

Interpreting Contracts Without Context

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I. INTRODUCTION

Contract drafting always entails some risk of error. 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 contract language. In many cases, the parties may not realize that their contract is ambiguous but there will be some contextual evidence—in the form of prior drafts, statements made during negotiations, or course of dealing and performance—that will help to clarify what these provisions mean. In other cases, there will be little to no contextual evidence to assist the court. For example, when a contract clause is presumed to be a standard part of the transaction, lawyers and market participants may pay it little mind. Yet the very ubiquity of the clause can also tempt lawyers to append unnecessary legal jargon in an attempt to lend clarity. Because of these tendencies, parties may find themselves in a dispute as to the meaning of minor variations in contract boilerplate. In contract disputes of this sort, courts will find little contextual evidence to guide them.

In this Article, we show that many arbitration clauses and choice-of-law clauses—boilerplate provisions that are frequently borrowed wholesale from other agreements—present interpretive challenges to courts for the reasons outlined above. 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, most promisingly (3) giving weight to surveys and other evidence of market preference. While lawyers rarely attempt to introduce evidence of this sort, it is not because contract law forbids it. The practice of litigating contract disputes, like the practice of contract drafting, can be highly standardized and slow to innovate. Thus, to the extent acontextual contracts pose a problem, the answer is not (or not necessarily) to change the contract law. Instead, the answer may lie in changing the way lawyers litigate contract cases.

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II. 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.”¹ One reason is that parties do not have complete presentation.² 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.³

Likewise, everyone knows that contract clauses can be ambiguous. 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.⁴ Other times, the ambiguity may be unintentional, the result of poor drafting or of the inherent limitations of language.⁵ 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.⁶

So: language is imprecise, lawyers are fallible, and the future involves too many contingencies to foresee, much less address in a contract. The result is that contracts raise innumerable potential interpretive disputes. An important function of contract law is to supply tools for resolving these disputes. To a significant extent, the law does this by attempting to uncover the parties’ ex ante intentions.⁷ Thus, if persuaded the parties had a common intention

¹ Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J. LAW AND ECON. 233, 236 (1979).

² 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 N.W. U. LAW 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).

³ Michael Klausner, *The Contractarian Theory of Corporate Law: A Generation Later*, 31 J. CORPORATION L. 779, 785 (2006); Christopher R. Drahozal & Erin O’Hara O’Connor, *Unbundling Procedure: Carve-Outs from Arbitration Clauses*, 66 FLA. L. REV. 1945, 1954-55 (2014).

⁴ Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814 (2006).

⁵ *AM International, 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.”).

⁶ 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.”).

⁷ See *Restatement (Second) of Contracts* § 201 cmt c. (“[T]he primary search is for a common meaning of the parties.”); *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (N.Y. Ct. App. 2002) (“The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties’ intent.”).

with regard to the meaning of a clause, the court will assign this shared meaning, however idiosyncratic it might be.⁸

In many cases, however, it will be difficult or impossible to uncover the parties' subjective intentions. For this reason, even when ostensibly concerned with subjective intent, courts tend to favor evidentiary proxies that are "objective" in nature.⁹ Effectively, this means that courts assign to each party's behavior the meaning reasonably understood by its counter-party.¹⁰ We recognize and intend this as a generalization.¹¹ The so-called objective theory of contract is contested on both descriptive and normative grounds, as are the consequences for contract interpretation.¹² But it is broadly correct to say that contract law (i) treats interpretation as a search for the parties' ex ante intentions and (ii) favors objective evidence in this search.¹³

However, what if the parties did not intend (or act as if they intended) *anything* with regard to a clause—at least as applied to a particular state of the world or to a particular interpretive question? The process of contract drafting can be routine, even automated.¹⁴ At best, lawyers start with a standard form contract and carefully modify it to suit the client's needs.¹⁵ 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.¹⁶ The process creates a second, slightly different template, which might (or might not) become the template for yet a third deal.¹⁷ This iterative process can spawn a multiplicity of

⁸ 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.")

⁹ 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."); 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).

¹⁰ See, e.g., Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 723-24 (1990).

¹¹ 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 WISC. L. REV. 545, 548 n.11.

¹² 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); Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353 (2007); Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697 (1990).

¹³ Put differently, contract law expects parties to "be concerned about how their actions and communications appear to potential promisees." Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 724 (1990).

¹⁴ Barak Richman, *Contracts Meet Henry Ford*, 40 HOFSTRA L. REV. 77 (2011).

¹⁵ John Flood, *Doing Business: The Management of Uncertainty in Lawyers' Work*, 25 LAW & SOC. REVIEW 58 (1991).

¹⁶ See, e.g., Robert Anderson and Jeffrey Manns, *The Inefficient Evolution of Merger Agreements*, 85 GEO. WASH. L. REV. 57 (2017).

¹⁷ 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

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.¹⁸ It may be that no informed choice is possible. In many cases, no precedential judicial opinion will interpret the relevant clause, much less clarify whether that version of the clause means something different from other versions.¹⁹

It follows that parties do not always negotiate, or even contemplate, the subject matter addressed by each clause in their contract. Some clauses, for instance, just happen to be part of what is regarded as the “standard” template for this sort of transaction. 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 negotiate the subject matter covered by the clause, they may wrongly believe the choice implicates standardized options. To use an example we will cover at length later: parties may not realize that there are many different varieties of choice-of-law clauses or that small differences in contract language can have a significant impact in any subsequent litigation.²⁰

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’ shared *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. To be sure, the lawyers’ intentions will often be relevant, on the theory that the parties delegated the drafting of a particular clause to these agents. But if the lawyers did not make a deliberate choice among templates, they cannot solve the interpretive problem either.

B. “Black holes” and other problematic clauses

Thus, there will often be uncertainty as to the meaning of a contract clause, and a search for party intent will frequently turn up nothing of value. The problem is compounded when lawyers make minor 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, etc. 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*.

English law. The story attributes this to accident—positing that the lawyers carelessly began with the English-law form. The story appears to be false, but this did not diminish its appeal. See W. Mark C. Weidemaier and Mitu Gulati, *A People’s History of Collective Action Clauses*, 54 VA. J. INT’L L. 51, 74-80 (2013).

¹⁸ Anderson and Manns, *supra* n. _ at 84-85.

¹⁹ 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.”).

²⁰ On potential differences, see W. Mark C. Weidemaier, *Customized Procedure in Theory and Reality*, 72 WASH. & LEE L. REV. 1865, 1925-30 (2015).

How often do contracts create these interpretive problems? Although there is relatively little evidence, the literature suggests that many contracts contain clauses that cannot sensibly be interpreted by looking for shared party intent. In a study of merger agreements, Anderson and Manns find a “remarkable level of editorial churning,” in which lawyers made extensive and seemingly cosmetic changes to deal documents.²¹ 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.²²

Choi, Gulati, and Scott present similar evidence in a study of the *pari passu* clause in sovereign bond contracts.²³ 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).²⁴ The clause typically states that the issuing government will rank its obligations to creditors *pari passu*. 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). But the meaning is unclear in the sovereign debt context, where there is no bankruptcy court and no liquidation.²⁵

Choi et al. document how different versions of the *pari passu* clause gradually evolved and spread through the market, including one that obliged the issuing government to maintain the equal ranking of its “payment obligations.” Over a series of decisions, first against Peru in Belgium (in 2001), and later against Argentina in New York (starting in 2011), courts interpreted this clause to require that the government *pay* its creditors pro rata. 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.²⁶

Choi et al. present a compelling case that market participants were surprised by these rulings and viewed them as unwelcome. Relying on archival work, they point out that the *pari passu* clause has appeared at least occasionally in sovereign bonds for two centuries, that the clause has gradually become a routine feature of sovereign bond documentation, and that lawyers have slowly introduced variations into the clause that serve no apparent purpose. This allowed creditors of Peru and Argentina 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.

²¹ Anderson and Manns, *supra* n. _ at 76.

²² Anderson and Manns, *supra* n. _ at 76.

²³ Stephen J. Choi, Mitu Gulati, and Robert E. Scott, *The Black Hole Problem in Commercial Boilerplate* (Dec. 14, 2016 version), available at <https://ssrn.com/abstract=2835681>.

²⁴ See W. Mark C. Weidemaier, Robert E. Scott, and Mitu Gulati, *Origin Myths, Contracts, and the Hunt for Pari Passu*, 38 LAW & SOC. INQUIRY 72 (2013).

²⁵ See W. Mark C. Weidemaier, Robert E. Scott, and Mitu Gulati, *Origin Myths, Contracts, and the Hunt for Pari Passu*, 38 LAW & SOC. INQUIRY 72 (2013).

²⁶ W. Mark C. Weidemaier and Anna Gelpern, *Injunctions in Sovereign Debt Litigation*, 31 YALE J. REG. 189 (2014).

Choi et al. 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.”²⁷ Such black holes, they say, are utterly devoid of interpretive context: “[T]he 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 meaning exists.”²⁸ The tendency of lawyers to introduce new legal jargon to an existing clause—which Choi et al. term “encrustation”—compounds the problem by creating a risk of “litigation over essentially meaningless variations in the boilerplate.”²⁹

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 somewhat less exotic contracts and clauses, focusing on clauses that are routinely included in commercial contracts. We document the widespread use of certain problematic clauses, which share the important functional characteristics of contractual “black holes.” That is, the clause’s meaning is unclear; the uncertainty cannot be resolved by searching for shared party intent or by looking to transactional context; and the clause takes slightly different form from contract to contract, which tempts courts to assign different meanings to minor textual variations.³⁰

²⁷ Choi et al., *supra* note __ at __. 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.* at __. Choi et al. note that such clauses raise the same interpretive issues and thus use “black hole” as an umbrella term. *Id.* at __. So shall we.

²⁸ Choi et al., *supra* note __ at __. A quibble: At times, Choi et al. appear to lament the lack of evidence of the intentions of the *very first parties to ever use the clause*. *Id.* at 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 and Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129 (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 CAPITAL MARKETS LAW JOURNAL 255 (2014).

²⁹ Choi et al., *supra* note __ at __.

³⁰ Though nothing turns on the distinction, Choi et al. distinguish “black holes” from more traditional cases of 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...” Choi, Gulati, and Scott, *supra* n. __ at __. We accept the distinction but are inclined to discount its significance. However many meanings a clause is capable of bearing, the job of a court or arbitrator is always to pick between the interpretations proffered by the parties. If the court finds no answer after a search for contextual evidence, we do not think it matters whether the reason is that there is *no* relevant context at all (the black hole case) or that the available evidence plausibly supports both proffered interpretations (the ambiguity case). Either way, the court will have to look elsewhere to assign meaning.

III. ARBITRATION AND CHOICE-OF-LAW SURPRISES

Our focus in this Part is on commercial contracts—i.e., contracts for the provision of goods and services—between sophisticated commercial actors. We focus on two relatively ubiquitous clauses: arbitration clauses and choice-of-law clauses. The former requires the parties to submit any future disputes to binding resolution before a private third party (rather than a judge). The latter designates the legal regime that will govern the parties’ relationship. Both clauses appear routinely in commercial contracts.³¹ Drawing on datasets compiled in our separate work, we demonstrate that problematic clauses akin to contractual black holes are commonplace, even in contracts involving high stakes and sophisticated parties.

As an initial matter, we note that parties can often agree whether to arbitrate future disputes, and on their preferred governing law, *ex ante*. But their preferences can diverge *ex post*. As an example, arbitration typically offers less discovery than litigation. *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. *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. In such a case, it will have an incentive to try to avoid its obligation to arbitrate.³² The same dynamic exists for choice-of-law causes. If a party ultimately concludes that the law of a jurisdiction other than the one named in the boilerplate 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* agreement. But again, recall that on many questions, the parties will not have had any *ex ante* intentions at all. The disputes we describe below often fall into this latter category. That is, while the parties may have broadly agreed to arbitrate, or to have their agreement governed by the law of a particular state, they will rarely have given any thought to the matters we discuss. For example, a party to a contract with an arbitration clause might later argue that the clause applies to contract but not tort claims. This argument is not inherently implausible; that parties agreed 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.

Before turning to the data, we pause to note that courts can take into account a wide variety of objective evidence as to meaning. Obvious examples include the views of participants in the relevant market (i.e., usage of trade)³³ and the expectations of investors (in the case of

³¹ In a sample of material commercial contracts attached to SEC filings made between 2000 and 2012, Weidemaier finds entered between or instance, Weidemaier finds that 95.7% designate the governing law, while 48.2% provide for arbitration. Arbitration clauses appear even more frequently (61%) in contracts between parties from different countries. *See* Weidemaier, *supra* n. 1 at 10.

³² Party preferences with regard to dispute resolution procedures will often change once a dispute arises. *See* Daphna Kapeliuk & Alon Klement, *Contractualizing Procedure* at 13, available at <http://ssrn.com/abstract=1323056>; Bruce L. Hay, *Procedural Justice—Ex Ante Vs. Ex Post*, 44 UCLA L. REV. 1803, 1811-39 (1997).

³³ *See, e.g.*, U.C.C. §2-202 (allowing courts to consider usage of trade and other evidence to explain or supplement an integrated contract).

financial contracts).³⁴ Even when there is little or no contextual evidence from which a court might infer the contracting parties' intentions, evidence of this sort can often point towards a sensible meaning. For instance, present market participants, if asked, might have a view as to the proper meaning of the clause, or at least a view as to what it does *not* mean. (Evidence of the latter sort would be enough to dismiss a plaintiff's breach of contract claim.)

We think contract law permits courts to assign meaning in this way. As an initial matter, even if true contractual "black holes" exist—in the sense of clauses whose purpose has been largely or completely forgotten—we doubt a court would ever acknowledge that it had found one. A litigant is not likely to argue that *literally no one has any idea* what the clause means; to make this argument is to hand the horse's reins to one's adversary. Thus, there will always be *some* contextual evidence presented in support of each party's proffered meaning. In the resulting evidentiary uncertainty, a court might accept evidence of current market preference as a proxy for the (presumed) intentions of the contracting parties. Or it might infer that the parties intended the clause to mean something like, "whatever market participants think it means at the time the clause becomes relevant."³⁵ The point of boilerplate, after all, is to avoid giving an unpleasant surprise to those whose rights are affected by a clause.

We elaborate on these points later. For now, it is enough to note that some interpretive problems can be resolved through recourse to objective evidence of the sort described above. This is true of many of the problematic clauses we describe below, as it is true so-called contractual "black holes."

A. Disputes about the enforceability and scope of the arbitration clause

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. Nor can the parties 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.³⁶

Arbitration is one alternative to this uncertainty. In its typical form, an arbitration clause requires future disputes to be submitted to a neutral party selected by the parties and

³⁴ See, e.g., *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 942-43 (5th Cir. 1981) (noting that uniformity of contract terms makes it easier for investors and advisors to compare issues).

³⁵ Or it might frankly acknowledge that it is creating a majoritarian default rule.

³⁶ Daphna Kapeliuk & Alon Klement, *Changing the Litigation Game: An Ex Ante Perspective on Contractualized Procedures*, 91 TEX. L. REV. 1475, 1483-84 (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 over litigation process).

empowered to render a binding decision.³⁷ 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.³⁸ Whatever the reason for the choice, parties will often devote little time to negotiating the details.³⁹ On occasion, 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. In consequence, 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. To simplify a complex area, as a matter of federal arbitration law, the merits of such a challenge (probably) must be litigated before the party can be compelled to arbitrate.⁴⁰

More commonly, a party might concede that a contract exists but contest the enforceability of some or all of its terms. Such an argument will not always help avoid arbitration. This is because challenges that implicate the entire contract—for instance, a party’s claim that its assent to the contract was induced by fraud—must themselves be arbitrated.⁴¹ However, courts must resolve challenges “to the arbitration clause itself” before requiring parties to arbitrate the underlying merits of their dispute. Examples include the argument that a party’s assent *to arbitrate* was procured by fraud and the argument that the arbitration clause is unconscionable. Importantly, these are default rules. Most relevant here, the contract may require the parties to arbitrate challenges to the arbitration clause itself, as long it provides “clear and unmistakable evidence” of this intent.⁴²

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. Again, the party will be entitled to make this argument to a judge, unless the contract clearly

³⁷ *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 382 (2002).

³⁸ 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 1,000 Corporations*, HARV. NEGOT. L. REV. 1, 16 (2013) (describing survey results in which corporate counsel reported reasons for selecting arbitration).

³⁹ See 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 an afterthought thrown into a contract by corporate attorneys who have little experience with arbitration.”); 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).

⁴⁰ See, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006).

⁴¹ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

⁴² *AT&T Tech., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986); *First Options of Chicago, Inc. v. MK Investments, Inc.*, 514 U.S. 938, 944-45 (1995).

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.”⁴³ Put differently, courts “independently ... resolve scope-related questions ... by applying the ‘presumption of arbitrability.’”⁴⁴ Yet, as we describe below, this “presumption of arbitrability” will not always lead a court to require arbitration, especially if the arbitration clause is not properly drafted.

To recap: A party seeking to litigate rather than arbitrate the underlying merits of a dispute may (1) assert that no contract exists, (2) dispute the enforceability of the arbitration clause itself, or (3) argue that its claims or defenses are outside the scope of the clause. Courts encounter such challenges to arbitration frequently, even when the contract memorializes a commercial transaction between relatively sophisticated parties.⁴⁵ However, the contract may require arbitration of the latter two challenges if it does so clearly and unmistakably.⁴⁶ We will use the term “delegation cause” to describe a part of an arbitration clause that meets this standard.⁴⁷

2. Drafting to avoid (or 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 starters, 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).⁴⁸ 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.”⁴⁹ If they cannot be

⁴³ *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983).

⁴⁴ *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 72 (2d Cir. 2012).

⁴⁵ *See, e.g.*, *W.L. Doggett LLC v. Paychex, Inc.*, 92 F. Supp. 3d 593 (S.D. Tex. 2015); *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7 (1st Cir. 2009); *Alamo Moving & Storage One Corp. v. Mayflower Transit LLC*, 2002 WL 1973482 (5th Cir. July 31, 2002); *Glass Design, Inc. v. Owens-Brockway Glass Container, Inc.*, No. 12-cv-132, 2013 WL 12091106 (W.D. Tex. Jan. 7, 2013); *Continental Ins. Co. v. Jantran, Inc.*, 906 F. Supp. 362 (E.D. La. 1995).

⁴⁶ 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, West, Inc. v. Jackson*, 561 U.S. 63 (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). Moreover, a separate challenge to the existence of the arbitration clause—say, if a party argued that its counterparty fraudulently inserted the clause after formation—would presumably have to be litigated.

⁴⁷ *See Douglas v. Regions Bank*, 757 F.3d 460, 461 (5th Cir. 2014). The term “arbitrability clauses” is also used. *Societe Generale de Surveillance, S.A. v. Raytheon European Mgmt. Sys. Co.*, 643 F.2d 863, 869 (1st Cir. 1981).

⁴⁸ *See supra* _.

⁴⁹ *See, e.g.*, *Oracle Am., Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1071 (9th Cir. 2013); *Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1329 (11th Cir. 2005).

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.⁵⁰

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.⁵¹ Common examples include requests for preliminary injunctive relief and claims of infringement of intellectual property rights. Thus, an arbitration clause might look something like this:

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...⁵²

The preceding example assumes the parties want to arbitrate everything but a discrete category of disputes. On occasion, however, parties will want to arbitrate only specific matters, such as sales quotas, valuation questions, and the like.⁵³ Clauses that send a limited subset of disputes to arbitration are sometimes called “carve-ins.”⁵⁴

What makes no sense is for parties to draft a seemingly broad arbitration clause, but to use words that create an ambiguity as to whether the parties in fact intended to arbitrate only *some* 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.⁵⁵

⁵⁰ See, e.g., AMERICAN ARBITRATION ASS’N, *Drafting Dispute Resolution Clauses: A Practical Guide* at 10 (2013), available at https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540.

⁵¹ Drahozal and O’Hara O’Connor, *supra* n. __.

⁵² 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.

⁵³ Clauses like this are often, but not always, considered “arbitration.” Compare *Evanston Ins. Co. v. Cogswell Properties, LLC*, 683 F.3d 684, 693-94 (6th Cir. 2012) (appraisal process did not constitute arbitration) and *Salt Lake Tribune Pub. Co. v. Management Planning, Inc.*, 390 F.3d 684, 689-92 (10th Cir. 2004) (same) with *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 7-8 (1st Cir. 2004) (clause providing for “final determination” of certain valuation issues by 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; *Necchi S.p.a. v. Necchi Sewing Mach. Sales Corp.*, 348 F.2d 693, 696 (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., *New York Civil Practice Law and Rules § 7601* (McKinney) (providing for specific performance of an agreement to submit to a valuation, appraisal, or similar process, “as if it were an arbitration agreement”).

⁵⁴ *Unbundling Procedure*, *supra* note __, at 1950 n.23.

⁵⁵ See, e.g., *Vemco, Inc. v. Flakt, Inc.*, 1996 WL 506495 (6th Cir. 1996) (interpreting “arising out of” not to require arbitration of all disputes between the parties); *Mediterranean Enter. v. Sangyong Corp.*, 708 F.2d 1458 (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); *Welborn Clinic v. MedQuist, Inc.*, 301 F.3d 634 (7th Cir. 2002).

Other courts, by contrast, interpret language like this more broadly, equivalent to language that includes the obligation to arbitrate claims “related to” the contract.⁵⁶

Parties who use arbitration clauses that refer exclusively to claims “arising out of” the contract—sometimes (unhelpfully) called “narrow” arbitration clauses—set themselves up for expensive, post-dispute skirmishing over whether the arbitration agreement applies to all or only some issues.⁵⁷ Because disputes can typically be analyzed under multiple legal theories, a clause like this simply invites parties to frame their dispute in ways that arguably bring it outside the scope of the clause. And to repeat, given the minimal time parties typically invest in negotiating the clause, there will often be no contextual clues as to how the parties 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. A delegation clause “clearly and unmistakably” evidences the intent to reverse this presumption.⁵⁸ But many delegation clauses do not clearly 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 American Arbitration Association’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.⁵⁹

There are two potential problems with treating this as a delegation clause. The first is that not all courts hold that incorporation by reference satisfies the “clear and unmistakable” standard. While most federal courts would treat this as sufficiently clear, some federal and a number of state courts have held to the contrary.⁶⁰ (And, given the prominence of Delaware as a

⁵⁶ See, e.g., *Mineracao da Trindade-Samitri v. Utah Int’l Inc.*, 745 F.2d 194 (2d Cir. 1984) (interpreting the phrase “any question or dispute arising or occurring under” the contract to include claims for fraudulent inducement).

⁵⁷ See Alan Scott Rau, *Everything You Really Need to Know About “Separability” in Seventeen Simple Propositions*, 14 AM. REV. INT’L ARB. 1, 36 (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”).

⁵⁸ See generally Alan S. Rau, *Everything You Really Need to Know About “Separability” in Seventeen Simple Propositions*, 14 AM. REV. INT’L ARB. 1 (2003).

⁵⁹ AAA Commercial Arbitration Rules R-7.

⁶⁰ For cases holding that incorporation by reference meets the “clear and unmistakable” standard, see, e.g., *Shaw Group Inc. v. Triplefine Int’l Corp.*, 322 F.3d 115 (2d Cir. 2003) (holding that incorporation of ICC rules evidenced intent to arbitrate questions of arbitrability); *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009) (AAA Rule R-7(a)); *Terminix Int’l v. Palmer Ranch Ltd. Partnership*, 432 F.3d 1327, 1332 (11th Cir. 2005) (AAA rules); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) (AAA rules). For contrary cases, see, e.g., *Burlington Resources Oil & Gas Co. v. San Juan Basin Royalty Trust*, 249 S.W.3d 34 (Ct. App. Tex. 2007) (AAA rules); *Ajamian v. CantorCO2e*,

state of incorporation and the fact that commercial disputes often do not implicate federal law, contracting parties would often find themselves in state court.) The second problem is that, while institutional rules like AAA Rule R-7 clearly allow the arbitrator to decide questions related to the scope and enforceability of the arbitration clause, it is not clear that these rules confer *exclusive* decision-making authority.⁶¹ 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 its 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. (There are, of course, other ways in which an arbitration clause can be badly drafted.)

Both types of problematic clause are endemic, even in contracts involving high stakes and sophisticated parties. Here, we draw on a hand-coded sample of material contracts attached as exhibits to corporate SEC filings between January 1, 2000 and December 31, 2012.⁶² The sample and coding methods are described in detail elsewhere.⁶³ Though material contracts are not representative of all contracts, the factors that make them unrepresentative—high stakes, sophisticated parties—mean that the parties and their lawyers can more readily justify an investment in drafting carefully. If these contracts frequently include problematic clauses, others likely do too. The sample was drawn from the 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.

With regard to the scope of arbitration, recall that careful parties will either (A) 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 (B) write a narrow cause that expressly requires arbitration only of specified issues. The problematic, so-called “narrow” clause aspires to require arbitration of all disputes but contains significant gaps. Narrow clauses turn out to be

L.P., 203 Cal. App. 4th 771, 789-790 (Cal. App. 2012) (AAA rules); *Diesselhorst v. Munsey Building*, No. Civ. AMD 04-3302, 2005 WL 327532, *4 (D. Md. Feb. 9, 2005).

⁶¹ 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, rptrs. note to cmt. e.

⁶² 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).

⁶³ Weidemaier, *supra* n. _ at _.

quite common—appearing in 22.8% of the contracts with arbitration clauses in the sample. As an 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.⁶⁴

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 the parties to argue *ex post* about whether they *really* have to arbitrate all of their claims and defenses. This error is overshadowed, however, by a 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. Again, 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 delegates questions of scope or enforceability to the arbitrator. And while more than nine clauses out of ten (92.3%) incorporates 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 an expensive and time-consuming preliminary skirmish in court. To a significant extent, the outcome will depend on *where* this fighting occurs—and, unless the contract designates the exclusive forum for any judicial proceedings,⁶⁵ this may depend on factors as trivial as which party most quickly races to its preferred courthouse.⁶⁶

B. Disputes about choice-of-law clauses

Choice-of-law clauses, like arbitration clauses, are a staple of modern contract practice. 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.⁶⁷ They also present interpretive challenges for courts.⁶⁸ In many cases, these

⁶⁴ Joint Marketing Agreement between SRI/Surgical Express, Inc. and Cardinal Health 200, Inc., dated Nov. 26, 2008 (emphasis added).

⁶⁵ In the sample, only 39.7% of contracts include a forum selection clause. Of these, 73.2% expressly designate the forum as exclusive. *See also* Weidemaier, *supra* n. 1 at 1917-18.

⁶⁶ 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, 1102-03 (2d Cir. 1970) (recognizing the priority afforded to the suit filed first).

⁶⁷ *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) (observing that a “choice of law provision, when viewed in isolation, may reasonably be considered a substitute for the conflicts-of-laws analysis that otherwise would determine what law to apply to disputes arising out of the contractual relationship.”).

⁶⁸ *See* John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. (forthcoming 2017); *see also* PETER HAY ET AL., *CONFLICT OF LAWS* 1145 (2010).

clauses are pure boilerplate; the parties will not have negotiated the language in the clause other than to select the governing jurisdiction.⁶⁹ Consequently, it is not at all clear that the text of the typical clause provides a particularly reliable guide to what the parties “intend” with respect to a wide range of issues.⁷⁰ Nor will the parties always *have* an intention about how the clause should be applied to a particular matter, for reasons we have discussed.⁷¹ Nevertheless, the courts are frequently called upon to interpret these clauses.

When a contracting party believes that the law of the jurisdiction named in the choice-of-law clause is unfavorable to it, 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.⁷²
2. The clause states that 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.⁷³
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.⁷⁴
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.⁷⁵
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.⁷⁶

⁶⁹ See Glenn West, *The Law You Choose to Govern Your Contract May Not Be the Law That Governs*, *Weil Insights*, Weil’s Global Private Equity Watch, January 12, 2016, <http://goo.gl/RIJTDv> (last visited Feb. 23, 2017) (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”).

⁷⁰ See *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 488 (1989) (Brennan, J., dissenting) (“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 way at variance with the purposes for which choice-of-law clauses are commonly written and the manner in which they are generally interpreted.”).

⁷¹ See *supra* _.

⁷² See *Krock v. Lipsay*, 97 F.3d 640, 645 (2d Cir. 1996).

⁷³ See *Boat Town U. S. A., Inc. v. Mercury Marine Division of Brunswick Corporation*, 364 So. 2d 15, 17 (Fla. Dist. Ct. App. 4th Dist. 1978).

⁷⁴ See *Western Video Collectors, L.P. v. Mercantile Bank*, 23 Kan. App. 2d 703, 705-706 (Kan. Ct. App. 1997).

⁷⁵ See *Weiss v. La Suisse, Société d’Assurances sur la Vie*, 293 F. Supp. 2d 397, 402 (S.D.N.Y. 2003).

⁷⁶ See *Travelers Prop. Cas. Co. of Am. v. St.-Gobain Tech. Fabrics Can., Ltd.*, 474 F. Supp. 2d 1075, 1081-1082 (D. Minn. 2007).

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 evade the law of the jurisdiction named in the choice-of-law clause and have the law of a different jurisdiction applied in its place.

It should be emphasized that none of the above arguments challenge the basic *enforceability* of a choice-of-law clause. Instead, these arguments require the court to determine the correct *interpretation* of a clause. In some cases, the clause will be drafted so as to make the act of interpretation unnecessary. Consider the following comprehensive clause:

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.⁷⁷

The use of such a comprehensive clause effectively precludes either party from utilizing one of the five escape hatches identified above. 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 express language of this simple clause does not allow a judge to determine whether the escape hatches are open or closed. To the extent it raises an interpretive question 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.⁷⁸ A judge called on to interpret such a clause faces a nearly impossible task; he or she must determine whether to accept or reject one of the five aforementioned interpretive arguments with essentially no guidance from the text of the contract.

In response to this challenge, the courts have developed canons of construction that assign a presumptive meaning to simple choice-of-law clauses.⁷⁹ To create these interpretive rules, the courts frequently engage in armchair empirical speculation as what most contracting parties would probably *want* these clauses to mean.⁸⁰ While this speculation may occasionally be informed by contextual evidence furnished by the parties, in many cases it will be driven by

⁷⁷ The bracketed numbers identify the language in the clause that is responsive to each of the five numbered arguments set forth above.

⁷⁸ See *supra* Part II (discussing functional characteristics of a contractual black hole).

⁷⁹ 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.’”).

⁸⁰ See Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1581-84 (2005).

the judge's (possibly idiosyncratic) assessment of how a "rational businessperson" would want the clause to be interpreted.⁸¹

The foregoing discussion raises two important questions. First, is the typical choice-of-law simple or comprehensive? If the former, then the off-the-cuff interpretive rules developed by the courts will matter. A lot. If the latter, then these interpretive rules will not matter as much. Second, are the interpretive default rules developed by judges consistent across U.S. jurisdictions? If so, then a simple choice-of-law clause of the sort discussed above will have a uniform meaning across the United States. If not, then the meaning assigned to such a clause will vary depending on where the suit is brought. In such cases, the exact same choice-of-law clause may mean one thing in California and something quite different in New York.

1. Contract Practice: A Review of 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 identified above, we reviewed 159 international supply agreements. Each of these agreements was filed with the U.S. Securities and Exchange Commission between 2011 and 2015 and each involved at least one U.S. party.⁸² 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. Choice-of-law clauses in international contracts are therefore 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. This treaty does not apply to contracts for the sale of good domestically. 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.

After collecting the 159 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.

⁸¹ *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 468-470 (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, 694-95 (W.D. Pa. 2013) (same).

⁸² A complete account of how we went about gathering these agreements is set forth in the Appendix.

Issue	Percentage of Contracts Specifically Addressing Issue
Does the clause apply exclusively to issues of interpretation? Or does it also address the issue of governing law?	96%
Does the clause exclude the conflict-of-laws rules of the chosen jurisdiction?	78%
Does the clause address the potential applicability of a federal treaty (the CISG)?	41%
Does the clause address the question of whether it applies to tort and statutory claims that are related to the contract?	22%
Does the clause distinguish between substantive and procedural law?	16%

Our review revealed considerable variety in drafting practice. Approximately 96% of the contracts stated that the contract would be “governed by” the law of chosen jurisdiction. 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 78% of the agreements contained a clause directing the courts not to apply the conflict-of-laws rules of the chosen jurisdiction. 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 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 41% of the clauses referenced the CISG despite that the treaty’s salience to international supply agreements. Only 22% of the clauses addressed the question of whether the chosen law applied to related tort and statutory claims as well as contract claims. And only 16% of the clauses addressed the question of whether the clause selected the procedural law of the chosen jurisdiction. On the one hand, the contracts’ failure to seal these escape hatches could indicate that most contracting parties view them 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, the literature suggests that a surprising number of U.S. lawyers conduct little research into the content of the law of the chosen jurisdiction.⁸³ Each lawyer will typically want the law of his or her home jurisdiction to apply and

⁸³ 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

will declare victory if this objective is achieved.⁸⁴ There are, moreover, 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.⁸⁵ When it comes to choosing a governing jurisdiction, the prevailing view in the literature 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 the unfamiliar.”⁸⁶ 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.⁸⁷ 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. Interpretive Conflicts in Simple Choice-of-Law Clauses

Where a particular contract provision lacks any recoverable meaning as to the intent of the contracting parties—as is often the case in simple choice-of-law clauses—it falls to the courts to develop interpretive default rules that assign it a constructive meaning. Over the past several decades, the courts have developed several canons of construction for these clauses that seek to do precisely this.⁸⁸ In a number of cases, however, the interpretive rules adopted by the courts in one state are in direct conflict with the interpretive rules adopted by the courts in another state. We provide two examples of these interpretive conflicts below.⁸⁹ The first relates to the intended scope of a simple choice-of-law clause. The second relates to whether a simple choice-of-law clause encompasses the statutes of limitations of the chosen jurisdiction.

clause.”); *see also* E-mail to Author from In-House Counsel at U.S. Energy Company, Mar. 3, 2016 (“[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.”).

⁸⁴ Michael Gruson, *Governing Law Clauses in Commercial Agreements -- New York's Approach*, 18 COLUM. J. TRANSNAT’L L. 323, 362-63 (1980); *see also* Shaffik Bhalloo, *Jurisdictional Issues in Electronic Commerce Contracts: A Canadian Perspective*, 7 COMP. L. REV. & TECH. J. 225, 278 (2004) (discussing advantages to choosing the law of one’s home jurisdiction); E-mail to Author from former General Counsel at Minnesota Company, Aug. 22, 2016 (“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.”).

⁸⁵ *See, e.g.*, *Mail Boxes Etc. USA, Inc. v. Considine*, 1999 U.S. Dist. LEXIS 23380 (W.D. Wash. Aug. 13, 1999); *Novak v. Mut. of Omaha Ins. Co.*, 29 Kan. App. 2d 526, 536, 28 P.3d 1033, 1037-40 (2001); *see also* Restatement (Second) on Conflict of Laws § 187 reporters note (collecting cases).

⁸⁶ Gruson, *supra* note __, at 362-63.

⁸⁷ *See infra* notes 123-128 & accompanying text (discussing interviews conducted by Coyle in which lawyers evinced minimal knowledge as to the significance of small differences in language in choice-of-law clauses and as to the existence of certain escape hatches from those clauses).

⁸⁸ *See* Coyle, *supra* note __, at __

⁸⁹ We do not here discuss the question of whether it is a “mistake” for the courts to read choice-of-law clauses that select the law of a particular U.S. state to select the CISG indirectly. While there is quite a bit of evidence that this interpretive move is inconsistent with the expectations of most U.S. parties, we know too little about the expectations of non-U.S. parties to draw any firm conclusions on this issue.

a. The Scope of a Simple Choice-of-Law Clause

Lawsuits in which the sole claim asserted is a breach of contract action are rare. Breach of contract actions are typically brought alongside actions sounding in tort or statute.⁹⁰ It follows that courts must often decide whether the choice-of-law clause set forth in the contract also applies to tort and statutory claims that relate in some way to the contract claims. In some cases, the choice-of-law clause will address this issue by stating that it will apply to causes of action “relating to” the agreement. (This is akin to our prior arbitration example, in which the use of “relating to” expands the scope of arbitration.) In other cases, however, the clause will be silent.

In the face of contractual silence, many U.S. courts have taken the position that simple choice-of-law clauses do not apply to related tort and statutory claims. The New York Appellate Division, for example, has held that simple choice-of-law clauses do not bind the parties as to “causes of action sounding in tort.”⁹¹ The Texas Supreme Court has held that simple clauses do “not purport to encompass all disputes between the parties or to encompass tort claims.”⁹² The Eleventh Circuit has held that “[a] choice of law provision that relates only to the agreement will not encompass related tort claims.”⁹³

Other U.S. courts, by comparison, have taken the position that simple choice of law clauses do apply to related tort and statutory claims.⁹⁴ The California Supreme Court has articulated the following rationale in support of this latter position:

When a rational businessperson enters into an agreement establishing a transaction or relationship and provides that disputes arising from the agreement shall be governed by the law of an identified jurisdiction, the logical conclusion is that he or she intended that law to apply to all disputes arising out of the transaction or relationship. We seriously doubt that any rational businessperson, attempting to provide by contract for an efficient and business-like resolution of possible future disputes, would intend that the laws of multiple jurisdictions would apply to a single controversy having its origin in a single, contract-based relationship. Nor do we believe such a person would reasonably desire a protracted litigation battle concerning only the threshold question of what law

⁹⁰ Christina L. Boyd et al., *Building a Taxonomy of Litigation: Clusters of Causes of Action in Federal Complaints*, J. EMP. LEG. STUD.(2013) (observing that “from the passage of the federal rules until quite recently, liberal joinder and liberal pleading combined to recommend that attorneys set forth as many causes of action as they felt would pass a very loose (but not nonexistent) judicial scrutiny”).

⁹¹ *Id.*

⁹² *See, e.g.*, *Reading & Bates Corp.*, 992 S.W.2d 423, 433-434 (Tex. 1999).

⁹³ *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1162 (11th Cir. 2009); *see also Panthera Rail Car LLC v. Kasgro Rail Corp.*, 985 F. Supp. 2d 677, 694-95 (W.D. Pa. 2013); *Winsor v. Glasswerks PHX, L.L.C.*, 204 Ariz. 303, 306, 63 P.3d 1040, 1043 (Ct. App. 2003).

⁹⁴ *See, e.g.*, *Northwest Airlines v. Astraea Aviation Services*, 111 F.3d 1386 (8th Cir. 1997); *Pyott-Boone Elecs., Inc. v. IRR Trust for Donald L. Fetterolf* Dated December 9, 1997, 918 F. Supp. 2d 532, 542-548 (W.D. Va. 2013); *Hazout v. Ting*, 134 A.3d 274, fn. 69 (Del. 2016); *Masters Group International, Inc. v. Comerica Bank*, 2015 MT 192 (Mont. 2015); *Enter. Bank & Trust v. Barney Ashner Homes, Inc.*, 300 P.3d 115 (Kan. Ct. App. 2013).

was to be applied to which asserted claims or issues. Indeed, the manifest purpose of a choice-of-law clause is precisely to avoid such a battle.⁹⁵

When confronted with contractual silence on the issue of the intended scope of a choice-of-law clause, in short, courts in different U.S. states have developed different interpretive rules to fill the void. Recall that less than a quarter of the international supply agreements that we studied extended the governing law to tort and other claims “related to” the contract. In over three-quarters of our contracts, therefore, the scope of a simple choice-of-law clause will vary depending upon the state in which the litigation is brought.⁹⁶

b. Issues Relating to Statutes of Limitations

The principle that choice-of-law clauses only select the substantive law of the chosen jurisdiction—and not its procedural law—is widely accepted. It would be absurd to argue that a Delaware court must apply all of New York’s procedural law, including its rules relating to the size of typeface in court filings, to resolve a dispute merely because a contract stipulated that it was to be governed by the law of New York.⁹⁷ Historically, matters such as statutes of frauds, burdens of proof, and statutes of limitations were classified as procedural by U.S. courts.⁹⁸ Accordingly, each of these matters was invariably deemed to be governed by the law of the forum rather than the law of the jurisdiction named in the choice-of-law clause.

In recent years, however, judicial practice has evolved in this area. While courts in a majority of U.S. jurisdictions continue to classify statutes of limitations as procedural, an increasing number of courts have held that statutes of limitations should be classified as substantive. In those states that now classify statutes of limitations as substantive, simple choice-of-law clauses will be deemed to select the statutes of limitation of the chosen jurisdiction. As one federal district court in Florida has explained:

Florida courts consider the statute of limitations to be substantive, and therefore the statute of limitations of the parties’ chosen [jurisdiction] will apply where there exists a contractual choice of laws provision.⁹⁹

Conversely, the courts in states that continue to classify statutes of limitations as procedural construe simple choice-of-law clauses to exclude the statutes of limitations of the chosen jurisdiction. In the words of the New York Court of Appeals:

⁹⁵ *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 468-470 (Cal. 1992).

⁹⁶ U.S. courts also disagree as to how to *select* the interpretive rules that should be used to construe a choice-of-law clause. The Second Circuit has held that a court should apply the interpretive rules of the forum. *See Fin. One Pub. Co. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 332-333 (2d Cir. 2005). The California Supreme Court, by comparison, has held that a court should apply the interpretive rules of the jurisdiction named in the choice-of-law clause. *See Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 469 (Cal. 1992).

⁹⁷ *See* 22 N.Y.C.R.R. 500.1.

⁹⁸ *See Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 136 (N.J. 1973).

⁹⁹ *Gaisser v. Portfolio Recovery Assocs., LLC*, 571 F. Supp. 2d 1273, 1276 (S.D. Fla. 2008).

Choice of law provisions typically apply to only substantive issues and statutes of limitations are considered “procedural” because they are deemed as pertaining to the remedy rather than the right. There being no express intention in the agreement that Delaware’s statute of limitations was to apply to this dispute, the choice of law provision cannot be read to encompass that limitations period.¹⁰⁰

When presented with contractual silence on the issue of the whether simple choice-of-law clauses encompass statutes of limitation, in summary, courts in different U.S. states have developed different interpretive rules to fill the void. The most straightforward way of eliminating this uncertainty, of course, would be for the parties to address the question explicitly in their choice-of-law clause. But only one-sixth of the clauses in our sample did so. In the remainder of these contracts, the answer to the question of whether the choice-of-law clause covers procedural matters will vary depending on the forum.¹⁰¹

IV. CONTRACT LAW OR CONTRACT LITIGATION?

There is probably no such thing as a typical contract interpretation case, nor a typical judicial approach to interpretation.¹⁰² To roughly generalize, however, courts begin with the text and, if unsatisfied that this has a clear meaning, haphazardly consider a range of evidence that might lend relevant context.¹⁰³ Traditionally, this inquiry into context has focused on evidence with a relatively clear tie to the parties and their transaction, such as prior drafts,¹⁰⁴ statements made during negotiations, course of dealing and performance, etc. Because courts favor objective indicators of intent, they also look, of course, to usage of trade—typically in the form of competing witnesses who testify as to what they believe the language to mean. And courts evaluate all of this evidence against their armchair intuitions as to what “reasonable” or “rational” parties would expect.

The most immediate implication of Part III is that many of these traditional methods will be of little use in interpreting arbitration clauses and choice-of-law clauses, among others. To be sure, on occasion parties will have discussed the matters we described in Part III while negotiating the contract; in such cases, traditional methods of interpretation may do the job. But in many other cases, the negotiating context will provide few clues. Nor will there be a coherent usage of trade, or obvious clues from the transactional context. Many interpretations thus result from simply guesswork as to what a reasonable contracting party (i.e., in the abstract, not *these* parties) would want. As an example, recall the presumption that parties do not want to arbitrate challenges to the enforceability or scope of their arbitration agreement (and therefore must

¹⁰⁰ *Portfolio Recovery Assocs., LLC v. King*, 14 N.Y.3d 410, 416 (N.Y. 2010). *But see* *Am. S.S. Owners Mut. Prot. & Indem. Ass’n v. Dann Ocean Towing, Inc.*, 756 F.3d 314, 319 (4th Cir. 2014) (concluding that a choice-of-law clause selecting New York law encompassed New York statutes of limitations).

¹⁰¹ *See supra* note ___ (discussing varying approaches to choosing which interpretive rules to apply).

¹⁰² *See generally* Keith A. Rowley, *Contract Construction and Interpretation: From the “Four Corners” to Parol Evidence (And Everything In Between)*, 69 *MISS. L.J.* 73 (1999).

¹⁰³ Haphazardly, in part, because courts rely on attorneys to select and present relevant evidence.

¹⁰⁴ *See, e.g.,* *Valve Corp. v. Sierra Entertainment, Inc.*, 431 F. Supp. 2d 1091, 1099-1100 (W.D. Wash. 2004).

“clearly and unmistakably” signal their intent to do so).¹⁰⁵ The Supreme Court explicitly justified this rule by engaging in armchair speculation about the salience of such matters during contract negotiations.¹⁰⁶ We do not mean this as critically as it may sound. Cases must be decided, and courts depend on the parties to supply the necessary information. But it is nevertheless true that much of interpretation involves armchair empirical speculation—so-called “fireside induction.”¹⁰⁷

Contractual “black holes,” and clauses of the sort described in Part III, raise these issues acutely because of the relative lack of context that might help clarify meaning. Importantly, however, no contract is *entirely* acontextual—if we broaden our view of context to reach beyond the circumstances surrounding the negotiation and performance of the disputed contract. In the discussion to follow, we evaluate possible alternative forms of evidence that might guide interpretation when more traditional forms of contextual evidence fail.

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 help produce more informed interpretations of contract language. Each has its limitations. But in at least some cases, each may produce somewhat more informed judicial guesses as to meaning, and thus minimize the chance that a court’s interpretation will come as a shock. 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

Recall that contracts often share the characteristics of other products. Law firms and other producers construct “routines that are dedicated to the mass production of homogeneous goods.”¹⁰⁸ From this perspective, what is especially 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 as to *which* version of the disputed clause appears in the template for their deal. 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,

¹⁰⁵ *Supra* at __.

¹⁰⁶ *First Options of Chicago, 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. v. Bd. of Trs.*, 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.”).

¹⁰⁷ *See* Paul E. Meehl, *Law and the Fireside Inductions (With Postscript): Some Reflections of a Clinical Psychologist*, 7 *BEHAVIORAL SCIENCES AND THE LAW* 521 (1989), *reprinted in* Paul E. Meehl, *Selected Philosophical and Methodological Papers* 440 (C.A. Anderson and K. Gunderson eds., University of Minnesota Press, 1991).

¹⁰⁸ Barak Richman, *Contracts Meet Henry Ford*, 40 *HOFSTRA L. REV.* 77 (2011).

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. Arguably, this also is what happened in the *pari passu* litigation described earlier, 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. 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.

Choi et al. disagree with the result, and imply the evidence might have been different if the courts had been willing to consider “evidence of encrustation.” As an example, they suggest courts might consider whether the clause has “been repeated by rote over 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.”¹⁰⁹ To put the point a bit differently, one might say that courts should be receptive to testimony about how lawyers produce and select contracts of this sort.

Consider a case in which a party wants to introduce evidence that (i) there are multiple extant versions of a clause and (ii) lawyers select the beginning document template largely based on considerations of convenience and familiarity.¹¹⁰ In a case like this, courts arguably should be skeptical of assigning different meanings to different versions. 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 to us reasonable to begin with a presumption that clauses mean the same thing.¹¹¹ This would not, of course, help the court decide *which* meaning to embrace, but it would prevent outlier cases in which courts interpret a contract in unexpected ways based on little more than a minor textual deviation.

As an example, return again to 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 the choice extends to disputes “relating to” the agreement. As our interviews suggest in the choice of law context, most lawyers do not even consider the possibility that the clause would not apply to, say, tort claims. Many are unfamiliar with many of the choice-of-law nuances we describe above. Certainly they do not negotiate over matters such as whether to exclude tort but not contract claims from the choice-of-law clause. Yet with some frequency, courts have interpreted such clauses to exclude a variety of merits-related disputes from the scope of the clause. This result contravenes what we know about how lawyers produce these clauses. If anything, that production method implies that lawyers presume that minor differences do not

¹⁰⁹ Choi et al., *supra* n. _ at _.

¹¹⁰ See, e.g., Anderson and Manns, *supra* n. _ at 84.

¹¹¹ This approach derives support from lawyer interviews conducted by one of us (Coyle), in which several interviewees expressed surprise that some courts view minor variations in boilerplate language as significant. See *infra* note 125.

matter. If that is so, courts should not go out of their way to create meaning from minor differences.

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. 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 19 words to a multi-page clause totaling 1,671 words. 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 had 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. Nor can the answer be that the clause has been repeated, even revised, “without having been tested in litigation.”¹¹² Leaving aside uncertainty over what constitutes a sufficient “test,” countless clauses would meet this description.

2. Evidence About Whether Clause Versions are Priced

Another possibility is that parties might sometimes be able to present courts with evidence concerning whether a clause is priced.¹¹³ 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 will make it next-to-impossible to find meaningful pricing data. Even for financial contracts where good pricing data is available, 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.¹¹⁴

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 the clauses will be enforced 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 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

¹¹² Choi et al., *supra* n. _ at _.

¹¹³ Choi et al., *supra* n. _ at _.

¹¹⁴ If one accepts that minor variations in language *can* be meaningful, then presumably the best methodology would rely on machine coding of contracts and would attempt to control for *all* differences in the text—possibly a staggering number of variables.

describes the *pari passu* litigation against Argentina. 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.¹¹⁵ 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.

The problem, as we see it, is that even where pricing data exists, 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 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 its impact, a party in Argentina’s position need only advance an interpretation that might plausibly be priced, but that would not produce the plaintiff’s desired result.

3. Surveys and Other Evidence of Market Preference

Perhaps the most fruitful avenue would be to conduct surveys of market participants’ views as to meaning. The upshot is that many black hole problems can be resolved by asking what the relevant audience for the clause *thinks* it should mean. Assume, for instance, a commercial contract for the sale of widgets. A survey of buyers and sellers in the industry (and their attorneys, for clauses that are less salient during negotiations) could help identify majoritarian preferences as to what clause does or does not mean.

Even if a dispute involves a true contractual “black hole,” where a contract clause has gone unnoticed for many years, market participants are likely to have views about what the clause should and should not mean. If there is something approaching consensus as to meaning, it is fair to attribute this meaning to the parties. In most cases, a court could do so without abandoning the pretense that “objective” evidence is a proxy for the actual intentions of the parties. As we noted previously, if a party’s unreflective use of a contract template signals anything at all about 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 think it means, whenever the question becomes relevant.” Indeed, even if survey data reveals no consensus as to what a scrap of boilerplate means, there may be consensus as to what it does *not* mean, and this alone may be enough to resolve many cases.

There is some momentum behind the use of surveys as interpretive tools. 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.¹¹⁶ In a related

¹¹⁵ See Declaration of Hal S. Scott, *NML Capital Ltd. v. Rep. of Argentina*, No. 08-CV-6978 (TPG) (S.D.N.Y. Dec. 10, 2010).

¹¹⁶ Omri Ben-Shahar & Lior Jacob Strahilevitz, *Interpreting Contracts Via Surveys and Experiments*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2905873.

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.¹¹⁷

There are many advantages to relying on survey and interview data rather than expert testimony to resolve interpretive disputes.¹¹⁸ As Ben-Shahar and Strahilevitz note, the standard method of proving trade usage—the presentation of competing testimony by selected industry insiders—effectively amounts to a survey with an N of 1.¹¹⁹ We would add that these surveys are horribly infected by bias, as lawyers will not proffer the testimony of a witness with an unfavorable view. Though not free from potential bias,¹²⁰ methods that aggregate the views of the parties who use and consume contracts are likely to be more reliable than expert testimony proffered by a single hired expert.

As an example, recall that courts have reached differing results on two important questions about the meaning of simple choice-of-law clauses. The first relates to the intended scope and to whether the clause applies to tort and other non-contractual claims. The second relates to whether a simple choice-of-law clause encompasses the statute of limitations of the chosen jurisdiction.¹²¹ 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.¹²² Could survey or interview evidence have helped produce a consistent result?

¹¹⁷ Coyle, *supra* note __, at __.

¹¹⁸ 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 Corporation 2009).

¹¹⁹ Ben-Shahar and Strahilevitz, *supra* n. __ at 48.

¹²⁰ Ben-Shahar and Strahilevitz, *supra* n. __ at 18-21.

¹²¹ *Supra* Part III.

¹²² 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* n. __ at 522.

To begin to address this question, one of us (Coyle) solicited the views of practicing attorneys, using a combination of interviews and structured email exchanges (86 in total), to gain a better understanding of how they interact with choice-of-law clauses. Recall that parties, through their lawyers, generally negotiate the basic choice of governing jurisdiction (often choosing the lawyer’s home state).¹²³ 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 can’t recall ever negotiating the language in the rest of the clause.”¹²⁴ These interviews also revealed that attorneys do not always understand the meaning of certain standard 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.¹²⁵ The interviewees were also frequently unaware of the ways in which choice-of-law clauses had been construed by the courts in their home jurisdiction; when asked to predict how these courts would interpret specific contract provisions, their guesses were frequently incorrect.¹²⁶ Finally, with respect to clauses that addressed the applicability of the CISG, a number of interviewees were unaware of the treaty’s very existence.¹²⁷ Others had heard of it but didn’t know exactly what it did; one interviewee confided that he had been excluding the CISG from his contracts for years without ever understanding what it was.¹²⁸

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*.¹²⁹ 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. We doubt their clients are any better informed.

¹²³ E-mail to Author from former General Counsel at Minnesota Company, Aug. 22, 2016 (“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.”).

¹²⁴ See Interview with In-House Counsel I at U.S. Pharmaceutical Company, Feb. 24, 2017; Interview with In-House Counsel I at U.S. Pharmaceutical Company, 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.”).

¹²⁵ See E-mail to Authors from Lawyer I at TX Law Firm, Nov. 17, 2016 (incorrectly suggesting that the phrase “excluding conflict-of-laws principles” addressed the question of whether the statute of limitations of the chosen jurisdiction would be applied); E-mail to Authors from Lawyer II at TX Law Firm, Nov. 17, 2016 (same); E-mail to Authors from Lawyer at TN In-House Counsel, Oct. 18, 2016 (same). Some courts have also made this same mistake. See *Brill v. Regent Communications, Inc.*, 12 N.E.3d 299, 306-308 (Ind. App. 2014); *OrbusNeich Med. Co. v. Boston Sci. Corp.*, 694 F.Supp.2d 106, 113 (D.Mass 2010).

¹²⁶ See Coyle, *supra* note __, at __.

¹²⁷ Coyle, *supra* note __, at __.

¹²⁸ Interview with NC Attorney, Feb. 13, 2015.

¹²⁹ See George S. Geis, *An Embedded Theory of Indefinite Contracts*, 90 MINN. L. REV. 1664, 1680-82 (2006) (discussing concept of strategic ambiguity).

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, our interviews suggest that most contracting parties would prefer the interpretive default rule adopted by California—that related tort and statutory claims are covered by simple choice-of-law clauses. 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.¹³⁰ 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. 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). As Ben-Shahar and Strahilevitz acknowledge, survey methods have limits and potential biases,¹³¹ and the same is true of interviews and other less structured methods. But we agree that courts should be relatively receptive to 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. The question, to which we now turn, is this: 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.¹³² 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.¹³³ But this is an evidentiary objection, not an objection founded on the law of contract. It seems quite plain to us that—hearsay questions aside—survey methods would generate relevant and admissible evidence as to the “reasonable” meaning of contract language. Certainly the evidence is no less relevant than the testimony of individual participants in a trade.

¹³⁰ See, e.g., E-mail to Author from Firm Lawyer at California Law Firm, June 7, 2016 (“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.

¹³¹ Ben-Shahar and Strahilevitz, *supra* n. __ at __.

¹³² Ben-Shahar and Strahilevitz, *supra* n. __ at __.

¹³³ Ben-Shahar and Strahilevitz, *supra* n. __ at __.

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 increasingly comfortable with the idea that transactional lawyers often bear little resemblance to “medieval artisans ... producing extensively hand-tailored wares.”¹³⁴ Just as other producers, transactional lawyers develop routines that lead them to produce (relatively) homogeneous documents. Much modern contracts scholarship represents an effort to understand the implications of this method of production.

But path dependence and the adherence to routine are not only characteristics of transactional lawyers. Litigators also have routines. And while litigators routinely introduce 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 such evidence derived from these methods. Contract law already offers adequate tools for addressing contractual black holes and other clauses where traditional evidence of context is missing or unhelpful. It seems to us that the problem, if there is one, is with legal practice instead.

¹³⁴ Mark Suchman, *The Contract as Social Artifact*, 37 LAW & SOC'Y REV. 91, 102 (2003).