Discussing the Papers:
From *Pari Passu* to Dobby A Free Elf--
Of Lack of Understanding and Lack of Intent

Peter Linzer
Professor of Law,
University of Houston Law Center

[Discussion in *Session Four* (Saturday, 10:15-noon)]

Draft Sixteen – April 5, 2017

[I will attempt to add more references to papers before the beginning of the Conference. And I apologize for the egregious formatting. I normally use WordPerfect but got stuck in Word and didn't know how to get out.]

We discussants were encouraged by the organizers both to discuss the particular topics we have been assigned and to relate our talks to the overall themes of the conference. While I will talk a bit about consumer contracts, I got involved in this conference after reading the Choi-Gulati-Scott papers1 on "black" and "grey" holes2 in boilerplate contracts, particularly *pari passu* clauses3 in third world debt instruments, and the broad topic of how to approach a clause without meaning has intrigued me ever since. Nonetheless, that topic and my assigned topic of consumer transactions4 are related.

---

1 Stephen J. Choi, Mitu Gulati & *Robert* E. Scott, *The Black Hole Problem in Commercial Boilerplate* ("CGS, *Black Holes"*); CGS, *Evolution or Intelligent Design? The Variation in* Pari Passu *Clauses* ("CGS, *Intelligent Design?").*
2 Building on an analogy to cosmology, they mean by "black holes" provisions in boilerplate contracts that over the years have come not to emit any information and have become meaningless because no one is sure what they mean or even of their history, CGS, *Black Holes*, supra note 1, at 2, while "grey holes," emit some, but confusing information. Id. at 2-3. Much of the loss of information is caused by rote usage or "encrustation" of words added in some forgotten context and mechanically reused over the years. Id. at 4-15. See also, CGS, *Intelligent Design?,* supra note 1, at 3-4.
3 "Pari passu" is Latin for "in equal steps."
4 I think that it is misleading to speak of consumer "contracts." The basic elements of a contract, bargain and assent, are not present in a mass market transaction; they can't be. But "contract" brings a lot of baggage with it, including a false sense of free will and concepts like "the duty to read." Just as we moved away from tort in products liability, we need to rethink the topic of mass market consumer transactions. See generally, Margaret Jane Radin, *Boilerplate* ( ).

On reading fourteen of the papers (three weren't yet available) and a couple of books related to the issues here, I have three lines of thought:

- the courts seem to ignore problems of language and ask the wrong questions, often looking at parties' intent and understanding when in fact there was none;
- the legal profession comes off very badly, both in failing to anticipate and resolve problems with "sticky" language, and in serving its clients and the public interest;
- whether in consumer transactions or in Big Law dealings among sophisticated parties, formalism is often inadequate. We must remember that there are people involved, whether consumers, the people of an emerging nation, stockholders in companies whose principals either did not anticipate a problem or ignored it, and lawyers who were either indifferent to or ignorant of the impact of terms they did not understand. That does not mean that the little guy should always win, but that as important as the words on a page are, there are other factors that should inform the analysis and future strategies.

I
Understanding Meaningless Words, Asking the Wrong Questions, and Searching for Non-existent Intent

To an extent, consumer transactions and sovereign international bonds are alpha and omega of contracts, one group dealing with the untrained, the unsophisticated and the unobservant in small dollar amounts, the other involving august law firms, sophisticated buyers and sellers and a multi-trillion dollar industry. Yet, as the *pari passu* story shows, they both involved, at least before *pari passu* hit the fan in 2010 and still today for consumers, both

lawyers and parties who had no idea what the controlling document meant. Whether it is an untrained consumer who doesn't read and wouldn't understand a provision buried in a fifty page attachment that he doesn't bother to link to, or bond traders and Wall Street lawyers who had no idea of the meaning or significance of "pay equally and ratably," "rank equally in payment," or "*pari passu"* itself,5 the least important aspect of the deals was and is the meaning of the words themselves. In the consumer case the words of the adhesion contract are never read by the consumers and in the bond case they had no meaning to anyone but vulture fund lawyers and Professor Andreas Lowenfeld.6 They might as well be a bunch of emojis: a smiley face (say, *pari* passu unmodified or adhesive words read contextually by a court) meant the little guy (Argentina, a consumer) wins; a devil's head (the same adhesive words read literally and formally; *pari passu* combined with "equally and ratably," or "equally in right of payment") means the winner is big business or a vulture fund (AT&T, any fund owned by Paul Singer).

I teach Contracts, Constitutional Law, First Amendment and Contract Drafting, and I studied how to read and write English as an undergraduate. Not surprisingly, my background makes me interested in words, and words, of course, should be our first reference in contracts. Yet words seem like the least important part of these contractual dealings.[7]

---

5 See CGS, *Black Holes,* supra note 1, at 26-30, esp. Table 1, at 30; CGS, *Intelligent Design?,* supra note 1, at 6-13.
6 Professor Lowenfeld, an eminent international law professor at NYU, submitted a "declaration" in Elliot Associates, LP v. Banco de la Nation, 96 Civ. 7916 (S.D.N.Y., August 31, 2000) on behalf of a holdout bondholder. He gave his opinion in favor of a holdout veto in Paragraphs 10-17. On my reading, his analysis is a strict plain meaning reading with an understandable lack of interest in context or implications ("I have no difficulty in understanding what the *pari passu* clause means: it means what it says – a given debt will rank equally with other debt of the borrower, whether that borrower is an individual, a company, or a sovereign state." Id. at Paragraph 14).

[7] Even in CGS, *Black Holes,* supra note 1, the first quotation of "[t]he typical *pari passu* clause" appears on page 27. In fairness, Professor Anna Gelpern prints four versions of the clause fairly early in her paper, *The Importance of Being Standard*, ESBC Legal Conference 2016, 23,

Others have discussed the *pari passu* problem in much greater detail, but the background is that in 2000 the Brussels Court of Appeals upset almost everyone's view of *pari passu* clauses, which were thought almost meaningless, by holding that they permitted any bondholder to block a "haircut" agreed to by nearly all other bondholders unless the holdout was paid in full, even if it bought its bonds at, say, ten cents on the dollar.8 The opinion did not have a great deal of reasoning in it, and no one took it too seriously ("What do some Belgians know?") until, eleven years later, Judge Thomas Griesa of the United States District Court for the Southern District of New York ruled the same way and enjoined payment to any third parties until the dissenting bondholder was paid in full.9 Judge Griesa was affirmed by the Second Circuit10, and the combination of the two most important courts in the international debt field11 suddenly got everybody's attention. Despite the brouhaha, nothing happened for about two years. Eventually, in late 2014, sovereign issuers adopted the International Capital Markets Association's proposed text, which, though rather filled with legalese, does seem to address the holdout problem. But between the aberrational holding of the Brussels Court of Appeals in 2000 (and the more important but equally aberrational holdings of the SDNY and Second Circuit in 2011-12) and late 2014, a period of almost fifteen years, the debate was over adverbs (for instance, "equally" and "ratably") that meant nothing in themselves and in no way explained who should be paid and

---

at 30-31.

8 Elliot Associates v. Republic of Peru, Docket No. 2000/QR/92 (Ct. App, Brussels, 8th Chamber, September 26, 2000).

9 NML Capital Ltd v. Republic of Argentina, Order, No. 08-Civ 6978 (S.D.N.Y. Dec. 7, 2011).
10 NML Capital Ltd v. Republic of Argentina, 699 F.3d 246 (2d Cir. 2012).
11 The SDNY and the Second Circuit handle almost all the cases on foreign debt instruments, which are almost all governed by either New York or English law. I think it is fair to say that neither court did a lot of reasoning here,

how much. In late December of 2016 Judge Griesa virtually overruled his earlier opinion12, but we are still left with the question how to interpret a murky boilerplate clause, particularly when it involves perhaps a billion dollars and an impoverished third world nation (or ten million consumers, each with a claim for five or ten dollars). It is striking how little actual analysis can be found in any of the opinions, from *Elliot Associates* in 2000 to Judge Griesa's recantation in *White Hawthorne* three days before Christmas in 2016.13

A court faced with an interpretation problem must first of all decide what it should be interpreting. An example of a court asking the wrong question is a fairly well-known, if remarkably dumb, case from a Massachusetts lower court, *White City Shopping Center, LP v. PR Restaurants, LLC 14,* involving a restaurant lease's "exclusivity clause" in which the landlord agreed not to rent "for a bakery or restaurant expected to have annual sale of sandwiches greater than ten percent (10%) of its total sales . . .".[15] The lessee, a Panera Bread's branch, sought to enjoin the landlord from leasing space to a Mexican restaurant that proposed to sell burritos, tacos and quesedillas. The court decided that the term "sandwiches" was unambiguous and looked up "sandwich" in the dictionary. It used a very respectable dictionary, the Merriam-Webster Third International, which produced the definition "two thin slices of bread, usually buttered, with a thin layer (as of meat, cheese, or savory mixture) spread between them." Based

---

either.

12 White Hawthorne, LLC v. Republic of Argentina, Case No. 16-CV-1042 (S.D.N.Y. Dec. 22, 2016).

13 There is considerable analysis in William Bratton, Jr. and Adam J. Levitin, *The New Bond Workout*, dealing with Section 316 (b) of the Trust Indenture Act of 1939, which creates a opportunity for holdouts in corporate bond workouts, much like the *pari passu* decisions in Brussels and the older New York federal decisions.

14 21 Mass. L. Rptr. 565 (Super. Ct., Worcester County 2006),

[15]There were a number of other provisions in both the original clause and an amendment that involved other forms of competition, not using the word "sandwich."

on this, the court found that the burritos, etc. weren't sandwiches and ruled for the landlord.

Now it should be obvious that the dictionary definition, which Merriam-Webster hadn't changed since the nineteen thirties, was at least incomplete, and by 2006, mostly wrong: a club sandwich has three slices of bread, Subway calls its footlongs on thickly sliced hero rolls sandwiches, McDonald's calls a Big Mac a sandwich, and even when the definition was new, the still popular comic strip, *Blondie,* featured Blondie's husband regularly making a "Dagwood sandwich" that in place of Webster's "thin layer" was so over-filled that you would dislocate your jaw trying to eat it.[16]

But the real vice in the opinion was not its foolish reliance on a bad definition. It was that the court shouldn't have been concerned with the definition of sandwich at all. The word was in what the court called the "exclusivity clause" of the lease. The clause was certainly there to protect Panera's from competition, and the only question was whether a seller of "burritos, tacos and quesadillas" competed with a Panera's, a restaurant that sold, among other things, panini and "breakfast sandwiches." Relevant markets are often hard to define, as shown by the concept's common but often disputed role in antitrust litigation, and maybe the answer should have been against Panera's. Maybe the judge was just trying to help the little guys in the Mexican restaurant against a bigger competitor. I'm sure the problem wouldn't have been easier had the court used the right analysis. But it didn't.

The mechanical and unthinking way the Massachusetts court reasoned illustrates why so

[16]For an equally skeptical but quite different analysis of the case, see Majorie Florestal, *Is a Burrito a Sandwich? Exploring Race, Class and Culture in Contracts*, 14 Mich. J. Race & L. 1 (2008).

many courts and lawyers dealing with the *pari passu* clauses were equally wrong. The issue was not the meaning of meaningless words in a clause no one had thought about for a hundred years, but whether the vulture funds should have a veto over a bargained-for settlement between a financially embarrassed country, likely to default if a deal couldn't be made, and many buyers willing to make such a deal rather than lose everything. For many years no one had thought that a holdout had a veto. Perhaps forcing unwilling buyers to acquiesce involves too much moral hazard, a matter discussed by Professors Leshem and Kahan.[17] Perhaps giving those who bought at a deep discount an opportunity to hold out for a bribe is itself a moral hazard, or is just plain immoral.[18] That is the issue, not the meaning of "ratably" and "payable."[19]

We are told that the normal starting point in contract analysis is the ascertaining of the parties' intent20. The normal dispute among courts is merely whether to rely on the formalistic plain meaning rule or to allow extrinsic evidence of context.21 But in the *pari passu* debate and, I would say, also in the consumer boilerplate debate, I would go with the *Black Hole* paper. Common sense (my paraphrase) "argues for a shift in contract doctrine away from the futile and ultimately costly effort to discover a shared meaning that no longer [and, I would add, in the

[17]Shmuel Leshem and Marcel Kahan, *Moral Hazard and Sovereign Debt: The Role of Contractual Ambiguity and Asymmetric Information*. This paper is strongly disputed by its adversary in *Session One,* CGS, *Intelligent Design?*, supra note 1.

[18]According to an Op-Ed cited in *Black Holes,* supra note 1, at 70 note 194, some hedge fund holdouts received payments estimated at a 1000% profit. See Martin Guzman & Joseph E. Stiglitz, *How Hedge Funds Held Argentina to Ransom,* N.Y. Times, April 1, 2016. While this is only an estimate in a newspaper opinion piece, Professor Stiglitz was awarded the Nobel Prize in Economics in 2001, and is a heavy hitter in this field.

19 Thus I am in general agreement with Choi, Gulati and Scott's thesis in CGS, *Intelligent Design?,* supra note 1.
20 Restatement Second of Contracts § 201 comment c: "[T]he primary search is for a common meaning of the

consumer context never] exists."22

Rather than discussing an intricate philosophy of interpretation, I look to a rather homey dispute about kosher food from 75 years ago, *Parev Products Co., Inc. v. I. Rokeach & Sons, Inc.* 23 Homey the dispute might have been; the panel certainly was not. The opinion was written by Charles Clark and his colleagues were Learned Hand and Jerome Frank. As background it must be noted that Orthodox Jews do not mix meat and milk dishes at the same meal. Thus, they cannot use butter with meat. In its place they used for many years chicken fat, called in Yiddish "schmaltz." In the early twenties the Parev folks came up with a viscous (and rather unattractive) semi-liquid vegetable oil substitute for chicken fat and marketed it as "Parev Schmaltz." ("Parev," which has many different transliterations, means "neutral," neither meat nor milk.) Apparently, they did not have the capital to market the product and so, in 1924, they entered into a license agreement with Rokeach, a leading manufacturer and distributer of kosher products in what was then a very large market. Rokeach had the right to change the name of the product, which it renamed "Nyafat." Parev had no rights in the name Nyafat, and thus would be left with an unknown product if it separated from Rokeach.24 The product was a hit with kosher cooks and the parties made a lot of money between 1924 and 1939.

Then the unexpected happened. Procter & Gamble had previously come up with Crisco, a more solid hydrogenated form of vegetable oil as a cheap substitute for lard and was marketing

---

parties . . . ." See also CGS, *Black Holes*, supra note 1, at 6 n. 17.

21 See 6 *Corbin on Contracts* § 25.4 (Peter Linzer rev. ed. 2010, Joseph M. Perillo, gen. editor).

22 CGS, *Black Holes*, supra note 1, at 6.

23 124 F.2d 147 (2d Cir. 1941). It is discussed at greater length in 6 *Corbin on Contracts*, supra note 20, § 26.2 [B], at 406-10. Incidentally, when we add the kosher food to the Mexican food and panini in *White City*, we have three cultures involved, to which we can add a Latin phrase that everyone could translate but no one could explain.

24 There was also a clause forbidding the Parev company and its principals from selling a similar product after

it successfully as early as 1911, but apparently it wasn't until the late thirties that it aggressively went into the kosher food market, spurred by Lever Brothers' new competing product, Spry, which had cut deeply into Crisco's sales. Now Crisco and Spry, more attractive and less messy, and engaged in a serious price war that undercut the price of Nyafat, started affecting the sales of Nyafat.

In 1940 Rokeach responded by marketing a product that looked like Crisco and Spry and was named "Kea." Parev yelled foul and sued for an injunction, arguing that since Rokeach was not paying it any royalties on Kea and the sales of Nyafat were dropping, Rokeach was in breach of the license agreement, which of course was silent on competing new products from outside the kosher food industry. The district court denied the requested injunction, based on the absence of any negative covenants expressly agreed to by Rokeach, what the trial judge thought were significant differences in composition between Kea and Nyafat, and lack of any evidence that the parties had intended to bar the actions Rokeach was taking.25 The case went up to the Second Circuit, then the most prestigious court below the Supreme Court. The Court of Appeals responded in an opinion by Judge Clark, a legal realist, former dean of Yale Law School and the draftsman of the Federal Rules of Civil Procedure.26

Judge Clark found the differences in composition between Kea and Nyafat less significant than their being used "for exactly the same purpose—shortening; if any covenant is to be implied, it

---

termination

25 36 F. Supp. 686 (E.D.N.Y. 1941).

26 In this era of judicial partisanship, it might be noted that President Franklin Delano Roosevelt had appointed him to a newly created seat on the Second Circuit though he was a Republican.

would be hollow unless it took note of this fact."27 As to the question of an implied negative covenant against Rokeach using Kea to compete with Nyafat, "[w]hen we turn to the precedents we are met at once with the confusion of statement whether a covenant can be implied only if it was clearly 'intended' by the parties, or whether such a covenant can rest on principles of equity."28 He devoted a long paragraph to the question of "intention," citing Williston, Holmes, Fuller and Zechariah Chafee to the effect that "'intention of the parties' is a good formula by which to square doctrine with result. That this is true has long been an open secret."29 Judge Clark continued:

> a certain sophistication must be recognized –if we are to approach the matter frankly—where we are dealing with changed circumstances, fifteen years later, with respect to a contract which does not touch this exact point and which has at most only points of departure for more or less pressing analogies.
>
> . . . . And we must consider that in the period of time since the making of the contract there have been various developments *which present a situation not clearly, if at all within the contemplation of the parties at the time.30*

This paragraph seems critical to me, whether in the context of sovereign debt instruments or consumer contracts of adhesion. Neither bond buyers not bond sellers thought the various

---

27 124 F.2d at149.

28 Id.

29 At this point he appended a quotation from Chafee:

> My first suggestion is, that we should firmly resolve never to speak of the intention of a testator or other writer on a given point except after we have carefully convinced ourselves that the point was actually in the mind when he wrote the words in question. For example, we will never say "He intended this result" when we merely think that had he foreseen the present contingency (which he didn't) he would have intended this result. That consideration may be helpful, but it is not his intention.

Id. at 149 note 2. Note that the reasoning condemned by Chafee is standard for ex post reasoning by law and economics types.

30 Id. at 149 (emphasis added).

wordings of *pari passu* clauses had any impact on countries' ability to make deals for discounted payment of their bonds, and consumers have no idea what is meant by the thirty to fifty page EULA that they did not read, and whose drafters did not expect them to read, indeed banked on their not reading it.

The point in *Parev Products* was that neither party had anticipated Spry, the price war between it and Crisco, or Procter & Gamble and Lever Brothers going heavily into the kosher food market. Yet Parev and Rokeach were joined at the hip:

> Here is a status upon which each party should be entitled to rely. What we should seek is therefore that which will most nearly preserve the status created and developed by the parties. . . . [T]wo facts stand out. Plaintiff [Parev] must clearly rely on defendant for any future benefit to be derived from its original formula; and defendant, if it is to continue to remain in the vegetable oil market, must be able to prevent the inroads of outside products, such as Crisco and Spry.31

Parev was entitled to protection since it had transferred its formula for exploitation, but "[c]ertainly we cannot say that defendant must market Nyafat, come what may, down to the sale of a mere can a year while the vegetable oil business goes to outsiders."32 He was unwilling to hold Rokeach merely to a good faith standard, which would give it too much leeway but was also unwilling to give Parev the injunction it sought. "A broad one would be unfair to defendant; a narrow one would be an empty gesture."

What then was to be done?

> The really equitable solution is to permit defendant to sell Kea so long as it does not invade Nyafat's market if that point is susceptible of proof, as we think it is. Thus, assuming that defendant is correct in its assertions, Kea sells only to people who no longer buy Nyafat. Hence, all the plaintiff is entitled to is the market Nyafat has created

31 Id. at 149-50.
32 Id. at 150.

and will retain, regardless of outside competition.33

This was to be resolved by expert testimony. The dismissal was affirmed, but Parev was given leave either to move to reopen the action or to bring a new one "for relief not inconsistent with this opinion."34 At first blush the solution sounds fatuous, but apparently the parties worked out a deal. An Internet search for "Nyafat" showed that Rokeach (now called RAB Food Products) continued to sell Nyafat until 2007, when it finally discontinued it, to the dismay of those in a kosher cooks' chat room.35 Still, sixty-six years ain't bad.

What do we get out of Judge Clark and *Parev Products*? I think a great deal. We should be alert when the words tell us nothing and we have no evidence of the parties' intent, since either both parties had none (*Parev Products*, the *pari passu* clauses) or one side (business drafters) presumably knew what it was doing but relied on the other (consumers) to be ignorant. In these cases the courts should not search for invisible meanings or intentions but instead rely on what Judge Clark called "equity," Ian Macneil called "relational contracts,"36 and Judge Thomas P. Griesa, in his most recent essay at resolving *pari passu* clauses saw as "significantly changed circumstances."37

The query should not be resolving some mumbo-jumbo that no one really understands. (*White Hawthorne,* the recent case, involved two differently worded *pari passu* clauses, but Judge Griesa did not even mention this fact.) What should matter is the status or relationship of the parties, and their conduct after the fact. Perhaps Judge Griesa in 2016 was just trying to undo

33 Id.
34 Id. at 151.
35 See 6 *Corbin on Contracts*, supra note 21, at 410 n. 41.
36 See id. at 408.

his earlier damage, perhaps the 2011 -13 decisions were really based on Argentina's former bad conduct, but the questions that the courts should always have been answering were first and foremost, how much vulture funds, which were not parties to the original contract for the bonds and which bought them at radical discounts, should be paid when those who paid closer to par were willing to take haircuts. And against that approach, whether third world countries, relying perhaps on a volatile wasting asset like oil, should be encouraged to float many billion dollars of bonds with the chance of wriggling out of their obligations – or at least passing the chance to wriggle to some later government.

And in the consumer adhesion contract context, we should be treating the matter as a transaction, not a contracts exercise. We know that almost no consumers read the linked document38, we know the drafters are relying on that violation of "the duty to read." We know that the drafters do all they can to make the document unintelligible, and so long that no rational person would waste his time even trying to read it. We should than be looking to the status of the parties: neither can bargain; that would bring consumer commerce to a halt. But one is dominant, the other ignorant, casual and negligent.39 Professor Michelle Boardman, in her very interesting paper on insurance contracts40, coins the term “blank holes” and proposes using the *contra proferentum* maxim against the party offering the contract of adhesion. This expansion from insurance law seems to me to be appropriate and immensely useful in consumer transactions,41

---

37 White Hawthorne, LLC v. Republic of Argentina, Case No. 16-cv-1042 (S.D.N.Y. December 22, 2016 at *6.
38 Yannis Bakos, Florencia Marotta-Wurgler and David R. Trossen, *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts* at 3 (NET Institute Working PaperNp. 09-04, 2009), available at http:/ideas.repec.org/p/net/wpaper/0904.html (answer: no.)
39 This is not just a question of education. How often have you read your car rental agreement?
40 Michelle Boardman, *Blank, Black, and Grey Holes in Insurance Contracts.*
41 If courts fully acknowledge the existence of blank holes as a separate category, it may free

but it doesn't get us anywhere with respect to sovereign debt, since there is, essentially, no author of the *pari* passu clause.

But in so tight and small a group of participants, at both the selling and underwriting ends, we could try for standardized terms from a neutral third party.42 In 2007, Professor Joseph Perillo, in a keynote address at Pace Law School's celebration of the ninetieth anniversary of *Wood v. Lucy, Lady Duff- Gordon,*43 proposed that the American Law Institute create a collection of default rules and definitions, and Professor Anna Gelpern has made a similar proposal for sovereign bonds, suggesting that "[a]n industry body such as ICMA, perhaps in collaboration with a public institution such as the IMF or the FSB, and a rotating complement of sovereign debt managers and their lawyers, could draft the core non-financial terms of a New York trust indenture or an English trust deed,"44 followed by public consultation and posting on a website for adoption by parties.

When it comes to consumer contracts of adhesion, my solution is for government to impose hard and specific rules about what you can and cannot put in an unbargained-for

---

> them to reconsider using contra proferentum as a penalty. Unlike black holes, blank holes are blank to one party only—the policyholder. The insurer understands the purpose and desired effect of the clause. With some minimal effort, judges can come to understand these as well. Recall that blank holes are not ambiguous; they have one legally sophisticated meaning and are otherwise incomprehensible.

Boardman, supra note 40, at 19.

42 In addition to many trade associations, see, e.g., Professor Sgard's very instructive *The Governance of Boilerplate Contracts: the Experience of the London Corn Trade Association, 1885-1914*, we have the INCOTERMS, universally used in shipping of goods internationally, and the Uniform Customs and Practice, used with letters of credit, both of which are issued and regularly updated by the International Chamber of Commerce, a private body not connected with parties. Professor Drahozal has similarly examined the role of arbitration associations in creating standard arbitration clauses (and pointed out problems), in Christopher Drahozal, *Third-Party Boilerplate Providers and Contractual Black Holes.*

43 __ N.Y. ___ , ___ N.E. ___ (1917). Judge Benjamin Cardozo's opinion in *Wood v. Lucy* is the *ur* opinion on implied terms.

transaction,45 admittedly a non-starter in the Trump Universe, and again more useful in the consumer context than that of international debt.46

II

The Failure of the Legal Profession

A. International Debt Instruments

In the *pari passu* dispute, we know that the lawyers representing debtor countries were the most eminent in the world, dominated the field, and fully understood what was wrong with the Brussels and New York opinions.47 Leading lawyers assumed that fellow bond specialists would amend the language or delete the *pari passu* clause entirely.48 But they didn't.

Professors Kahan and Leshem argue that the ambiguity "is thus potentially optimal only if both information and moral hazard are sufficiently high,"49 and that "[b]y varying the probability that the *pari passu* clause will be interpreted broadly, therefore, parties to a sovereign debt contract can generate the optimal (second-best) trade-off between reducing moral hazard and imposing dead-weight default costs,"50 an "intelligent design" approach that would justify lawyers' inaction after the apparently aberrant decisions in Brussels and New York. Against this, in both CGS papers that I have been discussing the authors argue strongly that lawyers basically

---

44 Anna Gelpern, *The Importance of Being Standard* 42-45.
45 I've spelled this out more fully in Peter Linzer, *"Implied," "Inferred," and "Imposed": Default Rules and Adhesion Contracts—the Need for Radical Surgery*, 28 Pace L. Rev. 195 (2008), from the Pace Conference noted in note 40; and in 6 *Corbin on Contracts*, supra note 20, § 26.5 ("Implied Terms and Contracts of Adhesion"), esp. at 469-77.
46 But see text accompanying notes 42-44, supra.
47 See on the Brussels case, Lee Buchheit & Jeremiah Pam, *The Pari Passu Clause in Sovereign Debt Instruments*, 53 Emory L.J. 871 (2004). CGS, *Intelligent Design,* supra note 1, at 16.
48 See CGS, *Black Holes*, supra note 1, at 32 & note 101.
49 Kahan & Leshem, supra note 16, at 1.
50 Id. at 17. See also id. at 2-6.

sat on their hands. Various forms of *pari passu* clauses floated around for nearly fifteen years, and that it wasn't until the International Monetary Fund, the United States Treasury and other governmental and semi-governmental players put pressure, and the really big boys got together at the New York Fed in late 2014, that consensus was reached, a position that they interpret as evolution by essentially random selection, until an acceptable form was found.51

But why did it take so long? Choi, Gulati and Scott consider arguments that changes in language in new bond contracts would endanger existing ones, which would be harder to revise; that unilateral change might leave the changer alone and out on a limb; that collective action was difficult to coordinate, and, especially, that the issuer clients were not interested in change, believing that any change in bond buyers' check-off lists of existing terms would negatively affect their sales.52 They conclude, however, "with a heavy dose of agency costs."53 Some of this heavy dose involves the interests of the managers of sovereign debt among issuers, who are more interested in protecting their sales ex ante than protecting their nation from ex post litigation costs, which would be the responsibility of someone else, some day in the future.54

But a major source of the delay in changing the *pari passu* clauses stemmed from the inaction of the small group of elite lawyers who represented just about all the borrower nations. Choi, et al. say that the collective interest of this group was industry-wide. It was "to maintain a

51 This is the thesis of CGE, *Intelligent Design?,* supra note 1, passim. The crucial meetings in October 2014 are described in CGS, *Black Holes*, supra note 1, at 42-46, 67-69, and the authors point to them as supporting their random evolutionary approach. In both papers they back up their conclusions with a great deal of empirical data and analysis.
52 Id. at 46-64.
53 Id. at 61 (capitals in the section title have been reduced to lower case).
54 Id. at 59-61.

thriving sovereign bond market where bond issues are produced on an assembly line,"55 while at the same time, they "had no incentive to revise standard terms for their individual clients," who were indifferent to the legal terms, believing them to be irrelevant to the initial sales, and distrustful of deviations from the existing standard form that they believed would make the initial issuance more difficult and more costly to get to market.56 'Thus, the lawyers repeatedly demanded that the state solve the problem but did nothing themselves other than to offer empty platitudes about why they failed to act."57 This statement is followed by a "gaffe by telling the truth" made by a lawyer at a conference at Columbia Law School that preceded, but apparently led to the closed, and even more elite meeting at the New York Fed that actually produced agreement on change in the *pari passu* clause.58 What the lawyer said was "We don't know how to respond to this problem because the interests of our clients are not identical and many clients don't ask for (or want) any change in the standard legal terms."59

As we all know, the elite lawyers did agree on a change in language, and since then, it appears that Judge Griesa has made clear that he will not let hold-outs prevent compromise.60 But thousands of "quasi-sovereign" bond issuers61 have not changed their language,62 and nothing is being done about the possibility of another outlying decision relying on the failure to change. While there seems to be no ground to charge the elite bond lawyers with running up bills

55 Id. at 65.
56 Id. at 65.
57 Id.
58 See text accompanying note 48, supra, note14.
59 CGS, *Black Holes*, supra note 1, at 65.
60 See text accompanying note 12, supra.
61 Quasi-sovereigns are subdivisions of national states. They lack sovereign immunity but their nation guarantees the debt, so a default can have a major impact on the nation. See CGS, *Black Holes*, supra note 1, at 38 note 111.
62 Id. at 61 & note 168.

by churning, a topic discussed in Part II B, below with respect to mergers and acquisition contracts, there is a lot of evidence that they simply deferred to clients who had a view that was very much not in their interest63 and might have led to world-wide disaster. It looks like the lawyers and their third-world debtor clients have dodged a bullet, but that is not a testimony to good lawyering, however diligent and serious the elite lawyers were.

B. Mergers, Acquisitions, Insurance Contracts and Mortgage-Backed Securities

Professor John Coates is a very experienced merger and acquisitions (M&A) lawyer, and his paper64 is a painstaking examination of the radical lengthening of M&A agreements. He rejects the charge that the expansion is just lawyers grandstanding to increase their fees,65 but Anderson and Manns, in their paper, *Boiling Down Boilerplate in M&A Agreements,* suggest that textual "drift" from encrusted boilerplate has led to "speciation," clauses turning into a new species of parts of an M&A agreement, and say that lawyers are engaged in "churning,"66 which is quite similar to grandstanding. And Eldar and Strauss discuss "bespoke boilerplate" – provisions originally not intended for mass production that "were nonetheless mass produced without the examination or consensus that accompany an intentionally mass-replicated term."67 They argue that this bespoke boilerplate produced "invisible risks" in much of the fancy use of derivatives and swaps with residential mortgage-backed securities that led to the Great Recession, but point out that concede that the term is a misnomer. "The risks were visible if only

63 The debtors' money managers told the CGS interviewers that "the job of the lawyers was not to draft terms to protect the sovereign in case an adverse event occurred in the future," to which the authors added parenthetically, "that was, we confess, precisely what we thought was the job of the contract lawyer." Id. at 56.

64 John C. Coates IV, *Why Have M&A Contracts Grown? Evidence from TwentyYears of Deals.*
65 Id. at 28-30.
66 Anderson & Manns at 134-37.

someone had looked properly."68 Those someones, of course, were the lawyers, the same lawyers who created the fancy toys that made some clients a lot of money and in the process wrecked the economy, and who created the "blank holes" – incomprehensible terms -- in insurance contracts69 and, I might add, in adhesive consumer contracts.

Here what we see is the lawyer as *apparatchik*, doing what the client wants without regard for the interests of either the client or the public good. It is related to the elite lawyers who didn't hector their third world clients on the seriousness of the *pari passu* clauses, though it seems to me that here there is a greater issue of right and wrong, and worse things happened.

III

Against Formalism

Bob Scott has for many years been a devoté of formalism in what he calls "commercial contracts," by which he means contracts between sophisticated repeat players familiar with the rules.70 Happily, and to his moral credit as well as his acumen, he has argued that consumer contracts should be treated quite differently because the consumer does not fit that profile.71 We are concerned here almost exclusively with "big league" contracts between extremely competent repeat players,72 yet formalism clearly did not work. In fact, much of the *pari passu* problem came from attempts to apply the plain meaning rule to opaque words.73

---

67 Ofer Eldar and Emily N. Strauss, *The Problem of Invisisble Risk in Bespoke Boilerplate* at 3-4.
68 Id. at 4.
69 Boardman, supra note 40.
70 See, e.g., Alan Schwartz & Robert E. Scott, *The Common Law of Contracts and the Default Rules Project*, 102 Va. L. Rev. 1523, 1526 n. 7.
71 See id.; [also Scott article in the Stewart Macaulay Festschrift.]
72 One case on the cusp between the two concepts is the "sandwich case," *White City Shopping Center, LP v. PR Restaurants, LLC*, supra note 14, which involved three businesses that seem to have been relatively small.
73 Andreas Lowenfeld, in his (in)famous "declaration," supra note 6, relied heavily on the New York courts' rigid

I lack Bob's enthusiasm for a bright line between "commercial" and "consumer" contracts. I spent eleven years revising Arthur Corbin's volume that included the parol evidence rule and implied terms,74 and early on I let the reader into a dirty little secret: most parol evidence problems arose from bad drafting.75 But I found a sizable number of these cases involving big time players like Genetech and the City of Hope Medical Center ($300 million jury verdict in patent dispute over early bio-engineering)76 and Pillsbury and a subsidiary of Nestlé, the giant Swiss candy company (sale of Pillsbury's Häagen-Daz division).77 In discussing both cases I printed out excerpts from the contracts involved with an apology to the reader for making her wade through the unreadable phrasing. (I defended myself by pointing out that a jury of laymen was going to have to interpret the words.)78 In both cases an ambiguity was found and the plain meaning rule was avoided. But plain meaning was applied, in California, no less, in a dispute between Disney and the author of what became the hit movie, "Who Killed Roger Rabbit." 79 The plaintiff- author was represented by an IP lawyer who seems to have been outgunned by Disney's team. Since the author was a newcomer represented by counsel, he fits neither into the consumer mode nor the repeat player mode, unlike Disney.

---

plain meaning rule, and that approach was also followed in the Brussels decision, supra note 8, and the Second Circuit Court of Appeals' decision, supra note10, affirming Judge Griesa's December 7, 2011 order, supra note 9, enjoining payments to bondholders willing to settle.

74 6 *Corbin on Contracts*, supra note 21.

75 Id. at 28-29 .

76 City of Hope National Medical Center v. Genentech, Inc., 43 Cal. 4th 375, 75 Cal. Rptr. 3d 333, 181 P.2d 142 (2008), discussed at length in 6 *Corbin on Contracts*, supra note 21, §25.18 [B], at 244-50.

77 Pillsbury Co. v. Wells Dairy, 752 N.W.2d 430 (Iowa 2008), discussed at equal length in 6 *Corbin on Contracts*, supra note 21, §25.18 [C], at 250-57.

78 See 6 *Corbin on Contracts*, supra note 21, §25.18 [C], at 254 n. 59. I commented there: "Surely paragraph 2.01 (b) (8) [of the Pillsbury-Nestlé contract] is one of the worst fragments ever written in the English language." It appears on pages 252-23, and the reader is invited to see if I overstated the case.

79 See Wolf v. Walt Disney Pictures, 162 Cal. App. 4th 1107, 76 Cal. Rptr. 3d 585 (2008), discussed in 6 *Corbin on*

A brief reading of my volume shows that I'm a strong follower of Corbin, believing that a contextual reading is preferable to a rigid plain meaning approach. I think this is almost always preferable when consumer transactions are involved, particularly when they involve adhesion contracts that the consumer never read and could not change except by giving up the entire deal. And those deals often involve virtual necessities like cell phones or oligopolistic near-uniformity in the terms offered by sellers. Both sale of international debt instruments and the unfolding of mergers and acquisitions, two topic discussed throughout this conference, are obviously Big Time dealings, but even in these and related cases enough slippage (or stickiness) occurs when boilerplate intrudes, as it often does. I favor flexibility, certainly when extrinsic evidence can help a court understand the parties' intent, imperfectly expressed. But even when there is no intent discernible, as in the *pari passu* cases, looking past the words on the page to the impact of a decision on the parties and, often even more the general public – those who bought the bonds from the underwriters and those who are impoverished in the issuer's country – should be considered. As I wrote earlier, this will not always mean that the little guy will win. Often he should not. But it will come much closer to achieving justice than rigid formalism.

In a famous aphorism, Arthur Corbin wrote "Just when the court should quit listening to testimony that white is black and a dollar is fifty cents is a matter for sound judicial discretion."80 He continued "Even these things may be true for some purposes," and in a footnote, cited a Supreme Court case in which extrinsic evidence showed that the dollar referred

---

Contracts, supra note 21, §25.18 [D], at 257-69.

80 See 6 *Corbin on Contracts,* supra note 21, at 32. While that is in my revision of Corbin, they are his words; he wrote the words in the 1960 edition and, I believe, in the 1950 edition and the Yale Law Journal article that was the basis of his chapter on the parol evidence rule.

to was Confederate. I even found a case on black being white -- the Supreme Judicial Court of Massachusetts affirmed a conviction for poisoning with intent to kill, using white arsenic, though the evidence showed that the original white arsenic had been colored with lampblack.81

While Bob Scott and his superb group of colleague, here and elsewhere, will disagree, I believe that common sense and an awareness of the outside impact of contracts should often trump formalism. Formalism makes things much easier, but it does so at a cost that is often too high.

* * *

In the run-up to this conference I spent my spare time rereading the Harry Potter novels. One of my favorite characters is a "house elf" named Dobby. House elves are sort of serfs, bound to a master but bred to total obedience and total service. Dobby, though bound to an enemy of Harry, is Harry's hero-worshiper, and after Harry frees Dobby through a trick, Dobby tries (initially unsuccessfully) to convince his fellow house elves that freedom is better than semi-comfortable serfdom. In the end, Dobby saves Harry's life but is killed. Harry buries him with the hand-written epitaph "HERE LIES DOBBY, A FREE ELF."82

Maybe I was just punchy, but this reached me. Dobby seems to represent all the faceless little people who are affected when we interpret and enforce contracts in which they either played no part or were essentially impotent. I think we need to pay attention to them. It's fine to say that these contracts involved big players or that the consumer should have followed the rules and

81 See Commonwealth v. Hobbs, 140 Mass. 443, 446, 5 N.E. 158, 160 (1886) ("The fact that the white arsenic was colored with lamp-black was immaterial. It still remained the substance known as white arsenic, though no longer white in appearance."

82 J.K. Rowlings, *Harry Potter and the Deathly Hallows* 481 (2007).

protected himself. I think that neither rationale justifies applying the formalistic rules without considering their impact beyond the words of the contract.