Jurisdictional Clauses in Consumer Transactions: A Multifaceted Problem of Jurisdicion and Full Faith and Credit

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The problem of jurisdictional clauses in consumer transactions, alluded to in the title of this Article, can be brought into focus most easily by posing a simple hypothetical case.

Suppose Creditor C maintains an office in F-1, a state that has not enacted any effective laws for the protection of consumers and therefore has become a creditors' haven. Through its office in F-1, C enters into a consumer credit transaction with Debtor D. The latter resides in F-2, a state that has adopted stringent proconsumer laws. The contract contains a clause to the effect that D subjects himself to the jurisdiction of the courts of F-1. Alleging that D is in default, C sues D in F-1 and recovers a judgment against D. Subsequently, C seeks to enforce this judgment in F-2.

In situations of this kind, the overriding question is whether the F-2 court owes full faith and credit to the F-1 judgment. In trying to answer this question, one starts from the fundamental proposition that F-2 owes full faith and credit to the judgment of a sister state if...
(but only if) the F-1 court that rendered the judgment had jurisdiction. If D, by a general appearance, conferred unquestionable jurisdiction upon the F-1 court, F-2 would be constitutionally compelled to enforce the F-1 judgment. The same would be true if D, by special appearance or in some other way, had unsuccessfully raised a jurisdictional objection before the F-1 court. In that event, the so-called bootstrap doctrine would preclude D from again attacking the F-1 court's jurisdiction when an action is brought in F-2 on the F-1 judgment. Thus it is fair to say that whenever the F-1 judgment is the result of a contested proceeding, an F-2 court as a rule must give full faith and credit to that judgment.

Presently, however, we are dealing with consumer credit cases, and thus we can assume that the great majority of the judgments that have been obtained by creditors in some F-1 state and are then sought to be enforced in F-2, the state of the debtor's residence, will be in the nature of default or consent judgments. In cases of this kind, the full faith and credit clause would not preclude the F-2 court from examining the question whether the F-1 court had jurisdiction. The creditor, of course, will claim that defendant's consent is an accepted basis of personal jurisdiction and that, consequently, the F-1 court clearly had jurisdiction by virtue of the debtor's consent, declared in the form of the jurisdictional clause in the contract between the parties. If such consent is valid, then the F-1 court had jurisdiction, and the F-2 court must enforce the F-1 judgment.


2. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 32 (1971), and the authorities cited in the Reporter's Note at 135-36.

An element of possible confusion should be mentioned at this point. Some jurisdictional clauses, especially those using the word "exclusive," raise two separate questions: first, whether the clause confers jurisdiction on the chosen court, and second, whether it deprives all other courts of jurisdiction (or at least causes them to decline jurisdiction). The present Article deals only with the first question. As to the second question, see, for example, The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); Smith, Valentina & Smith, Inc. v. Superior Court, 17 Cal. 3d 491, 551 P.2d 1206, 131 Cal. Rptr. 374 (1976); REESE & ROSENBERG, CASES AND MATERIALS ON CONFLICT OF LAWS 185 (1978); Juenger, SUPREME COURT VALIDATION OF FORUM-SELECTION CLAUSES, 19 WAYNE L. REV. 49 (1972).

At first blush, this analysis seems to open a channel for creditors to circumvent all of the protections which F-2 legislators have sought to create for the benefit of consumers residing in F-2. When the debtor, a resident of F-2, is sued in F-1, the debtor is faced with Hobson's choice. If he appears in the F-1 action, it is likely that the F-1 court, perhaps honoring a choice-of-law clause in the parties' contract, will apply its own internal law, which is favorable to the creditor. The result will be a judgment in favor of the creditor, and this judgment clearly will be entitled to full faith and credit in F-2. If, on the other hand, the debtor decides to default in F-1, the resulting default judgment again will be entitled to full faith and credit in F-2, provided that the F-2 court gives effect to the consent contained in the jurisdictional clause of the contract.

I. The Outlines of the Problem

From the standpoint of F-2, which has attempted to aid resident consumers by strongly protective legislation, the problem is a grave one. If a debtor residing in F-2, by the mere act of signing a printed form that contains a boilerplate jurisdictional clause, can validly confer jurisdiction upon the courts of a creditor-haven state such as F-1, then it is easy for a clever creditor to evade every substantive safeguard provided to consumers by the laws of F-2. There appears to be only one way to prevent such evasion: by invalidating the debtor's consent upon which the jurisdiction of the F-1 court depends in such a case.

A number of states, seeing themselves in the role of F-2, in recent years have enacted express statutory provisions invalidating jurisdictional clauses in consumer transactions. The outstanding example of such a statute is the Uniform Consumer Credit Code (UCCC), thus far adopted in eleven states. Ten states have adopted section 1.201 (8) which contains the following language:

3. The growing tendency to put restrictions on jurisdiction and venue in actions against consumers, and ordinarily to permit such actions only at the place of the defendant's residence, appears to be world-wide. For a comparative discussion, see von Marschall, Recent Legislative and Judicial Trends in Consumer Credit in Germany, in Aspects of Comparative Commercial Law 166, 178 (J. Ziegel & W. Foster, eds. 1989).

Each of the following agreements or provisions of an agreement by a consumer who is a resident of this State at the time of a consumer credit transaction is invalid with respect to the transaction:

(a) that the law of another jurisdiction apply;
(b) that the consumer consents to be subject to the process of another jurisdiction;
(c) that the consumer appoints an agent to receive service of process;
(d) that fixes venue; and
(e) that the consumer consents to the jurisdiction of the court that does not otherwise have jurisdiction.

A similar rule prevails, at least arguably, in California. Section 1812.10 of the Civil Code in effect requires that actions involving consumer transactions normally be commenced in the county of the debtor's residence. This provision, which is mandatory, is supplemented by section 1804.1(i), prohibiting any contract provision that attempts to escape the venue requirements imposed by section 1812.10. It is true that both of these sections speak in terms of venue rather than of jurisdiction. One can make a strong argument, however, to the effect that the obvious legislative purpose is attainable only by invalidating every choice-of-forum clause seeking to circumvent section 1812.10, regardless of whether the chosen forum is within or without the State of California.

Thus, if one includes California, there are at least eleven states

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5. The language quoted in the text is that of the 1974 Final Draft of the UCCC. See 7 U.L.A. 158, 180-81 (Supp. 1971-77). The Iowa version contains the same language. In South Carolina, this provision has been omitted. In the other nine states listed in the preceding footnote, older versions of the provision in question have been adopted and are still in force. For purposes of the present discussion, however, it may be assumed that these older versions, while less artistically drafted, are intended to have substantially the same effect as the provision quoted in the text, that is, to invalidate choice-of-forum clauses by which resident debtors purport to subject themselves to the jurisdiction of an out-of-state court.


7. These include ten of the eleven UCCC states (excluding South Carolina), supra note 4, plus California.

Even in states that have not enacted such a statute, it is possible that a similar
(and the number appears to be growing) that invalidate jurisdictional clauses in consumer transactions.

Returning to the hypothetical case stated at the beginning of this Article, suppose F-2, the state of the debtor's residence, is one of the eleven states just mentioned. In that event the debtor, when sued in F-2 on the F-1 judgment, no doubt will argue that by virtue of the F-2 statute the debtor's consent to the jurisdiction of the F-1 court was void and that consequently the F-1 court lacked personal jurisdiction. The soundness of this argument hinges on whether it is F-2 law that governs the validity of the consent contained in the choice-of-forum clause. One may assume that under the law of F-1, a creditor-haven state, such a clause as a rule would be valid and enforceable. Thus the validity of the jurisdictional clause, and ultimately the jurisdiction of the F-1 court, appears to depend on the resolution (by the F-2 court) of a question of choice of law.

This choice-of-law problem is a difficult one. It is rendered even more complex by the circumstance that it arises in the context of judicial jurisdiction and of full faith and credit to a sister state's judicial proceedings,7a that is in a context heavily impacted by federal constitutional law. Neither courts nor legal writers have ever furnished a reasoned and systematic overview of the problem. It is the purpose of the present Article to provide at least a checklist of the many issues that must be addressed in order to arrive at such an overview.8

Before analyzing the problem of choosing between F-1 law (upholding the validity of the jurisdictional clause) and F-2 law (invalidating the clause), one must address the preliminary question whether — apart from any such choice-of-law analysis and merely as a matter of federal constitutional law and of F-1 law — the F-1 judgment is necessarily valid. This preliminary question is treated in Part II, infra. There will follow, in Part III, the choice-of-law analysis itself, and in Part IV, a discussion of the additional complexities arising from the possibility that in some instances the F-1 court might

rule may emerge as a matter of decisional law, especially in cases where the contract is one of adhesion.

7a. See text accompanying notes 91-92 infra.
8. The intention is to present an annotated checklist rather than a definitive treatment of the many pertinent issues. For this reason, references to cases and other authorities will be illustrative rather than exhaustive.
have personal jurisdiction over the debtor even though the jurisdictional clause of the contract is ineffective.

II. Questions Preliminary to a Choice-of-Law Analysis

(1) Is the F-1 Action a Judicial Proceeding?

In a fact situation such as that set out at the beginning of this Article, the defendant consumer perhaps will try, first of all, to raise a fundamental argument against full faith and credit. The consumer will point out that the proconsumer laws of F-2, which F-1 ignored, embody an important public policy of F-2 and that the enforcement in F-2 of this particular F-1 judgment would offend such public policy. Under these circumstances, defendant will argue, F-2 is relieved of its duty to give full faith and credit to the F-1 judgment. Some scholars support the reasoning behind such a public policy argument.\(^9\) In practice, however, the argument would be unlikely to succeed because the United States Supreme Court has squarely and repeatedly held that a final sister state judgment (provided it is valid) is entitled to full faith and credit, even though it offends a strong public policy of the state in which it is sought to be enforced.\(^10\)

A different— and possibly more promising— argument against giving full faith and credit to the F-1 judgment derives from the very language of the pertinent constitutional provision,\(^11\) which makes it clear that an F-1 judgment is entitled to full faith and credit in F-2 only if the F-1 proceeding leading up to that judgment can be characterized as a judicial proceeding. In cases in which the F-1 judgment was entered by confession or by default, it may sometimes be doubtful whether this requirement of a judicial proceeding has been met. In \textit{Atlas Credit Corp. v. Ezrine}\(^12\) the New York Court of Ap-

\(^9\) \textit{Restatement (Second) of Conflict of Laws} § 103 (1971), and the authorities cited in the Reporter's Note at 314-15. Attention should be called to the admission in the Reporter's Note that in formulating the black-letter text of § 103 considerable reliance has been placed on Mr. Justice Stone's dissenting opinion in \textit{Yarbrough v. Yarborough}, 290 U.S. 202 (1933).


\(^11\) \textit{U.S. Const. art. IV, § 1.}

peals held that where the F-1 judgment was based on a cognovit note and was entered by a clerk whose "duties are purely ministerial,"12a the F-1 proceeding did not involve "the exercise of discretion or judgment"13 and hence did not amount to a judicial proceeding entitled to full faith and credit. If this holding is correct, many judgments entered by confession are excluded from the operation of the full faith and credit clause.

Moreover, the reasoning of Ezrine may well reach beyond fact situations involving cognovit notes or other forms of confession of judgment. In many states, a plaintiff who seeks to recover a sum certain in a contract action, upon a defendant's default can have a default judgment entered by a clerk whose "duties are purely ministerial." Run-of-the-mill default judgments of this kind would not be entitled to full faith and credit if the Ezrine doctrine were carried to its logical conclusion.

Law reviews14 and a federal district court opinion15 have criticized the above-mentioned holding of Ezrine. The holding, however, involves a question of federal constitutional law, and thus it is clear that an authoritative resolution of that question can come only from the United States Supreme Court, which has not yet spoken on the point. Until the Supreme Court settles the question, the doubts created by Ezrine may in many instances furnish arguments for consumers when they are sued in F-2 on an F-1 judgment.

(2) Is the F-1 Judgment Valid as a Matter of Federal Due Process?

A due process attack on the validity of the F-1 judgment may be based on either or both of two independent grounds: (a) absence of proper jurisdiction or (b) lack of notice and an opportunity to be heard.

(a) Concerning jurisdiction, the question to be addressed at this point is whether federal due process (regardless of the law of F-1 or

12a. Id. at 230, 250 N.E.2d at 481, 303 N.Y.S.2d at 391.
13. Id.
F-2) may invalidate a consumer's advance consent to the jurisdiction of a state other than that of the consumer's residence.

Until recently, courts and commentators generally assumed that as a matter of due process such consent constituted a valid basis of personal jurisdiction over the consenting defendant, even in the extreme situations where the consent was contained in a cognovit note. It was widely believed that this assumption was supported by the well-known case of National Equipment Rental, Ltd. v. Szukhent. In Szukhent a sharply divided Court upheld the validity of an advance consent contained in a contract by which the defendant farmers leased farm equipment from the plaintiff corporation. Mr. Justice Black's dissent in that case placed much emphasis on the adhesive nature of the contract, and as a consequence the majority opinion was widely thought to imply that such advance consent to jurisdiction could not be attacked on due process grounds, not even in cases where the defendant is a consumer and his consent is imbedded in a contract of adhesion.

Closer scrutiny, however, reveals that, at least insofar as consumer transactions are concerned, Szukhent is far less reliable as a precedent than is popularly assumed. First, in the modern age of big agribusiness it is not at all certain that a farmer-lessee of expensive agricultural equipment is the equivalent of a consumer. Secondly, and more importantly, Szukhent must now be read in the light of the Supreme Court's most recent pronouncement in Shaffer v. Heitner. Shaffer held that every assertion of jurisdiction is subject to the test of fairness and justice laid down in International Shoe Co. v. State of Washington. That test, therefore, will have to be employed not only where alleged personal jurisdiction is based on the long-arm doctrine or on defendant's presence, but equally where defendant's advance consent furnishes the asserted basis of jurisdiction.

21. Until recently it was generally taken for granted that personal service upon a defendant transiently present in the forum state (or flying over it) was a sufficient basis of personal jurisdiction, even though the forum had no other contacts with the
In future litigation, the broad principle announced in *Shaffer* will compel the courts to confront and to answer these questions: Is it fair and just to base personal jurisdiction over a non-resident consumer on his advance consent declared in a contract of adhesion? Should this question be determined once and for all as a matter of law, or should its determination depend on the facts and circumstances of each individual case, for example on the smallness of the print, the understandability of the contractual language, the consumer's educational qualifications, his wealth or poverty, the strength of the creditor's bargaining position, the inconvenience from the consumer's standpoint of the chosen forum, the fairness of the other provisions of the contract, and the myriad other variables of consumer transactions? We do not know at the present time how the courts will answer these questions. It is by no means impossible that, when answers to these questions come in, at least some jurisdictional clauses in consumer transactions will flunk the test of fairness and justice and thus will be held ineffective as a matter of federal due process.

In an article published in 1960, this author called that rule of transient jurisdiction a "scandalous anachronism." Schlesinger, *Methods of Progress in Conflict of Laws: Some Comments on Ehrenzweig's Treatment of "Transient" Jurisdiction*, 9 J. Pub. L. 313, 326 (1960). At the same time, however, I cautioned that as a matter of existing law "the transient rule is still so firmly established that as yet no lawyer has been bold enough to risk his client's money in a frontal attack upon the rule." *Id.* at 316. This statement was correct at the time (1960), and there has not been any case involving such a frontal attack since then. For the future, however, one can hope that lawyers representing victimized defendants will mount due process attacks on the transient rule. The Supreme Court's broad dicta in *Shaffer v. Heitner*, 433 U.S. 186 (1977), now encourage such attacks.

22. There is some authority for the proposition that, insofar as due process is concerned, there can be no single rule covering all jurisdictional clauses in consumer transactions and that in each case the decision must depend on the particular facts before the court. *See Irmco Hotels Corp. v. Solomon*, 27 Ill. App. 3d 225, 326 N.E.2d 542 (1975).


Note, also, that due process requires the use of clear and unequivocal language. A choice-of-forum clause, even if it does not contain a waiver of notice, in effect always implies a waiver "of the constitutional right of due process with respect to the right to be sued in a forum wherein in personam jurisdiction may clearly and properly be obtained in accordance with traditional notions of fair play and substantial justice. An agreement to waive this constitutional right must be deliberately and understandingly made, and language relied upon to constitute such a waiver must clearly, unequivocally and unambiguously express a waiver of this right." *Telephonic, Inc. v. Rosenblum*, 88 N.M. 532, 537, 543 P.2d 825, 830 (1975).
The significance of these doubts created by Shaffer is not limited to cognovit notes or to any other particular type of choice-of-forum clause. In every future case in which the plaintiff asserts personal jurisdiction over the defendant on the basis of the defendant's advance consent, it will be possible to attack such jurisdiction on due process grounds if it appears that under the circumstances of the case such basis of jurisdiction is less than fair and just.

(b) In some jurisdictional clauses, especially those of the cognovit type, the prospective defendant's consent to jurisdiction is coupled with a waiver of notice. The question then arises whether such waiver will pass muster under the due process clause of the United States Constitution. It is traditional learning that notice and opportunity to be heard, like other constitutional rights, are susceptible of being waived. In D. H Overmyer Co., Inc. v. Frick Co., the Supreme Court upheld the defendant's waiver of notice contained in a cognovit note; but the Court emphasized that the defendant in that case was a corporation, that the parties' contract involved a sizeable commercial transaction, and that in drafting their contract both parties were assisted by able counsel. The Court significantly added that its holding would not be "controlling precedent for other facts of other cases. For example, where the contract is one of adhesion, where there is great disparity of bargaining power, and where the debtor receives nothing for the cognovit provision . . . ." This dictum makes it clear that an advance waiver of notice and opportunity to be heard is sometimes valid and sometimes invalid.

24. The discussion in the text assumes that the cognovit note is valid and enforceable under F-1 law. Many states outlaw such notes, but with or without procedural restrictions they are still permitted in a number of states. A survey of jurisdictions can be found in Hopson, supra note 10. For references updating this survey, see Note. Cognovit Revisited: Due Process and Confession of Judgment, 24 Hast. L.J. 1045, 1046-48 (1973). See also Reese and Rosenberg, Cases and Materials on Conflict of Laws 59 (1978).

An F-1 judgment obtained in violation of F-1 statutory requirements may be invalid under F-1 law. See note 41 infra. The present discussion in the text, however, assumes that the F-1 judgment as well as the underlying cognovit note is valid under F-1 law.


27. Id. at 188, see Swarb v. Lennox, 405 U.S. 191 (1972).
Whether an advance waiver is valid or not, thus depends on the facts of the particular case.\textsuperscript{28} It follows that the defendant has a due process right to a hearing at which the facts determining the validity of the waiver can be shown. Among state courts and lower federal courts there is controversy as to whether the F-1 court must hold such a hearing before it enters judgment upon a cognovit note or whether it is constitutionally sufficient to provide merely for a subsequent hearing if and when the defendant moves to vacate the judgment.\textsuperscript{29} The procedural problem involved in that controversy is an important one, but in the present context it is unnecessary to discuss it in detail because it obviously relates to F-1 procedure, while the present focus is on the effect which the F-1 judgment will have in F-2.\textsuperscript{29a}

From the standpoint of F-2 it is clear that unless the issue concerning the validity of defendant's waiver of notice has been explicitly raised, litigated, and adjudicated in F-1,\textsuperscript{30} such issue is not precluded by collateral estoppel and hence may be examined and determined by the F-2 court. Thus there will be instances in which the latter court becomes the arbiter of that issue.

In F-2, a state that generally favors protection of consumers, the court probably will tend to look with a jaundiced eye at a waiver of notice contained in an adhesive consumer contract. Of course, where the defendant consumer, in spite of the contractual waiver, actually did receive proper notice of the proceedings, there is no violation of the constitutional notice requirement.\textsuperscript{31} Where, as in the typical cognovit situation, however, the waiver results in no notice being given before the entry of the F-1 judgment, the F-2 court will treat

\textsuperscript{28} Under some circumstances, even a cognovit note issued by a corporation may be vulnerable on due process grounds. Northern Ohio Bank v. Ket Assoc., Inc., 74 Mich. App. 286, 253 N.W.2d 734 (1977).


\textsuperscript{29a} It should be noted, however, that where the F-1 statute provides merely for a subsequent hearing on the validity of the waiver, the F-1 judgment may arguably be attacked in F-2 (as well as in F-1) on the ground of the F-1 statute's facial invalidity. See Isbell v. County of Sonoma, 21 Cal. 3d 61, 145 Cal. Rptr. 368 (1978).

\textsuperscript{30} See note 1 & accompanying text supra.

\textsuperscript{31} National Equipment Rental Ltd. v. Szukhent, 375 U.S. 311 (1964).
that judgment as invalid unless the court must regard the waiver as effective. The bare fact that the defendant is a consumer by itself may not always suffice to invalidate the waiver on constitutional grounds; but together with other circumstances, it may tend to show that the contract is one of adhesion and reflects great disparity in bargaining power. Once such a showing has been made, the Supreme Court's above-quoted Overmyer dictum will support the argument that the waiver, and consequently the F-1 judgment, should be held invalid.

It follows that the effectiveness of cognovit clauses and of similar waivers of notice in consumer transactions is clouded by serious constitutional doubts. These doubts—together with the other problems noted above, especially those flowing from Ezrine—have not gone unnoticed by creditors and their counsel. Expert observers have stated that the creditors' general awareness of these doubts and difficulties "has tended to eliminate cognovit provisions from the consumer field altogether." As a practical matter, therefore, one can assume that choice-of-forum clauses in future consumer transactions will not often be coupled with cognovit provisions or other forms of waiver.

32. See note 22 supra. Note, however, that depending on the applicable law a cognovit clause in a consumer transaction may be particularly vulnerable on statutory grounds. See, e.g., CAL. CIV. PROC. CODE § 1132(b); N.Y. CIV. PRAC. LAW AND RULES § 3201.

33. The Supreme Court of California, in speaking of cognovit notes, has said that a layman debtor's "ignorance of legal matters makes it unlikely that he will understand the character and effect of the instrument." Hulland v. State Bar, 8 Cal. 3d 440, 450, 503 P.2d 608, 614, 105 Cal. Rptr. 152, 158 (1972). See also Isbell v. County of Sonoma 21 Cal. 3d 61, 145 Cal. Rptr. 368 (1978).

34. Most of the cases decided to date do not squarely face up to the crucial issue of the burden of proof with respect to the facts on which the validity of the waiver depends. The presumption of validity to which the F-1 judgment is entitled seems to throw the burden of attacking the judgment on the judgment debtor. On the other hand, it can be argued that there is a presumption against any waiver of constitutional rights and that the burden is on the judgment creditor to overcome the latter presumption.

If correctly analyzed, the two presumptions do not necessarily contradict each other. The presumption of validity of the judgment is overcome by a showing that the defendant received no notice of the action. It is then incumbent upon the creditor to assert that notice was effectively waived, and the presumption against waivers of constitutional rights places the burden of proving the facts supporting that assertion upon the creditor. See Isbell v. County of Sonoma, 21 Cal. 3d 61, 68-69, 145 Cal. Rptr. 368, 372 (1978).

35. See note 27 & accompanying text supra.

36. See notes 12-13 & accompanying text supra.

37. CRAMTON, CURRIE & KAY, supra note 18, at 593.
of notice and that future F-1 judgments entered on the basis of such clauses are more likely to be ordinary default judgments than judgments by confession. In the remaining parts of this Article, the author will proceed on that assumption.

(3) Is the F-1 Judgment Valid Under F-1 Law? 38

According to the overwhelmingly prevailing view, the F-1 judgment is not entitled to full faith and credit, and F-2 will not enforce it, if under F-1 law the F-1 court lacked competence. 39 Assuming that F-1 is a creditor-haven state, it is likely that F-1 law in general will recognize a contractual choice-of-forum clause (unless it is tainted by fraud) as a valid basis of its courts' competence. 40 Even a creditor-haven state, however, applying section 2-302 of the Uniform Commercial Code or a similar judge-made rule, 41 will strike down a contract clause found to be unconscionable.

The facts of Paragon Homes, Inc. v. Carter 43 present an example

38. The question posed in the text relates exclusively to those rules of F-1 law that directly determine the competence of F-1 courts. The further question, whether the F-1 choice-of-law rule might indirectly invalidate the jurisdictional clause, and hence the competence of the F-1 court, by pointing to the internal law of another state (e.g., F-2) outlawing such a clause, will be taken up as part of the choice-of-law analysis. See notes 81-84 & accompanying text infra.

39. See Bell v. Staren & Co., 259 Ark. 506, 534 S.W.2d 238 (1976); Restatement (Second) of Conflict of Laws, § 105 (1971), and the authorities collected in the Reporter's Note at 318.


41. Note, however, that where F-1 statutory requirements have been violated in obtaining the F-1 judgment, the F-1 court's competence may be found lacking, even though the parties' contract contained a valid jurisdictional clause. See, e.g., Barnes v. Hilton, 118 Cal. App. 2d 108, 257 P.2d 98 (1953); Rolleenhagen v. Stevenson, 23 N.J. Misc. 219, 43 A.2d 173 (1945). For the somewhat odd subsequent history of the Barnes case, see Barnes v. Hilton, 178 Kan. 645, 250 P.2d 1024 (1956). See also note 29a supra.

42. Even in the absence of a statutory mandate such as U.C.C. § 2-302, an unconscionable provision in a contract of adhesion is apt to be invalidated by judge-made law. See McCall, Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance — Repossession and Adhesion Contract Issues, 26 Hastings L.J. 383, 417-19 (1974).

of a clearly unconscionable choice-of-forum clause. The contract involved in that case was between a creditor in Maine and a consumer in Massachusetts. In the jurisdictional clause of the printed contract, the defendant consumer submitted himself to the jurisdiction of the courts, not of Maine, but of Nassau County, New York. The court held that the clause was inserted into the contract for the sole purpose of harassing and embarrassing the consumer-customer and for this reason struck it down as unconscionable. The result seems sound, but the reasoning of the court applies only to the somewhat exceptional jurisdictional clauses choosing a forum that is neither the debtor's residence nor the creditor's place of business. In most jurisdictional clauses, however, the chosen forum is the residence or place of business of the creditor; in such cases the debtor will be less likely to succeed when he attacks the validity of the clause, and thus the basis of the F-1 court's competence, on the ground of unconscionability or on similar grounds bottomed upon F-1 law.

III. Choice-of-Law Analysis

Suppose the jurisdictional clause in question turns out to be valid under F-1 law. Suppose further that the clause, and the F-1 judgment based upon it, survive all of the constitutional attacks outlined above. Can the F-2 court nevertheless treat the F-1 judgment as invalid on the ground that the clause, which provides the necessary basis of the F-1 court's personal jurisdiction over the defendant, is invalid under F-2 law?

For purposes of the present discussion, it is assumed that F-2, by adopting section 1.201(8) of the UCCC or a similar statutory provision, seeks to invalidate all jurisdictional clauses in contracts made by resident consumers. The question, however, remains whether F-2 law governs the validity of the clause.

44. In cases of this kind it is possible, also, that the F-1 court will reach an essentially similar result by the use of an alternative technique. Where F-1, that is, the forum chosen in the jurisdictional clause, is neither the defendant's residence nor the plaintiff's place of business, the F-1 court sometimes will dismiss the action on grounds of forum non conveniens, thus avoiding a determination of the issue whether the clause is unconscionable. See Paragon Homes of New England, Inc. v. Langlois, 4 UCC Rep. 16 (N.Y. Sup. Ct. 1967); Paragon Homes of Midwest Inc. v. Grace, 4 UCC Rep. 19 (N.Y. Sup. Ct. 1967); AaaCon Auto Transport, Inc. v. Newman, 77 Misc. 2d 1069, 356 N.Y.S.2d 171 (Sup. Ct. 1974).

There is a vast body of case law dealing with this thorny choice-of-law problem. Virtually all of those cases involved cognovit notes that were valid under F-1 law but void under F-2 law. The courts, applying choice-of-law principles, sometimes turned to F-1 law, thus upholding the jurisdiction of the F-1 court; in other situations they held that F-2 law governed, in which case the F-1 court lacked jurisdiction. Insofar as cognovit situations are concerned, much of this older learning is now obsolete because, as has been shown, the more recent pronouncements of the United States Supreme Court probably invalidate most cognovit provisions in consumer contracts as a matter of due process.

A jurisdictional clause without a cognovit feature, on the other hand, formerly was unlikely to raise a choice-of-law question because, until the advent of modern statutes such as UCCC section 1.201(8), such a clause ordinarily was valid under the law of F-2 as well as F-1. Today, however, a statute of this kind, if in force in F-2 but not in F-1, clearly gives rise to a choice-of-law problem. A court struggling with such a problem will tend to turn to the choice-of-law principles formerly applied in the cognovit cases.

To spell out these principles is rendered difficult by the fact that, even though many of the cases reach sound results, analytical reasoning is almost totally absent from the judicial opinions forming this body of case law. It is submitted that utter confusion can be avoided in this area only if the fundamental distinction between jurisdiction (as a matter of due process, determined by United States Supreme Court law) and competence (as determined by F-1 law) is kept in mind. The F-1 judgment is invalid if the F-1 court lacked either jurisdiction or competence. In a case in which jurisdiction and

45. For extensive references to the pertinent case law see Hopson, supra note 10; Shuchman, Confession of Judgment As a Conflict of Laws Problem, 36 Notre Dame Law. 461 (1961). See notes 64, 70 & 75 infra.
46. See text accompanying notes 16-37 supra.
47. See text accompanying notes 7-8 supra.
48. "A judgment is valid only if it was rendered by a court which has been granted power to entertain the action. Even though a state may have judicial jurisdiction, it may not have given power to the particular court to entertain the action. In such a case, the court was not competent to render a valid judgment . . . ." Restatement (Second) of Conflict of Laws § 92, comment i (1971). See also id. §§ 92, 105.
competence both depend on the defendant’s advance consent declared in a choice-of-forum clause, it is clear that the validity of such consent must be examined in two steps. The first step determines whether the consent is a valid basis of the F-1 court’s jurisdiction. The second step, which does not necessarily parallel the first but may entail the application of choice-of-law rules flowing from a different source, determines the validity of the consent as a basis of the competence of the F-1 court.

(1) Choice-of-Law Analysis with Respect to Jurisdiction

(a) Federal or State Law?

When the F-1 judgment is sought to be enforced in F-2, it is necessarily the F-2 court that must examine the F-1 court’s jurisdiction and, as an incident thereto, the validity of the jurisdictional clause invoked by the plaintiff in F-1. The F-2 court, realizing that in a multistate situation the applicability of F-2 internal law cannot be taken for granted, will face the threshold problem of choosing the body of law that will furnish the rule of decision with respect to the validity of the jurisdictional clause.

The simple—and perhaps simplistic—way of tackling this threshold problem would be to turn to the choice-of-law rules of F-2, on the theory that every forum, when faced with an issue of choice-of-law, normally applies its own choice-of-law rules. The Supreme Court has recognized that a forum state has the power, either by statute or by judge-made law, to fashion the choice-of-law rules to be applied by its courts. Only in extreme cases, when a particular choice-of-law rule adopted by a state is wholly unreasonable, will the Supreme Court interfere with a state’s freedom to determine its own choice-of-law rules.

A difficulty arises, however, from the fact that the choice-of-law question presently under consideration (that is, what law governs the validity of the defendant’s consent contained in the jurisdictional clause) arises upon the plaintiff-creditor’s insistence that full faith and credit be given to a judgment for which such consent furnishes the

50. The necessity of this two-step approach is overlooked in the otherwise valuable article by Hopson, supra note 10, at 151.
jurisdictional basis. Full faith and credit to sister state judgments is basically different from full faith and credit to sister state statutes (public acts). When a statute of F-1 is invoked by one of the parties in a court of F-2, the court normally is free to apply or not to apply that statute, depending on F-2's own choice-of-law rules. Only in the exceptional cases mentioned above, in which it would be wholly unreasonable for the F-2 court to choose any law other than that of F-1 in resolving the particular issue before it, will the United States Supreme Court compel the F-2 court to apply the F-1 statute. The rule concerning full faith and credit to sister state statutes thus is a flexible rule of reason. In contrast, it is clear that, subject to minor exceptions not relevant here, a state's duty to give full faith and credit to the jurisdictionally valid judgments of a sister state is automatic and absolute.

It is arguable, therefore, that when a choice-of-law issue arises as a mere incident to what is essentially a due process question of F-1 jurisdiction and a question of the F-2 court's duty to give full faith and credit to the F-1 judgment, F-2 does not enjoy its normal freedom to fashion its own choice-of-law rules. This argument is supported not only by logic but also by seemingly potent policy considerations. If F-2 had the power, by the adoption of a particular choice-of-law rule, to invalidate the defendant's consent which constitutes the jurisdictional basis of the F-1 judgment, F-2 could easily evade the duty to give full faith and credit to such judgment. If accepted, this argument leads to the conclusion that a choice-of-law issue such as the one presently under discussion, which arises as a mere incident to a question of federal constitutional law, should itself be treated as a federal question. Indeed, one might even go a step further and assert that under these circumstances federal law should govern not merely the choice-of-law issue but the substantive issue concerning the validity of the consent.

52a. See text accompanying note 52 supra.
53. See note 10 supra.
54. I.e., a choice-of-law rule pointing to the internal law of F-2, which invalidates the jurisdictional clause.
55. For a counterargument, see note 59 infra.
56. If the issue were held to be governed by federal law, it would follow that state statutes such as UCCC § 1.201(8) would be ineffective. Such a holding probably would lead to much pressure for federal legislation. See text accompanying note 93 infra.
The Supreme Court, however, has not expressed itself clearly on this point. In a fairly large number of decisions of state courts and lower federal courts, the argument stated in the preceding paragraph has been implicitly rejected. Without discussing the existence of a federal-state problem, all of the pertinent judicial decisions have applied state law and state choice-of-law rules in determining the validity of jurisdictional clauses. Well-reasoned or not, these cases must be recognized as reflecting the presently prevailing view.

(b) Choice Among Conflicting State Laws

If, in accordance with the prevailing view, one assumes that state law is to determine the validity of the consent contained in a jurisdictional clause, then a choice-of-law question (which state's law?) necessarily arises. This choice-of-law question involves two separate issues which must be successively confronted: (i) what is the source of the applicable choice-of-law rule and (ii) what are the terms of that choice-of-law rule, or, in other words, to which state's internal law does the choice-of-law rule point?

(i) In theory, there are three possible answers to the first question. In looking for the source of the applicable choice-of-law rule, one can turn to federal law, F-1 law, or F-2 law. The prevail-
ing view has rejected the first of these three possibilities. There remains, however, the task of choosing between F-1 law and F-2 law as the source of the choice-of-law rule.

In support of applying the F-1 choice-of-law rule, which normally favors the creditor, one might argue as follows: if the defendant had raised the jurisdictional objection in F-1, it is probable that the F-1 court, in considering the validity of defendant's consent, would have applied its own choice-of-law rule; if, on that basis, the F-1 court had ultimately held that it had jurisdiction, the defendant could not later question such holding in any other state. This result, the argument runs, should not be changed by virtue of the fact that the defendant defaulted in F-1 and now seeks to raise the same issue in another forum. Notwithstanding its surface plausibility, however, the argument is not convincing. If one accepts the application of state law and of state choice-of-law rules, the possibility of different outcomes in different forums has to be faced, as in most conflicts situations. That possibility, therefore, does not furnish a forceful argument against the application of the simple, fundamental, and generally recognized principle that the forum (here F-2), when confronted with a choice-of-law problem, applies its own choice-of-law rules.

Nor can an argument in favor of applying F-1 choice-of-law rules be derived from the fact that the ultimate issue here goes to the jurisdiction of the F-1 court. It must be remembered that presently we are dealing with jurisdiction as distinguished from competence. The F-1 court's jurisdiction does not depend on F-1 law, and hence there is no reason whatsoever why the F-2 court in this context should borrow F-1 choice-of-law rules.

The courts, without even discussing the problem of the source of the applicable choice-of-law rule, consistently and unanimously have applied the choice-of-law rule of F-2. For the reasons just

60. See text accompanying notes 58-59 supra.
61. See text accompanying note 70 infra.
62. See note 1 supra.
63. See text accompanying notes 48-50 supra.
stated, this approach appears sound even as a matter of theory, provided one accepts the premise that the validity of a jurisdictional clause is to be determined by state law and state choice-of-law rules.65

(ii) We now turn to the question of the terms of the choice-of-law rule that an F-2 court should follow.66 To what state's internal law does that choice-of-law rule point?

The defendant's jurisdictional consent is contained in a contract. Thus the usual approach is to view the problem as one of choice of law with respect to the validity and effect of a contract or contract clause. The trouble is that this subject is one of the most controversial ones in the entire field of conflict of laws.67

In other contexts, the contracting parties can avoid many of the difficulties arising from controversial choice-of-law rules by writing a clear choice-of-law clause into their contract.68 In the context of a consumer transaction, however, one finds that F-2, which (we assume) has enacted the UCCC or similar legislation, invalidates not only jurisdictional clauses but also, by way of a statutory choice-of-law provision, most contract clauses relating to choice of law.69 It follows that a choice-of-law clause contained in a consumer contract normally will not influence the court's choice of the applicable law.

Until the conflicts revolution of the past thirty years, it was the prevailing rule that issues going to the validity of a contract or contract clause were governed by the law of the place where the contract had been "made"; occasionally, the law of the place of performance


66. As this Article has previously mentioned, any choice-of-law rule of F-2 may be overturned by the U.S. Supreme Court if it is thought to be wholly unreasonable. See text accompanying note 52 supra. It takes an extreme case, however, to trigger this kind of Supreme Court interference. It seems very doubtful whether any of the choice-of-law approaches to be discussed forthwith in the text are so unreasonable as to invite such interference.


68. See Restatement (Second) of Conflict of Laws § 187 (1971). See also U.C.C. § 1-105(1).

69. See UCCC § 1.201(8) (quoted in the text accompanying note 5 supra). For a more general discussion of choice-of-law clauses in contracts of adhesion, see A. Ehrenzweig, Conflicts in a Nutshell 150-51 (1974); Restatement (Second) of Conflict of Laws § 187, Comment b & Reporter's Notes (1971); R. Weintraub, Commentary on the Conflict of Laws 274 (1971).
was applied. It is easy for a clever creditor to manipulate the transaction in such a way that the contract is "made" and to be performed in F-1. Thus, it is not surprising to find that in the majority of cases this older view led to the application of the internal law of F-1, with the result that the F-2 court upheld the validity of the jurisdictional clause and enforced the F-1 judgment.\textsuperscript{70} Only in exceptional situations, where the creditor or his counsel had neglected to employ the usual boilerplate devices fixing the place of making and of performance in F-1, did the F-2 courts reach a result more favorable to the debtor.\textsuperscript{71}

Modern approaches to choice of law, however, are likely to bring about a drastic change. These modern approaches, which have been adopted in the great majority of states, are predicated upon a grouping of contacts,\textsuperscript{72} upon "the most significant relationship to the transaction,"\textsuperscript{73} or upon governmental interests analysis,\textsuperscript{74} and thus introduce a great deal of flexibility into the choice-of-law process. A court in F-2, by using one of these flexible approaches, will always be able to adduce respectable reasons for applying the law of the consumer's domicile, that is, F-2 law, and thus to treat the jurisdictional clause as invalid.\textsuperscript{75} It must be remembered, moreover, that the


\textsuperscript{71} See Monarch Refrigerating Co. v. Faulk, 228 Ala. 554, 155 So. 74 (1934); Ohio Bureau of Credits v. Steinberg, 29 Ala. App. 515, 199 So. 246 (1940). See also Hopson, supra note 10, at 135-36.


\textsuperscript{73} Restatement (Second) of Conflict of Laws § 188 (1971).


The Supreme Court of California has adopted the governmental interests approach in tort cases. Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976); Hurtado v. Superior Court, 11 Cal. 3d 556, 522 P.2d 666, 114 Cal. Rptr. 108 (1974). The sweeping language of these opinions may foreshadow the adoption of the same approach in contract cases. \textit{But cf.} Bernkrant v. Fowler, 55 Cal. 2d 598, 360 P.2d 608, 12 Cal. Rptr. 266 (1961), a contract case in which the court expressed itself as favoring a modern approach but reached a result that is somewhat difficult to reconcile with pure governmental interests analysis. For an interesting discussion of Bernkrant, see CRAMTON, CURRIE & KAY, supra note 18, at 289-92.

Uniform Commercial Code covers transactions (including consumer transactions) involving a sale of goods. By an express statutory choice-of-law rule,\(^7\) that Code favors the application of forum law whenever the transaction bears "an appropriate relation" to the forum.\(^7\) This forum-oriented rule\(^7\) will furnish additional support for the application of the F-2 statute prohibiting jurisdictional clauses. Even when the Uniform Commercial Code does not cover the transaction, the court can derive the same result from the prohibitory statute itself. In order to attain its purpose, such a statute\(^7\) must be interpreted as containing not only an internal-law prohibitory rule but also an implicit choice-of-law rule mandating that the statutory prohibition be applied to all jurisdictional clauses that appear in contracts with consumers residing in F-2. This implicit statutory choice-of-law rule is, of course, binding on the F-2 court.\(^8\)

The end result of this analysis is that in the future the F-2 court is likely to apply its own statute striking down the jurisdictional clause. Thus, the court will conclude that the clause did not confer jurisdiction on the F-1 court.

(2) Choice-of-Law Analysis with Respect to Competence

The F-1 court's competence, by definition, depends on F-1 law.\(^8\) Therefore, when an incidental choice-of-law question arises in deter-

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\(^7\) U.C.C. § 1-105(1).
\(^7\) Even if not directly applicable, U.C.C. § 1-105(1) might be invoked by way of analogy. See U.C.C. § 1-102.
\(^8\) See, e.g., UCCC § 1.201(8), quoted in the text accompanying note 5 supra.
\(^8\) See Restatement (Second) of Conflict of Laws § 6(1). At this point in the analysis, it is assumed that the source of the choice-of-law rules to be applied by the F-2 court is neither federal law nor F-1 law. See text accompanying notes 58-59, 63-65 supra.
\(^8\) See Restatement (Second) of Conflict of Laws § 105 Comment b (1971) See also notes 48-49 supra.
mining competence, even an F-2 court should resort to F-1 choice-of-law rules. 82

In dealing with the issue of the validity of the choice-of-forum clause (which, we presently assume, is the sole basis of the F-1 court's competence), to what state's internal law does the F-1 choice-of-law rule point? If F-1 has retained an old-fashioned approach to choice of law, it will apply the internal law of the place of contracting or of the place of performance. This approach, as has been shown, 82a ordinarily will lead to the application of F-1 law, under which the clause is valid. 83 If, on the other hand, F-1 belongs to the majority of states where more modern choice-of-law principles have been adopted, it may well be possible for the F-2 court to conclude that, even under F-1 choice-of-law rules, the internal law of the place of the consumer's residence should be applied, with the result that the choice-of-forum clause must be regarded as invalidated by the F-2 statute and that the F-1 court therefore lacked competence. 84

What, then, is the bottom line of this choice-of-law analysis? From the creditor's point of view, the bottom line is discouraging. The F-1 judgment must be treated as invalid if the F-1 court lacked either jurisdiction or competence. 85 The choice-of-law analysis has shown that when the F-2 court examines the validity of the F-1 judgment, it will very frequently find a lack of jurisdiction and in some instances a lack of competence to boot.

IV. Additional Complications: Concurrent Long-Arm Jurisdiction

A creditor who sues in F-2 on the F-1 judgment often will assert that the F-1 court had jurisdiction on two concurrent bases: consent

82. See Hopson, supra note 10, at 151. From the standpoint of the F-2 court, such reference to the whole law (including the choice-of-law rules) of F-1 perhaps involves renvoi, but as it would be senseless for an F-2 court, in dealing with the question of the F-1 court's competence, to reach a result different from that which F-1 would reach, this application of the renvoi doctrine is clearly justified. See Restatement (Second) of Conflict of Laws § 8(2), (3) (1971).

82a. See text accompanying note 70 supra.

83. See Hopson, supra note 10, at 152-54, and authorities cited therein.

84. Id. Note, however, that when the F-2 court treats an F-1 judgment as invalid under F-1 law, the F-2 court's interpretation and application of F-1 law is subject to review by the United States Supreme Court. Johnson v. Muelberger, 340 U.S. 581 (1951); Adam v. Saenger, 303 U.S. 59 (1938).

85. See note 49 supra.
and long-arm. If the defendant’s consent contained in the jurisdictional clause is held invalid, the plaintiff will then argue that there was nevertheless a sufficient long-arm basis for the F-1 court’s jurisdiction. Is this a sound argument in the context of consumer transactions? 

In the somewhat exceptional cases in which a nonresident consumer traveled to the state of the seller and there purchased at the seller’s store, the courts of that state may well have long-arm jurisdiction over the defendant consumer. Usually, however, an interstate consumer contract is concluded by mail or telephone and thus involves no physical presence or activity of the defendant consumer in F-1, the state where the creditor has his place of business. In this situation, the courts tend to deny the existence of F-1 long-arm jurisdiction over a consumer residing in F-2.

The same rule is likely to prevail where the nonresident consumer is a borrower who signed the promissory note outside of the forum state. Even as to nonconsumer borrowers, long-arm jurisdiction under these circumstances is somewhat doubtful; a fortiori, there can be no long-arm jurisdiction over a nonresident consumer-borrower who has never been physically present in the forum state.

There is, moreover, another recent development that will give a creditor pause before he uses long-arm or consent as a jurisdictional basis for an action in F-1 against a consumer residing in F-2.

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86. In the discussion which follows, this Article will assume that F-1 has adopted a long-arm statute going to the full length of what is constitutionally permitted under Hanson v. Denckla, 357 U.S. 235 (1958) and International Shoe Co. v. Washington, 326 U.S. 310 (1945).


Similar considerations might arguably support F-1 long-arm jurisdiction over a borrower residing in F-2 who has executed his promissory note in F-1. Cf. First Nat’l Bank of Kansas City v. Ward, 380 F. Supp. 782, 784-85 (W.D. Mo. 1974) and authorities cited therein (but note that the facts are not clear as to whether the defendant in that case was a consumer).


least one instance, the Federal Trade Commission enjoined the creditor from bringing such actions, on the ground that the practice of suing a mail order customer hundreds or thousands of miles away from his home constituted an unfair business practice within the meaning of section 5 of the Federal Trade Commission Act. On appeal, the Commission's action was upheld. The practical significance of this holding is considerable. It means that a creditor engaging in such a practice may invite trouble for itself, even though its customers, acting individually, rarely have access to sufficient legal assistance to raise jurisdictional objections either in F-1 or in F-2. From the standpoint of consumers as a group, such Commission action is a much more effective remedy than the occasional dismissal, in some F-2 court, of an action brought by the creditor against an individual consumer upon an F-1 default judgment.

In the majority of situations involving creditors' attempts to collect from consumers, it is thus unlikely that, in the future, many creditors will try, and even less likely that they will try successfully, to "long-arm" consumer defendants.

Conclusions

Some of the points discussed above may be technical, complex, and occasionally controversial. The conclusions that finally emerge, however, are surprisingly simple.

(1) Most of the doubtful questions we have encountered along the road could be resolved by congressional legislation. Article IV, section 1 of the United States Constitution provides: "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

It is arguable that this constitutional provision authorizes Congress to define the jurisdictional requirements that a state court judgment must meet in order to be entitled to full faith and credit in a sister state.

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91. Spiegel, Inc. v. F.T.C., 540 F.2d 287 (7th Cir. 1976).
92. It should be remembered, also, that since the time of Pennoyer v. Neff, 95 U.S. (5 Otto) 714 (1878), the Supreme Court has exercised the power to impose limits
In the past, Congress has not enacted any legislation implementing the full faith and credit clause, except the single provision of 28 U.S.C. section 1738, which deals with the formalities of authentication of sister state judgments but not with jurisdictional requirements.\textsuperscript{93} It seems that traditionally Congress has been reluctant to enter the field of interstate conflict of laws, which in general does not have much political interest. This Article, it is true, deals with an issue directly related to the regulation of consumer credit, an area in which Congress has been active in recent years. There is, nevertheless, no present indication of any strong desire on the part of Congress to grapple with conflicts issues of the kind discussed in this Article.

(2) Absent congressional action, most of the doubts and difficulties discussed herein could be authoritatively resolved only by the United States Supreme Court. That Court, however, while it has announced some helpful guiding principles, has shown itself disinclined to meet the practitioner's need for more light on the minutiae of choice of law, jurisdiction, and full faith and credit. Thus, it would not be prudent to expect that all of the doubts and difficulties mentioned above will disappear in the near future.

(3) In the face of these doubts and difficulties, a creditor who sells or lends to nonresident consumers, would be ill-advised to choose a collection method that involves the use of jurisdictional clauses or of long-arm jurisdiction.\textsuperscript{94}

Focusing specifically on jurisdictional clauses, this Article has shown that such a clause is apt to be without any practical value for on the jurisdiction of state courts and that the basis of this power is the Fourteenth Amendment. Congressional legislation in this area may, therefore, derive additional underpinning from section 5 of that Amendment.

\textsuperscript{93} Note, however, that the proposed new Federal Criminal Code, S.1437, 95th Cong., 2d Sess. (1977), as recently amended and passed by the Senate, contains a provision which, if adopted by the House, would mark an initial entry of Congress into this field. The provision in question, which is somewhat similar to H.R. 988, 95th Cong., 1st Sess. (1977) and S.797, 95th Cong., 1st Sess. (1977) would add a new section 1738A to U.S.C. Title 28. The thrust of the new section would be to define state court jurisdiction in interstate disputes involving child custody and to require that full faith and credit be accorded to custody determinations made by a state court having jurisdiction in accordance with such definition.

\textsuperscript{94} There are indications that merchandising firms doing a large volume of business with out-of-state consumers are in agreement with the statement in the text and are abandoning the former practice of suing such consumers at the creditor's place of business. See Spiegel, Inc. v. F.T.C., 540 F.2d 287, 290 (7th Cir. 1976).
the creditor if the debtor resides (and all of his property is located) in one of the growing number of states that have enacted a statute such as section 1.201(8) of the UCCC. Even if the debtor's state has not adopted such legislation, there are grave doubts whether a choice-of-forum clause in a typical consumer contract will effectively confer jurisdiction on the chosen forum.

The web of constitutional, statutory, and common law rules from which these conclusions derive is remarkably and regrettably complex. To some extent, such complexity may constitute part of the price we pay for our federal system, and thus may be unavoidable. The rules guiding courts and parties in this area of the law are not as elegant and clear-cut as they would be if they had been promulgated by an all-powerful and all-wise Philosopher King. Yet, by the imperfect and often tortuous methods of lawmaking in a democratic and pluralistic society, we seem to be reaching, or at least approaching, a fair solution. The combined efforts of legislators, courts, administrative agencies, and scholars have brought us reasonably close to general acceptance of the healthy principle that a collection suit against a consumer, even if it arises out of a multistate transaction, ordinarily must be brought in a forum near the defendant's home, and that this principle cannot easily be bent by a boilerplate clause in a standard contract.