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The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts

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Theodore Eisenberg and Geoffrey P. Miller*

Abstract:

We study choice of law and choice of forum in a data set of 2,882 contracts contained as exhibits in Form 8-K filings by reporting corporations over a six month period in 2002 for twelve types of contracts and a seven month period in 2002 for merger contracts. These material contracts likely are carefully negotiated by sophisticated parties who are well-informed about the contract terms. They therefore provide evidence of efficient ex ante solutions to contracting problems. In prior work examining merger contracts, acquiring firms incorporated in Delaware tended to select Delaware law or a Delaware forum to govern disputes under the merger agreements less frequently than firms in other states (New York in particular) specified the law or forum of those states. For the broader variety of contracts analyzed here, the contracting parties rarely opt for Delaware law other than for merger contracts and contracts establishing Delaware business trusts. New York law is the favored choice, with New York law chosen in 46 percent of the contracts and Delaware law, the second most frequent selection, chosen in 15 percent of the contracts. New York law was overwhelmingly favored for financing contracts, but was also preferred for most other types of contracts. With respect to choice of forum, the major finding is that a litigation forum was specified only for 39 percent of the contracts. Among those 39 percent of contracts, New York is the favored forum, accounting for 41 percent of the choices, with Delaware a distant second and accounting for 11 percent of the forum choices. When a forum is specified it usually matches the contract's choice of law. We also explore the decision to designate a forum, mismatches between choice of law and choice of forum, and whether parties designate an exclusive litigation forum. Overall, New York law plays a role for major corporate contracts similar to the role Delaware law plays in the limited setting of corporate governance disputes.

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I. Introduction

A firm's decision to incorporate in a state is not ordinarily considered in relation to a firm's decision, in commercial contracts, to subject disputes to the law or forum of a particular state. Yet these two decisions are similar and serve virtually identical purposes. When a firm incorporates in Delaware or another state the principal consequence, some minor franchise taxes aside, is to subject disputes over the company's governance to Delaware law.[1] Incorporation in Delaware also frequently effectively selects the Delaware Court of Chancery as the forum to resolve governance disputes.[2] The chartering decision is thus a kind of choice of law and choice of forum decision. This observation suggests that the extensive literature on Delaware incorporation can be viewed as addressing questions of choices of law and forum. It also suggests that the literature can be usefully supplemented because it to date does not consider a wide range of other important decisions firms make about the law and forum that will resolve disputes.[3]

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[1] See Erin O'Hara & Larry Ribstein, From Politics to Efficiency in Choice of Law, 67 U. Chi. L. Rev. 1151, 1202-1204 (2000) (stressing the fact that the selection of the state of incorporation is essentially a choice-of-law decision).

[2] Directors and officers of companies incorporated in Delaware are subject to that state's jurisdiction over matters growing out of their corporate activities, see Armstrong v. Pomerance, 423 A2d 174 (Del); 10 Delaware Code Sec. 3114, and Delaware may be the only state where, as a practical matter, all defendants in a case involving alleged breaches of fiduciary duty can be joined. Incorporation in Delaware is a weak choice of forum decision because it does not purport by its own terms to be exclusive. A plaintiff could bring a suit in any state (or even abroad) where he or she could obtain jurisdiction over all defendants. Delaware law would be applied (presumably) in such a case but the forum would be different.

[3] Insofar as they tend to appear repetitively in corporate contracts, and to assume relatively standardized terminology, choice-of-law and choice-of-forum provisions in corporate contracts may be considered, at least to some degree, as examples of contractual "boilerplate." Such a characterization should not be taken as indicating that these clauses are unimportant. A rich literature on boilerplate, much of it of recent origin, suggests that despite its repetitive and standardized nature, boilerplate can have potentially significant efficiency effects. See, e.g., Ronald J. Mann, "Contracting" for Credit, 104 Mich. L. Rev. 899 (2006); Michael I. Meyerson, The Efficient Consumer Form Contract: Law and Economics Meets the Real World, 24 Ga. L. Rev. 583, 594-603 (1990); Russell Korobkin, Bounded Rationality, Standard Form Contracts, and Unconscionability, 70 U. Chi. L. Rev. 1203, 1205-06 (2003); Lucian Bebchuk & Richard Posner, One-

This article explores these broader questions of corporate choice of law and forum. In earlier work, we examined contractual choice of law and choice of forum clauses in corporate merger agreements culled from seven months of Form 8-K filings with the Securities and Exchange Commission.[4] Delaware was the dominant setting for choice of law and choice of forum.[5] But we also found evidence of a "flight" from Delaware, in the sense that acquiring firms chartered in Delaware tended to specify a Delaware law or forum at a lower rate than firms chartered in other states specified the law or forum of those states.[6] We presented evidence that, relative to Delaware, New York and California were net attractors of choice of law and choice of forum provisions. We selected corporate merger agreements for our initial study because these appeared to be the type of contracts in the data set where the attractive force of Delaware law and forum would be greatest: the Delaware Chancery Court enjoys a strong reputation as an expert on the issues of fiduciary duty that are likely to play a role in corporate merger cases. The present study analyzes a larger set of contracts, not limited to mergers, filed

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Sided Contracts in Competitive Consumer Markets, 104 Mich. L. Rev. 827 (2006) (observing that provisions giving sellers discretion may function to enhance consumer welfare); Jason Scott Johnston, The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation between Businesses and Consumers, 104 Mich. L. Rev. 857 (2006); Florencia Marotta-Wurgler, "Unfair" Choice of Law, Forum, and Arbitration Clauses: Much Ado About Nothing?, in "Boilerplate:" Foundations of Market Contracts (O. Ben-Shahar, ed., Cambridge Univ. Press, 2007) ; Florencia Marotta-Wurgler, What's in a Standard Form Contract? An Empirical Analysis of Software License Agreements, 4 J. Empirical Legal Stud. 677 (2007) (reporting that standard form online software licenses display a net bias in favor of software companies); Florencia Marotta-Wurgler, Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements, J. Empirical Legal Stud. (forthcoming) (finding little evidence that market power is associated with imposing one-sided contract terms).

[4] Theodore Eisenberg & Geoffrey Miller, Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements, 59 Vanderbilt L. Rev. 1975 (2006).

[5] Id. at 1987 (tbl. 2).

[6] Id. at 1998-99, 2008.

with the SEC. It expands on the merger contract database by including six months of other categories of contracts.[7]

Existing literature focuses heavily on Delaware's effort to attract large corporations' charters, Delaware's success in doing so, and the effects of Delaware's success. Much less studied is New York's longstanding effort to attract legal business and whether it has succeeded in doing so. We explore in detail elsewhere the history of New York's effort.[8] The purposes of this study are to determine whether the attractive force of Delaware law and forum extends to the larger universe of contracts, to assess whether New York's campaign for legal business has succeeded, and more generally to investigate the determinants of the decision to select into a particular state's law or forum.

We find that New York law was the favored choice of law; 46 percent of the contracts specify New York as the choice of law. Delaware, the second most frequent selection, was the choice of law in 15 percent of the contracts. New York law was overwhelmingly favored for financing contracts, but was also preferred for most other types of contracts. With respect to choice of forum, the major finding is that a litigation forum was specified only for 39 percent of the contracts. Among those 39 percent of contracts, New York is the favored forum, accounting for 41 percent of the choices, with

[7] The extra month for corporate merger agreements was used to increase the number of observations for analysis in the earlier study. Arbitration clauses and jury trial waiver clauses using the expanded database are explored in Theodore Eisenberg & Geoffrey P. Miller, Do Juries Add Value?: Evidence from an Empirical Study of Jury Trial Waiver Clauses in Large Corporate Contracts, 4 J. Empirical Legal Stud. (2007) (finding jury trial waiver clauses are rarely used in material contracts of public corporations); Theodore Eisenberg & Geoffrey P. Miller, The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in Publicly-Held Companies' Contracts, 56 DePaul L. Rev. 335 (2007) (finding arbitration clauses are rarely used in material contracts of public corporations); Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, U. Mich. J. Law Reform (forthcoming) (finding companies that require arbitration in consumer contracts do so substantially less frequently in nonconumer material contracts).

[8] Theodore Eisenberg &Geoffrey P. Miller, The Market for Contracts (draft 2007).

Delaware a distant second and accounting for 11 percent of the forum choices. When a forum is specified it usually matches the contract's choice of law.

This paper is structured as follows. Part II sets forth the hypotheses studied, Part III describes the data and Parts IV and V reports the results. Part VI concludes.

II. Hypotheses

Hypotheses about the expected pattern of choice of law may relate to the type of contract—for example, various kinds of credit contracts or employments contracts; to characteristics of the contracting parties—place of business, place of incorporation, and attorney locale; to efforts by states such as New York and Delaware to attract contractual business; to perceptions about the quality of a state's civil justice system.

A. Contract Type

One hypothesis is that contracting parties' choice of law for particular kinds of contracts will cluster around one or a few states even if no particular state initially has especially distinctive legal characteristics. We show elsewhere that the presence of two dispute resolution clauses, arbitration clauses and jury trial waiver clauses, are strongly associated with the type of contract.[9] Parties presumably care about certainty and predictability. This can be achieved by development of a substantial body of reasonable case law in any locale. Once the venue is perceived as having a lead in legal development, that lead should induce more parties to contract for that state's law to govern. Therefore choices of law may cluster around a few states for various contracts type on grounds of predictability. Such a pattern can be observed in the growth of

[9] Eisenberg & Miller, Arbitration, supra note 7; Eisenberg & Miller, Jury Trials, supra note 7.

Delaware as the preferred choice of law for questions of corporate governance.[10] We show elsewhere that the presence of two dispute resolution clauses, arbitration and jury trial waiver clauses, is strongly associated with the type of contract.[11]

B. Connections to a State

The most natural expected choices of law are states with direct connections to the contract. A party's business location often relates to where events under a contract occur. The location of events influences the governing law under choice of law analysis and also often provides a set of legal rules developed in light of the contractual events occurring. For example, oil and gas law develops more and is taught more in states with these natural resources. Water law develops more in states with water supply issues. A state's substantive development of law in a contract's area promotes designating a state's law as the choice of law. Similarly, a company's state of incorporation often may be associated with contractual choice of law since the incorporating state's law can relate to issues that arise under come contracts. Attorney locale likely exerts its influence indirectly, through its association with one or more of these four geographical factors. The contracting attorney's state is likely to be associated with choice of law because the attorney is licensed in the state, is familiar with the state's law, and has an economic incentive to have it's state law govern.

C. The Delaware Hypothesis

A straightforward hypothesis is that sophisticated contracting parties will tend to choose Delaware law. The benefits of Delaware corporate law that attract incorporations

[10] E.g., Roberta Romano, The States as A Laboratory: Legal Innovation and State Competition for Corporate Charters, 23 Yale J. Reg. 209, 213 (2006) ("The more firms incorporated in the state, the more transactions will be undertaken and hence the more likely a legal precedent will be established for any particular transaction, providing greater certainty for future transactors.")

[11] Eisenberg & Miller, Arbitration, supra note 7; Eisenberg & Miller, Jury Trials, supra note 7.

can be divided into two classes. One class of benefits is somewhat specific to Delaware corporate law. These benefits include Delaware's flexibility and openness to variation, with most provisions operating only as default rules that can be avoided by contrary provisions in the corporate charter or bylaws,[12] the substantial body of Delaware corporate law cases, which lends predictability and reliability to its corporate law,[13] Delaware's reliance on corporate franchise taxes, which protects against legislation disfavored by corporate managers,[14] and the relative insulation of Delaware lawmaking from interests hostile to corporate interests.[15] Some of these benefits, such as flexbility and openness to variation, might be expected to influence parties towards choosing Delaware law for contracts generally.

Regardless of these corporate-law specific features of Delaware law, a second class of reasons for choosing Delaware corporate law could extend to other contracts. Delaware courts have been applauded for their high degree of competence and for the integrity of the state's judiciary.[16] Although these features are noted in the context of Delaware corporate law discussions, competence and integrity are judiciary features that might be expected to have appeal beyond the area of corporate law. The degree to which parties designate Delaware law in the mass of contracts studied here could be viewed as

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12. *E.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 15 (1991).

13. Romano, *supra* note 10, at 274.

14. *Id.* at 258-61.

15. *See, e.g.*, John C. Coffee, Jr., *The Future of Corporate Federalism: State Competition and the New Trend Toward De Facto Federal Minimum Standards*, 8 CARDOZO L. REV. 759, 762-63 (1987) (arguing that Delaware continues to be "the preeminent authority on corporate-law matters" because of powerful and unopposed lobbies within the state).

16. *See, e.g.*, Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1362 (2000) (describing literature claiming "that Delaware, through its reliance on charter revenue and its judicial selection process, has committed itself to provide corporate laws that enhance firm performance, and that market forces lead firms to adopt these value-enhancing laws" (footnote omitted)); Romano, *supra* note 10 at 277 (arguing that Delaware is the preferred state of incorporation in part because "the continuity in and small size of [the court that] hears corporation law cases" produces both judicial expertise and predictable decisions).

an indication of whether the appeal of Delaware law is specific to its corporate law features or extends to contracts generally.

One might expect a strong association between the perceived quality of state civil justice systems and the rate at which parties select state law for contracts. Parties are expected to be less likely to designate the law of states with suspect civil justice systems. The Chamber of Commerce of the United States annually ranks state civil justice systems.[17] The Chamber provides several rankings, including an overall ranking of state liability systems. The Chamber's overall ranking is based on the scores for several topics,[18] including treatment of tort and contract litigation, judges' impartiality, judges' competence, juries' predictability, and juries' fairness.[19] In the overall ranking, Delaware ranks first, New York ranks 27th, and California ranks 45th. Based on the Chamber's views, which reinforce the view of Delaware has a well-regarded judiciary beyond the narrow boundaries of incorporation law, one expects Delaware to be a frequent choice of law and New York to lack strong appeal.

D. The New York Hypothesis

The story of Delaware's possible appeal and efforts to recruit corporations is well known. Less well-studied is New York's effort to induce parties to use its laws. Since at least the early nineteenth century New York State, and especially New York City, have

[17] *See, e.g.*, U.S. CHAMBER OF COM., STATE LIABILITY SYSTEMS RANKING STUDY: FINAL REPORT STUDY NO. 14966 (Jan. 2002), *available at* http://www.instituteforlegalreform.com/resources1012202.pdf [hereinafter U.S. CHAMBER OF COM., STATE RANKING]. The Chamber and other business groups use the Chamber's ranking studies to try and influence courts to restrict causes of action and constrain legal actions against the business community. *See, e.g.*, Brief of the Chamber of Commerce of the United States et al. as Amici Curiae in Support of Defendant-Appellant, Henry v. Dow Chem. Co., 701 N.W.2d 684 (Mich. 2005) (No. 125205); Amicus Curiae Brief of Wisconsin Manufacturers and Commerce, Wischer v. Mitsubishi Heavy Inds. Am., Inc., 673 N.W.2d 303 (Wisc. Ct. App. 2002) (No. 99-CV-6553). For prior use of the Chamber's ranking in empirical analysis, see Marcel Kahan, *The Demand for Corporate Law: Statutory Flexibility, Judicial Quality, or Takeover Protection?*, 22 J. LAW, ECON. & ORG. 340, 348 (2006)

[18] U.S. Chamber of Commerce, supra note 17, 8 n.1.

[19] *Id*. tbl.5 at 17–18. Other factors include treatment of class actions, punitive damages, timeliness of summary judgment or dismissal, discovery, and scientific and technical evidence. *Id*.

played a special role in the nation's commercial activity. New York has a keen awareness of the financial benefits of choice of law provisions and has cultivated its role as the choice of law for commercial matters through early efforts to promote enforceability of arbitration clauses, through legislation, and through the creation of specialized business courts. [20]

1. History

In the case of finance-related contracts, New York state law, largely due to the City of New York's commercial prominence, might be expected to have developed an early advantage for two reasons. First, the City has been an important commercial center at least since the Erie Canal, which linked the Buffalo-Albany corridor to the Atlantic Ocean via the Hudson River, gave the City's port facilities an outlet to the United States' expanding mid-western markets and created an efficient, internal New York State system of navigation. The Canal opened in 1825 and by 1840 New York City's growth had expanded dramatically compared to other large cities. In the 1830 Census, New York had a population of about 203,000 compared to about 80,000 in each of Baltimore and Philadelphia; by the 1840 Census, New York's population had grown to about 313,000 while Baltimore had grown to about 102,000 and Philadelphia to about 94,000..[21] As the leading commercial center for most of U.S. history, many sizeable contracts were formed and performed in New York. This made the choice of New York law a natural one for

[20] Miller and Eisenberg, Market for Contracts, supra note 8.

[21] Campbell Gibson, U.S.Census Bureau, Population of the 100 Largest Cities and Other Urban Places in the United States: 1790 to 1990 (Population Division Working Paper No. 27, June 1998), available at http://www.census.gov/population/www/documentation/twps0027.html#urban (tbls. 6, 7), accessed Dec. 26, 2007. New York City's relative growth rate from 1820 to 1830 was also impressive. The 1820 Census reports a New York City population of about 124,000 compared to about 64,000 for Philadelphia and 63,000 for Baltimore. Id. (tbl. 5).

many substantial contracts. New York commercial law thus likely matured more quickly than that of other states.

2. New York's Courting of Commercial Contracts

Second, New York has openly sought to be an adjudication center for substantial business arrangements. But that goal was not fully achievable until relatively recently. The efficacy of seeking to be a preferred choice of law depended on developments beyond any particular state's control. As discussed elsewhere,[22] throughout much of American history, an open market for contracts was impracticable. Courts often refused to enforce choice of law clauses and, even if the courts enforced them, the clauses conferred limited benefits. The chosen law had to have a reasonable relationship with the contract itself. Parties were de facto limited to the place of contracting or the place of performance.[23] Some regarded choice of law clauses as impermissible attempts by private parties to displace state power.[24] Even fuller enforcement of choice of law terms would not necessarily have led to contracts being governed by the designated substantive law. Conflict of laws rules sought to impose clear standards for identifying the substantive law to be applied in contract cases and different courts' application of choice of law rules was reasonably likely to result in applying the same state's substantive law.[25]

[22] Miller & Eisenberg, Market for Contracts, supra note 8..
[23] See Joseph Beale, What Law Governs the Validity of a Contract: III. Theoretical and Practical Criticisms of the Authorities, 23 Harv. L. Rev. 260, 262 (1910).
[24] Id. at 260.
[25] Miller & Eisenberg, Market for Contracts, supra note 8. Even if conflict of law principles would select different laws the effect was likely to be slight. The prevailing view of contract law a body of generally-applicable principles enhanced interstate uniformity. See Lawrence M. Friedman, Contract Law in America 24, 186 (1965); 1 Samuel Williston, The Law of Contracts iii (1st ed. 1920) (deeming it desirable "to treat the subject of contracts as a whole, and to show the wide range of application of its principles.")

Swift v. Tyson's[26] requirement that federal courts apply a uniform general common law in diversity cases further limited the effect of contractually specifying a choice of law.

The decline of general common law after *Erie RR v. Tompkins*,[27] the expansion of personal jurisdiction embodied in *International Shoe v. Washington*,[28]and modern receptivity to choice of law clauses[29] have made choice of law provisions more effective. New York State was an early leader in legislating to promote use of its law and courts. As the early leading venue for commercial arbitration, New York's arbitration business was hampered by the legal doctrine that arbitration agreements were revocable at will and not specifically enforceable in court. Case law suggested that New York courts were not going to enforce arbitration clauses that faced revocation.[30] Avoiding the revocability of arbitration agreements required legislation. The New York business community and attorneys persuaded the New York legislature to repeal the rule of revocability in 1920,[31] and the provision survived a constitutional challenge.[32] Diversity litigation in federal court could still avoid arbitration through the revocability rule. The New York arbitration advocates sought enactment of a federal law,[33] leading to passage of the Federal Arbitration Act of 1925,[34] which requires federal courts to enforce pre-dispute arbitration agreements.

New York's efforts to attract commercial legal business have continued by seeking to assure that contractual designation of New York law will be respected. A

[26] 41 U.S. 1 (1842).
[27] 304 U.S. 64 (1938).
[28] 326 U.S. 310 (1945).
[29] Restatement (Second) of Conflicts of Laws §§ 6(2)(d), 187; See U.C.C. § 1-105 (1) (1999).
[30] Miller & Eisenberg, Market for Contracts, supra note 8.
[31] 1920 N.Y. Laws, Ch. 275.
[32] Berkovitz v. Arbib & Houlberg, Inc., 130 N.E. 288 (N.Y. 1921).
[33] Miller & Eisenberg, Market for Contracts, supra note 8.
[34] Codified at 9 U.S.C. §§ 1-16.

contract may bear a reasonable relationship to New York merely because of the parties' decision to select New York law.[35] New York courts in commercial cases narrowly apply the principle allowing rejection of the parties' choice of law may if it violates public policy.[36] "Thus contracts selecting New York law appear to be immune from public policy challenge in New York. . . . Overall, therefore, it appears that choices of law in commercial cases will receive nearly absolute respect in New York courts."[37] And, while most states now also generally enforce choice of law clauses, they tend to articulate less protective rules than New York.[38]

New York has also tried to reduce contracting parties' doubts that judicially created exceptions might preclude application of its law in commercial contracts. The Association of the Bar of the City of New York has noted that questions about the enforceability of New York choice of law and forum selection clauses could deter parties from selecting New York law or forum,[39] and therefore recommended that "parties to significant commercial contracts should be encouraged to submit to the jurisdiction of the New York courts and to choose New York law as their governing law."[40] The New York legislature adopted the committee's recommendations by enacting in 1984 a law that the parties to any contract for more than two hundred fifty thousand dollars may

[35] Cf. Mechanic v. Princeton Ski Shop, Inc., 1992 U.S. Dist. LEXIS 19979, 1992 WL 397576, at *3 (S.D.N.Y. 1992) (the parties' decision to select a particular law to govern their contract is given "heavy weight" in determining the jurisdiction with the most significant contacts with a transaction).
[36] In applying this exception New York courts appear to consider the public policy of New York only. Home Ins. Co. v. Appleton Papers, Inc., 2002 WL 22024 (S.D.N.Y. 2002). But see, e.g., DCMR v. Trident Precision Mfg., 317 F.Supp.2d 220 (W.D.N.Y. 2004) (fundamental policy of a jurisdiction other than New York may provide a basis for New York courts refusing to enforce a choice of law clause).
[37] Miller & Eisenberg, Market for Contracts, supra note 8.; See Hackett v. Milbank, Tweed, Hadley & McCloy, 86 N.Y.2d 146, 154, 654 N.E.2d 95, 100, 630 N.Y.S.2d 274, 279 (1995).
[38] Miller & Eisenberg, Market for Contracts, supra note 8.
[39] Committee on Foreign and Comparative Law, Proposal for Mandatory Enforcement of Governing-Law Clauses and Related Clauses in Significant Commercial Agreements, 38 Record of the Association of the Bar of the City of New York 537, 538 (1983).
[40] Id. at 549.

"agree that the law of [New York] shall govern their rights and duties in whole or in part, whether or not such contract . . . bears a reasonable relation to this state."[41] Furthermore, any person may sue a foreign party in New York courts where the lawsuit relates to any contract for more than a million dollars for which a choice of New York law has been made and which contains a provision submitting to New York jurisdiction.[42] Parties to major commercial contracts thus seem assured that New York courts will respect clauses selecting New York as the law, regardless of whether the parties have New York State connections.

3. New York's Effort to Supply High Quality Business Courts

Unpredictable courts would undermine New York's campaign to attract contracts. Courts that are positively perceived by the commercial community obviously enhance a state's effort to be a contractually designated choice of law. Highly regarded courts also should promote those courts' designation as a contractually designated forums.

One theory of Delaware's success in the market for corporate charters is that the Delaware courts, and especially the Delaware Chancery Court, offer expert, prompt, and reliable judicial services for adjudicating corporate disputes.[43] New York and other states compete for litigation and forum selection clauses by offering attractive judicial services to major commercial parties.[44]

Because of their location in the nation's most important commercial city and their substantial commercial experience, state and federal courts in Manhattan enjoy a natural advantage as preferred forums for the adjudicating business disputes. But New York

[41] General Obligations Law § 5-1401.
[42] General Obligations Law § 5-1402.
[43] See, e.g., Roberta Romano, The Genius of American Corporate Law 39-40 (1993); Marcel Kahan & Ehud Kamar, The Myth of State Competition in Corporate Law, 55 Stan. L. Rev. 679, 708 (2002).
[44] Miller & Eisenberg, Market for Contracts, supra note 8.

courts have sometimes suffered in perceived expertise in business matters in comparison to Delaware's highly regarded Chancery Court's experience and reputation.[45] And New York courts' docketing practices have led to dissatisfaction with the quality and efficiency of case processing.[46] In 1993 the state instituted a pilot commercial court program in the New York County (Manhattan) Supreme Court to address inefficiencies.[47] The state established a permanent Commercial Division of the Supreme Court in 1995,[48] which enlisted judges and court personnel who were experienced in business law,[49] implemented new case management techniques, and offered enhanced opportunities for court-annexed alternative dispute resolution.[50] Chief Judge Judith Kaye explained that the purpose of the commercial division is to give the New York business community a level of judicial service "commensurate with its status as the world financial capital."[51] Early indications are that the commercial division is achieving some success, and other states are following New York's lead in creating commercial courts.[52]

4. New York's Substantive Law

[45] Romano, Genius, supra note ; See Geoffrey P. Miller, Bad Judges, 83 Texas L. Rev. 431 (2004) (Brooklyn Democratic Party leadership reportedly sold judgeships for $50,000, with the bribes being distributed up and down the party food chain, and describing alleged pattern of systematic criminality, favoritism and malfeasance in the Brooklyn, New York court system).
[46] Miller & Eisenberg, Market for Contracts, supra note 8.
[47] The program designated a single judge for assignment to all aspects of a case, thus eliminating the revolving-door approach to judicial assignments that had characterized the New York system. Mitchell L. Bach & Lee Applebaum, A History of the Creation and Jurisdiction of Business Courts in the Last Decade, 60 Bus. Lawy. 147, 152 (2004).
[48] See Daniel Wise, Supreme Court Commercial Division Set Up: Crane, Rochester's Stander Added to Handle Disputes, N.Y.L.J. (Oct. 11, 1995). For a comprehensive account of the creation of this and other business courts, see Bach & Applebaum, supra note 47.
[49] The judges assigned to the commercial division serve fourteen year terms and are selected by the Chief Judge, and thus can be picked for their business law experience. See Bach & Applebaum, supra note 47, at 159.
[50] Id.
[51] Wise, supra note 48 (internal quotation omitted).
[52] Miller & Eisenberg, Market for Contracts, supra note 8.

New York courts and lawmakers also seek to provide legal rules that are attractive to financial contracts. These include limitations on lender liability,[53] accelerated consideration of actions "based upon an instrument for the payment of money only,"[54] and recognition in July 1997 of the Euro as a commercially reasonable substitute for the currency designated in pre-Euro contracts.[55] In the area of traded financial contracts, New York in 1994 revised its Statute of Frauds requirement that contracts had to be signed by the party to be bound to establish enforceable obligations[56] to provide alternative means for establishing the enforceability of agreements for the purchase and sale of currencies, commodities, foreign exchange, deposits and options, indexes and similar instruments.[57]

Based on (1) the natural tendency for contracts to specify a law that has been substantially developed, (2) New York's history as the commercial center of the United States, and (3) New York's open campaign to induce commercial contracts to designate New York law, one reasonable hypothesis is that major commercial contracts will tend to designate New York law.

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[53] Lesavoy v. Lane, 304 F.Supp.2d 520, 524 (S.D.N.Y. 2004); In re Sharp International Corporation, 403 F.3d 43, 54 (2d Cir. 2005); In re Global Service Group LLC, 36 B.R. 451 (S.D.N.Y. 2004). Paul Rubin, New Liability Under 'Deepening Insolvency' - The Search for Deep Pockets, 23 Am. Bankr. Inst. J. 50 (April 2004); Jonathan Landers, Deepening Insolvency Comes of Age, N.Y.L.J., Oct. 5, 2006.

[54] New York Civil Practice Law and Rules § 3213.

[55] New York Gen. Obl. L. 5-1603. Illinois acted almost simultaneously with New York, 815 Ill. Comp. Stat. Ann. 617, and several other states soon followed suit. See James H. Fries, Jr., Continuity of Contracts after the Introduction of the Euro: The United States Response to European Economic and Monetary Union, 53 Bus. Lawy. 701 (1998).

[56] See Denis M. Forster, Comment: Standard Swaps Agreements Don't Insulate Users from Risk, 159 Am. Banker 20 (June 13, 1994).

[57] New York General Obligations Law § 5-701. New York expanded the provision in 2002 to include institutional sales of commercial loans by means of telephone or oral communications. See letter from New York Bankers Association to Honorable James M. McGuire, Counsel to the Governor, July 3, 2002, in New York Bill Jacket, 2002 Senate Bill 5669, 225th Legislature, 2002 Regular Session.

III. The Data[58]

The data consist of twelve types of contracts contained as exhibits to Form 8-K "current report" filings with the Securities and Exchange Commission (SEC) for several months in 2002, plus a miscellaneous category of contracts designed as "other". Form 8-K must be filed by reporting firms to disclose certain material corporate events or changes that have not previously been reported by the company. For twelve contract categories, six months of contracts, covering the period January 1 to June 30, 2002, were studied. For merger contracts, the study covered a seven-month period from January 1 to July 31, 2002.[59] We searched all Form 8-K filings and the resulting sample consisted of 2,865 contracts with choice of law information.[60]

Cogent theoretical reasons exist for examining the agreements in this data set. Reporting firms have deemed all the transactions embodied in the agreements to be material. Because the contracts are important to the reporting firm's operations, we can assume that they receive some degree of care and attention during the negotiation and drafting phase, either from the reporting firm's employees or from outside counsel. Since the contracts that are written before disputes arise, one can be reasonably confident that the contracting parties did not systematically anticipate the nature of any dispute that might arise, and therefore would not know whether a choice of law or forum would help or hurt them in the event of a conflict. These characteristics suggest that the contract terms that we observe may represent reasonably efficient allocations of rights and duties

[58] The description of the data is based on Eisenberg & Miller, Jury Trial, supra note 7.
[59] The expanded period for merger contracts exploits our earlier detailed work on choice of law and choice of forum in merger contracts. Eisenberg & Miller, Mergers, supra note 7.
[60] The total number of contracts differs slightly from the total reported in earlier articles because (1) the key variable of interest for this analysis, choice of law, determined the number of contracts that could be analyzed, and (2) we omitted trust agreements from our analysis of jury trial waiver agreements.

among the parties, including the two choices made by the contracting parties that are studied here: the law picked to govern in the event of a dispute over the contract, and the forum selected for the adjudication or resolution of such a dispute.

The types and numbers of contracts studied are listed in Table 1, together with the number of contracts for which we had information about choice of law. Most of the contract types are self-explanatory. "Pooling and servicing" contracts are used in mortgage pass-through and other asset-backed securities arrangements; they represent agreements under which an owner transfers receivables to a trustee which holds title to and collects the income from the assets and passes the funds through to investors.[61]

Table 1. Types of Contracts Studied (number of contracts in parentheses)

Asset sale/purchase (323)	Other (465)
Bond indentures (155)	Pooling and servicing (173)
Credit commitments (217)	Securities purchase (461)
Employment (111)	Security agreements (37)
Licensing (48)	Settlements (72)
Mergers (412)	Trust agreements (48)
	Underwriting (352)

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts.

Securities purchase agreements were the most frequent contract type (excluding the residual category "Other") and accounted for 16.1 percent of the total of 2,865 contracts. Credit-related contracts—bond indentures, credit commitments, pooling and servicing agreements, and security agreements—accounted for about another 20 percent of the contracts. Merger contracts were about 14 percent of the sample but note that they had one extra month of coverage in the data. Together, the contract types offer a

[61] E.g., Circuit City Credit Card Master Trust, Form 8-K, Exh. 4.2, Amended and Restated Master Pooling Service Agreement, Dated as of December 31, 2001, filed Jan. 31, 2002, Doc. No. 02523859, at 21-22. See generally Thomas E. Planck, The Security of Securitization and the Future of Security, 25 Cardozo L. Rev. 1655 (2004).

Trust agreements establish these trusts and define certain of their powers and responsibilities. E.g., First Consumers National Bank, Form 8-K, Exh. 4.3, Trust Agreement Between First Consumers Credit Corporation, as Seller, and Bankers Trust Company, as Owner Trustee, Dated as of March 1, 2001, and amended and restated as of December 31, 2001, filed Jan. 31, 2002, Doc. No. 02524022.

reasonably rich variety of relations. Several types, including the credit-related contracts and trust agreements, obviously involve substantial financial institutions. Others types, asset sale/purchase and merger contracts, involve corporate restructurings. Settlements involve resolution of disputes. Employment contracts offer insights into choice of law in agreements between key individual employees and large corporate employers.

IV. Choice of Law Results

This Part first reports the overall pattern of choice of law clauses in the data.[62] It then explores factors that might be associated with choice of law, including type of contract, place of business, place of incorporation, attorney locale, perception of state civil justice system fairness. Throughout, we note the results for New York and Delaware light of their efforts to attract law-related business.

A. The Overall Pattern of Choice of Law Clauses

[62] Choice of law provisions will generally be respected by courts in the United States provided that they are enforceable under ordinary contract principles. See, e.g., William J. Woodward, Finding The Contract In Contracts For Law, Forum And Arbitration, 2 Hastings Bus. L.J. 1 (2006). There may be a limited exception for matters going to the internal affairs of corporations, where courts may reject the selection of a law other than the law of the state of incorporation. See Sokol v. Ventures Educ. Systems Corp. 10 Misc.3d 1055(A), Slip Copy, at **4, 2005 WL 3249447 (Table) (N.Y. Sup Ct.. June 27, 2005) ("Under New York law, the law of the incorporating state has traditionally been applied to the internal affairs of a foreign corporation."). A state may also refuse to enforce a choice-of-law provision if the contract bears no reasonable relationship to the state whose law is selected of if application of the law chosen would contravene an important policy of another (usually the forum) state. See Restatement (Second) Of Conflict Of Laws § 187(2) (1971) (amended 1989) ("[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.") A number of states – New York being a prime example – provide assurances that for significant commercial contracts of the sort contained in our data set, New York courts will respect a forum selection clause selecting New York law despite the lack of contacts with the state. Eisenberg & Miller, Market for Contracts, supra note 8. Even in the unusual cases where there is doubt about enforceability, the parties' decision to opt for a particular state's law presumably reflects their judgment about the rules that they prefer to govern disputes under the contract.

Table 2 shows the basic pattern of choice of law by locale. New York's dominance is striking. It is the choice of law in approximately 46 percent of contracts. New York's share rises to over 50 percent if one excludes the merger contracts in which Delaware dominates by being the choice of law in over one-third of the agreements. With respect to all contract types combined, Delaware is a distant second with about 15 percent. After Delaware, no state accounts for even ten percent of the choices of law and only California even exceeds five percent.

Table 2. Distribution of Choice of Law Locales

Locale	Number of contracts	Percent of Contracts	Locale	Number of contracts	Percent of contracts
AZ	16	0.56	NC	11	0.38
CA	219	7.64	NJ	27	0.94
CAN	30	1.05	NV	67	2.34
CO	45	1.57	NY	1309	45.69
CT	7	0.24	OH	36	1.26
DE	418	14.59	Other	215	7.50
FL	97	3.39	PA	37	1.29
GA	30	1.05	TX	96	3.35
IL	71	2.48	UT	17	0.59
MA	55	1.92	VA	21	0.73
MD	17	0.59	WA	24	0.84
			Total	2865	100.00

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 2002, and mergers Jan 2002 to July 2002.

New York's dominance suggests that both its commercial history and its longstanding efforts to attract commercial contracts have been successful. New York's dominance also supports the hypothesis that choices of law will tend to cluster around one or a few states because of the increased development of the law in those states.

B. Choice of Law by Contract Type

Table 3 shows that choice of law is strongly associated with contract type. It shows, for each contract type, the number and percent of contracts choosing a locale's law. For ease of presentation, we limit the output to four choices of law, Delaware, New York, California, and Other. Delaware dominates for one type of contract – trust

agreements. Thirty-nine of 48 trust agreements provided for Delaware law to govern. The dominance of Delaware for this specialized type of contract is apparently due to the advantages and flexibility which Delaware's business trust statute.[63] Other than trust agreements, however, the principal choice of law result is New York's dominance. Table 2 above shows that New York is the choice of law in almost half the contracts. Table 3 shows that this dominance extends across a broad range of contract types. New York law governs a higher proportion of contracts than either Delaware or California for ten of thirteen contract types.

New York's overall dominance eclipses Delaware's dominance as a choice of law in merger agreements. Delaware accounted for about 32 percent of the governing law clauses in merger agreements, with New York a distant second and California ranking third. When more contract types are considered, the pattern that emerges is even more lopsided towards New York as a choice of law.

Table 3. Choice of Law by Type of Contract

	Choice of law				
Contract type	DE	NY	CA	Other	Total
Asset sale purchase	32	82	30	179	323
Percent	9.91	25.39	9.29	55.42	100.00
Bond indentures	1	138	4	12	155
Percent	0.65	89.03	2.58	7.74	100.00
Credit commitments	6	105	9	97	217
Percent	2.76	48.39	4.15	44.70	100.00
Employment contracts	6	12	14	79	111
Percent	5.41	10.81	12.61	71.17	100.00
Licensing	5	10	8	26	49
Percent	10.20	20.41	16.33	53.06	100.00
Mergers	133	69	51	159	412
Percent	32.28	16.75	12.38	38.59	100.00
Other	89	185	42	152	468
Percent	19.02	39.53	8.97	32.48	100.00
Pooling service	17	149	0	7	173
Percent	9.83	86.13	0.00	4.05	100.00
Securities purchase	78	189	46	151	464

[63] See Robert H. Sitkoff, The Rise of the Statutory Business Trust (forthcoming). Sitkoff found that 1,517 statutory business trusts were formed in Delaware during 2002, by far the leading state for such formations. The closest competitor was Massachusetts, with 674 trusts being formed in that year.

Percent	16.81	40.73	9.91	32.54	100.00
Security agreements	0	22	3	12	37
Percent	0.00	59.46	8.11	32.43	100.00
Settlements	12	13	11	37	73
Percent	16.44	17.81	15.07	50.68	100.00
Trust agreements	39	7	0	2	48
Percent	81.25	14.58	0.00	4.17	100.00
Underwriting	0	328	1	23	352
Percent	0.00	93.18	0.28	6.53	100.00
Total	418	1,309	219	936	2,882
Percent	14.50	45.42	7.60	32.48	100.00

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 2002, and mergers Jan 2002 to July 2002.

Our earlier study of merger contracts demonstrated that although Delaware led all other states as a place of incorporation, choice of law, and litigation forum, once one accounted for Delaware as the place of incorporation, firms tended to flee Delaware as a choice of law and forum. This effect is more pronounced in the broader data base of contracts. Table 2 suggests that, across a broad range of contracts, the major pattern is not so much a flight from Delaware as it is the attraction of New York.

Table 3 shows three type of contracts, employment, licensing, and settlements, in which neither New York nor Delaware account for even 25 percent of the choices of law. None of these contract types falls within the core areas for which New York and Delaware have campaigned. New York's dominant thrust has been in the area of finance contracts. Table 3 suggests that it has been highly successful across several types of finance and credit contracts, despite Delaware's efforts to attract finance contracts.[64] New York's prominence is this area likely is reinforced by the location of large banks in New York. As lenders, they need not be the reporting firm for SEC purposes, but they may insist on New York law applying to loan agreements. Delaware's historic emphasis on attracting incorporations and its establishment of specialized trust legislation do not extend to the three contract types that escape its and New York's domination.

[64] 6 Del. Code 2702A (effort to keep asset backed securities transactions out of bankruptcy entanglements).

C. Choice of Law and State Contacts

In addition to contract type, one might expect a business's location to be associated with the contract's choice of law. Business location is associated with where events affecting a business might occur. Thus, the location of events influences choice of law and forum. Place of business is often associated with choice of law,[65] but they are not always the same.

Since contracts have at least two parties, most contracts can be associated with more than one business locale. For purposes of some analyses, however, it is helpful to associate a contract with a unique place of business. Designating a unique place of business for each contract requires considering the nature of the contract.[66] For example, for merger contracts, two places of business are plausible: that of the acquiring company and that of the acquired company. For merger and other contracts, when associating a contract with a single place of business we used what one would normally expect to be the dominant place of business. For example, for merger contracts, we used the acquiring company's place of business. Table 4's "First place of business" column shows the business locales chosen for 12 types of contracts. Because of the varied nature of the residual Other contracts category, we excluded such contracts from this analysis.

Other of our analyses below allow a contract to be associated with two parties' places of business. A second party's business locale is usually simply that of the second party to the contract. For a few contract categories, the second locale could be that of a substantive party or a trustee. Table 4's "Second place of business column" shows the second business locale chosen for 11 types of contracts. In the case of employment

[65] *See generally* Eisenberg & Miller, Mergers, *supra* note 7.

[66] This paragraph is based on Eisenberg & Miller, Arbitration, supra note 7.

contracts, the second party is an individual and we do not associate such contracts with a business locale other than that of the employer.

TABLE 4. PLACES OF BUSINESS BY CONTRACT TYPE

Contract type	First party's place of business	Second party's place of business
Asset sale purchase	Buyer's place of notice location	Seller's place of business
Bond indentures	Issuer's place of business	Indenture trustee's place of notice
Credit commitments	Principal lender's designated office	Borrower's place of business
Employment contracts	Employer's place of business	Not applicable
Licensing	Licensor's place of business	Licensee's place of business
Mergers	Acquiring company's place of business	Acquired company's place of business
Pooling service	Depositor's place of business	Servicer's place of business
Securities purchase	Issuer's place of business	Buyer's place of business
Security agreements	Registrant's place of business	Adversary's place of business
Settlements	Reporting company's place of business	Adversary's place of business
Trust agreements	Registrant's place of business	Adversary's place of business
Underwriting	Issuer's place of business	Lead underwriter's place of business

Source: SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 1, 2002 to June 30, 2002 for all contract types other than mergers and Jan. 1, 2002 to July 31, 2002 for merger contracts. Excludes contracts categorized as Other.

Table 5 reports the relation between the first place of business and choice of law. To keep the output manageable, we report results only for states that were the place of business or choice of law for a reasonable number of contracts. States with few contracts are included in the residual categories, "Other."

Table 5. First Party's Place of Business and Choice of Law

	Choice of law									
Place of business	CA	DE	FL	IL	MA	NV	NY	Other	TX	Total
CA	**129**	62	5	6	0	12	142	22	4	382
	33.77	16.23	1.31	1.57	0.00	3.14	37.17	5.76	1.05	100.00
DE	0	**16**	0	0	0	0	22	2	0	40
	0.00	**40.00**	0.00	0.00	0.00	0.00	55.00	5.00	0.00	100.00
FL	1	10	**51**	1	0	2	44	6	0	115
	0.87	8.70	**44.35**	0.87	0.00	1.74	38.26	5.22	0.00	100.00
IL	1	22	0	**32**	0	0	32	4	2	93
	1.08	23.66	0.00	**34.41**	0.00	0.00	34.41	4.30	2.15	100.00
MA	4	13	0	0	**31**	0	23	3	0	74
	5.41	17.57	0.00	0.00	**41.89**	0.00	31.08	4.05	0.00	100.00
NV	2	8	1	1	0	**10**	15	6	1	44
	4.55	18.18	2.27	2.27	0.00	**22.73**	34.09	13.64	2.27	100.00
NY	4	23	1	3	1	0	**233**	22	2	289
	1.38	7.96	0.35	1.04	0.35	0.00	**80.62**	7.61	0.69	100.00
Other	29	152	24	16	8	35	510	**380**	10	1,164
	2.49	13.06	2.06	1.37	0.69	3.01	43.81	**32.65**	0.86	100.00
TX	7	23	2	3	0	3	103	14	**58**	213
	3.29	10.80	0.94	1.41	0.00	1.41	48.36	6.57	**27.23**	100.00

Total	177	329	84	62	40	62	1,124	459	77	2,414
	7.33	13.63	3.48	2.57	1.66	2.57	46.56	19.01	3.19	100.00

Source: SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 1, 2002 to June 30, 2002 for all contract types other than mergers and Jan. 1, 2002 to July 31, 2002 for merger contracts. Excludes contracts categorized as Other.

Table 5's bold diagonal entries show a strong association between place of business and choice of law. Reading across the table's rows shows that, for every locale, the place of business ranks no lower than second as the choice of law. But rows the table also confirm the strong attraction of New York law. Only New York as the choice of law trumps the place of business as the choice of law. New York trumps the place of business for every state except Florida, where New York is the second choice, and Illinois, where New York ties Illinois for the number of choices of law.

One also expects a business's place of incorporation to be associated with a contract's choice of law. Place of incorporation sets the applicable law for most questions of corporate governance and establishes a corporation's connection to a state. Like place of business, place of incorporation is often associated with choice of law,[67] but they are not always the same.

Table 6 reports the relation between place of incorporation and choice of law. Again, to keep the output manageable, we report results only for states that were the place of incorporation or choice of law for a reasonable number of contracts. States with few contracts are included in the residual categories, "Other". The first place of incorporation for a contract is assigned using the same criteria described in Table 4. For example, in merger contracts, the acquiring company's place of incorporation is used.

Table 6. First Party's Place of Incorporation and Choice of Law

	Choice of law									
Place of incorporation	CA	DE	FL	IL	MA	NV	NY	Other	TX	Total

[67] *See generally* Eisenberg & Miller, Mergers, *supra* note 4.

CA	**44**	5	0	0	0	0	26	10	1	86
	51.16	5.81	0.00	0.00	0.00	0.00	30.23	11.63	1.16	100.00
DE	81	**246**	21	30	19	4	607	109	22	1,139
	7.11	**21.60**	1.84	2.63	1.67	0.35	53.29	9.57	1.93	100.00
FL	0	1	**32**	0	0	0	18	7	0	58
	0.00	1.72	**55.17**	0.00	0.00	0.00	31.03	12.07	0.00	100.00
IL	0	1	0	**5**	0	0	4	2	1	13
	0.00	7.69	0.00	**38.46**	0.00	0.00	30.77	15.38	7.69	100.00
MA	1	1	0	0	**8**	0	3	1	0	14
	7.14	7.14	0.00	0.00	**57.14**	0.00	21.43	7.14	0.00	100.00
NV	19	5	8	2	1	**36**	29	43	4	147
	12.93	3.40	5.44	1.36	0.68	**24.49**	19.73	29.25	2.72	100.00
NY	1	6	0	0	0	1	**63**	3	1	75
	1.33	8.00	0.00	0.00	0.00	1.33	**84.00**	4.00	1.33	100.00
Other	30	60	21	25	12	21	355	**281**	31	836
	3.59	7.18	2.51	2.99	1.44	2.51	42.46	**33.61**	3.71	100.00
TX	1	4	2	0	0	0	19	3	**17**	46
	2.17	8.70	4.35	0.00	0.00	0.00	41.30	6.52	**36.96**	100.00
Total	177	329	84	62	40	62	1,124	459	77	2,414
	7.33	13.63	3.48	2.57	1.66	2.57	46.56	19.01	3.19	100.00

Source: SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 1, 2002 to June 30, 2002 for all contract types other than mergers and Jan. 1, 2002 to July 31, 2002 for merger contracts. Excludes contracts categorized as Other.

Table 6's bold diagonal entries show a strong association between place of incorporation and choice of law. For every locale, the place of incorporation ranks either first or second as the choice of law. New York is again the most prominent choice of law outside the state of incorporation. Only New York as the choice of law trumps the place of incorporation as the choice of law, and it does so in Delaware and Texas. Otherwise New York is the second leading choice of law.

New York thus dominates as a choice of law for contracts with Delaware corporations but is not as dominant as a choice of law for contracts without Delaware corporations. Thus, if a company has decided not to incorporate in Delaware, that is also something of a signal that the company prefers its own state law over New York law.

Attorney locale while often associated with place of business, is also expected to be associated with a contract's choice of law. An attorney is familiar with the law of his or her own state and has an economic stake in that state's law applying.

Table 7 reports the relation between attorney locale and choice of law. Again, to keep the output manageable, we report results only for states that were the attorney locale or choice of law for a reasonable number of contracts. States with few contracts are included in the residual categories, "Other." Attorney locale for a contract is assigned using the same criteria described in Table 4.

Table 7. First Party's Attorney Locale and Choice of Law

	Choice of law									
Attorney locale	CA	DE	FL	IL	MA	NV	NY	Other	TX	Total
CA	**55**	46	4	1	0	6	57	12	1	182
	30.22	25.27	2.20	0.55	0.00	3.30	31.32	6.59	0.55	100.00
DE	0	**1**	0	0	0	0	1	0	0	2
	0.00	**50.00**	0.00	0.00	0.00	0.00	50.00	0.00	0.00	100.00
FL	0	3	**15**	0	1	2	6	2	2	31
	0.00	9.68	**48.39**	0.00	3.23	6.45	19.35	6.45	6.45	100.00
IL	1	20	1	**9**	2	0	13	4	1	51
	1.96	39.22	1.96	**17.65**	3.92	0.00	25.49	7.84	1.96	100.00
MA	2	12	1	0	**18**	0	17	5	0	55
	3.64	21.82	1.82	0.00	**32.73**	0.00	30.91	9.09	0.00	100.00
NV	0	1	0	1	0	**2**	1	0	0	5
	0.00	20.00	0.00	20.00	0.00	**40.00**	20.00	0.00	0.00	100.00
NY	2	40	12	5	2	0	**183**	24	1	269
	0.74	14.87	4.46	1.86	0.74	0.00	**68.03**	8.92	0.37	100.00
Other	116	194	51	44	17	52	794	**405**	56	1,729
	6.71	11.22	2.95	2.54	0.98	3.01	45.92	**23.42**	3.24	100.00
TX	1	12	0	2	0	0	52	7	**16**	90
	1.11	13.33	0.00	2.22	0.00	0.00	57.78	7.78	**17.78**	100.00
Total	177	329	84	62	40	62	1,124	459	77	2,414
	7.33	13.63	3.48	2.57	1.66	2.57	46.56	19.01	3.19	100.00

Source: SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 1, 2002 to June 30, 2002 for all contract types other than mergers and Jan. 1, 2002 to July 31, 2002 for merger contracts. Excludes contracts categorized as Other.

Table 7's bold diagonal entries show a strong association between attorney locale and choice of law. For every locale, the place of incorporation ranks no lower than third as the choice of law. New York is the most prominent choice of law outside the attorney locale; it always ranks first or second.

Table 8 provides a summary perspective of the relations between choice of law and (1) business locale, (2) place of incorporation, and (3) attorney locale. It shows the

distributions by state of these attributes, as well as contract type, that might be expected to be associated with the choice of law pattern.

Table 8. Distribution by Locale of: Reporting Firm's Place of Business and Incorporation and Attorney's Place of Business

	Reporting firm place of business		Reporting firm place of incorporation		Reporting firm's attorney's place of business	
	N	%	N	%	N	%
AZ	32	1.33	9	0.37	10	0.41
CA	382	15.82	86	3.56	182	7.54
CAN	39	1.62	20	0.83	7	0.29
CO	52	2.15	30	1.24	27	1.12
CT	44	1.82	3	0.12	3	0.12
DE	40	1.66	1139	47.18	2	0.08
FL	115	4.76	58	2.40	31	1.28
GA	42	1.74	15	0.62	36	1.49
IL	93	3.85	13	0.54	51	2.11
MA	74	3.07	14	0.58	55	2.28
MD	47	1.95	87	3.60	15	0.62
NC	53	2.20	16	0.66	11	0.46
NJ	82	3.40	15	0.62	16	0.66
NV	44	1.82	147	6.09	5	0.21
NY	289	11.97	75	3.11	269	11.14
OH	40	1.66	21	0.87	13	0.54
Other	528	21.87	525	21.75	1497	62.01
PA	76	3.15	31	1.28	50	2.07
TX	213	8.82	46	1.91	90	3.73
UT	31	1.28	21	0.87	14	0.58
VA	57	2.36	26	1.08	14	0.58
WA	41	1.70	17	0.70	16	0.66
Total	2414	100.00	2414	100.00	2414	100.00

Source: SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 1, 2002 to June 30, 2002 for all contract types other than mergers and Jan. 1, 2002 to July 31, 2002 for merger contracts. Excludes contracts categorized as Other.

Table 8 establishes that New York's choice of law dominance likely does not stem from contract-specific contacts with New York. New York accounts for only about 12 percent of the reporting firms' places of business, three percent of the reporting firms' places of incorporation, and eleven percent of the attorney locales. Yet Table 2 shows that it accounts for about 46 percent of the choices of law. If place of business dictated choice of law, then California, with almost 16 percent of the places of business, would be

far more prominent as a choice of law. Yet Table 2 shows that California accounts for less than eight percent of the choices of law.

Tables 6 and 8 confirm Delaware's dominance as a place of incorporation for publicly held firms. Delaware is the reporting firm's state of incorporation for approximately 47 percent of agreements. Other than Delaware, only Nevada achieves even a five percent share of the reporting firm-incorporation market. Large or commercially prominent states, California, New York, and Texas, have miniscule shares of the incorporation market but substantial or nontrivial shares of the reporting firms' places of business. Delaware's attraction is thus not a function of where companies do substantial business. Delaware is the "Reporting firm place of business" for less than two percent of firms. Here California and New York are more dominant, with Texas third. If place of incorporation dictated choice of law, then Delaware's percent of the incorporations would lead it to dominate the choice of law pattern instead of New York.

We were able to identify attorney addresses for approximately 38 percent of the contracts. New York accounted for 11 percent of the attorney locales, or about 29 percent of the known attorney locales. Even if the 68 percent of unknown attorney locales were distributed in the same pattern as the known locales, New York's choice of law share would far outstrip its core contacts with the contracts.

One can assess the degree to which New York and other states attract choices of law without having core contacts with the contract. How often do contracts designate a choice of law other than the reporting firm's place of business, the reporting firm's place of incorporation, or the reporting firm's attorney's locale? To explore this, we construct a dummy "match" variable equal to one if the contract's choice of law matches any of the

three core characteristics: the reporting firm's place of business, the reporting firm's place of incorporation, or the reporting firm's attorney's locale. The variable equals zero if the contract's choice of law matches none of the three characteristics. A second match dummy variable counts as a match all contracts for which the first match variable equals one and adds as matches contracts in which the choice of law matches the place of business or place of incorporation of the second party to the contract, as designated in Table 4. Table 9 presents the results for both matching dummy variables. Columns (1) and (2) report results for the first match variable; columns (3) and (4) report results for the expanded match variable.

Table 9. Percent of Choices of Law That Match
Place of Business, Place of Incorporation, or Attorney's Locale

	Contracts that match reporting firm's place of business or incorporation, or attorney's locale		Contracts that match reporting firm's place of business or incorporation, attorney's locale, or second party's place of business or incorporation	
	Number of contracts	Percent	Number of contracts	Percent
	(1)	(2)	(3)	(4)
AZ	12	66.7	13	92.3
CA	162	82.7	163	93.3
CO	34	70.6	34	94.1
CT	5	60.0	5	80.0
DE	321	78.2	327	94.2
FL	77	75.3	80	91.3
GA	20	75.0	20	95.0
IL	54	64.8	57	80.7
MA	36	88.9	37	91.9
MD	16	62.5	16	93.8
NC	8	62.5	8	62.5
NJ	18	77.8	18	100.0
NV	60	61.7	62	93.5
NY	1072	33.5	1076	61.5
OH	26	57.7	28	89.3
Other	172	98.3	173	99.4
PA	32	87.5	32	96.9
TX	63	84.1	67	92.5
UT	15	93.3	15	93.3
VA	17	70.6	17	100.0
WA	16	93.8	16	93.8
Total	2236	57.7	2264	78.4

Source: SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 1, 2002 to June 30, 2002 for all contract types other than mergers and Jan. 1, 2002 to July 31, 2002 for merger contracts. Excludes contracts categorized as Other.

The table shows New York's distinction in having by far the lowest rate of contracts that designate it as a choice of law that have a core contact with the state. Using the first match variable (columns (1) and (2)), New York's 34 percent rate is followed by Ohio's 58 percent rate but Ohio has only 26 choices of law. The vast majority of contracts that designate a choice of law lacking a core contact do so because they designate New York or Delaware law. Overall 92.4 percent of the contracts designate a state law that has a core contact, designate New York law, or designate Delaware law. This result is not sensitive to the inclusion of contracts with non U.S. parties. Excluding them increases the 92.4 percent to 93 percent.

The expanded match variable reported in columns (3) and (4) confirms the pattern even after accounting for second party business and incorporation contacts with a state. New York's match rate is 61.5 percent, well below the overall match rate of 78.4 percent, and New York remains the state with the highest rate of contracts specifying its law that lack a measurable contact with the state. The great majority of states have chosen-state contacts for over 90 percent of the contracts selecting their law.

D. Choice of Law and Rating of State Civil Liability Systems

As noted above, of the three states with the most choices of law, the Chamber of Commerce ranks the civil liability system of Delaware to be by far the best—number one of all the states—New York ranks below the median state, and California ranks near the bottom. The Chamber's members' actual contracting behavior is not consistent with the survey rankings. In fact, outside the area of mergers and specialized trust agreements, large public corporations choose New York law the most, California law next, and

Delaware law the least. The Chamber's members' concerns about New York and California likely reflect perceptions about court systems when a large corporation is litigating against private individuals in, for example, a tort case. A possible explanation for the patterns observed in the Chamber's survey and in corporate contracting behavior is that large corporations perceive New York's civil justice system to be near the best in matters of contract law, but below the median state in other matters that survey respondents focus on when responding to the survey. Given the Chamber's use of the survey in litigation,[68] the survey appears to be used to support tort reform but is otherwise often ignored in the actual behavior of large corporations.

E. Choice of Law Regression Model

The previous subsections separately assess the relationship between choice of law and (1) contract type, (2) place of business, (3) place of incorporation, and (4) attorney locale. The principal result is New York's dominance as a choice of law. We therefore further explore in regression models the factors associated with designating New York as the choice of law as a simultaneous function of the above characteristics. We exclude the Chamber of Commerce rankings because they so clearly do not explain the pattern of choice of law.

Each model in Table 10 is a logistic regression model in which the dependent variable equals one if New York is the choice of law and otherwise equals zero. The models exclude contracts of type "Other." Model (1) contains dummy variables for each contract type, with merger contracts as the reference category. Model (2) adds dummy variables for the dominant place of incorporation. Model (3) adds dummy variables for the dominant place of business, and model (4) adds dummy variables for the attorney

[68] Note 17 supra.

locale. Model (5) add dummy variables for second contracting party places of business and incorporation.

TABLE 10. LOGISTIC REGRESSION MODELS OF NEW YORK AS CHOICE OF LAW

	(1)	(2)	(3)	(4)	(5)
	Dependent variable = NY choice of law				
Asset sale purchase	0.526**	0.477*	0.455*	0.436*	0.456*
	(2.86)	(2.54)	(2.41)	(2.26)	(2.33)
Bond indentures	3.698**	3.687**	3.732**	3.706**	3.584**
	(12.80)	(12.82)	(12.68)	(12.39)	(11.87)
Credit commitments	1.539**	1.335**	1.307**	1.275**	1.341**
	(8.13)	(6.80)	(6.61)	(6.27)	(6.33)
Employment contracts	-0.507	-0.547+	-0.571+	-0.598+	-0.704*
	(1.52)	(1.65)	(1.72)	(1.78)	(2.09)
Licensing	0.243	0.261	0.260	0.216	0.191
	(0.64)	(0.68)	(0.68)	(0.56)	(0.48)
Pooling service	3.430**	3.431**	3.400**	3.362**	3.417**
	(13.37)	(13.19)	(12.96)	(12.43)	(11.72)
Securities purchase	1.229**	1.231**	1.251**	1.237**	1.254**
	(7.57)	(7.41)	(7.52)	(7.28)	(7.30)
Security agreements	1.987**	1.807**	1.876**	1.904**	1.881*
	(5.52)	(4.75)	(5.06)	(5.11)	(4.83)
Settlements	0.074	-0.072	-0.043	-0.057	-0.135
	(0.22)	(0.21)	(0.13)	(0.16)	(0.38)
Trust agreements	-0.164	-0.278	-0.287	-0.326	-0.458
	(0.38)	(0.61)	(0.64)	(0.72)	(0.95)
Underwriting	4.219**	4.184**	4.210**	4.182**	4.088**
	(16.92)	(16.44)	(16.14)	(15.79)	(15.29)
CA corp.		-0.931**	-0.745*	-0.749*	-0.590+
		(3.31)	(2.50)	(2.51)	(1.82)
MD corp.		0.352	0.333	0.360	0.435
		(1.00)	(0.95)	(1.02)	(1.20)
NV corp.		-0.735**	-0.710**	-0.728**	-0.575*
		(2.81)	(2.72)	(2.79)	(2.12)
NY corp.		2.228**	2.175**	2.160**	1.941**
		(6.37)	(6.19)	(6.13)	(5.38)
CA business			-0.346*	-0.356*	-0.332*
			(2.38)	(2.26)	(2.00)
FL business			-0.258	-0.293	-0.066
			(1.06)	(1.22)	(0.27)
TX business			-0.412*	-0.545**	-0.399*
			(2.37)	(2.89)	(2.00)
CA attorney				-0.039	-0.009
				(0.18)	(0.04)
IL attorney				-0.809*	-0.855*
				(2.30)	(2.43)
MA attorney				-0.593	-0.655+
				(1.57)	(1.69)
PA attorney				0.072	0.095
				(0.20)	(0.26)
TX attorney				0.485+	0.611*
				(1.82)	(2.25)
Constant	-1.604**	-1.569**	-1.475**	-1.428**	-1.360**
	(12.15)	(11.40)	(10.35)	(9.30)	(8.65)

Observations	2414	2414	2414	2414	2414

Robust z statistics in parentheses

+ significant at 10%; * significant at 5%; ** significant at 1%

Note. Model (5) includes, but we do not report here, dummy variables for second contracting party places of business and incorporation. Source: SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 1, 2002 to June 30, 2002 for all contract types other than mergers and Jan. 1, 2002 to July 31, 2002 for merger contracts. Excludes contracts categorized as Other.

The regression models confirm that, compared to the reference category of merger contracts, New York law is chosen significantly more often for all contract types other than employment, licensing, settlements, and trust contracts. Incorporation in New York is significantly associated with New York as the choice of law compared to the reference category of Delaware incorporation. California or Nevada incorporation are significantly associated with not selecting New York law. California, Florida, and Texas as a place of business are negatively associated with New York as a choice of law compared to New York as a place of business, the reference category. The results for California and Texas are statistically significant. An Illinois attorney being associated with the contract is significantly associated with not choosing New York law, compared to New York attorneys, the reference category.[69] Results do not materially change in model (5), which includes variables for second contracting party places of business and incorporation.

V. Choice of Forum Results

We now report results for forum selection clauses.[70] As in the case of choice of law clauses, we first present the basic pattern and then provide more complex analyses.

[69] Additional models could plausibly explore multiple choice of law outcomes using multinomial logistic regression. Because of New York's dominance, we limit our analysis to when New York law is designated and avoid the complexity of reporting and interpreting multinomial logit models.

[70] Like choice of law clauses, forum selection clauses are ordinarily enforced in courts of the United States. See, e.g., Woodward, supra note 62; Restatement (Second) of Conflict of Laws § 80 (1989) ("The parties' agreement as to the place of the action will be given effect unless it is unfair or unreasonable"). But the enforceability of these clauses probably remains less certain than the enforceability of choice of law

Because the dominant result with respect to choice of forum is that most contracts fail to designate a forum, we model the decision to specify a forum. When a forum is specified, it overwhelmingly corresponds with a contract's choice of law. We therefore model when a forum specification does not match a contract's choice of law.

A. Basic Pattern

Table 11 summarizes the distribution of choice of forum clauses. The most prominent feature is the absence of forum clauses in 61 percent of the contracts. The most frequent state is New York, with 16 percent of the 62contracts. Of the 39 percent of contracts designating a forum, New York accounts for 41 percent of the selections, with Delaware a distant second, accounting for 11 percent of the clauses.

Table 11. Choices of Forum

Forum	N	Percent of all contracts	Percent of those contracts specifying a forum
CA	73	2.53	6.51
CO	19	0.66	1.69
DE	121	4.20	10.79
FL	44	1.53	3.93
IL	37	1.28	3.30
MA	26	0.90	2.32
NV	17	0.59	2.52
NY	462	16.03	41.21
OH	22	0.76	1.96
TX	48	1.67	4.28
VA	15	0.52	1.34
Bankruptcy Court	23	0.80	2.05
No forum specified	1761	61.10	-
Other	170	5.90	15.17
Foreign forum	44	1.53	3.93

clauses. State courts sometimes refuse to respect contractual agreements to litigate disputes in another forum in contexts where the subject of the litigation is deemed to have an important connection with the non-chosen forum. See [citations.] Conversely, a state court may employ a doctrine of *forum non conveniens* to refuse to accept its designation by the contracting parties as the forum for resolving a dispute, in contexts where the court concludes that the relevant contacts are much stronger with some other forum. Citations. Some states – New York being an example – provide assurances to parties in major commercial contracts that their courts will not turn away cases on *forum non conveniens* grounds. [Citation.] Federal courts are highly receptive to forum selection clauses. The Bremen v. Zapata Off-Shore Co., 401 U.S. 1 (1972); Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991). Federal courts may transfer cases to the federal court selected by the parties even if state courts where the federal court sits would reject the forum selection clause. [Citations.]

Total	2882	100.00	100.00

Source: SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 1, 2002 to June 30, 2002 for all contract types other than mergers and Jan. 1, 2002 to July 31, 2002 for merger contracts.

As in the case of choice of law clauses, a significant difference exists between the broader data base and the merger contracts studied in our previous work.[71] Our earlier study found that Delaware lead as a litigation forum choice for merger agreements, with New York being selected as a forum only about two-thirds as often and California being selected about half as often. No other state approached these three in frequency of forum selection. When the full data set of contracts is considered, a different pattern emerges. As shown in Table 6, New York dominates, Delaware is selected at about one-quarter the New York rate, and California is specified at about one-sixth the New York rate.

The pattern of choice of forum is largely explained by choice of law. The forum selected is usually the same as the state whose law is specified to govern the dispute. The relationship between choice of law and forum selection clauses is shown in Table 12. Table 12 reduces the geographical units to Delaware, New York, California and Other. As before, all places of incorporation or choices of law other than Delaware, New York, and California are coded as Other. The sample in Table 12 excludes contracts that do not designate a forum or that designate a bankruptcy forum. The table's boldface diagonal entries indicate that the forum chosen is overwhelmingly the same as the law chosen. For contracts designating New York law that designate a forum, over 95 percent designate a New York forum.

Table 12. Choice of Law and Choice of Forum

	Choice of forum				
Choice of law	DE	NY	CA	Other	Total
DE	**110**	16	4	29	159
	69.18	10.06	2.52	18.24	100.00

[71] Eisenberg & Miller, supra note 4.

NY	7	**439**	3	7	456
	1.54	**96.27**	0.66	1.54	100.00
CA	1	2	**64**	23	90
	1.11	2.22	**71.11**	25.56	100.00
Other	3	5	2	**383**	393
	0.76	1.27	0.51	**97.46**	100.00
Total	121	462	73	442	1,098
	11.02	42.08	6.65	40.26	100.00

Source: SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 1, 2002 to June 30, 2002 for all contract types other than mergers and Jan. 1, 2002 to July 31, 2002 for merger contracts. Sample limited to contracts that specify a choice of forum.

Table 12 also indicates a further flight from Delaware. Parties who choose Delaware law are less likely to choose Delaware as a forum than parties who choose non-Delaware law are to choose their choice of law as choice of forum. While 159 contracts that designated a forum selected Delaware law, only 121 contracts designated Delaware as the forum. And only 69 percent of the contracts that choose Delaware law also choose Delaware as the fourm. New York shows a slight increase in forum designations over choice of law, with 456 choices of law and 462 designations as forum. California, like Delaware has fewer forum designations than choices of law.

B. The Decision to Designate a Forum

Since most contracts do not specify a forum, and since contracts overwhelmingly specify the place of choice of law as the choice of forum, the decision to specify a forum is central to assessing the observed choice of form pattern. For example, while New York dominates as a choice of law and forum, it is not the leader in the rate at which contracts specify a forum. Table 13 shows the relation between choice of law and the rate of forum specification.

Table 13. Choice of Law and Specification of a Forum

Choice of law	No forum specified	Forum specified	Total
DE	197	132	329
Percent	59.88	40.12	100.00
NY	715	409	1,124
Percent	63.61	36.39	100.00

CA	99	78	177
Percent	55.93	44.07	100.00
Other	448	336	784
Percent	57.14	42.86	100.00
Total	1,459	955	2,414
Percent	60.44	39.56	100.00

Source: SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 1, 2002 to June 30, 2002 for all contract types other than mergers and Jan. 1, 2002 to July 31, 2002 for merger contracts. Excludes contracts categorized as Other.

The table shows that the range of forum specifications is fairly narrow, from 36 percent for contracts specifying New York law to 44 percent for contracts specifying California law. Surprisingly, New York, despite being the most specified choice of law and choice of forum, also has the lowest rate of forum specifications. We explore the source of the lower New York rate by breaking down the sample by contract type in Table 14.

Table 14. Contract Type, Choice of Law, and Rate of Forum Specification

	Choice of law			
Contract type	DE	NY	CA	Other
Asset sale purchase	0.41	0.51	0.40	0.41
Bond indentures	0.00	0.09	0.00	0.00
Credit commitments	0.50	0.70	0.44	0.73
Employment contracts	0.17	0.67	0.21	0.28
Licensing	0.00	0.50	0.38	0.35
Mergers	0.53	0.65	0.53	0.43
Pooling service	0.06	0.07	-	0.29
Securities purchase	0.46	0.61	0.50	0.43
Security agreements	-	0.45	0.67	0.67
Settlements	0.42	0.54	0.36	0.46
Trust agreements	0.05	0.29	-	0.00
Underwriting	-	0.23	0.00	0.00

Source: SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 1, 2002 to June 30, 2002 for all contract types other than mergers and Jan. 1, 2002 to July 31, 2002 for merger contracts. Excludes contracts categorized as Other.

Table 14 shows that bare reliance on Table 13 is misleading. For nine of twelve contract types, contracts designating New York law have the highest rate of forum specification. For credit commitments, New York barely trails California. Only for pooling service agreements and security agreements does New York noticeably trail in

the rate of forum specification. New York's rank in Table 13 is a consequence of it being designated the choice of law in the vast majority of pooling service agreements (149 of 173 of those represented in Table 13), and pooling service agreements having a low rate of forum specification.

Table 15 accounts for both choice of law and forum specification in logistic regression models. Model 1, analogous to Table 13, shows the California, Delaware, and "Other" choice of law dummy variables to have positive coefficients. Since New York as the choice of law is the reference category, this suggests that contracts designating New York have a relatively low rate of forum specifications. Model 2, like Table 14, accounts for both choice of law and contract type. New York as the choice of law is again the reference category. Now the California, Delaware, and "Other" choice of law dummy variables all have negative, statistically significant coefficients. Once one accounts for contract type, contracts designating New York law are significantly more likely to specify a forum. Table 12 shows that the specified forum is overwhelmingly New York.

TABLE 15. LOGISTIC REGRESSION MODELS OF WHETHER CONTRACT SPECIFIES A FORUM

	(1)	(2)
	Dependent variable = forum specified (1 = yes)	
CA law	0.320+	-0.648**
	(1.96)	(3.41)
DE law	0.158	-0.774**
	(1.23)	(4.62)
Other law	0.472**	-0.291*
	(4.81)	(2.39)
Asset sale purchase		-1.054**
		(6.11)
Bond indentures		-3.446**
		(10.58)
Credit commitments		-0.057
		(0.28)
Employment contracts		-1.586**
		(6.51)
Licensing		-1.395**
		(4.31)
Pooling service		-3.455**
		(10.74)
Securities purchase		-0.743**

		(4.72)
Security agreements		-0.782*
		(2.12)
Settlements		-0.916**
		(3.41)
Trust agreements		-2.886**
		(5.43)
Underwriting		-2.346**
		(11.73)
Constant	-0.559**	1.093**
	(9.01)	(6.88)
Observations	2322	2322

Robust z statistics in parentheses
+ significant at 10%; * significant at 5%; ** significant at 1%

Source: SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 1, 2002 to June 30, 2002 for all contract types other than mergers and Jan. 1, 2002 to July 31, 2002 for merger contracts. Excludes contracts categorized as Other.

New York thus is overwhelmingly the choice of law; contracts specifying New York law tend to specify a forum; the forum specified is almost always New York. New York's decades-long campaign to attract legal business has been highly successful though usually overshadowed by the focus on Delaware's success in attracting incorporations.

C. Exploring When Choice of Law and Choice of Forum Differ

Despite the overlap between forum selection and choice of law clauses, the parties are not required to link the two. Table 12 shows that they sometimes elect to specify the law of one state to govern the dispute and the forum of another state as the place to resolve it. This suggests investigating the circumstances under which a mismatch between choice of law and choice of forum occurs.

Table 16 shows, for each contract type and selected choices of law, the proportion of contracts that specify a forum different from the choice of law specified in the contract. The table is based on a mismatch variable that equals one when the contract specifies a forum different from the choice of law and zero otherwise. We exclude from the analysis contracts that do not specify a forum.

Table 16. Contract Type, Choice of Law, and Mismatch of Choice of Law and Forum

	Choice of law			
Contract type	DE	NY	CA	Other
Asset sale purchase	0.23	0.17	0.58	0.08
	13	42	12	74
Bond indentures	-	0.00	-	-
	-	13	-	-
Credit commitments	0.33	0.01	0.00	0.04
	3	74	4	71
Employment contracts	1.00	0.00	0.33	0.00
	1	8	3	22
Licensing	-	0.20	0.67	0.00
	-	5	3	9
Mergers	0.28	0.11	0.15	0.07
	71	45	27	68
Pooling service	0.00	0.00	-	0.00
	1	11	-	2
Securities purchase	0.39	0.04	0.39	0.03
	36	115	23	65
Security agreements	-	0.00	0.50	0.00
	-	10	2	8
Settlements	0.20	0.29	0.00	0.00
	5	7	4	17
Trust agreements	0.50	0.00	-	-
	2	2	-	-
Underwriting	-	0.06	-	-
	-	77	-	-
Total	0.31	0.06	0.31	0.05
	132	409	78	336

Source: SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 1, 2002 to June 30, 2002 for all contract types other than mergers and Jan. 1, 2002 to July 31, 2002 for merger contracts. Sample limited to contracts that specify a choice of forum.

The table shows that New York has a mismatch less frequently than Delaware and California. The residual choice of law category "Other" has the lowest rate of mismatch but that is understandable because we count a match as occurring when both the choice of law and choice of forum are Other. We do not pick up as a mismatch in this analysis a choice of law that is "Other" but that differs from a choice of forum that is a different Other than the choice of law. Our primary interest is the comparison of the three specific states.

Table 16 shows that New York has a consistently low rate of mismatches and that its lower overall rate is not a consequence of one or two contract categories. California only has a lower mismatch rate for credit commitments, a category in which California

has only four contracts specifying a forum. Delaware only has a lower mismatch rate than New York for settlement agreements, in which neither Delaware nor New York has more than seven contracts specifying a forum. Contracts specifying New York law therefore more consistently specify New York as the litigation forum.

D. Federal and State Choice of Forum

We find little evidence that contracting parties strongly prefer state courts or federal courts to the exclusion of the other. The strongest evidence of this indifference is the 61 percent of contracts that do not specify a forum at all. Additional evidence is the 1,064 contracts for which we could determine whether a forum selection clause was exclusive. Of these, 617 specified an exclusive forum but the dominant exclusive factor was the state, not the federal or state court within the state. While 530 exclusive-forum contracts specified an exclusive state as litigation forum, the contracts rarely chose between state and federal courts within a state. Only 85 specified an exclusive federal or state court and these contracts were about evenly divided between state and federal courts. Forty contracts specified an exclusive federal forum and 45 contracts specified an exclusive state forum. If the contracting parties believed that federal or state courts were likely to provide more efficient or fairer adjudication, that belief is not manifested in the pattern of choice of forum clauses.

VI. Conclusion

We find evidence that choice of law and choice of forum provisions are negotiated in the material contracts of public firms. No state's share of the market for these clauses exceeds 50 percent. Although no state has more than 50 percent of the designations, New York is clearly the dominant state with over 40 percent of the choices

of law and, given a choice of forum, over 40 percent of the forum designations. New York's success appears to be combination of a decades-long effort to attract contracts together with possible lender insistence of New York law governing credit arrangements. Delaware suffers a net outflow of choices of law and forum relative to its connections to contracts through incorporation or other factors.

As might be expected, we find that a substantial degree of overlap exists between choice of law and choice of forum. If a particular state's law is chosen as applicable to the contract, that state's forum is also likely to be selected. However, the overlap was not complete: some contracts designated a forum to adjudicate disputes that was not located in the state whose law was selected to govern the substantive issues. Further, and quite interestingly, we find that while the contracting parties always opted to include choice of law provisions in their contracts, the same was not true for choice of forum provisions. Only 39 percent of the contracts contained litigation forum selection clauses. Holding type of contract constant, contracts designating New York as the choice of law tended to designate a choice of forum, also New York.

Given that the parties could easily select the forum as well as the applicable law – and given that the forum selected can sometimes be as important if not more important than the law chosen – the frequent failure of the parties to specify a forum for resolution of disputes presents a theoretical puzzle. Bargaining obstacles or agency problems are possibly fruitful areas for future research.