

LEAD ARTICLE

INTERPRETING CONTRACTS  
WITHOUT CONTEXT

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*Contracts always present questions of interpretation. This is nothing new. What is new is the concern that courts lack the tools to resolve many of these questions. When text is unclear, courts look to context, examining extrinsic evidence for clues as to what the parties intended. But what if there is no evidence of context? Some contract theorists worry about these contractual “black holes” based on two assumptions. First, that ostensibly standard clauses may vary in ways that have escaped the notice of transaction participants and other market actors. Second, that contract law’s usual interpretive tools cannot help courts decide whether to assign different meanings to different versions of a clause. If true, opportunistic parties might exploit textual variation to achieve unexpected results.*

*This Article critically evaluates these assumptions. Drawing on multiple, hand-coded samples of commercial contracts, we first document widespread and problematic variance in ostensibly standardized choice-of-law and arbitration clauses. This finding provides empirical support for the concern about contractual black holes. We push back, however, against the claim that contract law must change to accommodate these findings.*

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## INTRODUCTION

Contracts always present questions of interpretation. This is nothing new. One of contract law’s most important functions is to resolve interpretive problems created by the use of imprecise or unclear language.<sup>1</sup> In the usual case, the text is unclear, but there will be some contextual evidence—in the form of prior drafts, statements made during negotiations, course of dealing and performance, or usage of trade—to help clarify the parties’ intent.<sup>2</sup> The search for evidence to

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1. See Shawn Bayern, *Contract Meta-Interpretation*, 49 U.C. DAVIS L. REV. 1097, 1099 (2016) (noting that interpretive questions are the “core questions” of contract law).

2. See *infra* note 41 and accompanying text.

put the parties' intentions into proper context is fundamental to contract interpretation. Indeed, contract law is centrally defined by the tension created by this search, which pits the desire to honor the contract's text against the recognition that, without an understanding of context, a court may misconstrue the parties' intentions.<sup>3</sup>

Recently, however, some scholars have raised a different concern: the *absence* of contextual evidence may leave courts without tools to resolve common interpretive problems.<sup>4</sup> Assume, for example, that after principal negotiators have sketched the outlines of a deal, their lawyers document the transaction by using a contract from a previous transaction as a template. The lawyers may assume that the clauses in this template were carefully honed in prior transactions. Or perhaps they assume that many of the clauses are boilerplate and, even if imperfectly drafted, must remain constant from transaction to transaction. In either case, neither the lawyers nor their principals may pay any heed to many parts of the contract.

If contracts were indeed standardized and well-understood by market participants, this inattentiveness would pose few problems.<sup>5</sup> For example, even if the parties and their lawyers gave no thought to a clause, evidence of trade usage can clarify its meaning.<sup>6</sup> But what if contracts are not standardized? Lawyers are famous tinkerers with contract language.<sup>7</sup> A change introduced by one lawyer, perhaps intended merely to clarify rather than change the meaning, may pass unnoticed into other contracts.<sup>8</sup> Consequently, an ostensibly "standard" clause may vary from contract to contract. In a dispute, a party that discovers such a discrepancy may claim, opportunistically, that the contract has an unexpected meaning.<sup>9</sup>

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3. On the debate between textualism and contextualism in contract interpretation, see, e.g., Ronald J. Gilson, Charles F. Sabel, & Robert E. Scott, *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 25–28 (2014); Bayern, *supra* note 1, at 1099–1100.

4. For recent scholarship motivated by this problem, see Stephen J. Choi, Mitu Gulati, & Robert E. Scott, *The Black Hole Problem in Commercial Boilerplate*, 67 DUKE L.J. 1 (2017); and the associated commentary in Duke Law Journal Online, Lisa Bernstein, *Black Hole Apparitions*, 67 DUKE L.J. ONLINE 102 (2017); and Douglas G. Baird, *Pari Passu Clauses and the Skeuomorph Problem in Contract Law*, 67 DUKE L.J. ONLINE 84 (2017).

5. See Bayern, *supra* note 1.

6. See, e.g., U.C.C. § 1-303 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM'N 2017) ("The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing.").

7. See, e.g., W. Mark C. Weidemaier et al., *Origin Myths, Contracts, and the Hunt for Pari Passu*, 38 LAW & SOC. INQUIRY 72, 95–96 (2013).

8. See *infra* notes 33–35 and accompanying text.

9. See, e.g., Stephen J. Choi, Mitu Gulati, and Robert E. Scott, *Contractual Arbitrage*, in OXFORD HANDBOOK OF INT'L GOVERNANCE 1 (Eric Brousseau et al. eds., 2017) [hereinafter *Contractual Arbitrage*].

Contract theory is increasingly focused on this danger.<sup>10</sup> As an empirical matter, however, it is not clear the concern is warranted.<sup>11</sup> How often do contracts create these interpretive problems, where courts must assign meaning to text without helpful contextual evidence about what the contracting parties intended? The literature to date has mostly examined this question by focusing on an arguably idiosyncratic clause in an arguably idiosyncratic contract: the *pari passu* clause in sovereign debt contracts.<sup>12</sup> We examine whether clauses routinely found in ordinary commercial agreements also generate interpretive disputes that cannot be placed into meaningful context.<sup>13</sup>

We find that they do. Specifically, we show that many choice-of-law clauses and arbitration clauses—boilerplate provisions that are frequently borrowed wholesale from other agreements—present interpretive challenges to courts. Without contextual information as to the meaning of the clause, what are judges to do? We explore several possible answers, each imperfect in its own right: (1) considering evidence about how contracts are produced and selected; (2) asking whether different versions of the disputed clause are priced differently; and (3) giving weight to surveys and other evidence of majoritarian preference. Although lawyers rarely attempt to introduce evidence of this sort, we do not think contract law forbids it.<sup>14</sup> The practice of litigating contract disputes, like the practice of contract drafting, can be standardized and slow to innovate.<sup>15</sup> If “acontextual” contracts are a problem, the answer is not, or not necessarily, to change contract law. Instead, the answer may lie in changing the way lawyers litigate contract cases.

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10. See Choi, Gulati, & Scott, *supra* note 4.

11. See *id.* at 6–8.

12. See *infra* notes 47–51 and accompanying text; see also NML Capital, Ltd. v. Argentina, 699 F.3d 246, 257–58 (2d Cir. 2012) (surveying literature discussing disputes as to the intended meaning of the *pari passu* clause).

13. See Choi, Gulati, & Scott, *supra* note 4, at 5.

14. *Infra* Part III.B (describing the evolution of admissibility of consumer survey data in modern trial practice); see also Rachel M. Bowe, Comment, *The Scope of Arbitration Clauses in Collective Bargaining Agreements & Superficial Divide: Clarifying the Circuit Confusion*, 31 HAMLINE L. REV. 234, 247 (2008).

15. See *Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1277 (1989) (stressing that extrinsic evidence is inadmissible when contract terms are unambiguous); see also Omri Ben-Shahar & Lior Jacob Strahilevitz, *Interpreting Contracts Via Surveys and Experiments*, 92 N.Y.U. L. REV. 1753, 1755 n.3 (2017).

## I. INTERPRETATION WITHOUT CONTEXT

A. *The Relevance (and Frequent Absence) of Contractual Intent*

Everyone knows that contracts are incomplete, in that they do not describe and discount “all relevant future contingencies . . . with respect to both likelihood and futurity.”<sup>16</sup> One reason for incompleteness is that parties do not have complete presentation.<sup>17</sup> Even if this were not so—that is, even if parties could assign a probability and value to all possible future states of the world—it would be prohibitively costly to negotiate and draft a contract covering such an infinitude of possibilities.<sup>18</sup>

Likewise, everyone knows that contracts include ambiguities.<sup>19</sup> On occasion, this is a design choice. For instance, parties might choose to define their obligations imprecisely, effectively delegating the task of adding precision to a later adjudicator.<sup>20</sup> Other times, the ambiguity may be unintentional, the result of poor drafting or of the inherent limitations of language.<sup>21</sup> A contract is an attempt to translate the ideas underlying a bargain into words. Much can get lost in this act of translation, for ideas are more complex and nuanced than the words available to represent them.<sup>22</sup>

So: language is imprecise, lawyers are fallible, and the future involves too many contingencies to foresee, much less address, in a contract. The

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16. Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233, 236 (1979).

17. Ian Macneil defined “presentation” as “a recognition that the course of the future is so unalterably bound by present conditions that the future has been brought effectively into the present so that it may be dealt with just as if it were in fact the present.” Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 863 (1978). Macneil, of course, was well aware that people do not have complete presentation. See Ian R. Macneil, *Restatement (Second) of Contracts and Presentation*, 60 VA. L. REV. 589, 591 & n.10 (1974).

18. See Christopher R. Drahozal & Erin O’Hara O’Connor, *Unbundling Procedure: Carve-Outs from Arbitration Clauses*, 66 FLA. L. REV. 1945, 1954–55 (2014); Michael Klausner, *The Contractarian Theory of Corporate Law: A Generation Later*, 31 J. CORP. L. 779, 785 (2006).

19. See Bayern, *supra* note 1.

20. See Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 817 (2006).

21. See *AM Int’l, Inc. v. Graphic Mgmt. Assocs., Inc.*, 44 F.3d 572, 577 (7th Cir. 1995) (“Discrepancy between the word and the world is a common source of interpretive problems everywhere.”).

22. Claire A. Hill, *A Comment on Language and Norms in Complex Business Contracting*, 77 CHI. KENT L. REV. 29, 53 (2001) (“[T]he limits of language, too, constrain parties’ ability to specify exactly what they want and how they want the law to treat them in various circumstances.”).

result is that contracts raise innumerable potential interpretive disputes. An important function of contract law is to supply tools for resolving these disputes.<sup>23</sup> To a significant extent, the law does this by attempting to uncover the parties' ex ante intentions.<sup>24</sup> Thus, if the courts are persuaded that the parties had a common intention with regard to the meaning of a clause, the court will assign it this shared meaning, however idiosyncratic it might be.<sup>25</sup>

In most cases, it is difficult or impossible to recover the parties' subjective intent with perfect accuracy.<sup>26</sup> For this reason, even when ostensibly concerned with subjective intent, courts tend to favor evidentiary proxies that are objective in nature.<sup>27</sup> Effectively, this means that courts assign to each party's behavior the meaning reasonably understood by its counter-party.<sup>28</sup> We recognize and intend this as a generalization.<sup>29</sup> As we have noted, the tension between subjectivist and objectivist approaches to interpretation is fundamental to contract law and theory.<sup>30</sup> But it is broadly correct to say (1) that the primary

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23. Bayern, *supra* note 1, at 1099.

24. See *Greenfield v. Philles Records, Inc.*, 780 N.E.2d 166, 170 (N.Y. 2002) ("The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent."); RESTATEMENT (SECOND) OF CONTRACTS § 201 cmt. c (AM. LAW INST. 1981) ("[T]he primary search is for a common meaning of the parties . . ."); *infra* note 31, at 1–2.

25. See, e.g., *TKO Equip. Co. v. C&G Coal Co.*, 863 F.2d 541, 545 (7th Cir. 1988) ("[P]arties, like Humpty Dumpty, may use words as they please. If they wish the symbols 'one Caterpillar D9G tractor' to mean '500 railroad cars full of watermelons,' that's fine—provided parties share this weird meaning."); *Garza v. Marine Transp. Lines, Inc.*, 861 F.2d 23, 27 n.4 (2d Cir. 1988) ("There is nothing in the law of contracts that prevents the parties from ascribing an uncommon meaning to their words.").

26. See Bayern, *supra* note 1, at 1128.

27. See Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 723 (1990) ("Ordinary or reasonable meaning is relevant to, although not dispositive of, the question of shared subjective meaning.") (quotations omitted); Bayern, *supra* note 1, at 1128 (noting the difficulty in determining the parties' subjective intentions); cf. Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353, 368 (2007) ("[S]peech acts all contain inferences of the speaker's intent.").

28. See, e.g., Braucher, *supra* note 27, at 723–24.

29. Contract law embraces contradictory principles, most notably the conflict "between protecting reasonable expectations based on promise while simultaneously preserving a more subjectively conceived freedom of choice." William C. Whitford, *Ian Macneil's Contribution to Contracts Scholarship*, 1985 WIS. L. REV. 545, 548 n.11.

30. See *supra* note 3 and accompanying text. For examples, see Alan Schwartz and Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926 (2010); Shawn J. Bayern, *Rational Ignorance, Rational Close-Mindedness, and Modern Economic Formalism in Contract Law*, 97 CAL. L. REV. 943 (2009); Braucher, *supra* note 27; Solan, *supra* note 27.

articulated goal of contract interpretation is to divine the parties' ex ante intentions,<sup>31</sup> and (2) that, especially when the text of a written contract is unclear, courts examine contextual evidence for clues about "what individual parties wanted (or what reasonable parties in their circumstances would have wanted)."<sup>32</sup>

But what if the parties did not intend, or act as if they intended, *anything*? Creating a written contract can be a routine, even automated, process.<sup>33</sup> At best, lawyers start with a standard form contract and carefully modify it to suit the client's needs.<sup>34</sup> To take a dimmer view of legal practice, lawyers may also engage in "editorial churning"—that is, making ad hoc and largely cosmetic changes to the template from a prior deal.<sup>35</sup> The process creates a second, slightly different template, which might or might not become the template for yet a third deal.<sup>36</sup> This iterative process can spawn a multiplicity of templates across and within firms. And when the time comes to prepare documents for a new deal, lawyers may lack the time or inclination to make an informed choice about which to use.<sup>37</sup> It may be that no informed choice is possible. In many cases, no precedential judicial opinion will clarify whether one version of the clause means something different from any other.<sup>38</sup>

It follows that parties do not always negotiate, or even contemplate, the subject matter addressed by each clause in the contract. Some clauses, for instance, just happen to be part of what is regarded as the

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31. STEVEN J. BURTON, *ELEMENTS OF CONTRACT INTERPRETATION I* (2009).

32. Bayern, *supra* note 1, at 1100.

33. *E.g.*, Barak Richman, *Contracts Meet Henry Ford*, 40 *HOFSTRA L. REV.* 77, 85 (2011) (asserting that "the efficiency of unthinking mimicry" underlies both boilerplate contracts and automobile assembly lines).

34. *See* John Flood, *Doing Business: The Management of Uncertainty in Lawyers' Work*, 25 *LAW & SOC'Y REV.* 41, 57 (1991).

35. *See, e.g.*, Robert Anderson & Jeffrey Manns, *The Inefficient Evolution of Merger Agreements*, 85 *GEO. WASH. L. REV.* 57, 61 (2017).

36. Lawyers are aware of this dynamic, and in fact even use it to explain seeming oddities in contract drafting practices. For example, one popular story seeks to explain how a few sovereign bonds issued under New York law in the 1990s incorporated collective action clauses, which were then associated with sovereign bonds issued under English law. The story attributes this to accident—positing that the lawyers carelessly began with the English-law form. The story appears to be incorrect, but this did not diminish its appeal. *See* W. Mark C. Weidemaier & Mitu Gulati, *A People's History of Collective Action Clauses*, 54 *VA. J. INT'L L.* 51, 74–80 (2013).

37. Anderson & Manns, *supra* note 35, at 84–85.

38. *See* Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 *VA. L. REV.* 757, 776 (1995) ("A judicial opinion that interprets one corporation's contract term in effect embeds that interpretation in the contracts of all firms that use the same term.").

“standard” template for this sort of transaction.<sup>39</sup> Parties may first discover these clauses, and consider their potential meaning(s), long after contract formation. Nor do parties always make intentional choices among different versions of a clause. Even if they discuss the broad subject matter covered by the clause, they may wrongly believe their discussion implicates standardized options. To use examples we will cover at length later: parties may agree to arbitrate future disputes, or to have their contract governed by a particular state’s law, without realizing that the clauses memorializing these choices come in many different varieties and that the choice of a contract template can have significant consequences.<sup>40</sup>

If the parties later disagree about the meaning of a clause produced in this manner, one cannot seriously describe the court’s interpretive task as a search for the parties’ *ex ante* intentions. This is true even when intent is examined objectively rather than subjectively. In such cases, the parties neither had, nor behaved as if they had, any intention with regard to the meaning of the clause or to how it would apply to their present dispute. Nor can the lawyers provide insight. Even if the lawyers’ intentions are relevant, on the theory that the parties delegated the drafting of a particular clause to these agents, the lawyers cannot solve the interpretive problem if they did not make a knowing choice among templates. Nor will there often be trade usage or other relevant objective evidence, as there may be no widespread commercial practice or understanding with regard to the interpretive question.<sup>41</sup> To use another example we will cover later: there may not be any prevailing view about whether an arbitration agreement necessarily encompasses both contract and tort (rather than just contract) claims.<sup>42</sup>

### B. “Black Holes” and Other Problematic Clauses

When contracting parties dispute the meaning of a clause produced in this manner, a search for contextual evidence of party intent will turn up little of value. The problem is compounded when lawyers make minor

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39. See Choi, Gulati, & Scott, *supra* note 4, at 4.

40. See generally *infra* note 65 and accompanying text. For evidence of variance in dispute resolution clauses, see W. Mark C. Weidemaier, *Customized Procedure in Theory and Reality*, 72 WASH. & LEE L. REV. 1865, 1925–30 (2015).

41. See U.C.C. § 1-303(c) (AM. LAW INST. & UNIF. LAW COMM’N 2017) (defining usage of trade as “any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question”).

42. See *infra* note 136 and accompanying text.

changes to the template. As altered templates diffuse through the market, other lawyers may be unaware that they are using version “A” of a clause rather than versions “B,” “C,” and so forth. When disputes arise as to the meaning of these clauses, a textually minded judge may interpret these versions differently, on the assumption that differences in language must mean *something*.<sup>43</sup>

How often do contracts create these interpretive problems? Although there is relatively little evidence, the literature suggests that contracts may frequently exhibit variation that cannot be explained by reference to party intent (even objectively defined).<sup>44</sup> In a study of merger agreements, Anderson and Manns found a “remarkable level of editorial churning,” in which lawyers made extensive and seemingly cosmetic changes to deal documents.<sup>45</sup> These changes substantially increased the median length of merger agreements over time and likely resulted in the creation of numerous, different templates even within the same law firm.<sup>46</sup>

Choi, Gulati, and Scott present similar evidence in a study of the *pari passu* clause in sovereign bond contracts.<sup>47</sup> That phrase, meaning “in equal step” in Latin, appears in a clause in nearly all sovereign bonds—at least those governed by law other than that of the issuing government.<sup>48</sup> The clause typically states that the issuing government will rank its obligations to creditors *pari passu*.<sup>49</sup> This has a clear meaning in corporate debt, where *pari passu*-ranking creditors are entitled to a pro rata share of liquidation proceeds (after higher priority claims are satisfied).<sup>50</sup> But the meaning is unclear in the sovereign debt context, where there is no bankruptcy court and no liquidation.<sup>51</sup>

Choi, Gulati, and Scott document how different versions of the *pari passu* clause evolved and spread through the market, including one variation that obliged the issuing government to maintain the equal

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43. See *Metro. Life Ins. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d Cir. 1990).

44. See *Ricketts v. Pennsylvania R.R.*, 153 F.2d 757, 758–59 (2d Cir. 1946); see also *supra* notes 27–28.

45. Anderson & Manns, *supra* note 35, at 76.

46. *Id.*

47. See Choi, Gulati, & Scott, *supra* note 4, at 36–38.

48. See W. Mark C. Weidemaier et al., *Origin Myths, Contracts, and the Hunt for Pari Passu*, 38 LAW & SOC. INQUIRY 72, 73 (2013).

49. *Id.*

50. *Id.*

51. *Id.* at 74.

ranking of its “payment obligations.”<sup>52</sup> Over a series of decisions, first against Peru in Belgium, and later against Argentina in New York, courts interpreted this clause to require that the government pay its creditors pro rata.<sup>53</sup> Importantly, the court enforced this interpretation not through an award of damages—the pari passu clause becomes relevant after the government has already defaulted, so creditors already are entitled to money damages for the amount of the outstanding debt—but through an injunction that forced the governments to comply.<sup>54</sup>

Many market participants were surprised by these rulings and viewed them as unwelcome.<sup>55</sup> Relying on archival work, scholars pointed out that the pari passu clause has appeared at least occasionally in sovereign bonds for two centuries, that the clause had gradually become a routine feature of sovereign bond documentation, and that lawyers have slowly introduced variations into the clause that serve no apparent purpose.<sup>56</sup> By seizing on one variation, creditors of Peru and Argentina were able to advance a credible, textualist argument that the version of the clause used by those countries—the one with the word “payment”—meant something that surprised market participants.<sup>57</sup>

Choi, Gulati, and Scott characterize the pari passu clause as a contractual “black hole.” By this, they mean that the clause has been used in sovereign bonds for so long, and so thoughtlessly, that it has been “emptied of *any* recoverable meaning.”<sup>58</sup> Such black holes, they say, are utterly devoid of interpretive context: “The term in question can apply to an infinitely wide spectrum of referents . . . because there is no basis in the relevant context to determine what, if any, shared

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52. See Choi, Gulati, & Scott, *supra* note 4, at 6 (explaining that this variation “required holdout creditors to be paid in full as a condition to the sovereigns paying consenting creditors under a restructuring agreement”).

53. W. Mark C. Weidemaier & Anna Gelpern, *Injunctions in Sovereign Debt Litigation*, 31 YALE J. ON REG. 189 (2014).

54. *Id.* at 195–96.

55. See Choi, Gulati, & Scott, *supra* note 4, at 6.

56. See *id.* at 8.

57. See *id.* at 6.

58. *Id.* at 3–4. They also invoke the term “grey hole” for clauses for which some evidence on the meaning of the contractual term remains, but this evidence may be so minimal or contradictory as to leave courts effectively with little guidance on how to apply this meaning during litigation. *Id.* Choi, Gulati, and Scott note that such clauses raise the same interpretive issues and thus use “black hole” as an umbrella term. *Id.* So shall we.

meaning exists.”<sup>59</sup> The tendency of lawyers to introduce new legal jargon to an existing clause—which Choi, Gulati, and Scott term “encrustation”—compounds the problem by creating a risk of “litigation over essentially meaningless variations in the boilerplate language.”<sup>60</sup>

Despite these examples, the question remains: how often do contracts create interpretive problems that cannot be resolved through a search for party intent? In the next Part, we present evidence suggesting that the problem is quite common, perhaps endemic. We look to less exotic clauses that routinely appear in commercial contracts. In so doing, we document the widespread use of clauses that share important functional characteristics of contractual “black holes.” That is, the clause’s meaning is unclear; the uncertainty cannot be resolved by searching for the usual types of contextual evidence; and the clause takes slightly different form from contract to contract, which tempts courts to assign different meanings to minor textual variations.

## II. CHOICE-OF-LAW AND ARBITRATION SURPRISES

Our focus in this Part is on commercial contracts—contracts for the provision of goods and services between relatively large business firms. We focus on choice-of-law clauses and arbitration clauses. The former designates the legal regime that will govern the parties’ relationship.<sup>61</sup> The latter requires the parties to submit any future disputes to binding resolution before a private third party rather than a judge.<sup>62</sup> Both clauses appear routinely in commercial contracts.<sup>63</sup> Drawing on

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59. *Id.* at 9–10. A quibble: at times, Choi, Gulati, and Scott appear to lament the lack of evidence of the intentions of the very first parties to ever use the clause. *Id.* at 3 n.2 (“[T]he parties’ original understanding of what a clause meant can, in theory, be lost entirely by the process of repetition and the insertion of random variations . . .”). This emphasis on the very first drafters of a clause is consistent with views expressed previously by at least two of the authors. See Stephen J. Choi & Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129, 1153 (2006). But evidence of this sort is essentially irrelevant to contract interpretation—except in the sense that, if we knew what the very first users of a clause intended, this might serve as a weak proxy for the intent of the parties to *this* contract. Of course, evidence of how current market participants understand the clause would be better. In any event, contract law does not direct judges to excavate the very first contract to use a clause and to divine the meaning of these original users—dead, perhaps, for centuries. See W. Mark C. Weidemaier, *Indiana Jones, Contracts Originalist*, 9 CAP. MKTS. L.J. 255, 255–56 (2014).

60. Choi, Gulati, & Scott, *supra* note 4, at 3–5.

61. See *infra* note 78 and accompanying text.

62. See Drahozal & O’Hara O’Connor, *supra* note 18, at 1948.

63. In a sample of material commercial contracts attached to SEC filings made between 2000 and 2012, Weidemaier finds that 95.7% designate the governing law,

datasets compiled in our separate work, we demonstrate that clauses akin to contractual black holes are commonplace, even in contracts involving high stakes and sophisticated parties.<sup>64</sup>

Although parties often agree *ex ante* on whether to arbitrate future disputes and on their preferred governing law, their preferences can diverge *ex post*.<sup>65</sup> For example, arbitration typically offers less discovery than litigation.<sup>66</sup> *Ex ante*, parties might view this as a benefit, hoping that by choosing arbitration, they will constrain opportunistic use of discovery to impose costs on an adversary.<sup>67</sup> Post-dispute, however, one party may conclude that it needs extensive discovery to prove its claims, or may view the expense of discovery as a source of leverage.<sup>68</sup> In such a case, the party will have an incentive to try to escape its obligation to arbitrate.<sup>69</sup> The same dynamic exists for choice-of-law clauses. If a party ultimately concludes that the law of a jurisdiction other than the one named in the choice-of-law clause is more favorable, it may try to persuade the court to disregard the clause.

The foregoing discussion presupposes that one party takes a position inconsistent with its *ex ante* intention. But again, recall that on many questions, the parties will not *have any* *ex ante* intentions.<sup>70</sup> Even if the parties broadly agree to arbitrate, or to have their agreement governed by the law of a particular state, they will not always consider the questions we discuss. For example, a party to a contract with an

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while 48.2% provide for arbitration. Arbitration clauses appear even more frequently (61%) in contracts between parties from different countries. See Weidemaier, *supra* note 40, at 1905–06, 1919.

64. *Id.* at 1905–07.

65. See Bruce L. Hay, *Procedural Justice—Ex Ante vs. Ex Post*, 44 UCLA L. REV. 1803, 1811–13 (1997).

66. See Randy J. Sutton, Annotation, *Discovery in Federal Arbitration Proceedings Under Discovery Provision of Federal Arbitration Act (FAA), 9 U.S.C.A. § 7, and Federal Rules of Civil Procedure, as Permitted by Fed. R. Civ. P. 81(a)(6)(B)*, 45 A.L.R. Fed. 2d 51 (2010) (discussing the statutory and procedural bases for the limitation of discovery afforded in arbitration proceedings).

67. See Drahozal & O'Hara O'Connor, *supra* note 18, at 1953–54; Weidemaier, *supra* note 40, at 1886.

68. Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 603 (2001) (“[T]he bigger the expense to be borne by the opponent, the bigger the incentive to make the request.”).

69. Party preferences regarding dispute resolution procedures will often change once a dispute arises. See Daphna Kapeliuk & Alon Klement, *Contractualizing Procedure* 13 (Dec. 31, 2008) (unpublished manuscript), <http://ssrn.com/abstract=1323056>; see also Hay, *supra* note 65, at 1826–27.

70. See *supra* notes 33–42 and accompanying text.

arbitration clause might later argue that the clause applies to contract but not tort claims. The argument is not implausible; that parties wanted to arbitrate something need not imply that they wanted to arbitrate everything. And, crucially, a search for shared intent with regard to the question will likely turn up nothing of value. That is true even if framed in objective terms. To invoke evidence of trade usage, for instance, a party usually must prove that the usage existed at the time of the contract and that both parties knew or should have known of it.<sup>71</sup> But if participants in the trade rarely give any thought to a question, no such proof will be available.

#### A. *Disputes About Choice-of-Law Clauses*

Choice-of-law clauses are a staple of modern contract practice.<sup>72</sup> They provide certainty as to the law that will govern an agreement and make it unnecessary for a court to conduct a conflict-of-laws analysis when the dispute has a connection to more than one jurisdiction.<sup>73</sup> However, they also present interpretive challenges.<sup>74</sup> In many cases, these clauses are pure boilerplate; the parties will not have negotiated the language in the clause other than to select the governing jurisdiction.<sup>75</sup> Consequently, it is not at all clear that the text of the typical clause provides a reliable guide to what the parties “intended” with respect to a wide range of issues.<sup>76</sup> Nor will the parties always

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71. BURTON, *supra* note 31, at 174.

72. See John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. 631, 641 (2017).

73. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995) (observing that a “choice-of-law provision, when viewed in isolation, may reasonably be [considered] as merely a substitute for the conflict-of-laws analysis that otherwise would determine what law to apply to disputes arising out of the contractual relationship”).

74. See Coyle, *supra* note 72, at 635–39; see also PETER HAY ET AL., *CONFLICT OF LAWS* 1145 (5th ed. 2010).

75. See Glenn West, *The Law You Choose to Govern Your Contract May Not Be the Law That Governs*, WEIL INSIGHTS: GLOBAL PRIV. EQUITY WATCH (Jan. 12, 2016, 12:26 AM), <https://privateequity.weil.com/insights/contractual-choice-of-governing-law-and-statutes-of-limitations-the-law-you-choose-to-govern-your-contract-may-not-be-the-law-that-governs-the-applicable-statute-of-limitations-for-claims-arise> (stating that “most deal professionals actually do focus on the law chosen to govern an agreement” but that “there is often less focus on the actual wording of the clause that effectuates that choice”).

76.

Construction of a contractual provision is, of course, a matter of discerning the parties’ intent[ . . . ] We must therefore rely on the contract itself. But the provision of the contract at issue here was not one that these parties drafted themselves. Rather, they incorporated portions of a standard form contract commonly used in the construction industry. That makes it most unlikely that their intent was in any

*have* an intention about how the clause should be applied to a particular matter.

When a contracting party believes that the law of the jurisdiction named in the choice-of-law clause is unfavorable, that party will often try to persuade the court to apply the law of a different jurisdiction. In so doing, it will typically advance one of the following arguments:

1. The clause only applies to contract claims. It does not apply to the tort or statutory claims being asserted.<sup>77</sup>
2. The clause states that it will be “interpreted” or “construed” in accordance with the law of a given jurisdiction but leaves unanswered the question of which jurisdiction’s law will be applied to “govern” the contract.<sup>78</sup>
3. The clause only selects the substantive law of the chosen jurisdiction. The rule in question is procedural and therefore not covered by the clause.<sup>79</sup>
4. The clause selects the whole law of the chosen jurisdiction, including its conflicts rules, and these rules require the court to apply the law of a different jurisdiction.<sup>80</sup>
5. The law of the chosen U.S. state includes federal law. Federal law preempts state law. The contract is therefore governed by federal law rather than the law of the state named in the clause.<sup>81</sup>

We characterize each of these arguments as an “escape hatch.” If a party can persuade the court to accept one of these arguments, then it may escape the law of the jurisdiction named in the choice-of-law clause and have the law of a different jurisdiction applied in its place.

Importantly, none of the above arguments challenge the basic enforceability of a choice-of-law clause. Instead, these arguments require the court to interpret the choice-of-law clause. In some cases, the clause will be drafted so as to foreclose each of the aforementioned arguments. Consider the following comprehensive clause:

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way at variance with the purposes for which choice-of-law clauses are commonly written and the manner in which they are generally interpreted.

*Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 488 (1989) (Brennan, J., dissenting).

77. See *Krock v. Lipsay*, 97 F.3d 640, 645 (2d Cir. 1996).

78. See *Boat Town U.S.A., Inc. v. Mercury Marine Div. of Brunswick Corp.*, 364 So. 2d 15, 17 (Fla. Dist. Ct. App. 1978).

79. See *W. Video Collectors, L.P. v. Mercantile Bank*, 935 P.2d 237, 239 (Kan. Ct. App. 1997).

80. See *Weiss v. La Suisse, Société d’Assurances sur la Vie*, 293 F. Supp. 2d 397, 402 (S.D.N.Y. 2003).

81. See *Travelers Prop. Cas. Co. v. St.-Gobain Tech. Fabrics Can. Ltd.*, 474 F. Supp. 2d 1075, 1081–82 (D. Minn. 2007).

Any and all claims, controversies, and causes of action arising out of or [1] relating to this Agreement, whether sounding in contract, tort, or statute, shall be [2] governed by the [3] substantive and procedural laws of the State of New York, [4] without giving effect to any conflict-of-laws or other rule that would result in the application of the laws of a different jurisdiction. [5] The United Nations Convention on Contracts for the International Sale of Goods shall not apply to this Agreement.<sup>82</sup>

This clause specifically identifies each possible escape hatch and slams it shut. In so doing, it ensures that New York law will govern all aspects of the parties' relationship. By way of comparison, consider the following simple clause:

This contract shall be interpreted in accordance with the laws of the State of New York.

The language of this simple clause does not allow a judge to determine whether the escape hatches referenced above are open or closed. To the extent the clause presents interpretive questions that the parties did not consider during their negotiations—and as to which there is not even “objective” evidence as to their intent—it exhibits the functional characteristics of a contractual black hole.<sup>83</sup> A judge called on to interpret such a clause must determine whether to accept or reject one of the five interpretive arguments listed above with essentially no guidance from the text of the contract or from relevant evidence of context.

In response to this challenge, the courts have developed canons of construction that assign a presumptive meaning to simple choice-of-law clauses.<sup>84</sup> To create these interpretive rules, courts frequently engage in armchair empirical speculation as to what most contracting parties would probably *want* these clauses to mean.<sup>85</sup> While this speculation may occasionally be informed by contextual evidence furnished by the parties, in many cases it will be driven by the judge's assessment of how

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82. The bracketed numbers identify the language in the clause that is responsive to each of the five numbered arguments set forth above.

83. See *supra* Part I.B.

84. See Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 320 (1990) (describing a canon as “a background presumption about the legal system that is used to resolve uncertainty in interpretation” and observing that “any interpretive norm that courts rely on to resolve ambiguity is a ‘canon’”).

85. See Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1581–84 (2005); *infra* notes 162–164 and accompanying text.

a “rational businessperson” would want the clause to be interpreted.<sup>86</sup> This interpretive move, though entirely appropriate, raises an interesting question: what rational businessperson would want lawyers to draft a choice-of-law clause riddled with escape hatches?

1. *International supply agreements*

In an attempt to ascertain how frequently choice-of-law clauses contain comprehensive language that seals each of the five escape hatches, we first reviewed a sample of 157 international supply agreements. Each of these agreements was filed with the U.S. Securities and Exchange Commission (SEC) between 2011 and 2015, and all but three involved at least one U.S. party.<sup>87</sup> We chose to study international supply agreements for two reasons. First, issues of choice of law are generally more salient in international transactions than in purely domestic exchanges.<sup>88</sup> Accordingly, choice-of-law clauses in international contracts are more likely to be closely scrutinized than those in their domestic counterparts. Second, in some cases, a federal treaty—the United Nations Convention on Contracts for the International Sale of Goods (CISG)—will supply the governing law for international supply agreements.<sup>89</sup> This treaty does not apply to contracts for the sale of good domestically.<sup>90</sup> In selecting international supply agreements, therefore, we were able to evaluate whether the parties to such agreements regularly address the potential applicability of a federal treaty by drafting a provision that excludes it or chooses it as a source of governing law.

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86. *Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148, 1154 (Cal. 1992) (deploying “rational businessperson” standard to interpret a simple choice-of-law clause); *see also* *Panthera Rail Car LLC v. Kasgro Rail Corp.*, 985 F. Supp. 2d 677, 694 (W.D. Pa. 2013).

87. A complete account of how we went about gathering these agreements is set forth in the Appendices.

88. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (“[A] strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions . . . applies with special force in the field of international commerce”).

89. *See* United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3.

90. UNITED NATIONS COMM’N ON INT’L TRADE, EXPLANATORY NOTE BY THE UNCITRAL SECRETARIAT ON THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 34 (2010) (providing that the treaty applies to “parties whose places of business are in different states and either both of those states are contracting states or the rules of private international law lead to the law of contracting state”).

After collecting the 157 international supply agreements, we coded the choice-of-law clauses in each agreement for language that specifically addressed one of the five escape hatches. The results are presented in Table 1.

*Table 1: Choice-of-Law Clauses in International Supply Agreements, 2011–2015*

ISSUE	PERCENTAGE OF CONTRACTS SPECIFICALLY ADDRESSING ESCAPE HATCH
Does the clause select a law to “govern” the contract?	90%
Does the clause exclude the conflict-of-laws rules of the chosen jurisdiction?	77%
Does the clause address the potential applicability of the CISG?	41%
Does the clause distinguish between substantive and procedural law?	24%
Does the clause address the question of whether it applies to tort and statutory claims that are related to the contract?	20%

Approximately ninety percent of the contracts stated that the contract would be “governed by” the law of the chosen jurisdiction.<sup>91</sup> This formulation effectively forecloses the argument that the parties intended to choose the law of one jurisdiction to “interpret” their agreement and to choose the law of another jurisdiction to “govern” that same agreement. In addition, approximately seventy-seven percent of the agreements contained a clause directing the courts not to apply the conflict-of-laws rules of the chosen jurisdiction.<sup>92</sup> This formulation effectively forecloses the argument that the parties intended to select a body of law that could bounce them out of the jurisdiction named in

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91. See John F. Coyle & Christopher R. Drahozal, *An Empirical Study of Dispute Resolution Clauses in International Supply Contracts* 11 (forthcoming 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3206695](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3206695).

92. *Id.* at 11–12.

the clause to still another jurisdiction. These findings suggest that a significant number of contract drafters are aware of these two escape hatches and regularly take steps to seal them shut.

The other three escape hatches, by contrast, are frequently left unattended. Only forty-one percent of the clauses referenced the CISG despite the treaty's salience to international supply agreements.<sup>93</sup> Only twenty-four percent of the clauses confronted the question of whether the clause selected the procedural law of the chosen jurisdiction.<sup>94</sup> And only twenty percent of the clauses considered the question of whether the chosen law applied to related tort and statutory claims as well as contract claims.<sup>95</sup> On the one hand, the contracts' failure to seal these escape hatches could indicate that most contracting parties view these issues as unimportant. On the other hand, it could indicate that the parties are largely unaware of their existence.

We believe that lack of awareness is the more likely explanation. Notwithstanding the importance of choice-of-law clauses to future disputes, a surprising number of U.S. lawyers conduct little research into the content of the law of the chosen jurisdiction.<sup>96</sup> Each lawyer will typically want the law of his or her home jurisdiction to apply and will declare victory if this objective is achieved.<sup>97</sup> There are, moreover,

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93. *Id.* at 16–17.

94. *Id.* at 14.

95. *Id.* at 3.

96. See LEA BRILMAYER ET AL., *CONFLICT OF LAWS: CASES AND MATERIALS* 698 (7th ed. 2015) (“[S]urprisingly often, the parties do not even bother to research the chosen law before they include a clause selecting it.”); William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 *SMU L. REV.* 697, 762 (2001) (“Even if a party receiving a form contract choosing the law of, say, Arkansas took the time to read the form, the odds are extremely remote that the recipient would expend resources to determine the meaning of the clause.”); see also E-mail from In-House Counsel at U.S. Energy Company, to author (Mar. 3, 2016) (on file with American University Law Review) (“[I]n the ordinary course of commerce, where there are lots of contracts flying around all the time, and time/cost are always issues, it is not uncommon to agree to a choice of law without doing a detailed analysis of how that jurisdiction’s laws work for you or against you.”).

97. Michael Gruson, *Governing Law Clauses in Commercial Agreements—New York’s Approach*, 18 *COLUM. J. TRANSNAT’L L.* 323, 362–64 (1980); see also Shaffik Bhalloo, *Jurisdictional Issues in Electronic Commerce Contracts: A Canadian Perspective*, 8 *COMPUT. L. REV. & TECH. J.* 225, 278 (2004) (discussing advantages to choosing the law of one’s home jurisdiction); E-mail from former General Counsel of Minnesota Company, to author (Aug. 22, 2016) (on file with American University Law Review) (“We were mindful of the choice-of-law clauses, and generally preferred to identify our home state with which we were most comfortable, but that was generally the extent of our focus on that specific clause.”).

numerous cases in which one party succeeded in “winning” the choice-of-law issue during the negotiations—the law selected was the law of its home jurisdiction—only to discover in litigation that an essential contract term was invalid under the law of the chosen jurisdiction.<sup>98</sup> When it comes to choosing a governing jurisdiction, in short, the prevailing view is that this choice is frequently “not based on any deep knowledge of this law, but rather on a vaguely felt preference for dealing with what appears to be familiar rather than with the unfamiliar.”<sup>99</sup> With respect to the rest of the clause—everything except the choice of governing jurisdiction—the available evidence suggests that U.S. lawyers are even *less* mindful of the language they choose.<sup>100</sup> Accordingly, we believe that the most plausible explanation for the lack of attention paid to these is simple ignorance. In such cases, it can be said that the parties neither had, nor behaved as if they had, any intention with regard to the meaning of the clause.

## 2. *Bond indentures*

Next, we reviewed a sample of 358 bond indentures to gauge how frequently choice-of-law clauses in these contracts contained one of the five escape hatches.<sup>101</sup> Each of these agreements was filed with the SEC in 2016. After collecting these indentures, we coded the choice-of-law clauses in each agreement for language that specifically addressed one of the five escape hatches. The results are presented in Table 2.

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98. See, e.g., *Mail Boxes Etc. USA, Inc. v. Considine*, No. C98-1472L, 1999 U.S. Dist. LEXIS 23380, at \*2–4 (W.D. Wash. Aug. 13, 1999), *aff'd*, No. 99-35901, 2000 WL 964614 (9th Cir. July 11, 2000); *Novak v. Mut. of Omaha Ins. Co.*, 28 P.3d 1033, 1039–40 (Kan. Ct. App. 2001); see also RESTATEMENT (SECOND) ON CONFLICT OF LAWS § 187, Reporter’s Note (AM. LAW INST. 1971).

99. Gruson, *supra* note 97, at 325.

100. See *infra* notes 204–211 and accompanying text (discussing interviews conducted by Coyle in which lawyers evidenced little knowledge as to the significance of small differences in language in choice-of-law clauses).

101. A complete account of how we went about gathering these agreements is set forth in Appendix B.

Table 2: *Choice-of-Law Clauses in Bond Indentures, 2016*

ISSUE	PERCENTAGE OF CONTRACTS SPECIFICALLY ADDRESSING ESCAPE HATCH
Does the clause select a law to “govern” the contract?	83%
Does the clause exclude the conflict-of-laws rules of the chosen jurisdiction?	55%
Does the clause address the potential applicability of the CISG?	N/A
Does the clause address the question of whether it applies to tort and statutory claims that are related to the contract?	12%
Does the clause distinguish between substantive and procedural law?	2%

Here, again, the escape hatches are sealed much less frequently than one might expect. There is no rational reason to leave the scope of the clause unclear, for example, and yet eighty-eight percent of the clauses did precisely that. If this is a conscious drafting choice, then one is left scratching one’s head as to why a fully informed drafter would ever choose to make it. If it is not a conscious drafting choice, then one must accept that the differences between these clauses are random and inadvertent.

Interviews with lawyers who regularly draft bond indentures suggest that these differences in language are inadvertent.<sup>102</sup> These attorneys explained that no bond indenture is ever drafted from scratch.<sup>103</sup> The deal always begins with an existing indenture from a past deal, which

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102. See John F. Coyle, *Choice-of-Law Clauses in U.S. Bond Indentures*, 13 CAP. MKTS. L.J. 152, 163–65 (2018) (noting the ancillary language is viewed as unimportant and “virtually never discussed or negotiated”).

103. Telephone Interview with Partner, AmLaw30 Law Firm (Oct. 13, 2017) (“A lot of the indentures that we draft are based on precedent that we find filed with the SEC.”); Telephone Interview with Partner, NC Law Firm (Oct. 10, 2017) (“I’ve never started drafting from scratch.”).

is then modified to suit the needs of the present deal.<sup>104</sup> With respect to the choice-of-law clause, the underwriters always want the contract to be governed by New York law because this is what investors expect to see and this will make it easier for the underwriter to sell the bonds.<sup>105</sup>

The underwriters are, however, largely indifferent to the rest of the language in the clause because potential buyers generally do not care about this language. As one attorney put it: “The underwriter is not looking out for or protecting investors. The underwriter is just trying to make sure the terms aren’t so offensive that the buyer isn’t going to want it. If the issuer wants to change the language in the choice-of-law clause, no one cares. All they care about is that you get New York law.”<sup>106</sup> As another attorney explained in an e-mail:

In my experience, the indenture was drafted based on an agreed-upon precedent, and neither side wanted to be the one to make “unnecessary” changes to non-substantive provisions. You tried to keep your redlining to the most important points only, so that you had the highest chance of winning the points you really wanted—not wasting points on a non-substantive provision.<sup>107</sup>

Since the choice-of-law clause in a bond indenture is generally viewed as non-substantive, it rarely attracts the attention of the lawyers negotiating these agreements. As a result, choice-of-law clauses are routinely cut and pasted from one agreement to another without alteration. When this occurs, the lawyers may be unaware that they are using version “A” of a clause rather than versions “B,” “C,” and so forth. When disputes arise as to the meaning of these clauses, a textually minded judge may interpret these versions differently, on the assumption that differences in language must mean *something*. In practice, however, the

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104. Telephone Interview with Partner, AmLaw10 Law Firm (Oct. 10, 2017) (“For a first time issuer, the investment banks will look at a few comps in the relevant industry. They say that they’re going to model these notes on a company that did a deal six months ago in your space.”).

105. Telephone Interview with Partner, AmLaw15 Law Firm (Oct. 13, 2017) (“The bank is hired by the issuer but is trying to sell the bonds to the bondholders.”); *see also* Telephone Interview with Partner, AmLaw10 Law Firm (Oct. 10, 2017) (“The underwriters want to get the bonds sold because they want their percentage. They’re negotiating what they would perceive to be market and where they would get pushback on accounts.”).

106. Telephone Interview with Partner, AmLaw25 Law Firm (Oct. 11, 2007); *see also* Telephone Interview with Partner, AmLaw40 Law Firm (Oct. 17, 2017) (“A lot of time in these indentures, the underwriters are really just selling the paper/notes issued under the indenture. They’re not taking credit exposure and they’re not making sure the boilerplate is always up to snuff.”).

107. E-mail from NY Bond Attorney, to author (Oct. 26, 2017) (on file with Authors).

parties were likely wholly unaware of—and indifferent to—the significance of the words that they wrote into their choice-of-law clause. They were just cutting and pasting from a prior agreement.<sup>108</sup>

### B. Disputes About Arbitration Clauses

If a contract does not specify the forum or dispute resolution method, future disputes will be resolved in court. Because case-filing decisions are only weakly constrained by the rules governing jurisdiction, venue, and similar matters, the parties to such a contract cannot predict where litigation will occur. Indeed, they may become embroiled in litigation in multiple jurisdictions, at dramatically increased cost. Furthermore, the parties cannot assert much control over *who* decides their dispute; they will find themselves before a judge selected according to the rules of the relevant jurisdiction. Theoretically, the parties can resolve such questions by agreement *ex post*. But once a dispute has arisen, each party will have a preferred forum, and the cost of negotiating an agreement as to the forum may be prohibitive.<sup>109</sup>

Arbitration is one alternative to this uncertainty. Typically, an arbitration clause requires future disputes to be submitted to a neutral party, selected by the parties, and empowered to render a binding decision.<sup>110</sup> Parties might prefer arbitration to litigation for many reasons. A commonly cited reason is that arbitrators may have expertise that will allow for more accurate resolution of disputes.<sup>111</sup> Whatever the reason for the choice, parties will often devote little time to negotiating the details.<sup>112</sup>

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108. See *Espresso Disposition Corp. v. Santana Sales & Mktg. Grp., Inc.*, 105 So. 3d 592, 594–95 (Fla. Dist. Ct. App. 2013) (discussing interpretive challenges presented when text from one agreement is “cut and pasted” into another).

109. See Daphna Kapeliuk & Alon Klement, *Changing the Litigation Game: An Ex Ante Perspective on Contractualized Procedures*, 91 TEX. L. REV. 1475, 1483–85 (2013). But see Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 526–29 (2003) (critiquing overly sharp distinctions between *ex ante* and *ex post* agreements).

110. Cf. *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 382 (2002).

111. A desire for confidentiality and other considerations also may lead parties to prefer arbitration, just as competing considerations—such as the desire for robust appellate review—may lead them to favor litigation. See Thomas J. Stipanowich & J. Ryan Lamare, *Living With ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 16–18 (2014).

112. See Donald I. Baker & Mark R. Stabile, *Arbitration of Antitrust Claims: Opportunities and Hazards for Corporate Counsel*, 48 BUS. LAW. 395, 413 (1993) (contending that arbitration clauses are often included as an afterthought); Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341, 403–04 (2002) (“Often, arbitration agreements are

Occasionally, they will discuss basic details, such as the number and qualifications of arbitrators and the governing institutional rules, but they will often overlook important subjects.<sup>113</sup> Consequently, if a dispute arises and the arbitration clause is not well-drafted, a party may try to exploit an ambiguity to avoid arbitration. And neither party will be able to support its proffered interpretation by pointing to credible evidence of any shared intent.

1. *Preliminary skirmishes about the duty to arbitrate*

Fights over the obligation to arbitrate can take a number of forms. First, a party might try to avoid arbitration by alleging that no contract exists at all.<sup>114</sup> As a matter of federal arbitration law, a party who makes such an allegation is almost certainly entitled to a judicial resolution before the party can be compelled to arbitrate.<sup>115</sup>

More commonly, a party might concede that a contract exists but contest the enforceability of some or all of its terms.<sup>116</sup> Such an argument will not always help avoid arbitration because challenges that implicate the validity of the entire contract—for instance, a party’s claim that its assent to the contract was induced by fraud—must themselves be arbitrated.<sup>117</sup> However, courts must resolve challenges to the validity of the arbitration clause itself before requiring parties to arbitrate the merits of their dispute.<sup>118</sup> Examples include the argument that a party’s assent *to arbitrate* was procured by fraud and the argument that the arbitration clause is unconscionable.<sup>119</sup> Importantly, these are default rules.<sup>120</sup> Most relevant here, the contract may require the

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an afterthought thrown into a contract by corporate attorneys who have little experience with arbitration . . . “).

113. *Supra* note 112.

114. *See, e.g.*, Meyer v. Uber Techs., Inc., 868 F.3d 66, 79–80 (finding that there was unambiguous assent to Terms of Service to arbitrate due in part to the terms’ conspicuous appearance).

115. *See, e.g.*, Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444 n.1 (2006).

116. *See, e.g.*, Glass Design, Inc. v. Owens-Brockway Glass Container, Inc., No. W-12-cv-132, 2013 WL 12091106, at \*2 (W.D. Tex. Jan. 7, 2013).

117. *See, e.g.*, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 406–07 (1967) (holding that claims of fraud in the inducement of the contract as a whole must be resolved in arbitration).

118. *Id.* at 403–04.

119. *See* Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 72 (2010) (ordering arbitration to decide whether the parties’ arbitration clause was unconscionable).

120. *Infra* notes 124–125 and accompanying text.

parties to arbitrate challenges to the arbitration clause itself, as long it provides “clear and unmistakable evidence” of this intent.<sup>121</sup>

In another common challenge, a party concedes that an enforceable arbitration agreement exists but argues that its claims or defenses fall outside the scope of the clause.<sup>122</sup> Again, the party will be entitled to make this argument to a judge, unless the contract clearly requires otherwise. To succeed, the party will have to overcome yet another interpretive presumption, which is that “doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”<sup>123</sup> Put differently, courts “independently . . . resolve scope-related questions . . . by applying the ‘presumption of arbitrability.’”<sup>124</sup> Yet, this “presumption of arbitrability” will not always lead a court to require arbitration, especially if the arbitration clause is not properly drafted.<sup>125</sup>

To recap: a party seeking to litigate rather than arbitrate the underlying merits of a dispute may (1) assert that no contract or arbitration clause exists, (2) dispute the enforceability of the arbitration clause itself, or (3) argue that its claims or defenses fall outside the scope of the clause. Courts frequently encounter such challenges to arbitration, even when the contract memorializes a commercial transaction between business firms.<sup>126</sup> However, the contract may require arbitration of the latter two challenges if it does so clearly and unmistakably.<sup>127</sup> We will use the term “delegation clause” to describe a part of an arbitration clause that meets this standard.<sup>128</sup>

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121. See, e.g., *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 649 (1986); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944–45 (1995).

122. For a discussion of the scope of arbitration clauses, see *infra* notes 134–136.

123. *Id.*

124. *Schneider v. Thailand*, 688 F.3d 68, 72 (2d Cir. 2012) (quoting *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 298 (2010)).

125. See *infra* notes 134–136.

126. See, e.g., *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 9 (1st Cir. 2009); *Alamo Moving & Storage One Corp. v. Mayflower Transit LLC*, 2002 WL 1973482, at \*2 (5th Cir. July 31, 2002); *W.L. Doggett LLC v. Paychex, Inc.*, 92 F. Supp. 3d 593, 598 (S.D. Tex. 2015); *Glass Design, Inc. v. Owens-Brockway Glass Container, Inc.*, No. W-12-cv-132, 2013 WL 12091106, at \*2 (W.D. Tex. Jan. 7, 2013); *Cont’l Ins. Co. v. Jantran, Inc.*, 906 F. Supp. 362, 366 (E.D. La. 1995).

127. This is a simplified summary, and we overlook some nuances not relevant here. For instance, it is not clear that *every* challenge to the enforceability of the arbitration clause can be sent to the arbitrator. See, e.g., *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 73 (2010) (requiring parties to arbitrate whether their arbitration clause was unconscionable, at least where there was no challenge to the clause delegating this question to the arbitrator).

128. See *Douglas v. Regions Bank*, 757 F.3d 460, 461 (5th Cir. 2014). The term “arbitrability clause” is also used. *Societe Generale de Surveillance, S.A. v. Raytheon European Mgmt. & Sys. Co.*, 643 F.2d 863, 869 (1st Cir. 1981).

2. *Drafting to avoid, or perhaps invite, a skirmish*

A properly drafted arbitration clause can prevent these kinds of preliminary skirmishes over the duty to arbitrate. By contrast, a poorly drafted clause can invite parties to try to maneuver a dispute into litigation.

For example, consider questions concerning the scope of the arbitration clause. Parties can, without much effort, draft an arbitration clause that will oblige them to arbitrate essentially every dispute that might arise between them except, as noted above, for disputes about whether the contract or the arbitration clause actually exists. They need only describe their obligation to arbitrate using an off-the-rack formulation supplied by judicial decision, such as “we agree to arbitrate all disputes that arise out of or relate to this contract,” or “we agree to arbitrate all disputes that arise out of or in connection with this contract.”<sup>129</sup> If they cannot be bothered to write such a clause themselves, they can download one of the model clauses supplied on the websites of prominent arbitration providers such as the American Arbitration Association.<sup>130</sup>

After writing a properly broad arbitration clause, parties who have identified matters they do *not* want to arbitrate can include an express “carve out” for these matters.<sup>131</sup> Common examples include requests for preliminary injunctive relief and claims of infringement of intellectual property rights.<sup>132</sup> Thus, an arbitration clause might look something like the following:

Any dispute arising out of or relating to this agreement, except a dispute involving infringement of Third Party intellectual property rights or any intellectual property rights owned or controlled by a party, shall be submitted to arbitration . . . .<sup>133</sup>

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129. See, e.g., *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1071 (9th Cir. 2013); *Terminix Int’l Co., LP v. Palmer Ranch Ltd. P’ship*, 432 F.3d 1327, 1329 n.1 (11th Cir. 2005).

130. See, e.g., AMERICAN ARB. ASS’N, *Drafting Dispute Resolution Clauses: A Practical Guide* 10 (2013), [https://www.adr.org/sites/default/files/document\\_repository/Drafting%20Dispute%20Resolution%20Clauses%20A%20Practical%20Guide.pdf](https://www.adr.org/sites/default/files/document_repository/Drafting%20Dispute%20Resolution%20Clauses%20A%20Practical%20Guide.pdf) (providing two standard arbitration clauses, including possible alternatives or additions, which parties can adopt when contracting).

131. *Drahozal & O’Hara O’Connor*, *supra* note 18, at 1957.

132. See Weidemaier, *supra* note 40, at 1883.

133. See License, Development, Supply, and Distribution Agreement dated Dec. 11, 2006 between Immunicon Corporation and Diagnostic Hybrids, Inc. ¶ 14 (on file with Authors). Note that in the text above, we have added the words “arising out of or relating to this agreement” to make clear the broad nature of the clause.

The preceding example assumes the parties want to arbitrate everything but a discrete category of disputes. Occasionally, however, parties will want to arbitrate only specific matters, such as sales quotas, valuation questions, and the like.<sup>134</sup> Clauses that send a limited subset of disputes to arbitration are sometimes called “carve-ins.”<sup>135</sup>

What makes no sense is for parties to write a seemingly broad arbitration clause but to use words that create an ambiguity as to whether the parties in fact intended to arbitrate only an undefined subset of disputes. For example, some courts interpret a promise to arbitrate disputes “arising out of this contract” only to cover disputes relating to the interpretation or breach of the contract.<sup>136</sup> Other courts, by contrast, interpret language like this more broadly, equivalent to language that includes the obligation to arbitrate claims “related to” the contract.<sup>137</sup>

Parties who use arbitration clauses that refer exclusively to claims “arising out of” the contract—sometimes, perhaps unhelpfully, called “narrow” arbitration clauses—set themselves up for a post-dispute battle over whether the arbitration agreement applies to all or only

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134. Clauses like this are often, but not always, considered “arbitration.” Compare *Evanston Ins. Co. v. Cogswell Props., LLC*, 683 F.3d 684, 693–94 (6th Cir. 2012) (finding that the appraisal process did not constitute arbitration), and *Salt Lake Tribune Publ’g Co. v. Mgmt. Planning, Inc.*, 390 F.3d 684, 691–92 (10th Cir. 2004) (same), with *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 8, 12 (1st Cir. 2004) (concluding that a clause providing for a “final determination” of certain valuation issues by an accounting firm constituted arbitration).

Federal law entitles parties to what amounts to an order of specific performance enforcing an arbitration agreement. See 9 U.S.C. § 4 (2012); *Necchi S.p.A. v. Necchi Sewing Mach. Sales Corp.*, 348 F.2d 693, 696–97 (2d Cir. 1965). That remedy may or may not be available when the clause does not qualify as arbitration under federal or state law. See, e.g., N.Y. C.P.L.R. § 7601 (MCKINNEY 2010) (providing for specific performance of an agreement to submit to a valuation, appraisal, or similar process, “as if it were an arbitration agreement”).

135. See *Drahozal & O’Hara O’Connor*, *supra* note 18, at 1950.

136. See, e.g., *Vemco, Inc. v. Flakt, Inc.*, No. 94-1016, 94-1506, 1996 WL 506495, at \*3–4 (6th Cir. Sept. 5, 1996) (interpreting “arising out of” not to require arbitration of all disputes between the parties); *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983) (interpreting “arising hereunder” to disputes relating to contract performance or interpretation); *B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So. 2d 483, 488 (Miss. 2005) (interpreting clause requiring arbitration of disputes “arising under” the contract narrowly).

137. See, e.g., *S.A. Mineracao da Trindade-Samitri v. Utah Int’l, Inc.*, 745 F.2d 190, 195 (2d Cir. 1984) (interpreting the phrase “any question or dispute arising or occurring under” the contract to include claims for fraudulent inducement).

some issues.<sup>138</sup> Because disputes typically can be analyzed under multiple legal theories, a narrow arbitration clause invites parties to frame a dispute in ways that arguably bring it outside the scope of the clause. Given the minimal time parties typically invest in negotiating the clause, there will often be no traditional contextual clues as to how they intended to handle such disputes.

Another way parties can avoid litigating questions concerning their obligation to arbitrate is to include a delegation clause in the contract. Recall that challenges to the enforceability or scope of the arbitration clause are only *presumptively* for judicial resolution.<sup>139</sup> A delegation clause “clearly and unmistakably” evidences the intent to reverse this presumption. But many delegation clauses arguably do not satisfy this standard. An example is a clause that does not expressly delegate these questions to the arbitrator but incorporates institutional arbitration rules that do (at least arguably) make the delegation. For instance, an agreement to arbitrate pursuant to the AAA’s Commercial Arbitration Rules incorporates Rule R-7, which provides:

The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.<sup>140</sup>

There are two potential problems with treating this as a delegation clause. First, not all courts hold that incorporation by reference satisfies the “clear and unmistakable” standard. Most federal courts would treat this as sufficiently clear, but some federal and a number of state courts have held to the contrary.<sup>141</sup> Given the prominence of

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138. See Alan Scott Rau, *Everything You Really Need to Know About “Separability” in Seventeen Simple Propositions*, 14 AM. REV. INT’L ARB. 182, 207–08 (2003) (criticizing the “tedious” distinction between broad and narrow clauses as having “led federal courts into semantic exercises of such exquisite subtlety, avidly pursuing distinctions invisible to the naked eye”).

139. See *supra* note 125 and accompanying text.

140. AMERICAN ARB. ASS’N, *Commercial Arbitration Rules and Mediation Procedures R-7(a)* (2016), [https://adr.org/sites/default/files/CommercialRules\\_Web.pdf](https://adr.org/sites/default/files/CommercialRules_Web.pdf).

141. For cases holding that incorporation by reference meets the “clear and unmistakable” standard, see, e.g., *Auwah v. Coverall N. Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009) (citing AAA Rule R-7(a)); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) (AAA rules); *Terminix Int’l Co., LP v. Palmer Ranch Ltd. P’ship*, 432 F.3d 1327, 1332 (11th Cir. 2005) (AAA rules); *Shaw Grp. Inc. v. Triplefine Int’l Corp.*, 322 F.3d 115, 124–25 (2d Cir. 2003) (holding that incorporation of ICC rules evidenced intent to arbitrate questions of arbitrability). *But see e.g.*, *Ajamian v. CantorC02e, L.P.*, 137 Cal. Rptr. 3d 773, 790 (Ct. App. 2012) (AAA rules); *Diesselhorst v. Munsey Bldg, L.L.L.P.*, No. Civ. AMD 04-3302, 2005 WL 327532, at \*4 (D. Md. Feb. 9, 2005) (AAA

Delaware as a state of incorporation and the fact that commercial disputes often do not implicate federal law, contracting parties would often find themselves in state court for lack of diversity jurisdiction.<sup>142</sup> Second, while institutional rules like AAA Rule R-7 allow the arbitrator to decide questions related to the scope and enforceability of the arbitration clause, it is not clear that the rules confer *exclusive* decision-making authority.<sup>143</sup> Thus, while not as problematic as a clause that is ambiguous as to whether the parties must arbitrate all merits-related claims, a contract that simply incorporates institutional rules creates another ambiguity: may one party insist on litigating challenges to the scope or enforceability of the arbitration clause?

### 3. *The prevalence of problematic arbitration clauses*

The preceding discussion highlights two problematic arbitration clauses. The first is a seemingly broad obligation to arbitrate, written in a way that leaves room for a party to argue that particular claims or defenses fall outside of the clause's scope. The second incorporates institutional arbitration rules without clearly specifying whether the parties in fact want to arbitrate disputes about the scope or enforceability of the arbitration clause.

Both types of problematic clauses are endemic, even in contracts involving high stakes and sophisticated parties. For evidence on the prevalence of these clauses, we draw on a hand-coded sample of material contracts attached as exhibits to corporate SEC filings between January 1, 2000 and December 31, 2012.<sup>144</sup> The sample and coding methods are described in detail elsewhere.<sup>145</sup> Though material contracts are not representative of all contracts, the factors that make

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Rules); *Burlington Res. Oil & Gas Co. LP v. San Juan Basin Royalty Tr.*, 249 S.W.3d 34, 41 (Tex. App. 2007) (AAA rules).

142. The Federal Arbitration Act does not create federal subject matter jurisdiction, see *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983), and the shared Delaware citizenship would defeat diversity jurisdiction.

143. The new Restatement of International Commercial Arbitration takes the view that institutional rules like AAA R-7 simply empower, but do not require, the arbitrator to decide this question. See RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-14 cmt. e (AM. LAW INST. 2018).

144. See Weidemaier, *supra* note 40, at 1905–07. Material contracts include, among others, those “not made in the ordinary course of business which is material to the registrant and is to be performed in whole or in part at or after the filing of the registration statement or report or was entered into not more than two years before such filing.” 17 C.F.R. § 229.601(b)(10)(i) (2017).

145. Weidemaier, *supra* note 40, at 1905–06.

them unrepresentative—high stakes, sophisticated parties—mean that the parties and their lawyers can more readily justify an investment in careful drafting. If these contracts frequently include problematic clauses, others likely do too. The sample was drawn from the Electronic Data Gathering, Analysis, and Retrieval (EDGAR) database on Bloomberg Law and emphasizes commercial agreements, including manufacturing and supply agreements, distribution agreements, licensing and development agreements, and marketing and other services agreements.<sup>146</sup>

With regard to the scope of arbitration, recall that careful parties will either (1) use an off-the-rack formulation held to require arbitration of all disputes, with or without an express carve-out for claims the parties wish to litigate, or (2) write a narrow clause that expressly defines the issues to be arbitrated.<sup>147</sup> The problematic, so-called “narrow” clause aspires to require arbitration of all disputes but contains significant gaps. Narrow clauses turn out to be quite common and appear in 25.3% of the contracts with arbitration clauses in the sample.<sup>148</sup> For example, consider the following clause:

If any dispute between the parties arises under this Agreement, the parties shall use reasonable efforts to settle the dispute for at least 30 days. After that period, the dispute may be submitted for arbitration, and the arbitration will be conducted before an arbitration panel in accordance with the rules established by the American Arbitration Association.<sup>149</sup>

This clause is an example of spectacularly, almost ostentatiously, bad drafting. It expresses the obligation to arbitrate narrowly (“if any dispute . . . arises under this Agreement”), leaving ample room for ex post dispute about whether particular claims or defenses fall outside the scope of arbitration. This error is overshadowed, however, by a

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146. *Id.*

147. *See supra* Part II.B.2.

148. Weidemaier, *supra* note 40, at 1905–06. After excluding contracts where redactions by the filing party made it impossible to identify the scope of arbitration, 182 contracts with arbitration clauses remained. Of these, forty-six defined the obligation to arbitrate narrowly, creating an ambiguity about what must be arbitrated. These counts exclude contracts with carve-ins. *See supra* notes 134–135. We exclude these contracts because the drafter of a carve-in tries to expressly define the issues that must be arbitrated or submitted to another form of binding, third-party alternative dispute resolution. We cannot readily detect when a drafter makes a mistake in crafting this definition.

149. SRI/Surgical Express, Inc. & Cardinal Health 200, Inc., Annual Report (Form 10-K), Ex. 10.31 (Supply and Co-Marketing Agreement) (Nov. 26, 2008).

much larger one: the clause is arguably written to make the entire arbitration process voluntary (“may be submitted for arbitration”). Leaving aside this latter mistake, the clause is a good example of a so-called “narrow” arbitration clause. No sensible party would intentionally create such an ambiguity. Yet such clauses appear in nearly one-quarter of the sample.

Turning to delegation clauses—and ignoring, for now, the impact of incorporating institutional arbitration rules—fewer than one in ten arbitration clauses in the sample (7.6%) expressly delegate questions of scope or enforceability to the arbitrator.<sup>150</sup> And while more than nine out of ten clauses (92.3%) incorporate institutional rules that at least allow the arbitrator to decide such challenges, the impact of these clauses is unclear for the reasons noted above. In virtually every case, then, the parties cannot know whether questions of scope and enforceability must be arbitrated without litigating the question. To a significant extent, the outcome will depend on where the litigation occurs, because, as noted previously, the rules of interpretation differ across jurisdictions.<sup>151</sup> Because relatively few commercial agreements designate an exclusive forum for any judicial proceeding,<sup>152</sup> the forum will likely be determined by a race to the courthouse.<sup>153</sup>

### III. CONTRACT LAW OR CONTRACT LITIGATION?

We now consider whether the problematic drafting practices described above have implications for how courts and other interpreters should approach questions of interpretation. To frame that discussion, it may help to highlight some areas on which we agree—and occasionally disagree—with the literature on contractual “black holes.”

First, the choice-of-law and arbitration clauses that we describe are not quite “black holes,” in the sense that Choi, Gulati, and Scott use that term.<sup>154</sup> For them, a “black hole” clause is one that has been used for so long, and so reflexively, that it has been “emptied of *any* recoverable meaning.”<sup>155</sup> They distinguish this from more traditional cases of

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150. See Weidemaier, *supra* note 40, at 1920, 1929.

151. See *supra* Part II.

152. In the sample, only 39.7% of contracts include a forum selection clause. Of these, 73.2% expressly designate the forum as exclusive. See Weidemaier, *supra* note 40, at 1917–18. Thus, only 29.1% of contracts in the sample designate an exclusive judicial forum.

153. Courts faced with duplicative lawsuits often defer to the first-filed action. See, e.g., *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1202–03 (2d Cir. 1970).

154. Choi, Gulati, & Scott, *supra* note 4, at 3.

155. *Id.*

contractual ambiguity: “Terms that are linguistically uncertain in the sense we use here are not ambiguous but rather are acontextual. The term in question can apply to an infinitely wide spectrum of referents.”<sup>156</sup>

While we accept this distinction, we do not assign much significance to it. A party who alleges a breach of contract must, of course, prove that the contract includes the relevant promise.<sup>157</sup> For its part, the party accused of breach is hardly likely to seek dismissal of the claim on the basis that *literally no one has any idea* what the clause means. To make this argument is to hand over the horse’s reins to one’s adversary. Moreover, each party is likely to proffer *some* contextual evidence and to argue that this evidence supports its favored interpretation.<sup>158</sup> Thus, however many meanings a clause is capable of bearing, the interpreter’s job is always to pick between particular meanings proffered by the parties, each ostensibly supported by contextual evidence.

To be sure, the problematic choice-of-law and arbitration clauses share the important functional characteristics of contractual “black holes.” First, text is an unreliable guide to meaning, for an interpreter cannot easily “distinguish between meaningful language and empty boilerplate.”<sup>159</sup> Second, an inquiry into the subjective intent of the parties will likely prove fruitless.<sup>160</sup> Third, many traditional types of objective evidence—such as trade usage—will be absent (or, if proffered, deemed unhelpful or unpersuasive).<sup>161</sup>

What should courts do in such cases? Perhaps they should begin by recognizing that, although often couched as an inquiry into the contracting parties’ intentions, interpretation often resembles nothing more than a guess as to what reasonable parties would want language to mean. Indeed, courts sometimes make such guesses with no evidentiary record whatsoever. For example, recall the presumption that parties do not want to arbitrate challenges to the enforceability or scope of their arbitration agreement, and therefore, must “clearly and

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156. *Id.* at 9.

157. *See, e.g.,* *First Inv’rs Corp. v. Liberty Mut. Ins. Co.*, 152 F.3d 162, 168–69 (2d Cir. 1998).

158. Even in litigation over the *pari passu* clause—perhaps the platonic ideal of a contractual black hole—each party argued in support of a particular interpretation of the clause, and each supported its argument by reference to *some* contextual evidence. Argentina, for example, argued that the clause had a customary usage and that market participants widely understood the clause only to forbid formal legal subordination of a subset of *pari passu*-ranking creditors. *See NML Capital, Ltd. v. Argentina*, 699 F.3d 246, 258 (2d Cir. 2012).

159. Choi, Gulati, & Scott, *supra* note 4, at 67.

160. *Id.* at 4–5.

161. *See Ben-Shahar & Strahilevitz, supra* note 15, at 1764.

unmistakably” signal their intent to do so.<sup>162</sup> The Supreme Court explicitly justified this interpretive rule by engaging in armchair speculation about the salience of such matters during contract negotiations.<sup>163</sup> We do not mean this critically; cases must be decided, after all. But it is nevertheless true that much of interpretation involves armchair empirical speculation—what in a different context has been called “fireside induction.”<sup>164</sup>

The problem raised by contractual “black holes” is that, in making this guess about the meaning of text, courts may endorse an interpretation that fundamentally upsets the allocation of risks represented by the contract. As Choi, Gulati, and Scott put it: “[C]ourts may be persuaded to adopt an interpretation of the term at issue that is antithetical to the functioning of a market that relies on the standard contract to regulate the rights and duties of the participating parties.”<sup>165</sup> The absence of relevant contextual evidence presumably increases this risk.<sup>166</sup>

But no contract is *entirely* acontextual. The discussion to follow identifies alternative types of evidence that might guide interpretation when more traditional forms of contextual evidence fail. Each has flaws. Indeed, as authors we do not entirely agree with one another about the value of each type of evidence. But we agree that, in at least some cases, evidence of the sort we describe below can mitigate some of the more extreme risks imposed by contractual “black holes.”

A. *Building a Better Armchair: Making Better Guesses About Meaning*

If interpretation often involves at least some armchair speculation, it need not be completely uninformed. Here, we discuss three additional types of evidence that might, in some subset of cases, minimize the chance that a court’s interpretation will come as a shock.

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162. See *supra* notes 139–140 and accompanying text.

163. See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945 (1995) (speculating that parties are not likely to focus on these matters); see also *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 488 (1989) (Brennan, J., dissenting) (observing that it was “most unlikely that [the parties’] intent was in any way at variance with the purposes for which choice-of-law clauses are commonly written and the manner in which they are generally interpreted”).

164. See Paul E. Meehl, *Law and the Fireside Inductions (with Postscript): Some Reflections of a Clinical Psychologist*, 7 *BEHAV. SCI. & L.* 521, 522 (1989), reprinted in Paul E. Meehl, *Selected Philosophical and Methodological Papers* 440 (C.A. Anderson & K. Gunderson eds., 1991) (defining “fireside inductions” as principles that are established through generalizations and commonsense observations of human behavior).

165. Choi, Gulati, & Scott, *supra* note 4, at 5.

166. *Id.* at 6.

In the next section, we explore why courts rarely, if ever, seem to take evidence of this sort into account.

1. *Evidence about how contracts are produced*

Contracts often share the characteristics of other products.<sup>167</sup> Law firms and other producers construct “routines that are dedicated to the mass production of homogeneous goods.”<sup>168</sup> From this perspective, what is unique about contract clauses of the sort we have described is that they are *not* homogeneous. To the contrary, they exhibit differences both large and small, which may (or may not) have been intended to serve a function. Moreover, because these differences are often not salient during negotiations, parties and their lawyers pay little attention to *which* version of the disputed clause appears in the template for their deal.<sup>169</sup> If there is a later dispute about the meaning of a clause, what should courts do?

Of particular concern is the scenario where one litigant seizes on a minor variation in a boilerplate provision to argue that the clause has an unexpected meaning. As discussed above, parties routinely argue that the phrase “arising out of” has a very different meaning than the phrase “relating to” when litigating the meaning of arbitration and choice-of-law clauses.<sup>170</sup> Arguably, this also is what happened in the *pari passu* litigation described earlier,<sup>171</sup> where a holdout creditor seized on the use of the word “payment” to argue that the borrower had an obligation to pay all of its creditors ratably.<sup>172</sup> Although there was seemingly no consensus view as to what the *pari passu* clause in fact meant, this interpretation came as a shock to participants in the sovereign debt markets.<sup>173</sup>

Choi, Gulati, and Scott disagree with the result, and imply the evidence might have been different if the courts had been willing to consider “evidence of encrustation.”<sup>174</sup> For example, they suggest courts might consider whether the clause has “been repeated by rote over

167. Weidemaier, *supra* note 40, at 1895–96.

168. Richman, *supra* note 33, at 82.

169. See *supra* note 112 and accompanying text; see also James Gibson, *Vertical Boilerplate*, 70 WASH & LEE L. REV. 161, 195–96 (2013) (explaining that non-lawyers consider boilerplate clauses to be less important than more salient features of the consumer transaction, and tend to ignore complex boilerplate altogether).

170. See *supra* Part II.B.2.

171. *Capital Ltd. v. Argentina*, 699 F.3d 246 (2d Cir. 2012).

172. *Id.* at 254–55; see Choi, Gulati, & Scott, *supra* note 4, at 26–28.

173. See Choi, Gulati, & Scott, *supra* note 4, at 19–20.

174. *Contractual Arbitrage*, *supra* note 9, at 20.

many years, without [being] tested in litigation,” and whether it has been “embedded in layers of legal jargon such that its intelligibility is substantially reduced.”<sup>175</sup> To put the point a bit differently, Choi, Gulati, and Scott might say that courts should be receptive to testimony about how lawyers produce and select contracts of this sort.<sup>176</sup>

Consider a case in which a party wants to introduce evidence (1) that there are multiple extant versions of a clause, (2) that lawyers typically select the contract template based on considerations of convenience and familiarity, and (3) that the parties to this transaction did not specifically negotiate over the text of the disputed clause.<sup>177</sup> In such a case, courts should hesitate before assigning to the disputed version of the clause a meaning that other versions could not readily bear. For perhaps obvious reasons, we would not favor this result if there were clear evidence that participants in the relevant market understand the different versions to mean different things. But in the absence of such evidence, it seems reasonable for courts to begin with a presumption that clauses mean the same thing.<sup>178</sup> This would not always help the court decide *which* meaning to embrace, but it would reduce the risk of outlier cases in which courts interpret a contract in unexpected ways based on little more than a minor textual deviation.

For example, consider contracts that use a “narrow” rather than “broad” arbitration clause—i.e., one that requires arbitration of disputes “arising out of,” but not “related to” the contract. Or take the analogous example of a choice-of-law clause that does not specify that

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175. See Choi, Gulati, & Scott, *supra* note 4, at 68.

176. We are not suggesting that the lawyers who made the choice of *this* contract should testify, although we think such testimony might be relevant and need not always raise privilege concerns. Functionally, the question is similar to one that might arise in a dispute over whether a letter of intent or other preliminary agreement represents a binding contract, despite the parties' failure to execute a more complete agreement. Such cases often involve testimony about the importance of the terms omitted from the preliminary agreement. Evidence that the terms are mere boilerplate—i.e., not typically the subject of negotiations—may be offered to characterize the preliminary agreement as a binding contract. See, e.g., *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 795–96 (Tex. App. 1987); see also *Hunneman Real Estate Corp. v. Norwood Realty, Inc.*, 765 N.E.2d 800, 803, 806 (Mass. App. Ct. 2002) (noting that a letter of intent envisioned the execution of a contract with “such additional terms as are normal” and that this phrase “smacks more of formality and legal boilerplate than a call for further negotiation of material terms”).

177. See, e.g., *Anderson & Manns*, *supra* note 35, at 84–86.

178. This approach derives support from lawyer interviews conducted by Coyle, in which several interviewees expressed surprise that some courts view minor variations in boilerplate language as significant. See Coyle, *supra* note 72.

the choice extends to disputes “relating to” the agreement. With some frequency, courts have interpreted such clauses to exclude a variety of merits-related disputes from the scope of the clause.<sup>179</sup> At least in the choice-of-law context, however, there is evidence suggesting that most lawyers do not even consider the possibility that the clause would not apply to, say, tort claims.<sup>180</sup> Many are unfamiliar with many of the choice-of-law nuances we described earlier. Certainly they do not negotiate over matters such as whether to exclude tort but not contract claims from the choice-of-law clause. If presented with credible evidence to this effect, a court should hesitate before assigning such importance to the omission of the words “related to” from the clause.

This said, we are skeptical that evidence about how contracts are produced and selected, and how they have evolved over time, will prove very helpful in most interpretive disputes. The problem is that courts cannot completely ignore language. Even if parties select a template thoughtlessly, even if there is no contextual evidence as to meaning, and even if historical usage shows repeated contract evolution with no obvious motivation, courts cannot simply ignore the text. Contract clauses can exhibit staggering variety.<sup>181</sup> In our data, for instance, contracts with arbitration clauses devoted an average of 311 words to the clause, but the contracts ranged from a bare-bones clause of only nineteen words to a multi-page clause totaling 1671 words.<sup>182</sup> We suspect that many of these clauses began with a borrowed template, which itself had evolved over time for reasons that are not obvious in hindsight. Even if a court has perfect knowledge of the history of a clause and its template, by what non-textual standard is the court to distinguish meaningless “encrustation” from functional language? The answer cannot be that, in the encrustation case, neither party can articulate a sensible meaning for the contested language—for in that event, the case could be decided without any evidence at all.<sup>183</sup> Nor can the answer be that the clause has been repeated, even revised, “without having been tested in litigation.”<sup>184</sup> Leaving aside uncertainty over what constitutes a sufficient “test,” countless clauses would meet this description.

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179. See Coyle & Drahozal, *supra* note 91, at 13–14.

180. See *supra* Part III.A.1.

181. See *supra* Part I.A (explaining how the “editorial churning” process creates a multiplicity of templates within firms).

182. Weidemaier, *supra* note 40, at 1933 n.339.

183. In such a case, no party could establish a prima facie case of breach of contract.

184. Choi, Gulati, & Scott, *supra* note 4, at 68.

2. *Evidence that different clauses are priced differently*

Another potential way to mitigate the risk of interpretive error is to introduce pricing data showing that market participants do (or do not) assign different values to different versions of the disputed clause.<sup>185</sup> Here, however, we have even greater doubts. To begin with, although many contracts and contract rights can be traded, most contracts are not traded in liquid secondary markets, which makes it next to impossible to find meaningful pricing data.<sup>186</sup> Even for financial contracts where there is good pricing data, it will be hard to isolate the pricing implications of minor variation in language, and harder still to draw inferences even from valid pricing data.<sup>187</sup>

Assume, for instance, that a party presents credible evidence that contracts with version A of a clause trade at a small premium to contracts with version B. What is a court to make of this? A sensible inference, it seems to us, is that market participants understand the clauses to mean different things, or at least believe that courts will enforce the clauses as if they mean different things. But unless one party's case depends on a finding that all versions of the clause mean the same thing, how does this help decide which meaning is correct? To be sure, if version A has an established meaning, and the plaintiff's case depends on version B meaning something different, then the absence of a price difference might provide useful information. Arguably, this describes the *pari passu* litigation against Argentina.<sup>188</sup> In that case, while the meaning of the "basic" *pari passu* clause was unclear, the plaintiff argued that the addition of language requiring equal treatment of "payment obligations" created a different clause.<sup>189</sup> This argument would be (slightly) more plausible if supported by evidence that the market priced the clauses differently. Likewise, it would become (slightly) less plausible if the evidence showed the lack of a price differential.

Even when such pricing data exists, however, it will be relatively easy for parties to frame arguments in ways that minimize or even negate its impact. Assume, for instance, that the evidence showed a small pricing difference

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185. *Id.*

186. *See* Weidemaier, *supra* note 40, at 1935.

187. If one accepts that minor variations in language *can* be meaningful, then presumably the best methodology would rely on machine coding of contracts that would attempt to control for *all* differences in the text—possibly a staggering number of variables.

188. *See* Choi, Gulati, & Scott, *supra* note 4, at 26–27.

189. *See* Decl. of Hal S. Scott, *NML Capital Ltd. v. Argentina*, No. 08-CV-6978 (TPG) (S.D.N.Y. Oct. 20, 2010).

between contracts with and without an Argentina-style *pari passu* clause. Although this might help establish a difference in meaning, the evidence becomes nearly (perhaps entirely) irrelevant when offered to prove a *particular* meaning. To negate the impact, a party in Argentina's position need only advance an interpretation that might plausibly be priced, but that would not produce its adversary's desired result.

### 3. *Surveys and other evidence of market preference*

Another possibility is to present survey evidence about the preferred meaning of a clause among members of the relevant interpretive community (if this can be identified). Unlike traditional evidence of trade usage, which is offered to establish a regularly observed practice in effect at the time of the contract,<sup>190</sup> such a survey solicits information about what members of the relevant community think the clause *should* mean. Consider, for example, a commercial contract for the sale of widgets. A survey of buyers and sellers in the industry (and perhaps their attorneys, for clauses that are less salient during negotiations) could help identify majoritarian preferences as to what clause does or does not mean.

Evidence of this sort might help even if a dispute involves a true contractual "black hole," where the clause has escaped notice for many years. When finally asked, market participants may express firm views about the meaning of the clause.<sup>191</sup> If there is something approaching consensus, it is fair to attribute this meaning to the parties, at least as a strong initial presumption. In most cases, a court could do so without abandoning the pretense that "objective" evidence is a proxy for the parties' actual, subjective intentions. After all, if the unreflective use of a contract template signals anything at all about subjective intent, it is the intent *not* to differ from the norm. In effect, such parties signal the intent to have the clause mean "whatever the relevant interpretive community thinks it means, whenever the question becomes relevant."<sup>192</sup> Indeed, even if survey data reveals no consensus as to what a clause means, there may be consensus as to what it does *not* mean, and this alone may be enough to resolve some cases.

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190. BURTON, *supra* note 31, at 174.

191. See *Contractual Arbitrage*, *supra* note 9, at 6–7.

192. We refer to an "interpretive community" in recognition of the fact that interpretation is a socially embedded act. Those who share a "particular community's set of beliefs, values, categories of thought, paradigms, practices, and purposes" will often agree on the answer to an interpretive question. See Michael Robertson, *Picking Positivism Apart: Stanley Fish on Epistemology and Law*, 8 S. CAL. INTERDISC. L.J. 401, 408 (1999).

Omri Ben-Shahar and Lior Strahilevitz, for example, have argued for greater reliance on surveys in resolving interpretive disputes, especially but not only in the context of consumer contracts.<sup>193</sup> In a related vein, one of us has previously argued that evidence as to a contract's preferred meaning may be usefully obtained by conducting targeted interviews with the lawyers who routinely draft such agreements:

In many cases, courts striving to develop efficient majoritarian default rules . . . will have limited insight into the true preferences of most contracting parties. Each litigant will invariably argue that *its* reading of the contract language is the one that effectuates the preferences of most contract users and the court will have no easy way to determine which account is the correct one. What is needed are studies of practicing lawyers conducted outside the context of ongoing litigation that set forth their preferences when they are not constrained to advance a position that favors their client's immediate interest. Such studies would provide useful data to courts as they go about deciding which interpretive rule to adopt in a particular case.<sup>194</sup>

There are potential advantages to relying on survey and interview data rather than expert testimony to resolve interpretive disputes.<sup>195</sup> As Ben-Shahar and Strahilevitz note, the standard method of proving trade usage effectively amounts to a survey with a sample size of one.<sup>196</sup> We would add that these surveys are infected by bias, as lawyers will not proffer the testimony of a witness with an unfavorable view. Though not free from potential bias,<sup>197</sup> methods that aggregate the views of the parties who use and consume contracts are likely to be more reliable than testimony proffered by a hired expert.<sup>198</sup>

For example, courts have reached differing results on two important questions about the meaning of simple choice-of-law clauses.<sup>199</sup> The

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193. Ben-Shahar & Strahilevitz, *supra* note 15, at 1753.

194. Coyle, *supra* note 72, at 687.

195. Though less structured and often more expensive, interviews might have advantages where interpretive issues are more complex, require resolution of seemingly conflicting information, or where survey results leave gaps that more qualitative analysis could helpfully fill. On differences, see generally, Margaret C. Harrell and Melissa A. Bradley, *Data Collection Methods: Semi-Structured Interviews and Focus Groups*, RAND Nat'l Def. Res. Inst. (2009).

196. Ben-Shahar & Strahilevitz, *supra* note 15, at 1804 (explaining that a larger "n" reduces variance and increases the likelihood that the surveyed sample is representative).

197. *Id.* at 1773 (addressing critics of survey data and the belief that survey evidence is prone to bias because there is no sound consensus in survey methodology).

198. *Id.* at 1775.

199. See *supra* Part II.

first relates to the intended scope and to whether the clause applies to tort and other non-contractual claims.<sup>200</sup> The second relates to whether a simple choice-of-law clause encompasses the statute of limitations of the chosen jurisdiction.<sup>201</sup> Courts have attempted to fashion majoritarian default rules of interpretation, only to disagree on the appropriate rule. The disagreement is not surprising, since courts generally rely on armchair speculation to divine majoritarian preference.<sup>202</sup> Could survey or interview evidence have helped produce a consistent result?

To begin to address this question, one of us (Coyle) solicited the views of practicing attorneys, using a combination of interviews and structured e-mail exchanges (eighty six in total), to gain a better understanding of how they interact with choice-of-law clauses.<sup>203</sup> Recall that parties, through their lawyers, generally negotiate the basic choice of governing jurisdiction (often choosing the lawyer's home state).<sup>204</sup> The interviews suggest that lawyers rarely pay any heed to other important aspects of the clause. As one interviewee put it: "We go back and forth on the governing jurisdiction all the time but I [cannot] recall ever negotiating the language in the rest of the clause."<sup>205</sup> These interviews also revealed that attorneys do not always focus on the meaning of certain phrases that frequently appear in choice-of-law clauses; several interviewees misapprehended the purpose of the phrase "excluding conflict-of-laws principles" that is commonly found in these clauses.<sup>206</sup> The interviewees were also frequently unaware of

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200. See *supra* Part II.

201. See Coyle, *supra* note 72, at 688–91.

202. Paul Meehl famously (and without intending severe criticism) described the law as reliant on the "psychology of the fireside," defined to mean "those expectations and principles . . . arising from some mixture of (1) personal anecdotal observations, (2) armchair speculation, (3) introspection, and (4) education in the received tradition of Western culture prior to the development of technical social science method." Meehl, *supra* note 164, at 522.

203. Coyle, *supra* note 72, at 709–12.

204. E-mail from former General Counsel of Minnesota Company, to author (Aug. 22, 2016) (on file with Authors) ("We were mindful of the choice-of-law clauses, and generally preferred to identify our home state with which we were most comfortable, but that was generally the extent of our focus on that specific clause.").

205. Interview with In-House Counsel I, U.S. Pharmaceutical Company in city, state (Feb. 24, 2017) ("When it comes to boilerplate, I see people negotiate indemnification, termination, insurance, survivability, and assignability all the time. I never seen anyone negotiate the choice-of-law clause except for the governing jurisdiction.").

206. See E-mail from Lawyer I, TX Law Firm, to authors (Nov. 17, 2016) (on file with Authors) (incorrectly suggesting that the phrase "excluding conflict-of-laws principles" addressed the question of whether the statute of limitations of the chosen jurisdiction

the ways in which choice-of-law clauses had been construed by the courts in their home jurisdiction.<sup>207</sup> When asked to predict how these courts would interpret specific contract provisions, their guesses were frequently incorrect.<sup>208</sup> Finally, with respect to clauses that addressed the applicability of the CISG, a number of interviewees were unaware of the treaty's very existence.<sup>209</sup> Others had heard of it but didn't know exactly what it did.<sup>210</sup> One interviewee confided that he had been excluding the CISG from his contracts for years without ever understanding what it was.<sup>211</sup>

One inference to be drawn from these responses is that courts should be wary of assigning important differences in meaning to minor differences in language. Lawyers who draft simple choice-of-law clauses do not appear to be crafty transaction cost minimizers—perhaps deliberately foregoing ex ante certainty in order to maximize their flexibility in litigation ex post.<sup>212</sup> To the contrary, the interviews suggest that lawyers rely on simple choice-of-law clauses because they are generally unaware that the escape hatches discussed previously even exist.<sup>213</sup> We doubt their clients are any better informed.

Knowing that lawyers do not attend to the details of choice-of-law clauses, of course, does not help a court identify the rule they would prefer if they considered the question before the court. But survey and interview data can also help here. Even where lawyers admittedly pay little attention to the precise language in a clause, they may still have a strong preference as to what they *want* the clause to mean. With regard to the scope question, for example, interviews suggest that most contracting parties would prefer an interpretive default rule stipulating that related tort and statutory claims are covered by simple

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would be applied); E-mail from Lawyer II, TX Law Firm, to authors (Nov. 17, 2016) (on file with Authors) (same); E-mail from Lawyer, TN In-House Counsel, to authors (Oct. 18, 2016) (on file with Authors) (same). Some courts have also made this same mistake. See *Brill v. Regent Commc'ns, Inc.*, 12 N.E.3d 299, 305–08 (Ind. Ct. App. 2014); *OrbusNeich Med. Co. v. Boston Sci. Corp.*, 694 F. Supp. 2d 106, 113 (D. Mass 2010).

207. See Coyle, *supra* note 72, at 691.

208. See *id.* at 697.

209. *Id.* at 694–95.

210. *Id.*

211. Interview with NC Attorney (Feb. 13, 2015).

212. See George S. Geis, *An Embedded Options Theory of Indefinite Contracts*, 90 MINN. L. REV. 1664, 1680–82 (2006) (discussing concept of strategic ambiguity).

213. See Coyle, *supra* note 72, at 697–99.

choice-of-law clauses.<sup>214</sup> The overwhelming majority of the attorneys to whom we posed this question—fifty-four out of fifty-seven—stated that they generally wanted their choice-of-law clauses to cover related tort and statutory claims.<sup>215</sup> With regard to the statute of limitations question, our interviews suggest that most lawyers interpret even a simple clause to incorporate the limitations periods of the designated jurisdiction. The majority of the attorneys to whom we posed the question—forty-five out of fifty—stated that this was their general preference.<sup>216</sup> Such evidence could, at least in theory, prove useful to a court struggling to interpret a contract clause with little in the way of traditional contextual evidence to guide it.

We do not want to overstate the benefits of surveys, interviews, and similar methods for aggregating the views of the parties (and, where appropriate, their agents). Indeed, we are not of one mind about the benefits of survey data in resolving interpretive disputes.<sup>217</sup> As

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214. See, e.g., *Cannon v. Wells Fargo Bank N.A.*, 917 F. Supp. 2d 1025, 1051 (N.D. Cal. 2013) (outlining the California adopted choice-of-law default rule); Coyle, *supra* note 72, at 697.

215. See, e.g., E-mail from Lawyer, California Law Firm, to author (June 7, 2016) (on file with Author) (“At least when considering trade secret issues—my area of practice—and without going into anything privileged, companies generally want a single, unified choice of law.”). We are assuming (reasonably, we think) that the views of these attorneys are adequate proxies for the views of their clients, or that clients are happy to delegate such decisions to their lawyers.

216. Coyle, *supra* note 72, at 689–90.

217. As just one example, even a properly-designed survey must be administered to the relevant interpretive community, and identifying this community requires both empirical and normative judgments. For example, consider the note and mortgage or deed of trust associated with a residential home loan. The language of these instruments is potentially relevant to the borrower, the loan originator, various financial intermediaries, investors (who purchase securities backed by cash flows from borrowers’ loan payments), regulators, and various others. Which of these should be surveyed, and what weight(s) should be given their respective views? Any interpretive method necessitates judgments about such questions (although these judgments are often left implicit). But the difficulty in answering these questions is one reason for caution against assigning excessive weight to survey data.

Surveys administered (or survey procedures negotiated) *ex ante* may avoid some of these problems, for in most cases the contracting parties will be entitled to define the relevant interpretive community for themselves. But *ex ante* surveys may not be feasible. Among other reasons, contract disputes typically require judgments about what language means *in a specific context*. A meaningful survey, then, must formulate the question precisely. Given the nearly infinite number of potential interpretive disputes, it will often be difficult or impossible to do this *ex ante*. Finally, while parties might negotiate a survey process *ex ante*—leaving the specific question

Ben-Shahar and Strahilevitz acknowledge, survey methods have limits and potential biases,<sup>218</sup> and the same is true of interviews and other less structured methods. But we agree that courts should be receptive to some evidentiary proffers of survey and related data. Likewise, and despite the caveats noted above, we think pricing data, and data about methods of contract production and selection, have their occasional uses as well. We close, then, by considering this question: why *don't* courts consider this kind of evidence?

*B. Contract Litigation, Not Contract Law*

In discussing the utility of survey data, Ben-Shahar and Strahilevitz take pains to justify their proposal as consistent with the law of contract.<sup>219</sup> We understand why they felt obliged to do so, but are somewhat puzzled that it should be necessary. To be sure, one might expect a party to lodge a hearsay objection to testimony based on out-of-court surveys and similar methods of identifying the preferences of third parties—though, as Ben-Shahar and Strahilevitz note, courts overrule these objections in other settings.<sup>220</sup> But this is an evidentiary objection, not an objection founded on the law of contract.

Hearsay objections aside, evidence of the sort discussed in Part II.A should be relevant and admissible on the question of the contract's "reasonable" meaning. Certainly, it is no less relevant than the testimony of individual participants in a trade. And, as we noted previously, it is easy to justify consideration of survey data and similar evidence by invoking party intent. Parties who (mistakenly) assume that contracts are standardized exhibit the intent to be just that: *standard*.<sup>221</sup> If other users of the same contract template share a preference as to what the disputed clause should mean, there is every reason to impute that preference to these parties.

The interesting question is not whether survey evidence should be admissible in contract interpretation cases—it is why courts are so rarely asked to consider it. The answer, it seems to us, has little to do with contract law and everything to do with the practice of litigating contract cases. Put differently, modern contracts scholarship is

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to be designed *ex post* by the survey administrator—it is not clear why parties would prefer this method of resolving interpretive disputes to arbitration.

218. Ben-Shahar & Strahilevitz, *supra* note 15, at 1773.

219. *Id.* at 1815–19.

220. *Id.* at 1815–16.

221. See Anna Gelpern, *The Importance of Being Standard*, European Cent. Bank 2016 Ann. Legal Dep't Conf. Proc. (2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2963333](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2963333).

increasingly comfortable with the idea that transactional lawyers often bear little resemblance to “medieval artisans . . . producing extensively hand-tailored wares.”<sup>222</sup> Just as other producers, transactional lawyers develop routines that lead them to produce (relatively) homogeneous documents.<sup>223</sup> Much modern contracts scholarship represents an effort to understand the implications of this method of production.

But path dependence and adherence to routine are not characteristics limited to transactional lawyers. Litigators also have routines. And while litigators often proffer the testimony of individual witnesses to prove usage of trade, it is rare, in our experience, for them even to consider developing survey data. A similar point can be made about why transactional lawyers do not build survey methods into their contracts *ex ante*, as a means of resolving future interpretive disputes. The reason is not that contract law as presently constituted seriously undermines the utility of such clauses. It is simply that it is *not done*.

We are speculating, of course. We can point to no data on the frequency with which lawyers consider implementing survey methods to resolve existing or future disputes over the meaning of contract language. But we also can see no plausible argument that contract law would forbid the use of evidence derived from these methods. Contract law already offers some tools for addressing contractual black holes and other clauses where traditional evidence of context is missing or unhelpful. It may be that the problem, if there is one, is with legal practice instead.

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222. Mark C. Suchman, *The Contract as Social Artifact*, 37 LAW & SOC'Y REV. 91, 102 (2003).

223. See Richman, *supra* note 33, at 79–80.

## APPENDICES

*Appendix A: International Supply Agreements*

To collect the sample (n=157) of international supply agreements discussed in this Article, one of us (Coyle) worked with a team of research assistants. Each research assistant was instructed to conduct a search for “supply /2 agreement” in the “Material Contracts” section of the Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system database maintained by the U.S. Securities and Exchange Commission (SEC). These searches were conducted through the LexisNexis portal and were limited to contracts filed with the SEC between January 1, 2011 and December 31, 2015. This search resulted in 5549 hits. A research assistant then reviewed each of these agreements to determine whether the contract at issue was an “international” supply agreement involving at least one U.S. party and one foreign counterparty. Once this initial review was complete, we were left with 248 international supply agreements. One of us (Coyle) then worked in collaboration with Christopher Drahozal—a professor at the University of Kansas School of Law—to remove (1) repeat contracts, (2) amendments to previous contracts, and (3) contracts that were formatted in a manner that made them unreadable. Once this process was complete, we had 157 unique agreements. This collection of 157 international supply agreements comprises the dataset that we analyze in Part II.A.1.

*Appendix B: Bond Indentures*

To collect the sample (n=358) of bond indentures discussed in this Article, one of us (Coyle) worked with a team of research assistants. Each research assistant was instructed to review Form S-3s filed with the EDGAR system database maintained by the SEC between January 1, 2016 and December 31, 2016. These searches were conducted through the Bloomberg Law homepage and initially resulted in 448 hits. After eliminating duplicates, we ultimately identified 358 form bond indentures attached as exhibits to the Form S-3s. This collection of 358 bond indentures comprises the dataset that we analyze in Part II.A.2. It should be emphasized that the indentures here analyzed are *form* indentures attached as exhibits to shelf registration filings and that the *actual* indentures ultimately negotiated between the issuer and the underwriters may in some cases differ from the forms. That said, attorneys who regularly negotiate these agreements report that the choice-of-law clauses in the forms are rarely—if ever—revised as part of the negotiations with the underwriters.<sup>224</sup> This means that the form choice-of-law clauses will be identical to the actual clauses in the overwhelming majority of cases.

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224. *Supra* note 106 and accompanying text.