

**Third-Party Boilerplate Providers and Contractual Black Holes**  
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**1. Introduction**

As defined by Stephen J. Choi, Mitu Gulati, and Robert E. Scott, a contractual black hole is “a boilerplate term that is reused for decades and without reflection merely because it is part of a standard form package of terms, and is thereby emptied of *any* recoverable meaning.”<sup>1</sup> Boilerplate terms can become contractual black holes when they “develop linguistic variations” (i.e., become “encrusted” with legal jargon) “and thereafter are repeated by rote even after the original meaning has been largely lost.”<sup>2</sup> Boilerplate terms that have become contractual black holes pose “a heightened risk that courts may be persuaded to adopt an interpretation of the term(s) at issue that is antithetical to the efficient functioning of the market” and thereby impose “high costs to the participants in standardized market transactions who rely on the widely used boilerplate terms.”<sup>3</sup>

The paradigmatic case of a contractual black hole, as described by Choi, Gulati, and Scott, is the *pari passu* clause in sovereign bond contracts. This clause, “a standard boilerplate formulation common to sovereign debt contracts for several hundred years,” continued to be included in such contracts by big firm lawyers long after courts interpreted the clause in a way that major players in the market agreed was incorrect and that imposed serious costs on the

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<sup>1</sup> Stephen J. Choi et al., *The Black Hole Problem in Commercial Boilerplate* 2 (Oct. 2016).

<sup>2</sup> *Id.* at 3.

<sup>3</sup> *Id.* at 3-4.

parties.<sup>4</sup> The “lawyers had no incentive to revise the standard terms for their individual clients,” despite the fact that revision was in their (and their clients’) collective interests.<sup>5</sup>

But firms obtain contractual boilerplate not only from their lawyers, but also from a variety of third-party boilerplate providers. Thus, as stated by Lisa Bernstein, “[t]rade associations are, and traditionally have been, important sources of standard-form contracts—in the form of both traditional contracts and trading rules that can be incorporated into contracts by reference.<sup>6</sup>” Examples include the American Institute of Architects,<sup>7</sup> local realtors associations,<sup>8</sup> and the associations of commodities sellers studied by Bernstein.<sup>9</sup> Form sellers, such as CUNA Mutual Group with its Loanliner series of financial services contracts for credit unions,<sup>10</sup> sell standard form contracts, typically to smaller entities that do not want to pay lawyers to draft forms customized for them. The Consumer Financial Protection Bureau, in its study of consumer financial services arbitration, reported that “[a]t least 83 of the 141 small to mid-sized banks (58.9%) in the checking account sample used some version of a standard form prepared by a

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<sup>4</sup> *Id.* at 11. See generally MITU GULATI & ROBERT E. SCOTT, *THE 3½ MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN* (2013).

<sup>5</sup> Choi et al., *supra* note \_\_, at 49-52; GULATI & SCOTT, *supra* note \_\_, at 163 (“[D]espite the many caveats, there remains evidence that the institutional structure of the modern large law firm impedes innovation in contract design.”).

<sup>6</sup> Lisa Bernstein, *Copying and Context: Tying as a Solution to the Lack of Intellectual Property Protection of Contract Terms*, NYU LAW REV. ONLINE 2 (May 2013), <http://www.nyulawreview.org/sites/default/files/NYULawReviewOnline-88-2-Bernstein.pdf>.

<sup>7</sup> AIA Contract Documents, <https://www.aiacontracts.org/> (last visited Mar. 9, 2017).

<sup>8</sup> *E.g.*, Kansas City Regional Ass’n of Realtors, 2016 Contracts and Disclosures, <http://www.kcrar.com/2013-contracts-and-disclosures> (last visited Mar. 9, 2017).

<sup>9</sup> *E.g.*, Nat’l Feed & Grain Ass’n, Trade Rules, <https://www.ngfa.org/trade-rules-arbitration/rules/> (last visited Mar. 9, 2017). See generally Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1725 (2001); Lisa Bernstein, *The Questionable Empirical Basis of Article 2’s Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 713 (1999); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1769 (1996).

<sup>10</sup> *E.g.*, CUNA Mutual Group, LOANLINER Document Solutions, <https://www.cunamutual.com/products/lending/loanliner-document-solutions> (last visited Mar. 9, 2017).

single form provider.”<sup>11</sup> While some third-party boilerplate providers provide entire standard form contracts, others provide only specialized contract terms. The International Chamber of Commerce, for instance, publishes its Incoterms<sup>12</sup> and Uniform Customs and Practice for Documentary Credits,<sup>13</sup> among others,<sup>14</sup> while arbitration institutions provide both model arbitration clauses and standard form arbitration rules.<sup>15</sup>

This paper examines how the theory of contractual black holes (what Choi, Gulati, and Scott label the “‘black hole’ problem”<sup>16</sup>) applies to boilerplate from third-party boilerplate providers, with a particular emphasis on arbitration institutions and arbitration boilerplate. The paper will first offer some general thoughts on whether and how contractual black holes might develop in standard form contracts provided by third-party boilerplate providers. Then it will discuss in detail arbitration institutions as third-party boilerplate providers and identify possible contractual black holes (or at least contract provisions that have lost some of their original meaning) in arbitration boilerplate.

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<sup>11</sup> Consumer Financial Protection Bureau, Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a), at 54 (Mar. 2015) [hereinafter cited as CFPB Arbitration Study].

<sup>12</sup> Int’l Chamber of Commerce, Incoterms Rules 2010, <https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010/> (last visited Mar. 9, 2017).

<sup>13</sup> Int’l Chamber of Commerce, ICC Uniform Customs and Practice for Documentary Credits—UCP 600 (2007).

<sup>14</sup> See Int’l Chamber of Commerce, ICC Force Majeure Clause 2003 (2003), <https://cdn.iccwbo.org/content/uploads/sites/3/2017/02/ICC-Force-Majeure-Hardship-Clause.pdf>; Int’l Chamber of Commerce, ICC Anti-Corruption Clause (2012), <https://cdn.iccwbo.org/content/uploads/sites/3/2012/10/ICC-Anti-corruption-Clause.pdf>.

<sup>15</sup> See *infra* text accompanying notes \_\_\_-\_\_.

<sup>16</sup> Choi et al., *supra* note \_\_, at 2 (“[R]egardless of whether a boilerplate term has lost *all* or *almost all* meaning [the latter case being what they term a “contractual grey hole”], courts will face an interpretation conundrum that we collectively term the ‘black hole’ problem.”).

## 2. Contractual Black Holes and Third-Party Boilerplate Providers

Third-party boilerplate providers differ in a variety of ways from the law firms studied by Choi, Gulati, and Scott as sources of contractual black holes.<sup>17</sup> This section offers some preliminary thoughts on those differences and their possible implications for the theory of contractual black holes. It focuses on four ways in which at least some third-party boilerplate providers differ from law firms that draft sovereign bond contracts: some third-party boilerplate providers (1) operate on a not-for-profit rather than a for-profit basis (“not-for-profit”); (2) create industry standard forms (“standardization”); and (3) specialize in particular types of boilerplate terms (“specialization”).

**Not-for-profit.** Unlike law firms, some third-party boilerplate providers are not-for-profit entities. Kevin Davis has identified a number of differences between not-for-profit entities and for-profit entities as providers of boilerplate: not-for-profit entities may (1) “take into account benefits and costs that are not recognized by for-profit organizations”; (2) be “relatively well placed to stimulate demand for contracts by credibly assuring prospective users of their value”; (3) “produce contracts of a given quality at a relatively low cost because they have superior ability to attract volunteer labor”; and (4) “produce contracts at a relatively low cost because they enjoy preferential tax treatment.”<sup>18</sup>

The extent to which the incentives facing not-for-profit entities, especially ones competing with for-profit entities in the marketplace, in fact differ or alter their behavior relative

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<sup>17</sup> Although the principal focus of their paper is on contractual boilerplate developed by law firms, Choi, Gulati, and Scott do cite one example of a third-party boilerplate provider in their paper. See Choi et al., *supra* note \_\_, at 5 n.14 (noting “terms and conditions contained in standard form ISO [Insurance Services Office, Inc.] policies” as “another area with the potential for terms that have lost meaning”).

<sup>18</sup> Kevin E. Davis, *The Role of Nonprofits in the Production of Boilerplate*, 104 MICH. L. REV. 1075, 1077, 1083-97 (2006).

to for-profit entities is uncertain.<sup>19</sup> Even if not-for-profit entities do take into account different costs and benefits from for-profit entities, it is not obvious whether that would make them more or less likely to provide boilerplate resulting in contractual black holes. That said, the lower costs faced by not-for-profit entities producing contractual boilerplate might make it economical for them to produce greater documentation surrounding the boilerplate they provide, thus reducing the likelihood that a contractual black hole will form. Likewise, not-for-profit entities may have greater incentive to make public such documentation (perhaps to enhance their fundraising and other efforts), also reducing the likelihood that the original meaning will be lost. Conversely, not-for-profits might be slower to respond to the need for changes in their boilerplate, either because of the differing incentives they face or their volunteer labor force. And to the extent the not-for-profit boilerplate provider has the characteristics of a private legislature, the drafting and revision process may face additional limitations and hurdles to overcome.<sup>20</sup>

**Standardization.** Trade associations might provide boilerplate that serves as the de facto industry standard. If so, one certainly might still see rote reiteration of boilerplate but perhaps less encrustation (if nothing else because there will be fewer variations in contract language). To the extent the standardized boilerplate is provided by a trade association, the trade association might be likely to revisit and revise it on a regular basis:

These contracts and rules [provided by trade associations] were regularly revised in response to problems that arose, changes in technology, and other changes in market conditions. The process of adopting these changes was—and in the case of trading rules, continues to be—costly and time-consuming. . . . Changes are researched and debated extensively. In most groups, rule changes must be approved by a majority of group members, make it important for the revisers to clearly articulate the reasons for the proposed change. Although changes in

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<sup>19</sup> *Id.* at 1087-89.

<sup>20</sup> *E.g.*, Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995); Alan Schwartz, *The Still Questionable Role of Private Legislatures*, 62 LA. L. REV. 1147 (2002).

optional standard-form contracts do not typically require membership approval, in practice associations go to great lengths to adopt only those changes that will be widely accepted in the trade.<sup>21</sup>

So like boilerplate provided by not-for-profits more generally, standardized boilerplate may be more likely to have its drafting history documented and to be revised regularly, albeit through an arduous and demanding process.

In addition, trade associations may provide an internal dispute resolution system under which disputes between members are resolved in arbitration with industry-expert arbitrators rather than in court.<sup>22</sup> By keeping disputes between parties to standardized boilerplate out of the courts, trade association arbitration may reduce the likelihood that contractual black holes will develop because the arbitrators deciding any disputes will be “well versed in the meaning of trade rules and standard contract provisions” (even if the arbitrators apply those rules formalistically rather than flexibly).<sup>23</sup>

**Specialization.** Some third-party boilerplate providers provide standard form contracts in their entirety. Others provide individual terms as to which they have particular expertise, which parties and their lawyers can incorporate (either word-for-word or by reference) into their standard form contracts.<sup>24</sup>

Specialization would seem to reduce the likelihood that boilerplate will result in a contractual black hole or otherwise lose its meaning. First, specialization may mean that the provider has fewer contractual terms to draft in the first instance and hence to monitor on an ongoing basis. The lower ongoing cost of monitoring and updating specialized boilerplate makes

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<sup>21</sup> Bernstein, *supra* note \_\_, at 2.

<sup>22</sup> *Id.* at 3-4.

<sup>23</sup> *Id.* at 3.

<sup>24</sup> As discussed in the next Part, arbitration institutions are example of a third-party boilerplate provider that provides specialized boilerplate—arbitration clauses and rules.

it easier retain knowledge of the meaning of the boilerplate terms. It also may enable the specialized boilerplate provider to identify court interpretations that require the meaning of boilerplate terms to be clarified. Second, specialization is likely to result from and lead to greater expertise in a particular type of term. The greater expertise of specialized third-party boilerplate providers likewise makes them better able both to retain information about the meaning of boilerplate terms and to recognize the need for clarification. Accordingly, boilerplate provided by specialized providers seems less likely to result in contractual black holes and more likely to be revised in response to an aberrant court interpretation.

### **3. Arbitration Boilerplate and Contractual Black Holes**

This section looks in detail at arbitration boilerplate as a possible source of contractual black holes—or, at least, boilerplate that has lost some of its original meaning. It first examines arbitration institutions as an example of a third-party boilerplate provider. It then considers two types of arbitration boilerplate: scope provisions, which define the disputes that the parties have agreed to arbitrate, and delegation provisions, which reallocate the default authority to decide certain challenges to the enforceability of arbitration agreements from courts to arbitrators.

#### **A. Arbitration Institutions as Third-Party Boilerplate Providers**

By agreeing to arbitration, parties agree to have their disputes resolved by private judges (arbitrators) rather than in the public court system. In most cases parties agree to arbitration before a dispute arises by including a (pre-dispute) arbitration clause in their contract.<sup>25</sup>

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<sup>25</sup> See Stephen R. Bond, *How to Draft an Arbitration Clause (Revisited)*, 1(2) ICC INT'L CT. ARB. BULL. 14 (1990), reprinted in CHRISTOPHER R. DRAHOZAL & RICHARD W. NAIMARK, TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 65, 67 (2005) (“Of the cases submitted to the ICC Court, only

Arbitration is a common albeit not ubiquitous form of dispute resolution: the use of arbitration clauses varies by industry and by size of firm within an industry.<sup>26</sup>

Although not required to do so, parties typically contract to have an arbitration institution administer any arbitration that may occur.<sup>27</sup> Thus, 89.5% of a sample of arbitration clauses in international supply contracts (77 out of 86) provided for institutional (rather than ad hoc) arbitration, with the American Arbitration Association (AAA) (or its international wing, the International Centre for Dispute Resolution (ICDR)) and the International Chamber of Commerce (ICC) International Court of Arbitration the most commonly chosen institutions.<sup>28</sup> Essentially all U.S. consumer financial service contracts with arbitration clauses likewise provide for an administering institution, almost always either the AAA or JAMS.<sup>29</sup>

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four [of 237] in 1987 and six [of 215] in 1989 resulted from a *compromis*, that is, an agreement to submit an already-existing dispute to arbitration.”); Lewis L. Maltby, *Out of the Frying Pan, into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 319 (2003) (“AAA found only 6% (69/1148) of their 2001 employment arbitrations were the result of post-dispute agreements. In 2002, the frequency of post-dispute agreements was even lower, 2.6% (29/1124).”); Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 346 app.3 (2012) (finding that “virtually all (290, or 96.3%)” of a sample of AAA consumer arbitrations “arose out of pre-dispute agreements, while only 11 (or 3.7%) arose out of post-dispute agreements to arbitrate.”).

<sup>26</sup> See, e.g., Christopher R. Drahozal, *Empirical Findings on International Arbitration: An Overview*, pt. 1(1), in OXFORD HANDBOOK ON INTERNATIONAL ARBITRATION (Thomas Schultz & Frederico Ortino eds., forthcoming 2017); CFPB Arbitration Study, *supra* note \_\_, § 2, at 8 tbl. 1.

<sup>27</sup> Parties ordinarily identify the arbitration institution (or institutions) in their arbitration clause—i.e., before any dispute arises. The claimant then begins an arbitration proceeding by filing a claim with the arbitration institution after a dispute arises.

<sup>28</sup> John F. Coyle & Christopher R. Drahozal, *Dispute Resolution Clauses in International Supply Contracts* (working paper 2017) (based on sample of international supply contracts obtained from SEC filings). For a listing of the caseloads of leading international arbitration institutions, see Drahozal, *supra* note \_\_, pt. 1(3), tbl. 2.

<sup>29</sup> CFPB Arbitration Study, *supra* note \_\_, § 2, at 36-39. Interestingly, studies of the arbitration institution specified in arbitration clauses provide some evidence that consumer form contracts are “sticky”—that is, respond relatively slowly to changes in the legal environment. *Id.* § 2, at 35 (finding that “three credit card arbitration clauses ... listed the National Arbitration Forum (‘NAF’) as the sole option [for administering arbitrations], even though NAF ceased administering consumer arbitrations more than five years ago”; reporting, in addition, that one checking account arbitration clause, one prepaid card arbitration clause, and three storefront payday loan arbitration clauses likewise “listed NAF as the sole option”); Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 B.Y.U. L. REV. 1, 30 (“The persistence of the NAF in some credit card arbitration agreements for at least a year and a half after it was no longer available suggests that the costs of updating the issuer’s arbitration clauses exceed the benefits, or that the provision for some other reason is ‘sticky.’”); see also Peter B. Rutledge & Christopher R. Drahozal,



Arbitration institutions provide a variety of services to parties. First, institutions draft and publish model arbitration clauses that parties can include in their contracts.<sup>30</sup> Use of the model clauses is not mandatory, and, as noted below, parties rarely use the model clause without modification (if at all).<sup>31</sup> Increasingly, institutions are going beyond simply providing a model arbitration clause and in addition providing an online tool to assist in drafting a customized arbitration clause.<sup>32</sup>

Second, institutions provide a bundle of standard form arbitration rules that parties can incorporate by reference into their arbitration clause. Indeed, the rules commonly provide that by agreeing to have an institution administer their arbitration the parties also agree to be subject to the institution's arbitration rules.<sup>33</sup> Institutional arbitration rules cover the full extent of the arbitration proceeding, from the filing of the claim to the issuance of the award. With some exceptions,<sup>34</sup> the parties are free to—and commonly do<sup>35</sup>—modify various of the institutional rules.<sup>36</sup>

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*"Sticky" Arbitration Clauses? The Use of Arbitration Clauses After Concepcion and Amex*, 67 VAND. L. REV. 955, 1002-06 (2014) (discussing whether use of arbitration clauses in standard form contracts is "sticky").

<sup>30</sup> See JAN PAULSSON ET AL., *THE FRESHFIELDS GUIDE TO ARBITRATION CLAUSES IN INTERNATIONAL CONTRACTS* 131 app. 1 (3d ed. 2011); see also *infra* tbl. 1.

<sup>31</sup> See *infra* text accompanying notes \_\_-\_\_.

<sup>32</sup> E.g., American Arbitration Association & International Centre for Dispute Resolution, Alternative Dispute Resolution ClauseBuilder Tool, [www.clausebuilder.org](http://www.clausebuilder.org) (last visited March 15, 2017).

<sup>33</sup> E.g., American Arbitration Association, Commercial Arbitration Rules, Rule R-1(a) (rules amended and effective Oct. 1, 2013) [hereinafter AAA Commercial Arbitration Rules] ("The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules."); JAMS, JAMS Comprehensive Arbitration Rules & Procedures, Rule 1(b) (effective July 1, 2014) [hereinafter JAMS Arbitration Rules] ("The Parties shall be deemed to have made these Rules a part of their Arbitration agreement ("Agreement") whenever they have provided for Arbitration by JAMS under its Comprehensive Rules or for Arbitration by JAMS without specifying any particular JAMS Rules and the disputes or claims meet the criteria of the first paragraph of this Rule.").

<sup>34</sup> See, e.g., American Arbitration Association, Consumer Arbitration Rules, Rule R-1(d) (effective Sept. 1, 2014) ("The AAA administers consumer disputes that meet the due process standards contained in the Consumer Due Process Protocol and the Consumer Arbitration Rules. The AAA will accept cases after the AAA reviews the parties' arbitration agreement and if the AAA determines the agreement substantially and materially complies with

Third (and less relevant here), arbitration institutions provide administrative services to parties during the course of the arbitration proceeding. The arbitration institution may act as a court clerk’s office, accepting and distributing filings made in the arbitration.<sup>37</sup> It can serve as the appointing authority, providing fallback services for appointing arbitrators when a party fails to do so and ruling on challenges to arbitrators.<sup>38</sup> It may also handle the fees charged to the parties both for its services and for the arbitrators’ services.<sup>39</sup>

In a minority of cases, parties to arbitration agreements do not specify an arbitration institution but instead agree to have the arbitration proceed on an ad hoc basis—i.e., with the arbitrators themselves handling the administrative services and with some other third party (or court) serving as appointing authority.<sup>40</sup> In such cases, the parties can either draft arbitration rules themselves or agree to a set of arbitration rules created for use in ad hoc proceedings, such

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the due process standards of these Rules and the Consumer Due Process Protocol.”); *see also* Drahozal & Zyontz, *supra* note \_\_, at 307-15 (describing AAA process for reviewing consumer arbitration agreements for compliance with the AAA’s Consumer Due Process Protocol).

<sup>35</sup> *See, e.g.*, Coyle & Drahozal, *supra* note \_\_; W. Mark C. Weidemaier, *Customized Procedure in Theory and Reality*, 72 WASH. & LEE L. REV. 1865, 1871 (2015) (“The findings reveal that parties routinely alter the background rules of litigation.... Yet they exercise autonomy only within a limited domain.”). *Compare* David A. Hoffman, *Whither Bespoke Procedure?*, 2014 U. ILL. L. REV. 389, 394 (examining clauses providing for dispute resolution in court (rather than arbitration) and finding that, “even in circumstances where we would expect them to, parties almost never use contract terms to vary their post-dispute procedural contests”).

<sup>36</sup> *E.g.*, AAA Commercial Arbitration Rules, *supra* note \_\_, Rule R-1(a) (“The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator.”); JAMS Arbitration Rules, *supra* note \_\_, Rule 2(1) (“The Parties may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies (including, without limitation, Rules 15(i), 30 and 31).”).

<sup>37</sup> *E.g.*, AAA Commercial Arbitration Rules, *supra* note \_\_, Rule R-4(a) (“Arbitration under an arbitration provision in a contract shall be initiated by the initiating party (“claimant”) filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of the applicable arbitration agreement from the parties’ contract which provides for arbitration.”).

<sup>38</sup> *E.g., id.* Rules R-12, R-14, R-18(c); *see* Louise A. LaMothe, *Choosing Who and What, in ALTERNATIVE DISPUTE RESOLUTION: THE LITIGATOR’S HANDBOOK* 59, 61-62 (Nancy F. Atlas et al. eds. 2000).

<sup>39</sup> *E.g.*, AAA Commercial Arbitration Rules, *supra* note \_\_, Rules R-53, R-55(c), R-56, & R-57.

<sup>40</sup> In the sample of arbitration clauses from 86 international supply contracts, 9 (10.5%) of the clauses provided for ad hoc arbitration. *See* Coyle & Drahozal, *supra* note \_\_.

as the UNCITRAL Arbitration Rules, which were promulgated in 1976 (and amended in 2010 and 2013) by the United Nations Commission on International Trade Law (UNCITRAL).<sup>41</sup> The UNCITRAL Arbitration Rules have a well-documented drafting history<sup>42</sup> and have influenced the development of institutional arbitration rules.<sup>43</sup>

Arbitration institutions reflect several (although not all) of the characteristics of third-party boilerplate providers discussed in Part 2. Arbitration institutions are both for-profit (e.g., JAMS) and not-for-profit (e.g., AAA) entities.<sup>44</sup> The institution focuses on a single, specialized type of boilerplate—arbitration clauses and rules. Arbitration boilerplate is not standardized, however. No single arbitration institution has a sufficient market share to impose a standardized arbitration clause,<sup>45</sup> and the costs of modifying model arbitration clauses and institutional arbitration rules in their contracts evidently is low enough that parties do so with some frequency.

## **B. The Black Hole Problem in Arbitration Boilerplate**

This section looks in detail at two examples of arbitration boilerplate: scope provisions, which define the set of disputes the parties have agreed to arbitrate; and delegation provisions, which alter the default allocation of authority to decide certain challenges to the enforceability of

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<sup>41</sup> United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules (1976), <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>. For the text of the rules reflecting the 2010 and 2013 amendments, see <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf>.

<sup>42</sup> United Nations Commission on International Trade Law, Travaux Préparatoires UNCITRAL Arbitration Rules (1976), [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1976Arbitration\\_rules\\_travaux.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules_travaux.html) (last visited Mar. 20, 2017); *see also* DAVID D. CARON ET AL., THE UNCITRAL ARBITRATION RULES: A COMMENTARY (2006) (compiling and commenting on drafting history of the UNCITRAL Arbitration Rules).

<sup>43</sup> *See infra* text accompanying note \_\_ (AAA International Arbitration Rules).

<sup>44</sup> *See* LaMothe, *supra* note \_\_, at 60-61.

<sup>45</sup> My focus here is on commercial arbitration, not trade association arbitration.

an arbitration agreement. Both types of provisions differ from the *pari passu* clause in sovereign bond contracts in important respects, most notably that they are frequently litigated and do retain some core meaning. But they are similar in that some degree of information about the meaning of the provisions has been lost, as reflected in court decisions adjudicating disputes about that meaning.

### 1. Scope Provisions

An arbitration clause must define the set of disputes that the parties are agreeing to submit to arbitration—i.e., its scope.<sup>46</sup> Whether a dispute falls within the scope of an arbitration clause is a commonly litigated issue in disputes over the enforceability of an arbitration clause. Parties wishing to avoid arbitration argue that the dispute is outside the scope of the clause and thus must be decided in court, while parties wishing to arbitrate argue the opposite.

Although arbitration institutions commonly offer model arbitration clauses for parties to incorporate into their contracts, those model clauses vary in how they define the scope of the obligation to arbitrate, as shown in Table 1. The AAA clause, for example, applies to “[a]ny controversy or claim,” while the ICC clause applies to “[a]ll disputes” and the JAMS clauses apply to “[a]ny dispute, claim or controversy” (for domestic contracts) and “[a]ny dispute, controversy or claim (for international disputes).” (The language in the JAMS clause for international disputes is the same as in the UNCITRAL clause.) The AAA clause, as well as the JAMS and UNCITRAL clauses, use the connecting phrase “arising out of or relating to,” while

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<sup>46</sup> PAUL D. FRIEDLAND, *ARBITRATION CLAUSES FOR INTERNATIONAL Contracts* 61 (2d ed. 2007) (“It is essential that an arbitration clause cover precisely the subject matter that the parties intend be submitted to arbitration.”); Daniel M. Kolkey & Richard Chernick, *Drafting an Enforceable Arbitration Clause*, in *PRACTITIONER’S HANDBOOK ON INTERNATIONAL ARBITRATION AND MEDIATION* § 2.02[1], at 15 (3d ed., Daniel M. Kolkey et al., eds., 2012) (“The first step in drafting an arbitration clause is to determine the scope of the disputes that are to be arbitrated.”).

the ICC clause uses the connecting phrase “arising out of or in connection with.” The ICC clause then concludes with “the present contract.” The AAA clause adds “or the breach thereof,” the UNCITRAL clause adds “or the breach, termination or invalidity thereof,” and the JAMS clauses add “or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate” or “including the formation, interpretation, breach or termination thereof, including whether the claims asserted are arbitrable.” All of the model clauses aim to include a broad range of disputes within their scope.<sup>47</sup> Despite the wording differences, there is no indication that any model clause seeks to cover a different set of disputes than the others.

Parties rarely follow the model clauses, however, even as to such core provisions as scope. For example, in a sample of 86 international supply contracts with arbitration clauses, only five of the clauses (or 5.8%) included language matching one of the model clauses quoted in Table 1.<sup>48</sup> Prior studies have made similar findings.<sup>49</sup>

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<sup>47</sup> See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1383 (2d ed. 2014) (“The intent of leading international arbitration clauses is to apply expansively to all disputes relating to a particular contract, regardless of legal formulation.”); see, e.g., American Arbitration Association, Drafting Dispute Resolution Clauses: A Practical Guide 10 (2013), [https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_002540](https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540) (stating that the clause “makes clear that all disputes are arbitrable”); JAMS, JAMS Clause Workbook: A Guide to Drafting Dispute Resolution Clauses for Commercial Contracts 2 (Apr. 1, 2015), <https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS-ADR-Clauses.pdf> [hereinafter cited as JAMS Clause Workbook] (“While these clauses set forth no details as to procedures to be followed in connection with any such arbitrations, they provide a simple means of assuring that any future dispute will be arbitrated.”).

<sup>48</sup> See Coyle & Drahozal, *supra* note \_\_ (two used the AAA model clause (with one referring to the “contract” and the other to the “agreement”); one used the ICC model clause (referring to “this agreement” rather than “the present contract”); none used the JAMS model clause; and two used a clause very similar to the UNCITRAL model clause (“any dispute controversy or claim arising out of or relating to this Agreement or the alleged breach, termination or invalidity of this Agreement”).

<sup>49</sup> See Bond, *reprinted in* DRAHOZAL & NAIMARK, *supra* note \_\_, at 69 (“Of 1987’s 237 arbitration clauses [giving rise to ICC arbitrations], the standard clause, word-for-word, was used exactly once. Of 1989’s 215 clauses, it was used thrice.”).

Table 1. Scope Provisions in Model Arbitration Clauses

American Arbitration Ass'n	“Any controversy or claim arising out of or relating to this contract, or the breach thereof ....” <sup>50</sup>
Int'l Chamber of Commerce	“All disputes arising out of or in connection with the present contract ....” <sup>51</sup>
JAMS (domestic cases)	“Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate ....” <sup>52</sup>
JAMS (int'l cases)	“Any dispute, controversy or claim arising out of or relating to this contract, including the formation, interpretation, breach or termination thereof, including whether the claims asserted are arbitrable ....” <sup>53</sup>
UNCITRAL Arbitration Rules	“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof ....” <sup>54</sup>

More notable, however, is the striking degree of variation in each of the central elements of the scope provisions in the arbitration clauses in the international supply contracts sample. The arbitration clauses included 18 different descriptions of the disputes subject to the clause, 32 different formulations to describe the contract in which the arbitration clause is used, and 18 variations of the language describing the relationship between the two.<sup>55</sup> Overall, the 86 clauses contained at least 70 different formulations of scope language, with the most common

<sup>50</sup> AAA Commercial Arbitration Rules, *supra* note \_\_, at 4; *see also* International Centre for Dispute Resolution, Guide to Drafting International Dispute Resolution Clauses 2, [https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_002539](https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002539) (last visited Feb. 28, 2017) (same).

<sup>51</sup> International Chamber of Commerce, Standard ICC Arbitration Clauses, <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/standard-icc-arbitration-clauses/> (last visited Feb. 28, 2017).

<sup>52</sup> JAMS Clause Workbook, *supra* note \_\_, at 2.

<sup>53</sup> *Id.*

<sup>54</sup> UNCITRAL Arbitration Rules, *supra* note \_\_, Annex (“Model arbitration clause for contracts”).

<sup>55</sup> *Id.*

formulation appearing in only four contracts.<sup>56</sup> Thus, despite the central importance of the scope provisions to the parties' arbitration agreement, they seem to provide a nice illustration of encrusted boilerplate.

U.S. courts typically do not try to parse or distinguish among these numerous variations in contractual language.<sup>57</sup> Instead, they often deal with the wide variety of scope formulations by ignoring the variations in language and classifying arbitration clauses as either "broad" or "narrow."<sup>58</sup> If the court characterizes the scope of an arbitration clause as "broad," then, it is likely to apply a "pro-arbitration" policy in interpreting the clause in addition to finding it to apply to a range of disputes collateral to the contract.<sup>59</sup> If the court characterizes the scope of an arbitration clause as "narrow," then it does not apply a pro-arbitration policy in making its interpretation and is much less likely to find collateral disputes subject to arbitration.<sup>60</sup>

A main advantage of this sort of "simplified classification" as a response to encrustation is that it reduces the risk of arbitrary contractual interpretations by the courts. For example, a line of Ninth Circuit cases has construed scope provisions that cover disputes "arising under" the

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<sup>56</sup> *Id.*

<sup>57</sup> Restatement of the U.S. Law of International Commercial Arbitration, Reporters' Note *ii* to Comment *a*, § 2-14 ("The terms 'broad' and 'narrow' are used to reduce to simple categories what is in fact a wide range of contractual language."); *see also, e.g.*, FRIEDLAND, *supra* note \_\_, at 62 ("Research has uncovered no case in which a court refused to order arbitration of a dispute regarding a breach or termination of a contract on the ground that an arbitration clause referred to any dispute regarding the contract.").

<sup>58</sup> Restatement of the U.S. Law of International Commercial Arbitration, Reporters' Note *ii* to Comment *a*, § 2-14 ("Courts regularly assess the breadth in which an arbitration agreement is couched, characterizing certain clauses as 'broad' or 'narrow.' Some courts have held that this characterization must be made as the first step in the analysis, while others, without so holding, ascribe significance to the characterization when interpreting particular phrases in arbitration agreements.") (citations omitted); BORN, *supra* note \_\_, at 1201 ("Historically, a number of U.S. judicial decisions distinguished between 'broad' and 'narrow' arbitration clauses.").

<sup>59</sup> BORN, *supra* note \_\_, at 1392.

<sup>60</sup> *Id.* at 1393.

contract as narrow clauses that exclude tort claims from the scope of the obligation to arbitrate.<sup>61</sup> Other circuits have rejected that view, leaving the Ninth Circuit’s approach as a “distinctly minority rule.”<sup>62</sup> Given that, as Gary Born states, “the notion that business men or women compare different formulae, such as ‘arising out of,’ ‘relating to,’ or ‘in connection with,’ is difficult to accept in most settings,”<sup>63</sup> the simplified classification approach reduces the risk of decisions arbitrarily divorced from the meaning of the boilerplate language.

At the same time, the simplified classification approach disregards information and prevents consideration of parties’ individualized intent in an appropriate case. The Macneil treatise states that under this approach, “the form of an arbitration agreement may assume an unfortunate talismanic function, going somewhat beyond simply looking at the language to ascertain party intention,” with resulting overbroad or underinclusive interpretations of the scope provision.<sup>64</sup> Tenth Circuit Judge Neil Gorsuch, President Trump’s nominee to the U.S. Supreme Court, has criticized the approach, explaining:

An artificial dichotomy should not replace reasoned analysis of the parties’ contractual agreement. It ought not to be the case that, simply because we hold an arbitration clause to be “broad,” we automatically have license ... to send “collateral matters” to arbitration even if those matters plainly fall outside the boundaries of the arbitration clause. Neither ought it be the case that we “take care to carry out the specific and limited intent of [the] parties” only when faced with a “narrow” agreement .... Our job is always to enforce the parties’ intent and, absent such clear intent, apply the presumption of arbitrability.<sup>65</sup>

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<sup>61</sup> *Cape Flattery Ltd. v. Titan Maritime, LLC*, 647 F.3d 914, 922-24 (9th Cir. 2011) (“[U]nder an arbitration agreement covering disputes ‘arising under’ the agreement, only those disputes ‘relating to the interpretation and performance of the contract itself’ are arbitrable.”) (quoting *Mediterranean Enterprises, Inc. v. Ssangyong Construction Co.*, 708 F.2d 1458, 1464 (9th Cir.1983)); *Tracer Research Corp. v. National Environmental Services Co.*, 42 F.3d 1292, 1295 (9th Cir. 1994), *cert. dismissed*, 515 U.S. 1187 (“arising hereunder” narrow).

<sup>62</sup> *Efund Capital Partners v. Pless*, 59 Cal. Rptr. 3d 340, 353 (Cal. App. 2007).

<sup>63</sup> BORN, *supra* note \_\_, at 1384.

<sup>64</sup> IAN R. MACNEIL ET AL., II FEDERAL ARBITRATION LAW § 20.2.1, at 20:15 (1994) (“[I]f the arbitration clause is narrow in form or possibly if it contains an explicit exclusion, its judicial characterization as narrow may lead to the exclusion of arbitration that might possibly have been within the realm of the probable intention of the parties.”).

<sup>65</sup> *Chelsea Family Pharmacy, PLLC v. Medco Health Solutions, Inc.*, 567 F.3d 1191, 1201-02 (10th Cir. 2009).



Of course, that is assuming that the encrusted language of the scope provisions actually reflects some sort of intent of the parties. Gorsuch also highlights the possible role of presumptions in contract interpretation—in particular, the presumption in favor of arbitrability, an application of the strong “pro-arbitration” policy reflected in U.S. law. The relevance of that presumption is discussed in more detail in subsection (b)(3) below.<sup>66</sup>

## 2. Delegation Provisions

The Federal Arbitration Act (as construed by the courts) sets out default rules governing who decides challenges to the enforceability of arbitration agreements.<sup>67</sup> The general line is between challenges to the enforceability of an arbitration clause itself, over which courts have the final say, and challenges to the enforceability of the main contract that includes the arbitration clause, which are for the arbitrators to decide.<sup>68</sup> One exception is that issues of assent, whether to the arbitration clause or to the main contract, remain for the court to decide.<sup>69</sup>

In *Rent-A-Center, West, Inc. v. Jackson*, the U.S. Supreme Court held that the parties had changed the default allocation of authority by delegating challenges to the enforceability of the arbitration clause itself to the arbitrators for final decision.<sup>70</sup> The arbitration clause at issue in

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<sup>66</sup> See *infra* text accompanying notes \_\_ - \_\_.

<sup>67</sup> See Restatement of the U.S. Law of International Commercial Arbitration §§ 2-12 through 2-21.

<sup>68</sup> See, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04 (1967).

<sup>69</sup> Restatement of the U.S. Law of International Commercial Arbitration § 2-12(a); see *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 295-97 (2010); *Buckeye Check Cashing*, 546 U.S. at 444 n.1.

<sup>70</sup> *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 71-72 (2010).

*Rent-A-Center* contained the following provision, which the Court (following the parties) referred to as a “delegation provision”:<sup>71</sup>

The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.<sup>72</sup>

After *Rent-A-Center*, if the parties’ arbitration agreement contains a delegation provision, challenges to the enforceability not only of the main contract but also the arbitration clause are for the arbitrator to decide.<sup>73</sup> Only challenges to the enforceability of the delegation clause itself are for the court to decide.<sup>74</sup>

Contract language as detailed and explicit as in *Rent-A-Center* is unusual. Some arbitration clauses seek to change the default allocation of authority by expressly including challenges to the enforceability of the arbitration clause within the scope of the arbitration clause.<sup>75</sup> For example, of arbitration clauses in a sample of international supply contracts, 4 of 86 (or 4.7%) included such language.<sup>76</sup> By comparison, a much higher percentage of the consumer financial services arbitration clauses include such language, although notably the clauses sometimes expressly provide the opposite: that courts, not the arbitrator, are to rule on challenges

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<sup>71</sup> *Id.* at 68 (“It is the second provision, which delegates resolution of that controversy to the arbitrator, that *Rent-A-Center* seeks to enforce. Adopting the terminology used by the parties, we will refer to it as the delegation provision.”).

<sup>72</sup> *Rent-A-Center, West, Inc. v. Jackson, Jt. App.* at \*34, 2010 WL 723713 (U.S. 2010).

<sup>73</sup> And, as noted above, issues of assent, whether to the main contract or the arbitration clause, also are for the court to decide. *See supra* note \_\_\_\_.

<sup>74</sup> *Rent-A-Center*, 561 U.S. at 72 (“[U]nless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator.”).

<sup>75</sup> See, for example, the two JAMS clauses in Table 1.

<sup>76</sup> Coyle & Drahozal, *supra* note \_\_\_\_.

to the enforceability of the arbitration agreement.<sup>77</sup> Courts generally treat scope language that specifically refers to disputes over the enforceability of the arbitration agreement as equivalent to a delegation provision.<sup>78</sup> But merely using broad language in the scope provision, without specifically mentioning the arbitration agreement, usually is not sufficient.<sup>79</sup>

In addition, most institutional arbitration rules address the authority of arbitrators to decide challenges to the enforceability of the arbitration agreement—albeit without the exclusivity language included in the *Rent-A-Center* delegation provision. For example, the AAA Commercial Arbitration Rules provide that “[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.”<sup>80</sup> Other

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<sup>77</sup> CFPB Final Report, *supra* note \_\_, § 2, at 41:

The share ranged from 39.3% of arbitration clauses in our sample of checking account contracts (covering 51.6% of arbitration-subject insured deposits) to 63.4% of arbitration clauses in our sample of storefront payday loan contracts (covering 39.3% of the market), although none of the mobile wireless arbitration clauses studied included a delegation provision. Some of the clauses, however, did the opposite: They reserved the authority to rule on the enforceability of the arbitration clause to the court through an “anti-delegation clause.” From 7.0% of arbitration clauses in the storefront payday loan contracts (covering 28.4% of arbitration-subject storefronts) to 13.6% of arbitration clauses in credit card contracts (covering 42.6% of arbitration-subject credit card loans outstanding) to 26.2% of arbitration clauses in checking account contracts (covering 22.4% of arbitration-subject insured deposits) included such a provision.

Other arbitration clauses in consumer financial services contracts excluded challenges to the enforceability of a waiver of class relief from the scope of the arbitration clause. *Id.* at 43-44.

<sup>78</sup> *E.g.*, *Sadler v. Green Tree Servicing, LLC*, 466 F.3d 623, 625 (8th Cir. 2006) (clause providing for arbitration of “[a]ny controversy concerning whether an issue is arbitrable” treated as delegation provision under *Rent-A-Center*); *Saizhang Guan v. Uber Techs., Inc.*, No. 16CV598PKCCLP, 2017 WL 744564, at \*11 (E.D.N.Y. Feb. 23, 2017) (“The delegation clause’s language that an arbitrator will decide disputes ‘arising out of or relating to interpretation or application of this Arbitration Provision, including [its] enforceability, revocability or validity,’ clearly and unmistakably delegates the gateway issues to the arbitrator, and courts consistently have found clear and unmistakable delegation from similar language.”).

<sup>79</sup> *E.g.*, *Carson v. Giant Food, Inc.*, 175 F.3d 325, 330 (4th Cir. 1999); *Leb. Chem. Corp. v. United Farmers Plant Food, Inc.*, 179 F.3d 1095, 1100 (8th Cir. 1999); *Riley Mfg. Co., Inc. v. Anchor Glass Container Corp.*, 157 F.3d 775, 780 (10th Cir. 1998). *But see* *Shaw Group Inc. v. Triplefine Int’l Corp.*, 322 F.3d 115, 118, 121-122 (2d Cir. 2003); *Bell v. Cendant Corp.*, 293 F.3d 563, 566 (2d Cir. 2002).

<sup>80</sup> AAA Commercial Arbitration Rules, *supra* note \_\_, Rule R-7(a).

institutional arbitration rules have similar provisions with somewhat different language, as summarized in Table 2.

Table 2. Arbitrator Authority Provisions in Institutional Arbitration Rules

American Arbitration Ass’n, Commercial Arbitration Rules	“The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.” <sup>81</sup>
Int’l Centre for Dispute Resolution	“The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement(s), or with respect to whether all of the claims, counterclaims, and setoffs made in the arbitration may be determined in a single arbitration.” <sup>82</sup>
Int’l Chamber of Commerce	“If any party against which a claim has been made does not submit an Answer, or raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal ....” <sup>83</sup>
JAMS Arbitration Rules	“Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator.” <sup>84</sup>
UNCITRAL Arbitration Rules	“The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.” <sup>85</sup>

<sup>81</sup> *Id.*

<sup>82</sup> International Centre for Dispute Resolution, International Arbitration Rules, art. 19(1) (rules amended and effective June 1, 2014).

<sup>83</sup> International Chamber of Commerce, ICC Rules of Arbitration, art. 6.3 (effective March 1, 2017).

<sup>84</sup> JAMS Comprehensive Arbitration Rules and Procedures, *supra* note \_\_, Rule 11(b).

<sup>85</sup> UNCITRAL Arbitration Rules, *supra* note \_\_, art. 23(1).

U.S. courts have, with only a few exceptions, concluded that the arbitrator authority provisions in institutional arbitration rules have the same effect as the delegation provision in *Rent-A-Center*—i.e., that they delegate to the arbitrator final authority to rule on most challenges to the enforceability of an arbitration agreement.<sup>86</sup> Courts have so held as to the arbitrator authority provisions in the AAA,<sup>87</sup> ICDR,<sup>88</sup> JAMS,<sup>89</sup> ICC,<sup>90</sup> and UNCITRAL<sup>91</sup> arbitration rules, among others.<sup>92</sup> Indeed, one court has stated that the language of the arbitrator authority provision in the AAA Rules is “about as ‘clear and unmistakable’ as language can get, meeting the standard we have followed.”<sup>93</sup>

But there is a strong argument that U.S. courts have misconstrued the arbitrator authority provisions in institutional arbitration rules, with their original meaning seemingly lost to the courts. As explained in a Reporters’ Note to the Restatement of the U.S. Law of International Commercial Arbitration, the “principal reason” for including such arbitrator authority provisions “in institutional rules was to dispel the notion that arbitrators could only decide their own

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<sup>86</sup> See, e.g., *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074-75 (9th Cir. 2013) (“virtually every circuit” and “prevailing view”); *Brennan v. Opus Bank*, 796 F.3d 1125, 1130–31 (9th Cir. 2015) (“the vast majority of the circuits”); *Zenelaj v. Handybook Inc.*, 82 F. Supp. 3d 968, 972 (N.D. Cal. 2015) (“overwhelming consensus of other circuits”). *But see, e.g., Allstate Ins. Co. v. Toll Bros., Inc.*, 171 F. Supp. 3d 417, 428 (E.D. Pa. 2016) (“[T]his Court concludes that a cross-reference to a set of arbitration rules containing a provision that vests an arbitrator with the authority to determine his or her own jurisdiction does not automatically constitute clear and unmistakable evidence that the parties intended to arbitrate threshold questions of arbitrability—at least where those parties are unsophisticated.”).

<sup>87</sup> *E.g., Green v. SuperShuttle Int’l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011); *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006).

<sup>88</sup> *E.g., Stemcor USA, Inc. v. Miracero, S.A. de C.V.*, 66 F. Supp. 3d 394, 399 (S.D.N.Y. 2014).

<sup>89</sup> *E.g., Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1279 (10th Cir. 2017).

<sup>90</sup> *E.g., Shaw Group, Inc. v. Triplefine Int’l Corp.*, 322 F.3d 115, 118, 121-122 (2d Cir. 2003).

<sup>91</sup> *E.g., Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074-75 (9th Cir. 2013); *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 72-73 (2d Cir. 2012); *Rep. of Arg. v. BG Grp. PLC*, 665 F.3d 1363, 1371 (D.C. Cir. 2012).

<sup>92</sup> *E.g., PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1202 (2d Cir. 1996) (NASD rules); *Innospec Ltd. v. Ethyl Corp.*, No. 3:14-CV-158-JAG, 2014 WL 5460413, at \*4 (E.D. Va. Oct. 27, 2014) (LCIA rules).

<sup>93</sup> *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009).

jurisdiction to the extent that the parties expressly authorize them to do so.”<sup>94</sup> On this view, without such boilerplate language in the arbitration rules, the arbitrators might have to stop the case and wait until a court ruled on a challenge to the enforceability of the arbitration agreement rather than addressing the issue themselves—subject to de novo court review after the award is issued. As the Reporters’ note states, “there is little evidence to suggest that [the arbitral rules of the major international arbitral institutions] were specifically intended to render exclusive the competence of arbitral tribunals to make jurisdictional determinations.”<sup>95</sup>

For example, among the provisions included in Table 2, the oldest is the provision in the UNCITRAL Arbitration Rules, which was promulgated in 1976 and amended (with slight wording changes) in 2010.<sup>96</sup> Commentary during the drafting process and thereafter makes clear that the arbitrator authority provision was not intended to vest final decision making authority in the arbitrators.<sup>97</sup> Instead, the purpose of the provision was to make clear that arbitrators had the

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<sup>94</sup> Restatement of the U.S. Law of International Commercial Arbitration, Reporters’ Note *iii* to Comment *b*, § 2.8 (citing SIMON GREENBERG ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE 216-271 (2011)); *see also* JAN PAULSSON, THE IDEA OF ARBITRATION 55 (2013) (“Arbitration statutes and institutional rules ... state in plain terms that the tribunal has the power to rule upon both the validity of the arbitration agreement and the limits of its mission. Ultimate external control is not excluded; the objective is only that the arbitral tribunal not be required to stop as soon as it hears a challenge, but may rule on it.”)

<sup>95</sup> Restatement of the U.S. Law of International Commercial Arbitration, Reporters’ Note *iii* to Comment *b*, § 2.8.

<sup>96</sup> The original wording of the provision in the UNCITRAL Arbitration Rules was as follows: “The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.” Art. 21(1). The provision was amended in 2010 to reflect that the “arbitration tribunal can rule on its own jurisdiction in an appropriate circumstance even if not challenged by a party.” Jan Paulsson & Georgios Petrochilos, Revision of the UNCITRAL Arbitration Rules 96 (Sept. 2006), [http://www.uncitral.org/pdf/english/news/arbrules\\_report.pdf](http://www.uncitral.org/pdf/english/news/arbrules_report.pdf) (“The tribunal should have the power of its own motion to raise and decide the existence and scope of its own jurisdiction (for example when the dispute is not arbitrable).”).

<sup>97</sup> *E.g.*, CARON, *supra* note \_\_, at 444-446 (“Article 21(1) empowers the arbitral tribunal to rule on all objections to its jurisdiction.... Although the arbitral tribunal has the power under Article 21(1) to determine its own jurisdiction, any awards of the arbitral panel might be subject to challenge under the applicable law for excess of jurisdiction.”); *id.* (quoting Report of UNCITRAL, 8th Sess., Summary of Discussion of the Preliminary Draft, U.N. Doc. A/10017, ¶ 141 (1975)) (“The sole substantive concern of the Conference with respect to Article 21(1) was that it ‘could mislead parties, because questions as to the competence of the arbitrators were ultimately a matter for the courts to settle in accordance with the *lex fori*.’”); Pieter Sanders, *Procedures and Practices Under the UNCITRAL Rules*, 27 AM. J. COMP. L. 453, 462 (1979) (“The rule of para. 1 reflects the arbitration law and practice of most countries. ....

authority to decide such issues when presented to them in the first instance. The commentary on most other institutional arbitration rules is to the same effect.<sup>98</sup>

The one exception is the AAA’s arbitration rules.<sup>99</sup> A chronology is useful here to understand the development of this aspect of the AAA’s rules. Prior to 1995, the AAA’s commercial arbitration rules did not include any provision addressing the authority of arbitrators to rule on their own jurisdiction.<sup>100</sup> By comparison, when the AAA first adopted its international arbitration rules in 1991, it promulgated a set of rules that “were very closely modeled on the UNCITRAL Arbitration Rules.”<sup>101</sup> Indeed, the arbitrator authority provision in the AAA’s international arbitration rules tracked the provision in the UNCITRAL Arbitration Rules word

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Notwithstanding these provisions, the final word on the competence of arbitrators is for the court: Where the competence of arbitrators is involved, the jurisdiction of the courts cannot be excluded.”).

<sup>98</sup> See W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION § 28.07, at 513 (3d ed. 2000) (“Under Article 6 of the ICC Rules, if the ICC Court is ‘*prima facie* satisfied’ that an arbitration agreement exists, any jurisdictional challenge of a deeper nature goes to the arbitrators. This does not mean, however, that national courts will be deprived of power to make jurisdictional determinations when asked to stay litigation, enjoin arbitration or vacate an award.”); William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 AM. REV. INT’L ARB. 133, 141 (1997) (same); 2007 CPR Rules for Non-Administered Arbitration, General Commentary to Rule 8 (“This Rule expresses the generally accepted principle that arbitrator(s) have the competence *initially* to determine their own jurisdiction, both over the subject matter of the dispute and over the parties to the arbitration. Accordingly, any objections to the existence, scope or validity of the arbitration agreement, or the arbitrability of the subject matter of the dispute, are decided, *at least in the first instance*, by the Tribunal.”) (emphasis added); cf. HOWARD M. HOLTZMANN AND JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 494 (1988) (discussing the UNCITRAL Model Law) (“[I]t would be improper to divest the courts of a concurrent power to rule on the jurisdiction of the arbitral tribunal.”).

<sup>99</sup> See Alan Scott Rau, “*The Arbitrability Question Itself*”, 10 AM. REV. INT’L ARB. 287, 369 n.230 (1999) (stating that even if the AAA amended its arbitrator authority rules with the intent that they act as delegation provisions, “[t]his may not have been the original intention of other widely-used arbitration rules—like those of the ICC or of UNCITRAL—which are cast in similar terms”).

<sup>100</sup> American Arbitration Association Commercial Arbitration Rules Revision Committee, *Commentary on the Revisions to the Commercial Arbitration Rules of the American Arbitration Association*, ADR CURRENTS, Dec. 1998, at 6, 7 [hereinafter cited as *AAA Commercial Rules Commentary*].

<sup>101</sup> MARTIN F. GUSY ET AL., A GUIDE TO THE ICDR INTERNATIONAL ARBITRATION RULES ¶ 1.59 (2011).

for word.<sup>102</sup> As described in commentary at the time by the General Counsel of the AAA, under the provision “[t]he panel may decide a plea to its jurisdiction and determine the existence and validity of the contract’s arbitration clause.”<sup>103</sup> As such, the commentary was consistent with the commentary on the UNCITRAL Arbitration Rules; it did not give any indication that the arbitrator authority provision was intended to deprive courts of their ultimate authority over this set of issues.

In 1995, the U.S. Supreme Court decided *First Options of Chicago, Inc. v. Kaplan*, in which it suggested, in dicta, that parties might delegate decisions on the enforceability of the arbitration agreement to the arbitrators if the delegation was “clear and unmistakable”<sup>104</sup>—a suggestion taken up by the Court in *Rent-A-Center*.<sup>105</sup> When the AAA thereafter revised its International Arbitration Rules in 1997, it added “scope” to the list of issues that arbitrators had the authority to decide but otherwise kept the arbitrator authority provision unchanged.<sup>106</sup> In its commentary on the revised International Arbitration Rules, however, the drafting Task Force stated that it “believes that parties’ adoption of these rules is an explicit agreement to the arbitrability of such jurisdictional disputes.”<sup>107</sup>

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<sup>102</sup> See American Arbitration Association, International Arbitration Rules, art. 15(1) (effective March 1, 1991), reprinted in XVII YB. COMM. ARB. 310, 316 (1992) (“The tribunal shall have the power to rule on its own jurisdiction, including any objections to the existence or validity of the arbitration agreement.”).

<sup>103</sup> Michael F. Hoellering, *The New International Arbitration Rules of the American Arbitration Association*, in XVII YB. COMM. ARB. 307, 308 (1992).

<sup>104</sup> *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (internal alterations omitted).

<sup>105</sup> *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 71-72 (2010); see *supra* text accompanying notes \_\_\_ - \_\_\_.

<sup>106</sup> American Arbitration Association, International Arbitration Rules, art. 15(1) (effective March 1, 1991), reprinted in XXII YB. COMM. ARB. 303, 311 (1997) (replacing “to the existence or validity” with “with respect to the existence, scope or validity”); see also American Arbitration Association Task Force on the International Rules, *Commentary on the Proposed Revisions to the International Arbitration Rules of the American Arbitration Association*, ADR CURRENTS, Winter 1996-1997, at 6, 8 [hereinafter cited as *AAA International Rules Commentary*] (“The word ‘scope’ has been added to paragraph 1 in order to make clear that the tribunal shall have the power to rule on any challenge to its jurisdiction.”).

<sup>107</sup> *AAA International Rules Commentary*, *supra* note \_\_\_, at 8.



Subsequently, when the AAA amended its commercial arbitration rules in 1999, it added an entirely new arbitrator authority provision identical to the one in its International Arbitration Rules.<sup>108</sup> The Rules Revision Committee explained:

In *First Options v. Kaplan*, 115 S. Ct. 1920 (1995), the U.S. Supreme Court held that any dispute as to the arbitrability of a dispute shall be decided by the arbitrators if the parties have explicitly so agreed in their contract. Section R-8 is designed to address the Court's holding and to make explicit in the rules useful, generally accepted principles of arbitral jurisdiction.

The committee believes that by adopting these rules, parties agree to the arbitrability of such jurisdictional disputes. In an effort to make more explicit this designation of authority, the committee added Section R-8. Subsection (a) specifically states that 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." Inclusion of the word "scope" further clarifies the arbitrator's power to rule on any challenge to jurisdiction.<sup>109</sup>

Again, the language of the new provision in the AAA's Commercial Arbitration Rules is identical to that in its International Arbitration Rules, and essentially the same as that in the UNCITRAL Arbitration Rules. But although the commentary on the UNCITRAL Arbitration Rules is clear that it was not intended to be a delegation provision, the commentary on the AAA rules (with some caveats<sup>110</sup>) suggests that the drafters did intend it to serve as a delegation provision.

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<sup>108</sup> AAA Commercial Rules Commentary, *supra* note \_\_\_, at 7.

<sup>109</sup> *Id.*; see also *Revised Commercial Rules to Take Effect Jan. 1*, DISP. RESOL. TIMES, Oct. 1998, at 1, 18 ("The U.S. Supreme Court held in *First Options v. Kaplan* that any dispute as to the arbitrability of a dispute shall be decided by the arbitrators if the parties have explicitly so agreed in their contract. This section is designed to address the court's holding to make explicit in the rules generally accepted principles of arbitral jurisdiction. The rule states that 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. The term 'scope' clarifies the arbitrator's power to rule on any challenge to jurisdiction.").

<sup>110</sup> Richard W. Hulbert, *Institutional Rules and Arbitral Jurisdiction: When Party Intent is not "Clear and Unmistakable,"* 17 AM. REV. INT'L ARB. 545, 563 (2006) ("The comment that the new rule made 'explicit' generally accepted principles of arbitral jurisdiction suggests that nothing of substance was being added, but rather that what had been merely implicit was now set out in plain text for all to see. What is not shown is that it was supposed that the incorporation of the explicit terms of Rule R-8 [now R-7] represented a surrender by parties to arbitration under the Commercial Rules, or indeed under the International Rules adopted a few years earlier, of whatever rights they

As a result, the bottom line as I see it is as follows: either (1) the AAA drafting committees subjectively intended that the arbitrator authority provision in the AAA rules act as a delegation provision, but the language and source of that language do not support such an interpretation; or (2) even if the subjective intent of the AAA drafting committees controls as applied to the AAA and ICDR rules, it should not control as to the arbitrator authority provisions of the arbitration rules promulgated by other institutions, for which the evidence shows a very different subjective intent of the drafters. That said, as discussed above, most U.S. courts disagree with both of these propositions.<sup>111</sup>

### **3. Implications for the Contractual Black Hole Problem**

Neither scope provisions nor delegation provisions (or more precisely, the arbitrator authority provisions in institutional rules that courts generally treat as delegation provisions) are contractual black holes as defined by Choi, Gulati, and Scott. Both are frequently litigated, and neither has been in existence long enough for its original meaning to have been lost. That said, both types of provisions share some characteristics with contractual black holes, and provide insights into how courts might respond when faced with contractual black holes.

Scope provisions in arbitration clauses illustrate how boilerplate becomes encrusted with slight variations of contractual language. (As noted, the 86 arbitration clauses from international supply contracts contained at least 70 variations in scope language.<sup>112</sup>) Courts typically have

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otherwise have to judicial consideration of questions of arbitral jurisdiction.”); George A. Bermann, *Arbitrability Trouble*, 23 AM. REV. INT’L ARB. 367, 377 (2012) (“[The AAA’s revision of its rules after *First Options*] surely provides clear and unmistakable evidence of the institution’s intention to strengthen the hands of arbitral tribunals in determining their own competence. But it falls far short of demonstrating that the parties clearly and unmistakably share that intention.”).

<sup>111</sup> See *supra* text accompanying notes \_\_\_ - \_\_\_.

<sup>112</sup> See *supra* text accompanying notes \_\_\_ - \_\_\_.

responded by classifying the scope provisions as either broad or narrow, largely ignoring the encrusted language. This simplified classification approach avoids arbitrary decisions that construe clauses differently based on essentially meaningless differences in boilerplate. But the approach does, at least on occasion, ignore potentially meaningful differences in contract language, limiting parties' ability to fine tune their scope provisions. Given the institutional limitations faced by courts in interpreting encrusted contractual boilerplate, it may be that this simplified classification approach is the best alternative available, albeit not without costs.

By comparison, arbitrator authority provisions in institutional arbitration rules do not reflect the same degree of encrustation as the scope provisions (if for no other reason than that there are far fewer sets of institutional rules than there are arbitration clauses). Nor is this a case where the original meaning of the contractual language has been lost. As noted above, the drafting history of the UNCITRAL Arbitration Rules is well documented, with detailed commentary explaining the origins of its provisions.<sup>113</sup> Although less extensive, commentary on the drafting of and revisions to institutional arbitration rules likewise serves as a sort of legislative history for the original meaning of the rules.<sup>114</sup>

Yet with the (somewhat) rote repetition of the language of the arbitrator authority provisions, its meaning—as construed by courts—has shifted from that suggested by the drafting history. Moreover, once courts (arguably incorrectly) interpreted the arbitrator authority provision in one set of institutional rules, that interpretation quickly spread to other sets of rules with similar language, even though their drafting history does not support such an interpretation. Notably, no institution has, as yet anyway, responded to these decisions by revising its

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<sup>113</sup> See *supra* text accompanying notes \_\_\_ - \_\_\_.

<sup>114</sup> Cf. Mitu Gulati, *Towards a Legislative History of Contract Provisions*, 11 CAPITAL MARKETS L.J. 1 (2016).

institutional rules—either to change the result in the cases or to confirm that it is correct. As discussed above,<sup>115</sup> third-party boilerplate providers can be slow in revising contractual boilerplate. Thus, although the AAA has revised its fee schedules in recent years, it most recently amended its Commercial Arbitration Rules in 2013 and its International Arbitration Rules in 2014, and it was almost twenty-five years before UNCITRAL revised its Arbitration Rules.<sup>116</sup> So it is too soon to tell whether the lack of any change in the rules suggests that the cases are correctly decided or instead that there is some degree of stickiness in the boilerplate.<sup>117</sup>

One final complication: the U.S. Supreme Court has stated repeatedly that the Federal Arbitration Act reflects an “emphatic federal policy in favor of arbitral dispute resolution”<sup>118</sup> and a presumption that disputes are subject to arbitration.<sup>119</sup> It may be that this policy and presumption explain at least some of the results in the cases—i.e., that the cases reflect at least in part the idiosyncrasies of U.S. arbitration law rather than issues of contractual interpretation more generally.

#### 4. Conclusion

This paper has offered some preliminary thoughts about how the theory of contractual black holes might apply to boilerplate contract terms provided by third-party providers, such as trade associations, form sellers, and arbitration institutions. Third-party boilerplate providers are

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<sup>115</sup> See *supra* text accompanying notes \_\_ - \_\_.

<sup>116</sup> See *supra* notes \_\_ & \_\_.

<sup>117</sup> Cf. Rutledge & Drahozal, *supra* note \_\_.

<sup>118</sup> *KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)).

<sup>119</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S.1, 24-25) (1983)) (“The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration ....”).

more likely to be not-for-profit entities and provide industry-standard or specialized boilerplate than private law firms. Each of these differing characteristics would seem to make it less likely that a contractual black hole will form and more likely that the third-party provider would revise the boilerplate in response to an erroneous court decision.

Two examples of arbitration boilerplate—scope provisions and arbitrator authority provisions (construed by courts as delegation provisions)—both show some degree of encrustation or rote reiteration of boilerplate language (or both). Moreover, both types of arbitration boilerplate seem to have lost some of their original meaning, as reflected in court decisions interpreting them (although not to the degree the provisions can fairly be considered contractual black holes). Courts interpreting scope provisions generally classify them as either broad or narrow, potentially losing some contractual meaning but avoiding arbitrary interpretations. Here, the courts may have chosen the better of the two alternatives. But courts have treated arbitrator authority provisions as if they were delegation provisions, despite drafting history indicating otherwise. This suggests that even the availability of drafting history might not prevent the meaning of contractual boilerplate from being lost, particularly when competing policies, such as the policy in favor of arbitral dispute resolution, are in play.