section 4(c)(5) for those judgments in which "the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by

148 The Uniform Act provides:

(a) Except as otherwise provided in subsections (b) and (c), a court of this state shall recognize a foreign-country judgment to which this [act] applies.

(b) A court of this state may not recognize a foreign-country judgment if:

(1) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

(2) the foreign court did not have personal jurisdiction over the defendant; or

(3) the foreign court did not have jurisdiction over the subject matter.

(c) A court of this state need not recognize a foreign-country judgment if:

(1) the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend;

(2) the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case;

(3) the judgment or the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state or of the United States;

(4) the judgment conflicts with another final and conclusive judgment;

(5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court;

(6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action;

(7) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or

(8) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

(d) A party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for non-recognition stated in subsection (b) or (c) exists.

UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4.
proceedings in that foreign court.” 149 Put into the vocabulary used here in connection with the Hague Convention, a local court under the draft legislation might deny enforcement of a judgment where the judgment resulted from litigation in a “non-chosen” court. While commentary emphasizes that the enforcing court must find a valid choice of forum agreement for this exception to work, 150 the draft statute does not address how the forum court is to determine whether there was an agreement.

This, and the public policy exception more directly, will permit the diversity of state law views on choice of forum agreements in these contexts to flourish under the draft Uniform statute. Foreign parties who disobey their choice of court provision and litigate elsewhere may or may not—depending on the U.S. state court’s view of the contract issues underlying the choice of court provision—wind up with a judgment that will be recognized under NCCUSL’s draft statute.

The draft statute also connects to choice of court agreements covered by the Hague Convention. Section 5 of the draft statute forbids the forum court from denying recognition on account of the rendering court’s lack of personal jurisdiction over the defendant (one of the grounds for non-recognition listed in Section 4) 151 if “the defendant, before the commencement of the proceeding, had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved.” 152 Once again, the enforcing court must find a valid agreement covering the subject matter in order for this provision to bind the defendant; once again, the forum court will look to diverse state contract law in order to rule on the question.

Perhaps because it is focused on recognition of foreign judgments generally, the uniform act simply does not address the diversity in state law that will make enforcement of choice of court agreements, and recognition and enforcement of the judgments that proceed from them, difficult in the United States. If domestic ratification of the Hague Convention requires, either legally or practically, some harmonization of state law on the issues discussed here, the Uniform Foreign-Country Money Judgments Recognition Act does not do the job.

But could we develop a uniform law, to be enacted by the states

149 Id. § 4(c)(5) (emphasis added).
150 Id. § 4, cmt. 9.
151 Id. § 4(b)(2).
152 Id. § 5(a)(3) (emphasis added).
that would solve the problems in implementing the Hague Convention identified here? It seems extremely doubtful.

The NCCUSL has never been particularly successful in harmonizing the law when states have strongly held, diverse views on underlying policy. The need to persuade the legislatures of many diverse states to enact one uniform text surely works its way into the NCCUSL drafting process. The result usually is a high-quality legal product that, in order to be successful, does not take a stand on controversial issues, but avoids them.\(^{153}\) When the drafters in recent years have taken stands on issues on which states have diverse views, the results have been less than satisfying.

Nearing its fortieth birthday, the Uniform Consumer Credit Code, a uniform law addressing excesses in the consumer credit industry, has achieved only eleven enactments in all that time.\(^{154}\) Current Article 2 of the Uniform Commercial Code dodged the question of horizontal privity in breach of warranty settings by creating three alternative rules from which states could choose.\(^{155}\) More recently, the revision of Article 2, promulgated for enactment in 2003\(^{156}\) has not been enacted in any state. There is nothing in the proposed Article 2 revisions that addresses issues nearly as divisive in state law as how to treat franchisees, or the recipients of mass-market forms with class action waivers in them.

A final example is presented by Revised Article 1 of the Uniform Commercial Code. The drafters did not take on the potentially divisive question "how to treat choice of forum" provisions at all, but it did attempt to craft a new, modern contractual choice of law rule, one that liberalized the law by permitting more "party autonomy" in most cases and offered explicit protection to "consumers."\(^{157}\) In every one of the twenty-nine states that has enacted Revised Article 1,\(^{158}\) this new rule has

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\(^{156}\) U.C.C. art. 2, 1 U.L.A. 21 (supp. 2006).

\(^{157}\) U.C.C. § 1-301 (2004). The provision and the controversial nature of its underlying policy are developed in William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 SMU L. REV. 697 (2001). As elsewhere throughout the U.C.C., the category of contracts or persons entitled to enhanced protection, "consumers," was defined narrowly, with the category depending on the use to which the buyer put the product. UCC § 1-201(11).

\(^{158}\) See Keith A. Rowley, *The Often Imitated, But (Still) Not Yet Duplicated, Revised UCC Article 1*, 38 U.C.C.L.S. 195 (2006), updated version available at...
been jettisoned and replaced by the uncontroversial, old rule which was developed in the 1950s.\textsuperscript{159}

If one assumes that the diversity in state law with respect to enforcing choice of court agreements in franchise and mass-market contracts is a problem to be addressed by legislation, nothing in the long, distinguished history of the uniform state laws process suggests that NCCUSL can do it.

\textbf{5.2.2. The Federal Legislation Solution}

The difficulty NCCUSL would have with harmonizing diverse state law in these areas is largely a political one because it would require states to include provisions on which some states strongly disagree, and not enough state legislatures will enact the proposed statute. Congress, of course, has the power to force unity through federal legislation, whatever the state legislatures may wish. Federal legislation also has the distinct advantage of producing a more uniform approach. One text applies in all states,\textsuperscript{160} and conflicts between the judicial decisions of different jurisdictions can be decided by the Supreme Court.\textsuperscript{161}

The problems with federal legislation as a solution for the diversity described here are several. First, the diverse views of appropriate policy do not disappear when Congress begins its work; those problems simply show up as political obstacles to creating and enacting a uniform federal solution. In the mass-market area, the eight states that have thus far refused enforcement of arbitration provisions because they deprive customers of class action remedies are large states.\textsuperscript{162} Thirteen states refuse to enforce

\textsuperscript{159} See id. at 11 (listing states which have adopted the revised Article 1 of the U.C.C.). While U.C.C. § 1-105 states a uniform choice of law rule for contracts covered by the U.C.C., its terms are sufficiently broad and vague as to leave unstated the solutions to the mass market cases identified here (the U.C.C. will not typically apply to franchise terminations). No case has been found where a defendant successfully utilized U.C.C. § 1-105 to deflect a challenge to a choice of law provision as unconscionable or in violation of public policy.

\textsuperscript{160} The uniform laws process often results in non-uniform amendments to the uniform legislation; that is, textual variation from jurisdiction to jurisdiction. This is particularly true in areas where the uniform legislation attempts to address an area in which states are divided.

\textsuperscript{161} Cf. Burbank, supra note 25, at 20-21. See generally Hollis, supra note 26, at 1344-54.

\textsuperscript{162} See sources cited supra note 43.
choice of forum provisions in franchise cases. In both settings, the decisions have not been "merely" common law decisions; rather, they are decisions that implement state legislative schemes or procedural rules passed by other deliberative political bodies. It would not be easy to create federal legislation that would overrule the legislatures and courts of these states so as to make choice of court agreements enforceable in these debatable areas. Put differently, a federal legislative solution will be controversial and difficult politically and, given the other issues competing for Congressional attention, it seems very unlikely that this kind of solution would make it on to Congress's crowded agenda.

A second problem with a federal mandate to enforce choice of court agreements in Hague-covered franchise and mass-market/non-"consumer" contracts is that presumably the federal solution would extend only to international contracts covered by the Convention. This presents us with the prospect of disparate treatment of franchisees and mass-market customers within a given state depending on whether their choice of court provision was or was not covered by the Hague Convention and

163 See Zimmerman, supra note 76, at 773 (discussing which states refused to enforce choice of forum provisions).

164 The ALI Judgments Project would not solve the problems described here. It requires domestic courts asked to recognize or enforce a judgment (including, apparently, one predicated on a choice of court agreement covered by the Hague Convention) to refuse enforcement if the judgment is "repugnant to the public policy of . . . a particular state of the United States when the relevant legal interest, right, or policy is regulated by state law." ALI JUDGMENTS PROJECT, supra note 39, § 5(a)(vi). Foreign judgments, entered pursuant to purported choice of court agreements, against franchisees would likely fit this exception quite easily. Its focus being on recognizing and enforcing judgments, the ALI Judgments Project says nothing of a domestic court exercising jurisdiction in violation of a purported choice of court agreement. But it does touch our subject at the judgment enforcement stage. A domestic court must refuse recognition or enforcement 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." ALI JUDGMENTS PROJECT, supra note 39, § 5(b)(i). Of course, the provision begs the question whether there was "an agreement" choosing the foreign court. At least in cases where the defendant has not contested that contract question in the foreign court, the recognizing or enforcing court will have to make that threshold determination and the contract law that the forum's choice of law rule selected would probably be used to make it.

165 Congress probably has the power under the Commerce Clause to address the enforceability of choice of court agreements generally in both franchise contracts and in mass-market contracts. But federalizing these areas is yet more intrusive on traditional state lawmaking and politically even less likely.
accompanying federal rule. Assuming that choice of court agreements are more valuable to vendors when they are enforceable than not, this prospect would give at least a theoretical competitive advantage to international vendors over their domestic counterparts in those states where enforcement is currently refused. While it seems extremely doubtful that the incentives created by such disparate treatment would prompt domestic vendors to move offshore to take advantage of the Hague Convention and its then-accompanying federal legislation, the situation would at minimum exacerbate the political problems Congress would face in crafting a solution in the first place.

A final reason militating against federal legislation is that a federal solution may simply be ill-advised in our federal system. We have a very long and rich tradition of local rule at the state level. This tradition has, amazingly, continued in commercial law where one might have thought that the business need for low transaction and compliance costs would long ago have moved commercial law into the federal domain. We remain doggedly committed to state level commercial law, and to the related state law that protects various customers and others. Overriding strongly held, locally developed policy with a federal solution seems unwarranted unless the need for a uniform solution is overwhelming. Doing so in order to credibly join the Hague Choice of Court Convention seems ill-advised.

5.3. Why Do Anything?

Another alternative is to simply ratify the Convention without directly addressing these lines of cases with corrective legislation. One can imagine the view that the public policy

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166 Problems with imposing a treaty’s provisions on domestic states that might have different views of policy have led to the rejection of some treaties by the executive branch. See Hollis, supra note 26, at 1372.

167 The United States could ratify the Convention and allow it to be self-executing. See Vázquez, supra note 140 (explaining and discussing self-execution). Then the courts, and ultimately the Supreme Court, will eventually determine, among other things, the meaning of Articles 5, 6, and 9 and whether the public policy exception accommodates the diverse views of states on the matters addressed here. This is, of course, a very good recipe for a sustained, perhaps interminable, period of uncertainty—something that would seriously undercut the benefits of the Convention. It would seem to make little sense to ratify this Convention without some effort to address the diversity of U.S. state views on the kinds of contracts involved here. Cf. Reitz, supra note 25, at 319.
exception was developed for just such cases.\textsuperscript{168} It seems more likely, however, that the public policy exception was to work on exceptional cases, not entire classes of cases of the kinds I have described here. The overall structure of the Convention suggests that doing nothing might well be at odds with the underlying thrust of the Convention.

Reciprocity is a strong underlying theme in the Convention. This reciprocity is reflected in the Convention’s list of excluded contracts and in the inference one draws from that list, that choice of court provisions in contracts that are not excluded will be enforced by contracting states. It is also evident in Article 21 of the Convention. This provision permits a state at the ratification stage to exclude specific matters or contracts if the state has a “strong interest” in doing so. Importantly, there is explicit reciprocity built in for the classes of cases identified in such a Declaration—if a state describes and excludes a kind of contract under Article 21, that kind of contract is excluded from the commitment of other states when dealing with the contracts of the excluding state.\textsuperscript{169} The same is true for Article 22, which provides for reciprocal enforcement of judgments arising from non-exclusive choice of court agreements.

\textsuperscript{168} Cf. Teitz, \textit{supra} note 1, at 552. The negotiations from which the Convention emerged probably preceded the developments described here in the mass-market cases; these cases may truly have been “exceptional” at that time. On the other hand, the franchise cases have been with us for a much longer time. As early as 1980, a federal district court in Wisconsin rejected, on the basis of Wisconsin’s franchisee protection statutes, a choice of forum provision that would send litigation with a Wisconsin franchisee to Illinois. Lulling v. Barnaby’s Family Inns Inc., 482 F. Supp. 318, 323 (E.D. Wis. 1980). It is hard to understand the absence of an exception for franchise cases in the Convention.

\textsuperscript{169} The Convention explicitly provides for declarations at the time of ratification:

\begin{quote}
Article 21 Declarations with respect to specific matters

1. Where a state has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.

2. With regard to that matter, the Convention shall not apply a) in the Contracting State that made the declaration; b) in other Contracting States, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the State that made the declaration.

Hague Convention, \textit{supra} note 9, art. 21 (emphasis added).
\end{quote}
where the rendering and enforcing jurisdictions have both made appropriate declarations.\textsuperscript{170}

In a unified legal system, the situation is a good deal clearer than it is in a non-unified system such as ours. Consider, for example, a state with a unified legal system whose courts refused to enforce choice of court agreements in franchise cases. Would it be proper for such a state to join and ratify the Convention without addressing its franchise law? The state could, of course, believe or argue that the public policy exceptions would encompass such cases and that, therefore, there was no need to address the problem either through local legislation that changed the domestic franchise law, or through a Declaration that excluded franchise contracts from that state’s obligations—and the reciprocal obligations of other states—under Article 21 of the Convention.

But considering the Convention as a whole, and its approach to excluding whole classes of contracts and contractual matters, this hypothetical state’s approach would be at odds with the commitment that it, as a contracting state, makes when embracing the Convention. The public policy exceptions seem designed for case-by-case exclusions based on the unique, “exceptional”\textsuperscript{171} situations that inevitably turn up in litigation, not as loopholes for unilateral exclusion of whole classes of contracts. Joining the treaty without addressing this hypothetical state’s inconsistent views on franchise contracts seems inconsistent with the undertaking a state takes when it makes a treaty commitment.\textsuperscript{172}

Moreover, whatever the demands of international law, this hypothetical state’s approach would create a lopsided Convention, at least with respect to its franchise contracts. Thus, in the example, the contracting state would not be enforcing choice of court agreements involving its own franchisees but other contracting states would be enforcing choice of court agreements when their own franchisees were the recipients. Article 21 is designed to keep Convention obligations reciprocal among

\textsuperscript{170} Hague Convention, supra note 127, art. 22.

\textsuperscript{171} Cf. Teitz, supra note 1, at 550 (explaining how the structure of the Convention is designed to facilitate the harmonization of a myriad of laws, traditions, and political agendas such that a public policy exception need not be relied upon for non-extraordinary cases).

\textsuperscript{172} See Vienna Convention, supra note 113, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).
contracting states and one would expect a unified state to make such a Declaration under the circumstances supposed.

How apt is this hypothetical example in the U.S. system where the state law that would recognize choice of court agreements is, as developed above, diverse and only partially antagonistic to some classes of choice of court contracts covered by the Convention, rather than uniformly so? It is not the case that the majority of U.S. courts have refused to recognize choice of court agreements either in franchise situations or in mass-market contracts. Could the United States ratify the Convention without addressing the fact that in some predictable constituent jurisdictions, choice of court agreements will encounter great difficulty finding enforcement? If the exceptions to reliable enforcement were minor or unpredictable, perhaps the public policy exceptions could cover them. But these are not freak, unusual cases. With franchise and mass-market contracts, we have important and populous jurisdictions such as California, New Jersey, and Pennsylvania whose law, as it now stands, will in many cases predictably refuse enforcement of choice of court agreements in those contract areas. Where divergent views with respect to definable classes of cases are predictable, as they seem to be in these two areas of Convention-covered contracts, the “manifest public policy” approach seems questionable, given the aims and design of the Convention.174

173 Professor Teitz reports that, with respect to the kinds of contracts I have described as “mass-market contracts,” that “[i]t was ultimately left for the non-chosen or requested court to decide whether such a contract or the resulting judgment would not be enforced because it is ‘manifestly contrary’ to the forum’s public policy.” Teitz, supra note 1, at 552-53. Convention negotiations preceded most of the developments in mass-market cases described here. See cases cited supra note 43. The legal scene in the United States has changed and the question becomes whether the United States should take some steps in response to those changes in order to make the Convention a success. Certainly, the public policy exception could accommodate the divergent state law that I have described here and no doubt will if the United States joins the Convention as drafted and Congress or state legislatures take no action. The more difficult question is whether such a U.S. decision to pull the aberrant jurisdictions’ approaches through the “manifest public policy” loophole is sound as a policy matter, given the overall thrust of the Convention and the need for U.S. leadership to encourage broad ratification.

174 The strong reciprocity design of the Convention suggests that the public policy exception may be better suited to the odd, unpredictable cases with compelling facts than to an entire class of cases. Indeed, even if the rejection of the Convention’s enforcement rule were present in only one constituent jurisdiction, one might well expect the Contracting State to address the law of that
Important as may be the United States' legal obligations to uniformly enforce choice of court agreements in these areas if it enters the Convention, they may be secondary to a very practical problem. As the law now stands in the United States, ratification of the Convention without addressing these areas in some way will yield a lopsided Convention, tilted in favor of the United States. This lopsidedness, whatever it may mean as a legal matter, may impede our efforts to persuade other countries to join the Convention.175

6. RatiFICATION SOLUtiONS

6.1. Reciprocity and Ratification

The Hague Choice of Court Convention has largely been a U.S. initiative spawned by the problem of obtaining recognition and enforcement of U.S. judgments abroad; other countries have comparatively little difficulty enforcing their judgments in the United States.176 The United States was motivated to change the status quo— to level the playing field— but its lack of leverage with respect to reciprocal enforcement of judgments resulted in a disappointing outcome. As two commentators expressed it, "[h]oping to build a skyscraper, the United States has succeeded in constructing, at most, a low hut." 177 While this may seriously understate the very substantial accomplishment of the Conference,178 these many years of effort will not even yield a "low hut" if only a couple of states became interested in joining the Convention.

One wonders as an initial matter what might motivate constituent jurisdiction in the interests of the larger good coming from good faith ratification of the Convention and the commitment to enforcement that it represents.

175 States with unified legal systems are familiar with the lopsidedness of treaty obligations that can result when federal States take leeway to accommodate their federalism concerns; unified States sometimes resist giving those federal States the leeway. See Hollis, supra note 26, at 1375-77 (discussing the two main problems that hinder the widespread use of federal-state clauses).

176 See generally Adler & Zarychta, supra note 1 (explaining the history preceding the signing of the Convention and the subsequent results of the treaty); Teitz, supra note 1, at 544-50 (discussing the negotiations leading up to the Convention).

177 Adler & Zarychta, supra note 1, at 2.

178 See supra text accompanying note 6.
potential contracting states to join the Convention even in the best of circumstances. Difficulty in enforcing U.S. judgments abroad means that our businesses must arbitrate their claims or, if they litigate, either (1) litigate their claims abroad, or (2) risk non-enforcement if they litigate those claims in the United States and then seek recognition or enforcement abroad. Foreign businesses do not face the same risks when they do business with U.S. firms. Because they can effectively choose more fora for litigation, they enjoy an advantage over our businesses. The status quo is now tilted favorably in the direction of those who obtain judgments abroad, bring them to the United States, and generally get the recognition and enforcement that their own courts might not offer were the situation reversed. The Hague Convention, with its implicit reciprocity, will level the playing field. But a level playing field may be perceived as a relative disadvantage for those who now enjoy advantage from the lopsided status quo.

Now, of course, the Convention is consistent with free market ideology;\textsuperscript{179} leveling the playing field removes the differential difficulty of enforcing some judgments from the array of legal factors that might perversely motivate business decisions. Moreover, if the research regarding business' preference for judicial dispute resolution over arbitration\textsuperscript{180} holds for international agreements, potential contracting states (or their constituent businesses) might perceive the general economic benefits of joining the Convention to exceed the benefits they now enjoy from a lopsided status quo. Perhaps the ideology of the free market, or a forecast of other indirect benefits,\textsuperscript{181} will prompt states to trade their narrow advantages for a larger pie for everyone and

\textsuperscript{179} Cf. Teitz, supra note 1, at 557 (suggesting the Convention as a means to promote free trade).

\textsuperscript{180} See id. at 548 (supplying anecdotal evidence supporting a strong preference by practitioners for designating litigation instead of arbitration in their contracts).

\textsuperscript{181} One consequence of the present status quo might well be that U.S. firms do much of their international business on the condition that the contract contain arbitration provisions. Certainly, with the current absence of any treaty-based obligation to enforce other States' judgments, many American lawyers would advise their business clients to demand arbitration provisions in their contracts so that the New York Convention will apply and yield enforcement. If, indeed, most businesses would prefer judicial dispute resolution to arbitration, and if doing international business with U.S. firms typically requires arbitration because of the status quo, then the Hague Convention would indirectly benefit foreign businesses by removing barriers, demanded by hypothesis by U.S. firms, to judicial dispute resolution.
join the Convention. To one who was not privy to the negotiations, it seems a bit of a long shot.

The long shot turns into overwhelming worse odds if, in fact, the Convention is perceived as not merely shifting an advantageous situation into "neutral," but as reversing the advantage to favor the United States. The cases in the two areas discussed here suggest that this may well be the case: the United States will enjoy an "advantage," as it were, if it ratifies the Convention without addressing the diverse domestic law in these two areas. As suggested earlier, addressing the diverse state law using either a federal or state legislative process will be very difficult, if not impossible, politically. "Addressing" it by allowing the Convention to be self-executing will result in a sustained period of uncertainty about U.S. law that will impede ratification by other states. Unilateral options at ratification that would scale back the United States' commitment to the treaty182 might solve the legal compliance problems but, similarly, would produce lopsidedness in obligations that, under the circumstances, would likely impede widespread ratification.183

As noted above, Article 21 of the Convention presents another option, one that the United States should seriously consider if it proceeds to join the Convention.

6.2. Limited Ratification

Article 21 of the Hague Convention provides:

1. Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.

2. With regard to that matter, the Convention shall not apply—

182 The United States could attach a reservation at ratification in the interests of federalism as it did when ratifying the U.N. Convention Against Organized Crime. Hollis, supra note 26, at 1361. But, as the text suggests, such a unilateral approach would upset the Convention's balance and, more importantly, likely reduce the odds of a successful Convention.

183 See infra text accompanying note 184.
a) in the Contracting State that made the declaration;

b) in other Contracting States, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the State that made the declaration.

Article 21, paragraph 2(b) reinforces the reciprocity principle that is the bedrock for the entire Convention. If a contracting state declares the Convention inapplicable to some category of contracts or matters, those excluded agreements are carved out of the reciprocal commitments the Convention imposes on other states in their dealings with the Declaring state as well: if, for example, the United States was not committed by the Convention to enforce a choice of court agreement in a franchise agreement designating a Canadian court, Canadian courts would not be obligated by the Convention to enforce such agreements designating U.S. courts if suit were brought in Canada. Article 21 is a mechanism for recognizing the diversity in policy views of contracting states and allows for customization of the Convention to accommodate those views while maintaining its reciprocity principle. Article 21 reinforces the point made earlier: that the Convention conveys an expectation that a contracting state whose courts refuse to enforce some category of covered choice of court agreements ought not ratify the Convention without either changing its law or making an Article 21 declaration.

It is important to note that a Declaration under the Convention merely removes from courts the obligation under the Convention to enforce choice of court agreements in the defined category; a Declaration would not mandate non-enforcement of the choice of court agreement in the category so designated. Rather, the background law of the forum (chosen or unchosen) will remain for considering the effect of the choice of court agreement on the forum's decision to exercise or decline jurisdiction, or on its decision whether or not to recognize or enforce a judgment. In the substantial majority of state and federal courts in the United States, this would likely mean enforcement of choice of court agreements in these excluded categories both at beginning and end points of the dispute resolution process.

In the United States, the effect of an Article 21 Declaration would be to permit the diverse state law in these areas to continue to develop as it traditionally has. Were we to make such a Declaration, then in all other contracting states, local law, rather
than the Convention, would govern the effect a forum would give
to a purported choice of court agreement, or a judgment resulting
from one, in these defined categories. It is by no means clear that
other contracting states would refuse enforcement of choice of
court agreements in the U.S.-defined categories merely because
they were no longer covered by the United States contracting state
version of the Convention.

Article 21 requires that a contracting state have a "strong
interest" in excluding a category of cases from enforcement. In a
unitary legal system whose background law denies enforcement to
a category of choice of court agreements covered by the
Convention, the choice at the ratification stage is clear: either
change the background law in order to comply with the
Convention as written, or carve out that category of cases through
an Article 21 Declaration on the basis of the "strong interest"
underlying the refusal of enforcement.

But does the United States have a "strong interest" in refusing
to enforce choice of court agreements in either franchise or mass-
market cases? While our diversity in views creates predictability
problems not present in unitary systems, in both instances, these
are minority views, strongly held as they may be.

But what of our strong commitment to federalism itself,
reflected in our counterintuitive commitment to state level
commercial law in the face of increasing pressures of globalization?
Surely the United States could base a Declaration on our interest in
maintaining the diversity of our evolving state law on these
matters on which state policy varies and then "clearly and
suitably" define the categories of cases for these purposes. Indeed,
Professor Hollis details a long history of the United States limiting
its treaty obligations in the interests of preserving its brand of
federalism. 184 Making an Article 21 Declaration would mean that
other contracting states would not be obligated by the Convention
to enforce choice of court agreements in the cases we so define when
our businesses are seeking enforcement of agreements designating
U.S. courts in their courts. The local law governing enforcement of
choice of forum provisions and judgments resulting from them
would continue to operate and develop in those settings.

184 See generally, Hollis, supra note 26 (discussing the extent to which
federalism constrains the Article II treaty power).
6.3. Defining the Candidates for Exclusion

In both franchise and mass-market settings, the object would be to define the areas where the case law is evolving so that it could continue to evolve under our federal system. Since the definitions we develop will apply in other contracting states, it is also important to define the exclusions as narrowly as possible to maximize the Convention’s intended effect. We have generally identified franchise contracts and mass-market contracts as the important areas for exclusion. Neither has been adequately defined for purposes of Article 21 and different considerations go into defining these distinct areas. In the franchise area, states themselves define what franchises are and the extent to which state legislation will apply to them. For mass-market contracts, there is no legislative definition as such; the category itself is a construct derived from class action waiver cases.

6.3.1. Franchise Contracts

Since the courts denying enforcement of choice of forum provisions in franchise agreements are, typically, proceeding under local state franchise legislation, that legislation should be looked to in order to craft a suitable, narrowly defined Declaration in the Convention. An appendix to this article contains a sample of definitions found in those states that have refused to enforce choice of forum provisions in contracts involving their franchisees.

The Convention requires that “[t]he State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.” This presents a problem because (as might be expected) U.S. states define franchises differently. A domestic court that is inhospitable to a choice of court provision in a franchise contract will likely refuse to enforce it under its own law, whatever the Convention might provide. While the drafting task is to create a definition that is no broader than it needs to be, the reciprocity policy requires that it be broad enough to cover any franchise contract whose choice of court agreement would not find enforcement in a U.S. jurisdiction. The common theme that emerges from the definitions is the franchisee’s use of the franchiser’s trademark or related intellectual property rights in its business of selling goods or services.

185 Hague Convention, supra note 9, art. 21, para. 1.
New Jersey has a particularly strong policy in this respect and its definition is elegant, brief, and would cover the franchises that are more specifically defined in other state legislation. Its legislation provides:

"Franchise" means a written arrangement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trade mark, service mark, or related characteristics, and in which there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise.

A workable Declaration could be created from this definition.

6.3.2. Mass-market Contracts

The assumption thus far is that the United States could, if it were thought to be sound policy, exclude under Article 21 adequately defined "mass-market contracts" from the scope of its ratification in the interests of advancing the reciprocity goals of the Convention. The Convention is, unfortunately, more complicated.

In Article 2, paragraph 1, the Convention excludes from its scope both consumer and employment contracts. Consumer contracts are defined by reference to one of the parties to the contract coming within the Convention's implicit definition of "consumer." Contracts that "relate[] to contracts of employment, including collective agreements" are excluded as well. Article 2, Paragraph 2, then provides that the "Convention shall not apply to the following matters" and sets forth the long list quoted above.

Is there significance to this apparent distinction between contracts and matters? Article 21 provides that a state might make a

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186 New Jersey's definition limits coverage to "written" agreements whereas other states include oral franchise agreements in their definitions. N.J. STAT. ANN. § 56:10-3 (2001). Since the Hague Convention requires that a choice of court agreement be in writing or the equivalent, New Jersey's writing requirement poses no problem for purposes of creating a workable Declaration. Hague Convention, supra note 9, art. 3(c)(i).


188 Hague Convention, supra note 9, art. 2, para. 1 (emphasis supplied).

189 "This 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." Id. art. 2, para. 1(a).

190 Id. art. 2, para. 1(b).

191 Id. art. 2, para. 2 (emphasis supplied); see supra note 19.
“Declaration with respect to certain matters”. If there is a method to the division within Article 2 for purposes of Article 21, the Convention might limit what a state might exclude through an Article 21 Declaration. Agreements involving franchisees or franchise agreements could clearly coexist with the other "matters" on the list in Paragraph 2 had the drafters seen fit to include them. But "mass-market contracts" seem different and more closely resemble "consumer contracts" defined in the other section; the section that does not use the word "matters." The narrowness of the consumer definition was, apparently, an issue during the negotiations and those pressing for a broader definition did not prevail. One might argue that this point, having been negotiated, is not open to renegotiation through an Article 21 Declaration.

Whatever weight one assigned to the division in terms within Article 2 as a drafting matter, a reading that barred the United States from defining under Article 21 "mass-market contracts" as an excluded category under the circumstances discussed here would be at odds with the thrust and ultimate success of the Convention. If such a Declaration is not permissible, the United States would likely be faced with the unpalatable options of not joining the Convention at all, joining it as drafted without a mass-market contract Declaration under Article 21, or joining it with unilateral reservations, understandings, or declarations apart from Article 21. Only an Article 21 Declaration would preserve the reciprocity implicit in the Convention's design by explicitly carving the defined contracts out of the obligations of other states, thereby maintaining balance. Absent an Article 21 Declaration, other states that perceived the developing mass-market cases to be problematic might refuse to join the Convention until it was perceived to operate in a reciprocal manner in the United States. This delay would further dampen the enthusiasm that naturally follows a newly concluded accord. Given the potential for the Convention to make inroads into the longstanding problem of international recognition and enforcement of judgments, any obstacle to widespread ratification of the Convention would be very unfortunate. So, whatever the intended significance of the

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192 Hague Convention, supra note 9, art. 1 (emphasis supplied).
193 See Teitz, supra note 1, at 552 (describing the difficult task of resolving differences among legal systems as they pertain to specific substantive legal rules and issues).
word “matters” in Articles 2 and 21, the sensible approach would permit the United States to make an Article 21 Declaration (if it saw fit to do so) with respect to suitably defined mass-market cases and thereby permit the Convention’s intended reciprocity to operate with respect to choice of court agreements that our constituent courts are unlikely to enforce.

A mass-market definition is both harder and easier to construct than an appropriate franchise definition. As noted earlier, “mass-market contract” has not been defined in domestic legislation and is a construct one derives from the class action waiver cases. The silver lining is that it is unnecessary to conform a Declaration to extant and varied domestic legislation. As before, what is necessary is that a Declaration be broad enough to cover the divergent cases.

As discussed earlier, the American Law Institute’s project, *Intellectual Property: Principles Governing Jurisdiction, Choice-of-Law, and Judgments in Transnational Disputes,* has made the most headway in creating a suitable definition of “mass-market contract.” Section 101(3) defines the concept as a contract that “(a) is prepared by one party for repeated use; (b) is presented to another party or parties (the ‘nondrafting party’) by the [first] party . . . ; and (c) does not afford the nondrafting party a meaningful opportunity to negotiate its terms.” 194 This definition is broad enough to cover any of the cases discussed earlier in this rapidly developing area, and would leave to local law (most of which is welcoming to choice of court agreements) the question whether to enforce a choice of court agreement in the mass-market setting. 195 Creating such an Article 21 Declaration would mitigate the problems identified here with the enforceability of choice of

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194 INTELLECTUAL PROPERTY: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES, supra note 115, at 9–10.

195 Were the United States to create a Declaration excluding mass-market contracts from coverage under the Convention, the effect would be to leave to diverse local law the question of enforceability. In that context, a court faced with a choice of court agreement in an international mass-market context might well look to the American Law Institute’s INTELLECTUAL PROPERTY: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES, supra note 115, as a modern expression of policy in a closely analogous area. As discussed earlier, see supra text accompanying note 128, those principles provide enough flexibility for local courts to enforce, or refuse to enforce, such provisions. But they would vastly aid adjudication by providing a well thought through set of criteria for coming to an appropriate resolution on enforceability.
court agreements in the mass-market area and thereby improve the prospects for the success of the Convention.

7. CONCLUSION

The Hague Choice of Court Convention brings the international community closer than it has ever been to a reliable system for mutual recognition and enforcement of judgments. But as difficult as the Convention's negotiations and drafting may have been, the harder work of convincing states to join the Convention still lies ahead. The history of the project suggests that the United States must take a lead in the ratification effort. We will be unable to do so credibly unless we can convince other states that their choice of court agreements will, under the Convention, receive enforcement throughout the United States that is symmetrical to that which will be given by other states considering the Convention. Given the current state of United States law in the areas of franchise and mass-market contracts, such a showing will be difficult.

Of the available options, limiting the United States' commitment by making an Article 21 Declaration seems the most promising and, while it will further narrow the coverage of the Convention, it will ease domestic compliance problems and also yield a symmetry that may prove attractive to other states. Such an approach may be the best chance we will have for a long time in finally effecting an improvement to international recognition and enforcement of judgments, a long recognized impediment to smooth international trade.

8. APPENDIX: U.S. STATE FRANCHISE DEFINITIONS


(a) "Franchise" means a contract or agreement, either expressed or implied, whether oral or written, between two or more persons by which:

1) A franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor; and

2) The operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising or
other commercial symbol designating the franchisor or its affiliate; and

(3) The franchisee is required to pay, directly or indirectly, a franchise fee.

ILLINOIS: 815 ILL. COMP. STAT. ANN. 705/3 (1999)

§ 3 Definitions. As used in this Act:

(1) "Franchise" means a contract or agreement, either expressed or implied, whether oral or written, between two or more persons by which:

(a) a franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services, under a marketing plan or system prescribed or suggested in substantial part by a franchisor; and

(b) the operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and

(c) the person granted the right to engage in such business is required to pay, directly or indirectly, a franchise fee of $500 or more . . . .


Sec. 1. As used in this chapter:

(a) "Franchise" means a contract by which:

(1) a franchisee is granted the right to engage in the business of dispensing goods or services, under a marketing plan or system prescribed in substantial part by a franchisor;

(2) the operation of the franchisee's business pursuant to such a plan is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and

(3) the person granted the right to engage in this business is required to pay a franchise fee.

"Franchise" includes a contract whereby the franchisee is granted the right to sell franchises on behalf of the franchisor.

1. Definitions. When used in this section, unless the context otherwise requires: . . .
   c. (1) “Franchise” means either of the following:
      (a) An oral or written agreement, either express or implied, which provides all of the following:
         (i) Grants the right to distribute goods or provide services under a marketing plan prescribed or suggested in substantial part by the franchisor.
         (ii) Requires payment of a franchise fee to a franchisor or its affiliate.
         (iii) Allows the franchise business to be substantially associated with a trademark, service mark, trade name, logotype, advertisement, or other commercial symbol of or designating the franchisor or its affiliate.


   (c) “Area franchise” means an agreement between a franchisor and subfranchisor in which, for consideration, the subfranchisor is granted the right to sell or negotiate the sale of franchises in the name of or for the franchisor.

   (e)(1) “Franchise” means an expressed or implied, oral or written agreement in which:
      (i) a purchaser is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by the franchisor;
      (ii) the operation of the business under the marketing plan or system is associated substantially with the trademark, service mark, trade name, logotype, advertising, or other commercial symbol that designates the franchisor or its affiliate; and
      (iii) the purchaser must pay, directly or indirectly, a franchise fee.

   (2) “Franchise” includes an area franchise.


   (3) “Franchise” means a contract or agreement, either express or implied, whether oral or written, between 2 or more persons to which all of the following apply:
(a) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor.

(b) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services substantially associated with the franchisor’s trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate.

(c) The franchisee is required to pay, directly or indirectly, a franchise fee.

MINNESOTA: MINN. STAT. ANN. 80C.01 (1999)

Subd. 4. “Franchise” means (a) a contract or agreement, either express or implied, whether oral or written, for a definite or indefinite period, between two or more persons:

(1) by which a franchisee is granted the right to engage in the business of offering or distributing goods or services using the franchisor’s trade name, trademark, service mark, logotype, advertising, or other commercial symbol or related characteristics;

(2) in which the franchisor and franchisee have a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise; and

(3) for which the franchisee pays, directly or indirectly, a franchise fee; or

(b) a contract, lease, or other agreement, either express or implied, whether oral or written, for a definite or indefinite period, between two or more persons, whereby the franchisee is granted the right to market motor vehicle fuel using the franchisor’s trade name, trademark, service mark, logotype, advertising, or other commercial symbol or related characteristics for which the franchise pays a franchise fee; or

(c) the sale or lease of any products, equipment, chattels, supplies, or services to the purchaser, other than the sale of sales demonstration equipment, materials or samples for a total price of $500 or less to any one person, for the purpose of enabling the purchaser to start a business and in which the seller:

(1) represents that the seller, lessor, or an affiliate thereof will provide locations or assist the purchaser in finding locations for the use or operation of vending machines, racks, display cases, or similar devices, or currency operated amusement machines or
devices, on premises neither owned or leased by the purchaser or seller; or

(2) represents that the seller will purchase any or all products made, produced, fabricated, grown, bred, or modified by the purchaser using, in whole or in part, the supplies, services, or chattels sold to the purchaser; or

(3) guarantees that the purchaser will derive income from the business which exceeds the price paid to the seller; or

(d) an oral or written contract or agreement, either expressed or implied, for a definite or indefinite period, between two or more persons, under which a manufacturer, selling security systems through dealers or distributors in this state, requires regular payments from the distributor or dealer as royalties or residuals for products purchased and paid for by the dealer or distributor.

NEW JERSEY: N.J. STAT. ANN. § 56:10-3 (2001)

As used in this act:
a. “Franchise” means a written arrangement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trade mark, service mark, or related characteristics, and in which there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise.


Definitions. When used in this chapter, unless the context otherwise requires:

2. “Area franchise” means any contract or agreement between a franchisor and a subfranchisor whereby the subfranchisor is granted the right, for consideration given in whole or in part for such right, to sell or negotiate the sale of franchises in the name or on behalf of the franchisor...

5. a. “Franchise” means a contract or agreement, either expressed or implied, whether oral or written, between two or more persons by which:

(1) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor;

(2) The operation of the franchisee’s business pursuant to such
plan or system is substantially associated with the franchisor’s trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and

(3) The franchisee is required to pay, directly or indirectly, a franchise fee.

b. When used in this chapter, unless specifically stated otherwise, “franchise” includes “area franchise”.


Definitions . . .
(7) “Franchise” means
(i) An oral or written agreement, either express or implied, which:
(A) Grants the right to distribute goods or provide services under a marketing plan prescribed or suggested in substantial part by the franchisor;
(B) Requires payment of a franchise fee in excess of five hundred dollars ($500) to a franchisor or its affiliate; and
(C) Allows the franchise business to be substantially associated with a trademark, service mark, trade name, logotype, advertising, or other commercial symbol of or designating the franchisor or its affiliate; or
(ii) A master franchise.


Definitions . . .
(4) “Franchise” means:
(a) An agreement, express or implied, oral or written, by which:
(i) A person is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan prescribed or suggested in substantial part by the grantor or its affiliate;
(ii) The operation of the business is substantially associated with a trademark, service mark, trade name, advertising, or other commercial symbol designating, owned by, or licensed by the grantor or its affiliate; and
(iii) The person pays, agrees to pay, or is required to pay, directly or indirectly, a franchise fee.