

THE CANONS OF CONSTRUCTION  
FOR CHOICE-OF-LAW CLAUSES

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*Over the past half century, courts in the United States have developed canons of construction that they use exclusively to construe choice-of-law clauses. These canons are consistently applied by state and federal courts. They play an important role in determining the meaning of choice-of-law clauses and, by extension, the law that will be applied to resolve disputes that come before the courts. To date, however, these canons have attracted relatively little attention in the academic literature.*

*This Article aspires to fill that gap. It develops the first taxonomy of these canons, which fall into one of two families. The first consists of the lexical canons. These canons assign meaning to words and phrases that commonly appear in choice-of-law clauses. The second consists of the canons relating to scope. These canons determine whether the law selected by the parties applies exclusively to contract claims or whether it also applies to related tort and statutory claims. The Article then draws upon attorney interviews in an attempt to determine empirically whether these canons generate outcomes that are consistent with the preferences of most contracting parties. It shows that some do and others do not. When a particular canon regularly produces outcomes that are inconsistent with majoritarian preferences, the Article argues that the courts should cast it aside. The Article concludes by addressing how to resolve conflicts among the canons when they arise.*

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*The imperfection and abuse of language render it important that certain fixed canons of interpretation should be adopted, in order to give a uniform effect to the stipulations of contracting parties, who resort to judicial tribunals for the enforcement of rights and redress of wrongs arising from contracts and the breach of them.*<sup>1</sup>

## INTRODUCTION

Choice-of-law clauses present unique interpretive challenges for courts. They are frequently borrowed wholesale from other agreements.<sup>2</sup> They are often not negotiated other than to select the governing jurisdiction.<sup>3</sup> And they are typically terse in comparison to other contract language.<sup>4</sup> Consequently, it is not at all clear that the text of the typical choice-of-law clause provides a particularly reliable guide to what the parties “intend” with respect to a wide range of issues.<sup>5</sup> Nevertheless, U.S. courts are often called upon to assign meaning to specific words and phrases contained in these clauses.<sup>6</sup>

In order to assist in this task, the courts have developed several canons of construction that they use exclusively to construe choice-of-law clauses.<sup>7</sup> A canon of construction is a

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<sup>1</sup> THERON METCALF, *PRINCIPLES OF THE LAW OF CONTRACTS: AS APPLIED BY COURTS OF LAW* 274 (1874).

<sup>2</sup> See PETER HAY ET AL., *CONFLICT OF LAWS* 1145 (5th ed.) (2010).

<sup>3</sup> See Glenn West, *The Law You Choose to Govern Your Contract May Not Be the Law That Governs*, Weil Insights, Weil’s Global Private Equity Watch, January 12, 2016, <http://goo.gl/RIJTDv> (last visited Sept. 26, 2016) (stating that “most deal professionals actually do focus on the law chosen to govern an agreement” but that “there is often less focus on the actual wording of the clause that effectuates that choice”).

<sup>4</sup> HAY ET AL., *supra* note 2, at 1145.

<sup>5</sup> See *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 488 (1989) (Brennan, J., dissenting) (“Construction of a contractual provision is, of course, a matter of discerning the parties’ intent. [ . . . ] We must therefore rely on the contract itself. But the provision of the contract at issue here was not one that these parties drafted themselves. Rather, they incorporated portions of a standard form contract commonly used in the construction industry. That makes it most unlikely that their intent was in any way at variance with the purposes for which choice-of-law clauses are commonly written and the manner in which they are generally interpreted.”).

<sup>6</sup> The analysis in this Article generally assumes that the contract in which a choice-of-law clause appears is between two sophisticated firms with roughly equal bargaining power. Cf. Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 544 (2003) (developing a theory of contracts that applies exclusively where one firm sells to another firm). When a choice-of-law clause is set forth in a consumer contract, or where there is a significant disparity in terms of party bargaining power, a different analytical approach may be warranted. See Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 75-95 (2014) (proposing an interpretive regime tailored specifically to contracts of adhesion).

<sup>7</sup> Some scholars distinguish between the act of contract “interpretation” and the act of contract “construction.” See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 200 note, at 82 (1981) (observing that “‘interpretation’ relates to meaning,” whereas “construction” relates to “the ascertainment of legal operation or effect”). While this distinction is conceptually useful, the “overwhelmingly common practice” of courts today is to use the two terms interchangeably. CORBIN ON CONTRACTS § 24.3; see also E. ALLEN FARNSWORTH, *CONTRACTS* § 7.7 (4<sup>th</sup> ed. 2005); Michael H. Hoffheimer, *Conflicting Rules of Interpretation in Multi-Jurisdictional Disputes*, 63 RUTGERS L. REV. 599, 604-639 (2011) (“Courts applying the Second Restatement to private choice of law agreements fail to differentiate between interpretation and construction.”).

statement of judicial preference as to how a particular textual ambiguity should be resolved.<sup>8</sup> Canons are often described as “rules of thumb” that help courts to determine a contract’s meaning where it is difficult or impossible to ascertain the intent of the parties using traditional methods of contract interpretation.<sup>9</sup> When a contract states that it shall be governed by the “laws” of New York, for example, there are two possible ways of interpreting the word “laws.” The parties could be referring to the “whole law” of New York, including its conflict-of-laws rules. Alternatively, the parties could be referring to the “internal law” of New York, excluding its conflict-of-laws rules. Over the years, the courts have adopted a canon of construction which holds that the word “laws” in this context refers only to the internal law of the state of New York.<sup>10</sup> Since the purpose of a choice-of-law clause is to ensure a uniform choice of law, the courts have reasoned that this purpose is best furthered by construing the term “law” to exclude conflict-of-laws rules that may redirect the parties to the law of still another jurisdiction.<sup>11</sup> In this manner, the courts have assigned a constructive meaning to contract language that is ambiguous on its face.

The goal of this Article is to determine whether the various canons used by U.S. courts to construe choice-of-law clauses are broadly consistent with the preferences of most contracting parties. To this end, the Article first develops a comprehensive taxonomy of the choice-of-law canons. It shows that these canons tend to fall into one of two families: (1) the lexical canons, and (2) the canons relating to scope.<sup>12</sup> The lexical canons assign meaning to individual words and phrases that are commonly found in choice-of-law clauses. They are:

1. *The canon in favor of internal law.* This canon holds that when the parties choose to have their contract governed by the “law” or “laws” of a particular jurisdiction, they intend for courts to apply that jurisdiction’s internal law rather than its whole law.<sup>13</sup>

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<sup>8</sup> See Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 320 (1990) (describing a canon as “a background presumption about the legal system that is used to resolve uncertainty in interpretation” and observing that “any interpretive norm that courts rely on to resolve ambiguity is a ‘canon.’”). In his article, Kramer proposes several canons of constructions that judges *should* use to ascertain the intent of the legislature in resolving true conflicts. *Id.* at 319-38. In this Article, I identify several canons of construction that judges *do* use to ascertain the intent of the parties when construing choice-of-law clauses.

<sup>9</sup> For a sampling of the recent literature discussing canons of various stripes, see James J. Brudney & Cory Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 9 (2005); Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 793-94 (2013); Daniel B. Kostrub & Roger S. Christenson II, *Canons of Construction for the Interpretation of Mineral Conveyances, Severances, Exceptions, and Reservations in Producing States*, 88 N. DAK. L. REV. 649, 651 (2013); Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 658-68 (1992); Keith A. Rowley, *Contract Construction and Interpretation: From the “Four Corners” to Parol Evidence and Everything In Between*, 69 MISS. L.J. 73, 82 (1999).

<sup>10</sup> See *infra* Part II.A.

<sup>11</sup> *Id.*

<sup>12</sup> Both the lexical canons and the canons relating to scope are species of interpretive default rules that “assign legal content to particular phrases.” See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. (forthcoming 2017), at 35. The lexical canons ascribe meaning to individual words in choice-of-law clauses. The canons relating to scope ascribe meaning to the clause as a whole.

<sup>13</sup> See *infra* Part II.A.

2. *The canon in favor of substantive law.* This canon holds that when the parties choose to have their contract governed by the “law” or “laws” of a particular jurisdiction, they intend for courts to apply that jurisdiction’s substantive law rather than its procedural law.<sup>14</sup>
3. *The canon of linguistic equivalence.* This canon holds that regardless of whether the parties choose to have their contract “governed by” or “interpreted in accordance with” or “construed in accordance with” the law of a particular jurisdiction, the result will be the same.<sup>15</sup>
4. *The canon of federal inclusion and preemption.* This canon holds that when the parties select the law of a particular U.S. state, the law of that state will be deemed to include any relevant provisions of U.S. federal law. This canon further holds that federal law will preempt state law if the two are in conflict.<sup>16</sup>

The canons relating to scope, by comparison, seek to resolve common questions about the breadth of generic choice-of-law clauses. Does the law specified in the clause apply exclusively to contract claims? Or does it also apply to tort and statutory claims that relate to the contract in some way? In contrast to the lexical canons, which do not conflict with one another, the canons relating to scope are rivals. They are:

1. *The canon against non-contractual claims.* This canon holds that a generic choice-of-law clause governs only causes of action sounding in contract. It does not govern tort and statutory claims. If the parties want the choice-of-law clause to apply to tort and statutory claims, they must draft the clause more broadly.<sup>17</sup>
2. *The canon in favor of non-contractual claims.* This canon holds that a generic choice-of-law clause also governs tort and statutory claims when they are related to the contract. If the parties want the choice-of-law clause to apply exclusively to contract claims, they must draft the clause more narrowly.<sup>18</sup>

The lexical canons and the canons relating to scope play an important role in determining the meaning of choice-of-law clauses and, by extension, the law that will be applied to resolve disputes that come before the courts. To date, however, they have attracted relatively little attention in the academic literature.<sup>19</sup> The Article’s first contribution to the literature, therefore, is to identify these canons, to assign them labels, and to show how they operate in practice.

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<sup>14</sup> See *infra* Part II.B.

<sup>15</sup> See *infra* Part II.C.

<sup>16</sup> See *infra* Part II.D.

<sup>17</sup> See *infra* Part III.A.

<sup>18</sup> See *infra* Part III.B.

<sup>19</sup> For a recent and noteworthy exception, see SYMEON SYMEONIDES, CHOICE OF LAW 388-406 (2016); see also HAY ET AL., *supra* note 2, at 1136-46.

The Article then takes up the normative question of whether these canons produce results that are broadly consistent with the expectations of most contracting parties.<sup>20</sup> To answer this question, the Article draws upon data gleaned from eighty-six lawyer interviews conducted by the author in which the subjects were asked how they wanted the courts to interpret their choice-of-law clauses.<sup>21</sup> This methodological approach—which looks to lawyer surveys rather than to a close reading of the relevant text—represents a somewhat novel approach to contract interpretation. It is, however, in keeping with a burgeoning body of contract scholarship that relies on surveys and experiments to assist in the interpretation of contracts.<sup>22</sup> The interview data suggest that at least two of the canons discussed above regularly produce results that are inconsistent with the expectations of most contracting parties.<sup>23</sup> Accordingly, the Article argues that the courts should cast these canons aside. In their place, the courts should adopt new interpretive default rules that are more in line with the presumptive intent of most parties.

The Article's third and final contribution to the literature relates to conflict-of-laws rules. When two canons point in different directions, the courts must decide whether to follow (1) the canons prescribed by the law of the forum, or (2) the canons prescribed by the law of the state named in the choice-of-law clause. Most U.S. courts apply the canons of the forum. The Article argues that the courts should instead apply the canons of the state named in the clause for four reasons.<sup>24</sup> First, it ensures that the choice-of-law clause will have a consistent meaning across jurisdictions. Second, it is more in keeping with the terms of the hypothetical bargains that most parties would strike *ex ante*. Third, it is consistent with the approach set forth in the Second Restatement of Conflict of Laws. Fourth, and finally, it respects the ability of the parties to choose the body of law that will be used to interpret their contract.

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<sup>20</sup> See *infra* Part IV.

<sup>21</sup> This methodological approach may be fairly characterized as *empirical majoritarianism* in that it seeks to determine empirically the preferences of a majority of contracting parties when it comes to the intended meaning of a particular contract provision. This methodological approach is not without its critics. Steve Burton, for example, is generally skeptical of studies that seek to determine majoritarian preferences via surveys and interviews because he believes that the utility of contract terms will in many cases depend upon the cluster of other contract terms that surround it and that the utility of terms cannot be assessed in isolation. See Steven J. Burton, *Collapsing Illusions: Standards for Setting Efficient Contracts and Other Defaults*, 91 IND. L.J. 1063, 1068-72 (2016). This critique applies with less force, however, when the contract language in question is a freestanding choice-of-law clause. In contrast to other contractual provisions, the meaning and perceived utility of such clauses will generally not vary depending on other clauses in the agreement.

<sup>22</sup> See, e.g., Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545 (2014); Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417 (2014); Mark Weidemaier, Robert Scott & Mitu Gulati, *Origin Myths, Contracts, and the Hunt for *Pari Passu**, 38 LAW & SOC. INQUIRY 72, 77 (2013); see also Omri Ben-Shahar & Lior Jacob Strahilevitz, *Interpreting Contracts via Surveys and Experiments*, available at: [https://papers.ssrn.com/sol3/papers2.cfm?abstract\\_id=2905873](https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2905873).

<sup>23</sup> The two canons which produce results that are arguably inconsistent with the expectations of most parties are (1) the canon against non-contractual claims, and (2) the canon in favor of substantive law. See *infra* Part V. In addition, the canon in favor of federal inclusion and preemption will frequently produce outcomes that are inconsistent with the expectations of many U.S. companies who sell goods to foreign counterparties. *Id.*

<sup>24</sup> See *infra* Part V.C.

In summary, the Article aspires to (1) develop a comprehensive descriptive account of the canons that U.S. courts regularly use to interpret choice-of-law clauses, (2) determine whether these canons accurately reflect the preferences of most parties, and (3) offer guidance to courts on how to choose the correct canon in a given situation. With these goals in mind, the Article proceeds as follows.

Part I surveys the existing literature on choice-of-law clauses and discusses the interpretive challenges presented by contract boilerplate. Part II identifies the lexical canons and provides a detailed description of how they operate in practice. Part III discusses the canons relating to scope and details how these rival canons reflect profoundly different judicial assumptions about party intent. The first three Parts are largely descriptive. The next two Parts address the normative question of whether the canons developed by the courts are the *right* canons. Part IV seeks to identify the proper normative baseline against which to evaluate current judicial practice. Part V then draws upon eighty-six attorney interviews in order to assess the merits of the canons when measured against the baseline of majoritarian default rules.

## I. THE CHOICE-OF-LAW CLAUSE AS BOILERPLATE

### A. The Choice-of-Law Clause

When a contract has a connection to more than one jurisdiction, the courts will generally undertake a conflict-of-laws analysis to determine the law that will govern the agreement.<sup>25</sup> Scholars and judges have long grumbled that the outcome of such analyses can be difficult to predict.<sup>26</sup> Litigants, in turn, have long complained about having to pay their lawyers to litigate an issue—choice-of-law—that is peripheral to the central dispute between the parties.<sup>27</sup> One common solution to this problem is for the parties to address the issue preemptively by writing a choice-of-law clause into their contract. The presence of such a clause will in most cases make a conflict-of-laws analysis unnecessary—the court will simply apply the law of the chosen jurisdiction to resolve any disputes arising out of the contract.<sup>28</sup>

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<sup>25</sup> See RESTATEMENT (SECOND) ON CONFLICT OF LAWS § 188.

<sup>26</sup> See Shirley A. Wiegand, *Fifty Conflict of Laws “Restatements”: Merging Judicial Discretion and Legislative Endorsement*, 65 LA. L. REV. 1, 4 (2004); *Dowis v. Mud Slingers, Inc.*, 279 Ga. 808, 815 (2005).

<sup>27</sup> Erin Ann O’Hara, *Opting Out of Regulation: A Public Choice Analysis of Contractual Choice of Law*, 53 VAND. L. REV. 1551, 1569 (2000); Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1191 (2000); see also *Bulldog N.Y. LLC v. Pepsico, Inc.*, 8 F. Supp. 3d 152, 160-166 (D. Conn. 2014) (conducting extensive choice-of-law analysis on multiple claims only to decide that the appropriate law to apply was the same as the one selected in the contract).

<sup>28</sup> See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (observing that a “choice of law provision, when viewed in isolation, may reasonably be considered a substitute for the conflicts-of-laws analysis that otherwise would determine what law to apply to disputes arising out of the contractual relationship.”); Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1191 (2006) (“A boilerplate provision about governing law can be developed by those versed in choice of law . . . without users of the boilerplate provision having to think through all of the possible scenarios involving choice of law.”).

Choice-of-law clauses are thus useful in that they reduce the degree of legal uncertainty in commercial transactions that touch more than one jurisdiction.<sup>29</sup>

In theory, the parties who write choice-of-law clauses into their agreement have conducted extensive research into the law of the chosen jurisdiction. In practice, this is rarely the case.<sup>30</sup> Each party will usually want the law of its home jurisdiction to apply and will declare success if this objective is achieved. There are cases in which one party succeeded in “winning” the choice-of-law issue during the negotiations—the law selected was the law of its home jurisdiction—only to discover in litigation that an essential contract term was invalid under the law of that jurisdiction.<sup>31</sup> One observer has commented that each party will generally seek to apply the law of its home jurisdiction “not based on any deep knowledge of this law, but rather on a vaguely felt preference for dealing with what appears to be familiar rather than the unfamiliar.”<sup>32</sup> This characterization will not, of course, hold true in every case. Where one contracting party is quite sophisticated (an insurance company) or where the contract itself is a high-value contract (a merger agreement) the law of the chosen jurisdiction will frequently be researched carefully. When it comes to ordinary, run-of-the-mill commercial agreements, however, each party will tend to gravitate to the law of its home jurisdiction without giving the matter much additional thought.

When neither party is willing to accept the law of the other’s home jurisdiction, the parties will sometimes compromise by choosing the law of a “neutral” jurisdiction with no connection to either party. In the United States, the most frequently selected neutral jurisdictions are Delaware and New York.<sup>33</sup> In international contracts, the most commonly selected neutral jurisdictions are England, Singapore, and Switzerland.<sup>34</sup> Choice of law is also

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<sup>29</sup> John F. Coyle, *Rethinking the Commercial Law Treaty*, 45 GA. L. REV. 343, 345-47 (2011) (discussing problem of legal uncertainty); John Prebble, *Choice of Law to Determine the Validity and Effect of Contracts: A Comparison of English and American Approaches to the Conflict of Laws*, 58 CORNELL L. REV. 433, 495 (1973) (observing that the use of choice-of-law clauses simplifies the judicial task while contributing to certainty in commercial transactions).

<sup>30</sup> See LEA BRILMAYER ET AL., *CONFLICT OF LAWS: CASES AND MATERIALS* 698 (7th ed. 2015) (“[S]urprisingly often, the parties do not even bother to research the chosen law before they include a clause selecting it.”). One in-house attorney explained his thinking in the following way:

[I]n the ordinary course of commerce, where there are lots of contracts flying around all the time, and time/cost are always issues, it is not uncommon to agree to a choice of law without doing a detailed analysis of how that jurisdiction’s laws work for you or against you. Unless you have a crystal ball, you don’t know what your issues are going to be, so you don’t always know what to worry about.

E-mail to Author from In-House Counsel at U.S. Energy Company, Mar. 3, 2016.

<sup>31</sup> See, e.g., *Mail Boxes Etc. USA, Inc. v. Considine*, 1999 U.S. Dist. LEXIS 23380 (W.D. Wash. Aug. 13, 1999); see also Restatement (Second) on Conflict of Laws § 187 reporters note (collecting cases).

<sup>32</sup> Michael Gruson, *Governing Law Clauses in Commercial Agreements -- New York’s Approach*, 18 COLUM. J. TRANSNAT’L L. 323, 362-63 (1980).

<sup>33</sup> Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: A Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1975, 1979-83 (2006).

<sup>34</sup> See John F. Coyle, *The Role of the CISG in U.S. Contract Practice: An Empirical Study*, 38 U. PA. J. INT’L L. (forthcoming 2016); Gilles Cuniberti, *The Laws of Asian International Business Transactions*, 25 PAC. RIM L. & POL’Y J. 35 (2016) (finding that English law, U.S. law, and Singapore law dominate the market for law in international



closely linked to the choice of forum. The parties will typically want the chosen forum to be the same as the chosen law.<sup>35</sup> Indeed, in many cases they may care more about the choice of forum than the choice of law.<sup>36</sup> To the extent that one party prevails on the choice-of-forum issue, it is also likely to prevail on the choice-of-law issue.<sup>37</sup>

There is an extensive academic literature that explores the question as to why parties choose to have their contracts governed by the law of states such as New York or Delaware. Some scholars have argued that sophisticated businesses are more likely to choose New York as the law to govern their agreement because they prefer that state's more formal approach to contract interpretation.<sup>38</sup> Others have argued that the choice of forum drives the choice of law and that the courts in Delaware and New York are generally perceived as more sophisticated with respect to commercial issues than courts in other jurisdictions.<sup>39</sup> The parties' preferences may also vary depending on the type of contract at issue.<sup>40</sup> Whatever the parties' precise motivations for choosing the law of a particular state, the focus on the identity of the chosen jurisdiction has cast a long shadow over the academic literature relating to choice-of-law clauses. Scholars have paid little attention to the question of how courts should go about interpreting the other language in the clause, i.e. the language that does not specifically relate to the governing jurisdiction.

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contracts in Asia); Gilles Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws*, 34 NW. J. INT'L L. & BUS. 455 (2014).

<sup>35</sup> See Symeon Symeonides, *Choice of Law in the American Courts in 2015: Twenty-Ninth Annual Survey*, 64 AM. J. COMP. L. 221, 239 (2016) (observing that choice-of-law clauses and forum selection clauses "almost always" select the same jurisdiction); Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1506 (2009) (observing that "contracts overwhelmingly specify the place of choice of law as the choice of forum"); Eisenberg & Miller, *supra* note 33, at 1981 ("If a particular state's law is chosen, that state's forum is also very likely to be selected.").

<sup>36</sup> See George A. Zaphiriou, *Choice of Forum and Choice of Law Clauses in International Commercial Agreements*, 3 MD. J. INT'L L. 311, 311 (1978) ("The initial concern when drafting a transnational agreement is to determine first, the forum for resolving disputes related to the agreement, and secondly, the law governing its validity, interpretation and performance."); see also E-mail to Author from In-House Counsel at U.S. Energy Company, *supra* note 30 ("In truth, I usually worry more about the venue than the choice of law.").

<sup>37</sup> See *supra* note 35; see also SYMEON SYMEONIDES, CHOICE OF LAW 444 n. 52 (2016) (observing that it is exceedingly rare to find a contract in which the chosen forum is different from the chosen law).

<sup>38</sup> See John C. Coates IV, *Managing Disputes Through Contract: Evidence from M&A*, 2 HARV. BUS. L. REV. 295, 322-23 (2012); Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023, 1101-1103 (2009); see also Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1480-87 (2009); Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: A Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1975, 1979-83 (2006); Sarath Sanga, *Choice of Law: An Empirical Analysis*, 11 J. EMPIRICAL LEGAL STUD. 894, 902-03 (2014).

<sup>39</sup> See Juliet P. Kostritsky, *Context Matters—What Lawyers Say About Choice of Law Decisions in Merger Agreements*, 13 DEPAUL BUS. & COMM. L.J. 211, 213-17 (2015).

<sup>40</sup> See generally Adam B. Badawi, *Interpretive Preferences and the Limits of the New Formalism*, 6 BERKELEY BUS. L.J. 1 (2009) (arguing that cotton and diamond merchants have a preference for formal interpretation of their contracts but that these preferences are not necessarily shared by parties entering into construction or tailored software contracts).

## B. The Problem of Boilerplate

The term “boilerplate” is typically understood to refer to any standardized term in a contract that is used repeatedly across many different individual agreements.<sup>41</sup> The typical choice-of-law clause fits comfortably within this definition.<sup>42</sup> The use of standardized contract language presents obvious interpretive challenges to the courts. The goal of contract interpretation is commonly said to be to give effect to the “intent” of the parties.<sup>43</sup> The best evidence of this intent, in turn, is said to be the language of the agreement.<sup>44</sup> When the contract language consists of non-negotiated boilerplate, however, then an inquiry into the actual intent of the specific parties to a particular agreement presents clear challenges.<sup>45</sup> The parties are using the same language as have thousands of other parties in thousands of other contracts. Under these circumstances, it is difficult to divine any meaningful evidence of these particular parties’ “intent” by parsing the language of the contract.<sup>46</sup>

In light of these challenges, the courts have recognized that boilerplate contract language is entitled to special treatment in two specific contexts. A number of courts have held that boilerplate provisions in financial agreements (such as bond indentures) should be given a consistent interpretation because this allows the underlying financial instrument to be priced and traded.<sup>47</sup> Some courts have also held, following the Second Restatement of Contracts, that standard form contracts issued by a particular company (such an insurance company) should not be subjected to divergent interpretations by different courts.<sup>48</sup> In these contexts, the courts have recognized that boilerplate contract language should be given a uniform and consistent interpretation without regard to the idiosyncratic views of the specific litigants to a

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<sup>41</sup> Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1191 (2006); Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1111 (2006) (describing boilerplate as possessing “a private meaning, not between the two parties to the contract, but between the courts and the sophisticated drafter”).

<sup>42</sup> BLACK’S LAW DICTIONARY 167 (7<sup>th</sup> ed., 1999).

<sup>43</sup> *Hartford Casualty Ins. Co. v. Swift Distribution, Inc.*, 59 Cal. 4th 277, 288 (Cal. 2014); *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (N.Y. 2002).

<sup>44</sup> *Id.*

<sup>45</sup> Where the contract in question is a contract of adhesion, then the utility of such an inquiry is even more dubious. See *Assicurazioni Generali, S.P.A. v. Clover*, 195 F.3d 161, 165 (3d Cir. 1999) (“We recognize that courts sometimes do not enforce choice of law clauses in adhesion contracts due to the differential in bargaining power between the parties.”).

<sup>46</sup> HAY ET AL., *supra* note 2, at 1145 (“[T]oo many choice-of-law clauses are poorly or haphazardly drafted (and often copied wholesale from other contracts or cases). As such, these clauses provide a very weak basis from which to safely infer that the parties did or did not contemplate non-contractual issues.”).

<sup>47</sup> See *Broad v. Rockwell Int’l Corp.*, 642 F.2d 929, 947 (5th Cir. 1981) (en banc).

<sup>48</sup> See *Kolbe v. BAC Home Loans Servicing, LP*, 738 F.3d 432, 440 (1st Cir. 2013) (“When a contract uses uniform language that is contained in a large number of contracts, as is the case here, it is a well-established common law principle of contract interpretation that such contracts are interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.”) (citing RESTATEMENT (SECOND) OF CONTRACTS § 211(2)); *Bank of N.Y. Mellon Trust Co. v. Liberty Media Corp*, 29 A.3d 225, 241 (Del. 2011) (“[I]n interpreting boilerplate indenture provisions, courts will not look to the intent of the parties, but rather the accepted common purpose of such provisions.”) (internal quotation marks and citations omitted).

particular dispute. In furtherance of this end, some courts have held that the task of interpreting boilerplate terms is a question of law for the judge rather than a question of fact for the jury.<sup>49</sup> They have also deferred to prior decisions interpreting these terms even when these decisions were rendered in other jurisdictions.<sup>50</sup> While these rules are not universally followed, they constitute a form of “best judicial practice” when it comes to the interpretation of boilerplate language.<sup>51</sup>

To date, the courts have not expressly invoked any cases involving financial agreements and standard form contracts when construing boilerplate choice-of-law clauses. The courts have, however, developed a number of distinctive canons of construction that are largely in keeping with the intuitions discussed above. These canons—which are deployed exclusively in the context of choice-of-law clauses—are discussed in the next two Parts.

## II. THE LEXICAL CANONS

If one were to review a thousand choice-of-law clauses pulled from actual contracts, one would find that a great many of these clauses were essentially identical. This essential sameness presents an obvious interpretive challenge to courts.<sup>52</sup> How can one determine the parties’ intent based on boilerplate language that has been used verbatim by countless other contracting parties? In response, the courts have developed four canons of construction that assign a presumptive meaning to particular words and phrases in these clauses. The Article refers to these canons as the lexical canons. The first is the canon in favor of internal law. The second is the canon in favor of substantive law. The third is the canon of linguistic equivalence. The fourth is the canon of federal inclusion and preemption.

### A. The Canon in Favor of Internal Law

When a choice-of-law clause stipulates that it will be governed by the “law” or “laws” of a particular U.S. state, it is ambiguous whether the parties intended for the contract to be governed by the *whole law* of the state or by the *internal law* of the state. The whole law of the

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<sup>49</sup> Sharon Steel Corp. v. Chase Manhattan Bank, N.A., 691 F.2d 1039, 1048 (2d Cir. 1982) (“There are no adjudicative facts relating to the parties to the litigation for a jury to find and the meaning of boilerplate provision is, therefore, a matter of law rather than fact.”); *see also* Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Ltd., 52 F. App’x 528, 530 (2d Cir. 2002); Liverso v. SouthTrust Bank of Ala., 18 F.3d 1527, 1534 (11th Cir. 1994); Bank of N.Y. v. Tyco Int’l Grp., S.A., 545 F. Supp. 2d 312, 319 (S.D.N.Y. 2008); Drage v. Santa Fe Pac. Corp., No. 67966, 1995 WL 396370, at \*5 (Ohio Ct. App. July 3, 1995).

<sup>50</sup> *See* Morgan Stanley & Co. v. Archer Daniels Midland Co, 570 F. Supp. 1529, 1541-42 (S.D.N.Y. 1983); *see also* Diane Lourdes Dick, *Confronting the Certainty Imperative in Corporate Finance Jurisprudence*, 2011 UTAH L. REV. 1461, 1475-1477 (collecting cases).

<sup>51</sup> *Cf.* Royce de R. Barondes, *Vestigial Literalism in the Interpretation of Corporate Financing Instruments*, 15 TRANSACTIONS: THE TENNESSEE JOURNAL OF BUSINESS LAW 239 (2014) (describing various judicial approaches to interpreting boilerplate provisions in corporate financing instruments).

<sup>52</sup> Roadway Package Sys. v. Kayser, 257 F.3d 287, 288-289 (3d Cir. 2001) (observing that “a generic choice-of-law clause tells us little (if anything) about” the intentions of the contracting parties).

state includes the state's conflict-of-laws rules. The internal law of the state does not. The distinction is significant because the application of the whole law of state—including its conflict-of-laws rules—may result in the application of the law of a state other than the one named in the choice-of-law clause.<sup>53</sup> In practice, the courts presume that the word “law” or “laws” in this context refers to the internal law of the chosen state. This is the *canon in favor of internal law*.<sup>54</sup> The most commonly cited justification for this canon is that the purpose of a choice-of-law clause is to ensure a uniform choice of law, irrespective of forum, and that this purpose is best furthered by interpreting the term “law” or “laws” to refer to a body of laws that cannot redirect the parties to the law of still another jurisdiction.

The classic exposition of this canon can be found in *Siegelman v. Cunard White Star*.<sup>55</sup> In that case, a woman suffered an injury while aboard a cruise ship. The ticket issued by the vessel's operator stipulated that all suits for bodily injury had to be brought within a year of the injury and that “[a]ll questions arising on this contract ticket shall be decided according to English Law.”<sup>56</sup> After the woman died, her estate brought a claim against the cruise operator in federal district court.<sup>57</sup> The suit was, however, brought more than one year after the injury had occurred.<sup>58</sup> The trial court concluded that the choice-of-law clause selecting English law was enforceable and that the contract provision limiting the time in which suit could be brought was valid under English law.<sup>59</sup> The plaintiff appealed this decision to the Second Circuit.

On appeal, the Second Circuit weighed the question of how best to interpret the clause. After determining that the issue was to be decided under federal conflict-of-laws rules, the court observed that the “the provision that English law should govern must be taken to represent the intention of both parties.”<sup>60</sup> One of the key interpretive issues was whether the word “Law” referred to the whole law of England—including its conflict-of-laws rules—or by the internal law of England. The court concluded that the word “Law” referred exclusively to the internal law of England:

We think the provision must be read as referring to the [internal] law alone, for surely the

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<sup>53</sup> This is generally known as the problem of *renvoi*. See BLACK'S LAW DICTIONARY 1300 (7<sup>th</sup> ed. 1999) (defining “renvoi” as “[t]he doctrine under which a court resorting to foreign law adopts as well the foreign law's conflict-of-laws principles, which may in turn refer the court back to the law of the forum”).

<sup>54</sup> This is the choice-of-law canon that has attracted the most attention in the academic literature to date. See RESTATEMENT (SECOND) ON CONFLICT OF LAWS § 187(3) cmt. h. (“When they choose the state which is to furnish the law governing the validity of their contract, the parties almost certainly have the ‘local law,’ rather than the ‘law,’ of that state in mind. To apply the ‘law’ of the chosen state would introduce the uncertainties of choice of law into the proceedings and would serve to defeat the basic objectives, namely those of certainty and predictability, which the choice-of-law provision was designed to achieve.”).

<sup>55</sup> 221 F.2d 189 (2d Cir. 1955).

<sup>56</sup> *Id.* at 193.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* In light of the fact that the contract at issue was clearly a contract of adhesion, the accuracy of this statement is subject to question.

major purpose of including the provision in the ticket was to assure Cunard of a uniform result in any litigation no matter where the ticket was issued or where the litigation arose, and this result might not obtain if the ‘whole’ law of England were referred to.<sup>61</sup>

The court thus concluded perhaps inaccurately, given that it was dealing with a boilerplate provision in a contract of adhesion—that both parties intended that English law would govern the contract. The court then cited the need to ensure a uniform choice of law, irrespective of forum, as a rationale for why the parties must have wanted to choose the internal law of England rather than its whole law.

In 2003, a federal court in the Southern District of New York invoked a similar rationale in support of applying this canon. In *Weiss v. La Suisse, Société d’Assurances sur la Vie*, the court was called upon to interpret an insurance contract that contained a choice-of-law clause stating that the agreement was to be governed by “Swiss law.”<sup>62</sup> The plaintiffs argued that this clause referred to the whole law of Switzerland, including its conflict-of-laws rules, and that that the application of Swiss conflict-of-laws rules would result in the selection of New York law. The court rejected this argument. It first noted that “courts typically do not apply a conflicts analysis - let alone the conflicts law of the state whose law has been selected as governing - where the parties have expressly provided that a certain law applies.”<sup>63</sup> It then went on to note that the purpose of a choice-of-law clause is to achieve a uniform result and that this result is undermined if the term “law” is interpreted to refer to the whole law of a particular jurisdiction:

[The insurer] included the choice of law provision in the insurance policies to create some predictability regarding the interpretation of its insurance contracts which are sold throughout the world. Were I to follow Plaintiffs’ analysis, there would be no such predictability. In some cases Swiss law might apply; in others, Israeli, English or U.S. law might apply - all because Swiss conflicts-of-law principles (rather than its substantive law principles) point back to the law of the beneficiaries’ state.<sup>64</sup>

In *Weiss*, as in *Siegelman*, the court reasoned that since the purpose of a choice-of-law clause is to reduce uncertainty and to ensure a uniform choice of law, the parties must have intended to select the internal law of the Switzerland, as opposed to its whole law, to govern their agreement.<sup>65</sup> This is the canon in favor of internal law.

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<sup>61</sup> *Id.* at 194.

<sup>62</sup> 293 F. Supp. 2d 397, 402 (S.D.N.Y. 2003).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*; see also *Reger v. National Assoc. of Bedding Mfrs. Group Ins. Trust Fund*, 83 Misc. 2d 527, 544 (N.Y. Sup. Ct. 1975) (“In the court’s opinion the parties to the group policy obviously intended only Illinois internal law to apply. To look to the whole law of Illinois would serve to introduce uncertainty.”).

<sup>65</sup> See generally *Ministers & Missionaries Benefit Bd. v. Snow*, 26 N.Y.3d 466, 470 (N.Y. 2015) (“New York courts should not engage in any conflicts analysis where the parties include a choice-of-law provision in their contract . . . To do otherwise — by applying New York’s statutory conflict-of-laws principles, even if doing so results in the application of the substantive law of another state — would contravene the primary purpose of including a choice-of-law provision in a contract — namely, to avoid a conflict-of-laws analysis and its associated time and expense.”).

The canon in favor of internal law is followed by U.S. courts almost without exception.<sup>66</sup> There is only a single reported case in the past century in which a court interpreted a choice-of-law clause to refer to the whole law of a state.<sup>67</sup> This does not mean, of course, that sophisticated contracting parties do not sometimes draft their choice-of-law clauses so as to address this issue. Consider the following examples:

The validity and interpretation of this Agreement and the legal relations of the Parties to it shall be governed exclusively by *the internal laws, and not the law of conflicts*, of the State of New York.<sup>68</sup>

This Agreement and matters connected with the performance hereof shall be construed, interpreted, applied and governed in all respects in accordance with the laws of California and the United States *without regard to conflict of laws principles*.<sup>69</sup>

This Agreement and the exhibits and schedules hereto shall be governed by and interpreted and enforced in accordance with the laws of the State of New York, *without*

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Such an interpretation would also interfere with, and ignore, the parties' intent, contrary to the basic tenets of contract interpretation."); *IRB-Brasil Resseguros, S.A. v Inepar Invs., S.A.*, 20 N.Y.3d 310, 315 (N.Y. 2012) ("It strains credulity that the parties would have chosen to leave the question of the applicable substantive law unanswered and would have desired a court to engage in a complicated conflict-of-laws analysis, delaying resolution of any dispute and increasing litigation expenses."). In other cases, the courts have applied the presumption in favor of internal law without articulating its underlying rationale. *See, e.g.,* *McPhee v. GE Int'l, Inc.*, 2010 U.S. Dist. LEXIS 42945, 2-3 (S.D.N.Y. May 3, 2010); *Chan v. Society Expeditions*, 123 F.3d 1287 (9th Cir. 1997); *Amoco Rocmount Co. v. Anschutz Corp.*, 7 F.3d 909, 920 (10th Cir. 1993); *Economu v. Borg-Warner Corp.*, 652 F. Supp. 1242, 1246 (D. Conn. 1987).

<sup>66</sup> Very occasionally, one will come across a choice-of-law clause that expressly *chooses* the conflict-of-laws rules of the chosen jurisdiction. *See, e.g.,* Assumption Agreement, dated as of January 10, 2006, by and among Prime Group Reality, L.P., Chicago Title Land Trust Company, Continental Towers Associates-I, L.P., Continental Towers L.L.C., Richard A. Heise, and Roland E. Casati, filed with the SEC on Jan. 18, 2006 ("This Agreement is governed by the laws of the State of Illinois, including its choice of law principles."). It is difficult to discern a rational reason for drafting a choice-of-law clause in this manner if the parties' goal is to realize a greater degree of certainty as to governing law.

<sup>67</sup> *See Carlos v. Philips Business Systems, Inc.*, 556 F. Supp. 769, 774 (E.D.N.Y. 1983) ("While it is true that the parties designated New York law as controlling it is also true that the reference to New York law . . . was in no way limited or circumscribed to include only [internal] law. Specifically, it is the finding of the court that the whole law of New York, including its conflicts of law principles, must be referenced on this issue."). There are a number of cases in which the courts have interpreted the word "law" in a particular *statute* to refer to the whole law of a particular state. *See, e.g.,* *Simon v. United States*, 805 N.E.2d 798, 801 (Ind. 2004) ("Under the [Federal Tort Claims Act], a court should apply the whole law, including choice-of-law rules, of the place where the acts of negligence occurred.") (citing *Richards v. United States*, 369 U.S. 1 (1962)); *Burgio v. McDonnell Douglas, Inc.*, 747 F. Supp. 865, 869-70 (E.D.N.Y. 1990) (applying whole law of Louisiana, including its choice of law rules, to issue of damages under the Federal Reservation Act). There are, however, vanishingly few cases in which a court has interpreted the word "law" in a particular *contract* in this same manner.

<sup>68</sup> U.S. Supply and Distribution Agreement, by and among Cobalt Pharmaceuticals Inc., Cobalt Laboratories Inc. and Pfizer Inc., dated as of April 18, 2008, § 13.1 (emphasis added).

<sup>69</sup> Wafer Supply Agreement, by and between Power Integrations International, Ltd. and X-FAB Semiconductor Foundries AG, dated as of Oct. 1, 2010, § 18.4 (emphasis added).

*giving effect to any choice of law or conflict of laws rules or provisions (whether of the State of New York or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of New York.*<sup>70</sup>

There is certainly no harm in drafting choice-of-law clauses in this way.<sup>71</sup> To the extent that such language makes it wholly unnecessary for the courts to apply the canon in favor of internal law, it is to the parties' advantage to include it in their agreements. Given the prevalence of the canon, however, it is unlikely that a U.S. judge would ever conclude that the parties intended to select anything other than the internal law of a particular state when they wrote the word "law" or "laws" into a choice-of-law clause.<sup>72</sup>

## B. The Canon in Favor of Substantive Law

When two parties agree that a contract will be governed by the "laws" of a particular state, it is not altogether clear whether they are choosing to be governed by (1) the substantive law of the state, (2) the procedural law of the state, or (3) both. Substantive law is that body of law that "creates, defines, and regulates the rights, duties, and powers of parties."<sup>73</sup> Procedural law is comprised of rules that "prescribe the steps for having a right or duty judicially enforced."<sup>74</sup> In construing the word "laws" in the context of a choice-of-law clause, U.S. courts have generally concluded that the term encompasses the substantive law of the

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<sup>70</sup> Supply Agreement, by and between Q-Med Scandinavia Inc. and Q-Med AB, dated as of June 2, 2009, § 9.3 (emphasis added).

<sup>71</sup> As a general matter, the third formulation—the one that instructs courts not to apply any conflicts rule that would result in the application of the law of another jurisdiction—is to be preferred. A number of states have enacted statutes that direct courts to apply the law chosen by the parties even in situations where neither the parties nor the contract have a substantial connection to the state. *See, e.g.*, Cal. Civ. Code § 1646.5; 6 Del. Code Ann. § 2708; Fla. Stat. Ann. § 685.101; 735 Illinois Comp. Stats. Ann. 105/5-5; N.Y. Gen. Oblig. Law § 5-1401; Ohio Rev. Code Ann. § 2307.39; Tex. Bus. & Com. Code Ann. § 35.51. Each of these statutes constitutes a conflict-of-laws rule. If a choice-of-law clause provides that the contract shall be governed by the law of a state "without regard to conflict of laws principles," then a court could in theory read it as evidencing the parties' intent that these statutes not apply. *See* Michael Gruson, *Governing Law Clauses Excluding Principles of Conflict of Laws*, 37 INT'L L. 1023, 1025 (2003). It is highly unlikely that this is what the parties intended. The third formulation discussed avoids this problem by limiting the exclusion to only those conflicts rules that would result in the application of the law of another jurisdiction.

<sup>72</sup> *See, e.g.*, IRB-Brasil Resseguros, S.A. v Inepar Invs., S.A., 20 N.Y.3d 310, 316 (N.Y. 2012) (stating that the omission of the words "without regard to conflict of laws principles" from a choice-of-law clause was "inconsequential as a matter of law"). GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 318 (2012) (observing that "authorities in most jurisdictions interpret choice-of-law clauses as specifying the applicable substantive (and not conflict of laws) rules, even if an anti-renvoi provision is not included in the text of the clause"); Gruson, *supra* note 71, at 1031 ("No court in the United States has taken the absurd position to give effect to a choice of law clause in order to ignore it.").

<sup>73</sup> Black's Law Dictionary 1443 (7th ed., West 1999).

<sup>74</sup> Black's Law Dictionary 1221 (7th ed., West 1999).

chosen state but that it does not encompass that state's procedural law.<sup>75</sup> This is the *canon in favor of substantive law*.

Two rationales are frequently invoked in support of this canon. The first relates to the administrative costs inherent in applying the procedural rules of a different jurisdiction:

Enormous burdens are avoided when a court applies its own rules, rather than the rules of another state, to issues relating to judicial administration, such as the proper form of action, service of process, pleading, rules of discovery, mode of trial and execution of costs. Furthermore, the burden the court spares itself would have been wasted effort in most instances, because usually the decision in the case would not be altered by applying the other state's rules of judicial administration.<sup>76</sup>

The second rationale is based upon the presumed intent of the parties:

Parties do not usually give thought to matters of judicial administration before they enter into legal transactions. They do not usually place reliance on the applicability of the rules of a particular state to issues that would arise only if litigation should become necessary. Accordingly, the parties have no expectations as to such eventualities, and there is no danger of unfairly disappointing their hopes by applying the forum's rules in such matters.<sup>77</sup>

While these rationales are rarely explicitly invoked in judicial decisions, they explain why courts in the United States will typically construe the word "laws" in a choice-of-law clause to exclude the chosen jurisdiction's procedural laws.<sup>78</sup>

In applying this canon, the courts are frequently called upon to characterize an issue as "substantive" or "procedural." In some cases, this task will be straightforward. A pleading rule, for example, will typically be characterized as a procedural rule.<sup>79</sup> A rule imposing tort liability

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<sup>75</sup> *Stone & Webster, Inc. v. Baker Process, Inc.*, 210 F. Supp. 2d 1177, 1186 (S.D. Cal. 2002) ("[T]he general rule is that a general choice-of-law clause only incorporates state substantive laws, but NOT state procedural laws. State procedural laws must be expressly incorporated into the contract.").

<sup>76</sup> RESTATEMENT, *supra* note 25, at § 122 cmt. a.

<sup>77</sup> *Id.*

<sup>78</sup> *Cole v. Mileti*, 133 F.3d 433, 437 (6th Cir. 1998) (observing that "contractual choice-of-law clauses incorporate only substantive law, not procedural provisions"); *Woodling v. Garrett Corp.*, 813 F.2d 543, 551-552 (2d Cir. 1987) ("The contractual choice of law provision is deemed to import only substantive law, however, not procedural law."); *Stone & Webster, Inc. v. Baker Process, Inc.*, 210 F. Supp. 2d 1177, 1186 (S.D. Cal. 2002) ("[T]he general rule is that a general choice-of-law clause only incorporates state substantive laws, but NOT state procedural laws. State procedural laws must be expressly incorporated into the contract.").

<sup>79</sup> RESTATEMENT (SECOND) ON CONFLICT OF LAWS, *supra* note 25, at § 126; *see also* George Bundy Smith & Thomas J. Hal, *The Enforceability of Choice of Law Provisions*, N.Y. LAW JOURNAL, Apr. 19, 2013 ("New York courts find that, despite a contrary choice of law provision, the law of New York as the forum state governs procedural issues, including . . . personal jurisdiction and motions for default judgment.") (internal citations omitted).



on a negligent actor, by comparison, will typically be characterized as a substantive rule.<sup>80</sup> In other cases, however, the distinction between substance and procedure is more slippery.<sup>81</sup> Courts have long quarreled, for example, over whether statutes of frauds, burdens of proof, and various remedies should be categorized as substantive or procedural.<sup>82</sup> The most contentious dispute in this area, however, and the one that has generated the most litigation in the choice-of-law context, relates to the proper classification of statutes of limitations.

Courts have historically classified statutes of limitations as procedural rather than substantive “on the theory that the passage of the period destroys only the remedy and not the right and remedy is considered procedural and governed by the law of the forum.”<sup>83</sup> In contrast to other procedural rules, however, it is not particularly difficult for courts in one jurisdiction to identify and apply the statute of limitations of another.<sup>84</sup> Accordingly, a number of scholars and commentators have argued that statutes of limitation should generally be treated as substantive.<sup>85</sup> These arguments notwithstanding, most U.S. courts have long held that statutes of limitations are procedural and hence not covered by a standard choice-of-law clause. As the Kansas Court of Appeals has explained:

[T]he prevailing authority indicates that, unless the parties expressly agree to apply the statute of limitations of another state, general choice of law provisions in contracts incorporate only substantive law and do not displace the procedural law of the forum state.<sup>86</sup>

The New York Court of Appeals has adopted a similar position:

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<sup>80</sup> RESTATEMENT (SECOND) ON CONFLICT OF LAWS, *supra* note 25, at § 145.

<sup>81</sup> See HAY ET AL., *supra* 2, at 1137-41; H.L. McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws*, 78 U. PA. L. REV. 933, 942 (1930). A complicating factor in this analysis is the line of cases decided pursuant to the *Erie* doctrine that classifies legal issues as “substantive” or “procedural” for purposes of determining whether they should be governed by federal or state law. While it may be tempting to look to the *Erie* cases for guidance, an inquiry into whether an issue is substantive or procedural for purposes of resolving conflicts between the laws of two co-equal states presents issues that are distinct from the task of resolving conflicts between the laws of a state and the federal government. See *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1180 n.9 (3d Cir. 1992). Accordingly, the drafters of the Restatement urge courts to avoid “unthinking adherence to precedents that have classified a given issue as ‘procedural’ or ‘substantive.’” RESTATEMENT (SECOND) ON CONFLICT OF LAWS, *supra* note 25, at 122 cmt. b; see also *Gilmore v. Gilmore* (In re Estate of Gilmore), 124 N.M. 119, 122 (N.M. Ct. App. 1997) (“The problems arise when a perfectly sound decision in one area of the law classifies a matter as ‘substantive’ or ‘procedural’ and then a court considering another area of the law blindly applies the precedent despite the different considerations that should come into play.”).

<sup>82</sup> See BRILMAYER ET AL., *CONFLICT OF LAWS: CASES AND MATERIALS* 135 (7th ed. 2015).

<sup>83</sup> *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 136 (N.J. 1973).

<sup>84</sup> See Laura Cooper, *Statutes of Limitations in Minnesota Choice of Law: The Problematic Return of the Substance-Procedure Distinction*, 71 MINN. L. REV. 363, 378-79 (1986) (surveying literature).

<sup>85</sup> See RESTATEMENT (SECOND) ON CONFLICT OF LAWS § 142 (rev. 1988) (“Whether a claim will be maintained against the defense of the statute of limitations is determined under [general choice-of-law principles.]”); R. LEFLAR, *AMERICAN CONFLICTS OF LAW*, § 128, at 256 (3d ed. 1977) (“There is no inherent reason why the choice between statutes of limitations should be handled any differently than other choice-of-law problems.”).

<sup>86</sup> *Western Video Collectors, L.P. v. Mercantile Bank*, 23 Kan. App. 2d 703, 705-706 (Kan. Ct. App. 1997).

Choice of law provisions typically apply to only substantive issues and statutes of limitations are considered “procedural” because they are deemed as pertaining to the remedy rather than the right. There being no express intention in the agreement that Delaware’s statute of limitations was to apply to this dispute, the choice of law provision cannot be read to encompass that limitations period.<sup>87</sup>

The view that statutes of limitations are generally procedural—and hence not covered by a generic choice-of-law clause—is followed by state and federal courts in approximately thirty U.S. states.<sup>88</sup>

This general rule notwithstanding, a substantial minority of jurisdictions in the United States have taken the opposite position. The courts in Florida, for example, have held that statutes of limitations are substantive and hence covered by a standard choice-of-law clause.<sup>89</sup> As the U.S. District Court for the Southern District of Florida has explained:

Florida courts consider the statute of limitations to be substantive, and therefore the statute of limitations of the parties’ chosen [jurisdiction] will apply where there exists a contractual choice of laws provision.<sup>90</sup>

Courts in a number of other states have reached similar conclusions regarding the proper

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<sup>87</sup> Portfolio Recovery Assocs., LLC v. King, 14 N.Y.3d 410, 416 (N.Y. 2010). *But see* Am. S.S. Owners Mut. Prot. & Indem. Ass’n v. Dann Ocean Towing, Inc., 756 F.3d 314, 319 (4th Cir. 2014) (concluding that a choice-of-law clause selecting New York law encompassed New York statutes of limitations).

<sup>88</sup> See *Etheredge v. Genie Indus., Inc.*, 632 So. 2d 1324, 1326 (Ala. 1994) (Alabama); *Alaska Airlines, Inc. v. Lockheed Aircraft Corp.*, 430 F. Supp. 134, 139 (D. Alaska 1977) (Alaska); *Middleton v. Lockhart*, 355 Ark. 434, 438 (Ark. 2003) (Arkansas); *Midland Funding, LLC v. Wiczorkowski*, 2015 Conn. Super. LEXIS 1091 (Conn. Super. Ct. May 13, 2015) (Connecticut); *Pivotal Payments Direct Corp. v. Planet Payment*, 2015 Del. Super. LEXIS 1058 (Del. Super. Ct. Dec. 29, 2015) (Delaware); *Griffin v. Hunt Ref. Co.*, 292 Ga. App. 451, 453 (Ga. Ct. App. 2008) (Georgia); *Belleville Toyota v. Toyota Motor Sales, U.S.A.*, 199 Ill. 2d 325, 351-352 (Ill. 2002) (Illinois); *Smither v. Asset Acceptance, LLC*, 919 N.E.2d 1153, 1158 (Ind. Ct. App. 2010) (Indiana); *Harris v. Clinton Corn Processing Co.*, 360 N.W.2d 812, 814 (Iowa 1985) (Iowa); *Conway v. Portfolio Recovery Assocs., LLC*, 13 F. Supp. 3d 711, 715 (E.D. Ky. 2014) (Kentucky); *Tornesello v. Tisdale*, 2008 ME 84, P14 (Me. 2008) (Maine); *Lewis v. Waletzky*, 422 Md. 647, 664, 31 A.3d 123, 133 (2011) (Maryland); *Zurich Am. Ins. Co. v. Goodwin*, 920 So. 2d 427, 433 (Miss. 2006) (Mississippi); *Hemar Ins. Corp. of Am. v. Ryerson*, 108 S.W.3d 90, 95 (Mo. Ct. App. 2003) (Missouri); *Nez v. Forney*, 109 N.M. 161, 162-164 (N.M. 1989) (New Mexico); *Eagle Nation, Inc. v. Mkt. Force, Inc.*, 180 F. Supp. 2d 752, 756 (E.D.N.C. 2001); *Martin Marietta Materials, Inc. v. Bondhu, LLC*, 772 S.E.2d 143, 146 (N.C. Ct. App. 2015) (North Carolina); *Taylor v. First Resolution Inv. Corp.*, 2016-Ohio-3444, P36 (Ohio June 16, 2016) (Ohio); *Retail Pharm. Mgmt. Servs. v. Amerisourcebergen Drug Corp.*, 2013 U.S. Dist. LEXIS 15377 (E.D. Okla. Feb. 5, 2013) (Oklahoma); *Wilson v. Transp. Ins. Co.*, 2005 PA Super 401, P12 (Pa. Super. Ct. 2005) (Pennsylvania); *Illinois Tool Works, Inc. v. Harris*, 194 S.W.3d 529, 532 (Tex. App. 2006) (Texas); *Federated Capital Corp. v. Libby*, 2016 UT 41, P13 (Utah 2016) (Utah); *RMS Tech., Inc. v. TDY Indus.*, 64 F. App’x 853, 857 (4th Cir. 2003) (Virginia); *cf. Bartlett v. Commerce Ins. Co.*, 167 N.H. 521, 526 (N.H. 2015) (“[W]e treat statutes of limitations as procedural in any case in which either party is a New Hampshire resident or the cause of action arose. In a case in which no party is a New Hampshire resident and the cause of action did not arise in this state, we treat statutes of limitations as substantive.”).

<sup>89</sup> *Adm’r v. Sullivan*, 753 So.2d 549, 553 (Fla. 1999); *Merkle v. Robinson*, 737 So.2d 540 (Fla. 1999).

<sup>90</sup> *Gaisser v. Portfolio Recovery Assocs., LLC*, 571 F. Supp. 2d 1273, 1276 (S.D. Fla. 2008).

characterization of statutes of limitations.<sup>91</sup> In addition, the legislatures in seven states have adopted the Uniform Conflict of Laws—Limitation Act, which makes clear that limitations periods should generally be “governed by the limitations law of a state whose law governs other substantive issues inherent in the claim.”<sup>92</sup> In states where the statutes of limitations is treated as substantive, therefore, the maximum time after an event within which a suit must be brought will be determined by reference to the law of the jurisdiction selected by the parties.<sup>93</sup>

While most U.S. courts have hewed closely to the distinction between substance and procedure in determining whether choice-of-law clauses cover statutes of limitations, the courts in California have charted a different course. In *Hambrecht & Quist Venture Partners v. American Medical International*, the California Court of Appeals was presented with a choice-of-law clause which stated that “[t]he transactions contemplated by and the provisions of this Agreement shall be governed by and construed in accordance with the laws of the State of Delaware.”<sup>94</sup> The plaintiff argued that this clause did not encompass the Delaware statute of limitations and that the court should apply the statute of limitations of the forum.<sup>95</sup> The defendants argued that the clause selected the Delaware statute of limitations and that the plaintiff’s cause of action was therefore time barred.<sup>96</sup>

The court began its analysis by asking whether the word “laws” in the clause should be read to include the chosen state’s statute of limitations. It observed that “[t]here is no word in the language which in its popular and technical application takes a wider or more diversified signification than the word ‘law’—its use in both regards is illimitable.”<sup>97</sup> It then reasoned that, in light of this broad definition, a state’s “laws” must include its statute of limitations.<sup>98</sup> The court further noted that the Second Restatement took the position that the term “law” in a choice-of-law clause generally referred to “local law” of the chosen state and that this local law

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<sup>91</sup> See *Jackson v. Chandler*, 204 Ariz. 135, 137 (Ariz. 2003); *Dillon v. Dillon*, 126 Idaho 472 (Idaho 1994); *Sutherland v. Kennington Truck Serv.*, 454 Mich. 274, 290 (Mich. 1997); *Cornett v. Johnson & Johnson*, 211 N.J. 362, 374 (N.J. 2012); *Nierman v. Hyatt Corp.*, 441 Mass. 693, 695 (Mass. 2004); *Harodite Indus. v. Warren Elec. Co.*, 24 A.3d 514, 535 (R.I. 2011); *Wenke v. Gehl Co.*, 2004 WI 103, P58 (Wis. 2004).

<sup>92</sup> Unif. Conflict of Law-Limitations Act § 2 cmt., 12 U.L.A. 63 (Supp. 1994); see Colo. Rev. Stat. Ann. 13-82-104; Minn. Stat. § 541.31; Mont. Code Ann. 27-2-503; Neb. Rev. Stat. § 25-3203; N.D. Cent. Code 28-01.2-02; Or. Rev. Stat. § 12.430; Wash. Rev. Code 4.18.020-904.

<sup>93</sup> See, e.g., *Unifund CCR Partners v. Sunde*, 163 Wn. App. 473, 485 (Wash. Ct. App. 2011). While the courts in Massachusetts have also taken the position that statutes of limitations are substantive rather than procedural, they do not automatically assume that the parties’ choice of law encompasses the chosen state’s statute of limitations. Instead, the Massachusetts courts will conduct a conflict-of-laws analysis to determine whether the forum or the chosen state has the more significant relationship with the parties *even when* a contract contains a choice-of-law clause, apparently on the theory that such clauses do not clearly evidence the parties’ intent to select the chosen jurisdiction’s statute of limitations. See *New England Tel. & Tel. Co. v. Gourdeau Constr. Co.*, 647 N.E.2d 42, 45 (Mass. 1995); see also *Martin v. Law Offices of Howard Lee Schiff, P.C.*, 2012 U.S. Dist. LEXIS 185752 at \*7 (D.R.I. Dec. 10, 2012).

<sup>94</sup> 38 Cal. App. 4th 1532, 1539 (Cal. App. 2d Dist. 1995).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 1540 (internal quotation marks and citations omitted).

<sup>98</sup> *Id.*

“undoubtedly includes its statutes of limitations.”<sup>99</sup> Accordingly, the court concluded that the word “laws” in the clause incorporated Delaware’s statute of limitations:

In light of the broad meaning of “law” and of its interpretation by the courts and the Restatement to include the statutes of limitations, we find that the August agreement incorporated Delaware’s statutes of limitations. We therefore decline plaintiffs’ invitation to read the choice-of-law provision as if it incorporated only the substantive law of Delaware, i.e., excluded Delaware procedural law. Although statutes of limitations may be viewed as procedural rather than substantive in some contexts, the choice-of-law clause in this case does not make a distinction along those lines. It simply incorporates the “laws” of Delaware without using any adjectives or other qualifiers . . . In any event, we will not read into the agreement’s unqualified language a restriction that the parties could easily have inserted but failed to include.<sup>100</sup>

The court then went to explain why this analytical framework was superior to relying on the established dichotomy between substance and procedure:

We also find inapposite those cases holding that a standard choice-of-law clause does not include the chosen state’s statutes of limitations. Each of those decisions rested on the “traditional” conflict of laws principle that the forum state should apply its own statutes of limitations to all claims brought within its courts. Plainly, if a state’s conflict of laws principles dictate that its own statutes of limitations routinely be applied, the courts of that jurisdiction will be less inclined to construe a standard choice-of-law provision as mandating that a foreign statute of limitations apply. While California courts once followed the traditional approach to conflicts issues, the [California] Supreme Court abandoned that analysis over 25 years ago and adopted instead the “governmental interest” approach. Thus, California’s conflict of laws principles treat the statute of limitations in the same manner as any other issue, and the courts of this state do not automatically apply California’s statutes of limitations in every case.<sup>101</sup>

Subsequent cases in California have similarly construed standard choice-of-law clauses so as to incorporate the statutes of limitations of the state named in the clause.<sup>102</sup>

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<sup>99</sup> *Id.* at 1542. This analysis is not entirely persuasive. The reference to “local law” is more fairly read to distinguish between a jurisdiction’s internal law and its whole law. It does not address the distinction between a jurisdiction’s procedural law and its substantive law.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> See, e.g., *ABF Capital Corporation v. Berglass*, 130 Cal.App.4th 825, 836 (2005); *Hughes Electronics Corp. v. Citibank Delaware*, 120 Cal.App.4th 251, 257-58 (2004). One federal district court judge in Wisconsin has adopted a similar approach. See *Jahn v. 1-800-Flowers, Inc.*, 2002 U.S. Dist. LEXIS 28135, 27-28 (W.D. Wis. Oct. 21, 2002) (“In my view, the issue is not whether a statute of limitations is ‘substantive’ or ‘procedural,’ but more directly whether the terms of the choice of law provision encompass the statute of limitations.”); see also *Haley v. Kolbe & Kolbe Millwork Co.*, 2015 U.S. Dist. LEXIS 77542 at \*20-23 (W.D. Wis. June 15, 2015) (concluding that the use of the phrase “governed by” connoted an intent to select the statute of limitations of the chosen jurisdiction).

In summary, the courts in the majority of U.S. states classify statutes of limitations as procedural and hence not covered by standard choice-of-law clauses.<sup>103</sup> These courts will apply the statutes of limitations of the forum. Courts and legislatures in a sizable minority of states classify statutes of limitations as substantive and hence covered by standard choice-of-law clauses.<sup>104</sup> These courts will apply the statutes of limitation of the jurisdiction selected by the clause.<sup>105</sup> It follows, therefore, that while states may disagree as to whether statutes of limitations are substantive or procedural, most states utilize the canon in favor of substantive law to decide whether statutes of limitations are or are not covered by a typical choice-of-law clause.

It is, of course, possible for the parties to draft their choice-of-law clauses so as to make it wholly unnecessary to apply the canon in favor of substantive law.<sup>106</sup> Consider the following examples:

The validity of this Agreement and the interpretation and performance of all of its terms shall be governed by the *substantive and procedural laws* of the State of Utah.<sup>107</sup>

This Agreement and the transactions contemplated hereby . . . shall be construed in accordance with and governed by the laws (*including statutes of limitations*) of the State

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<sup>103</sup> See *supra* notes 86-88 & accompanying text.

<sup>104</sup> See *supra* notes 89-93 & accompanying text.

<sup>105</sup> As discussed above, the courts of California will apply the statutes of limitations of the jurisdiction named in the clause not because they view these statutes as “substantive” but because they interpret the word “laws” as used in the typical clause to include statutes of limitations. See *supra* notes 94-102 & accompanying text.

<sup>106</sup> The ability of the parties to shorten the statute of limitations by selecting the law of another jurisdiction with a shorter limitations period may in some instances be limited by state law. Compare *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586, 608 (1947) (“[I]n the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period.”) with Ala. Code § 6-2-15 (“Except as may be otherwise provided by the Uniform Commercial Code, any agreement or stipulation, verbal or written, whereby the time for the commencement of any action is limited to a time less than that prescribed by law for the commencement of such action is void.”). Courts and legislatures in Florida, Idaho, Maryland, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, Texas, and Vermont have also imposed limits on the parties’ ability to shorten otherwise applicable statutes of limitation by contract. See Fla. Stat. Ann. § 95.03; Idaho Code Ann. § 29-110; Md. Insurance Code Ann. § 12-104; Miss. Code Ann. § 15-1-5; Mo. Rev. Stat. § 431.030; Mont. Code Ann. § 28-2-708; 15 Okl. St. § 216; S.C. Code Ann. § 15-3-140; S.D. Codified Laws § 53-9-6; Tex. Civ. Prac. & Rem. Code Ann. § 16.070(a); Vt. Stat. Ann. § 12-465; see also *Intervision Sys. Techs. v. Intercall, Inc.*, 23 Neb. App. 360, 365 (Neb. Ct. App. 2015). However, the extent to which these rules practically limit the ability of the parties to select a shorter statute of limitations via a choice-of-law clause is unclear. The Florida Supreme Court, for example, has held that the parties may shorten the applicable statute of limitations indirectly by selecting the law of another jurisdiction even though Florida has enacted a statute that generally prohibits parties from shortening statutes of limitation directly via a contractual provision. See *Burroughs Corp. v. Suntogs of Miami, Inc.*, 472 So. 2d 1166, 1169 (Fla. 1985).

<sup>107</sup> Settlement and Release Agreement, dated as of October 14, 2015, by and between Nu Skin Enterprises, Inc., and Daniel R. Chard, § 12, filed with the SEC on October 16, 2015 (emphasis added). There are, of course, practical limits on the ability of the parties to choose the entire procedural law of a different state. See S.I. Strong, *Limits of Procedural Choice of Law*, 39 BROOK. J. INT’L L. 1027, 1034 (2014) (“[S]ome boundaries to procedural autonomy must necessarily exist, either as a matter of prudence, policy, or practice.”).

of New York, without regard to conflicts of law principles that would require the application of the laws of another jurisdiction.<sup>108</sup>

This Agreement shall be governed by, construed *and enforced* in accordance with the laws of the State of New York.<sup>109</sup>

When this language is present, the intent of the parties is clear.<sup>110</sup> In the absence of such language, however, most U.S. jurisdictions have concluded that while standard choice-of-law clauses generally cover the substantive law of the chosen jurisdiction, they do not encompass the procedural law of that jurisdiction. This is the canon in favor of substantive law.

### C. The Canon of Linguistic Equivalence

The typical choice-of-law clause comes in one of two varieties. The first states that a contract shall be “interpreted” or “construed” in accordance with the law of a particular state.<sup>111</sup> The second provides that an agreement shall be “governed” by the law of that state.

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<sup>108</sup> Temporary Limited Waiver, dated as of September 14, 2016, by and among Basic Energy Services, Inc., and certain guarantors and lenders, § 9, filed with the SEC on September 15, 2016 (emphasis added).

<sup>109</sup> 2138747 Ontario, Inc. v Samsung C&T Corp., 144 A.D.3d 122, 125 (N.Y. App. Div. 1st Dep’t 2016). When a choice-of-law clause stipulates that a contract is to be “enforced” under the law of a particular jurisdiction, a number of courts have construed the use of that term as evidence of the parties’ intent to select the procedural law of the chosen jurisdiction. *See id.* at 136; *see also* Czewski v. KVH Indus., 607 F. App’x 478, 481 (6th Cir. 2015); *Mills v. Smith*, No. 3:05CV534-S, 2006 U.S. Dist. LEXIS 63564, at \*6-7 (W.D. Ky. Aug. 30, 2006); *Yuen v. Superior Court*, 121 Cal. App. 4th 1133, 1145, 18 Cal. Rptr. 3d 127, 135 (2004).

<sup>110</sup> In many cases, the chosen jurisdiction will have enacted a borrowing statute that directs the courts to apply the statute of limitations of the state where the cause of action arose or accrued. *See, e.g.*, N.Y. CPLR § 202. If a court concludes that the law of the state selected in the clause includes its borrowing statute, then the court could conceivably apply the statute of limitations of a different jurisdiction even if that court views statutes of limitations as procedural. In one recent case, the New York Appellate Division held that a choice-of-law clause stating that a contract was to be “enforced” in accordance with the law of the State of New York evidenced the parties’ intent to select that state’s procedural law. *See* 2138747 Ontario, Inc. v Samsung C&T Corp., 144 A.D.3d 122, 126 (N.Y. App. Div. 1st Dep’t 2016); *see also infra* note 112. The court reasoned that the procedural law of New York included the New York borrowing statute and that it should therefore apply the statute of limitations of the place where the action had accrued—Ontario, Canada—to determine if the claim was timely. It is unlikely that this is the outcome the parties intended. If the clause had instead expressly referred to the “laws of the State of New York, including its statute of limitations,” then it is less likely—though not inconceivable, given the court’s position that the borrowing statute was itself a statute of limitations—that the court would have applied the law of Ontario on this issue. *See* William J. Hine & Sevan Ogulluk, *Standard New York Choice of Law Provisions May Apply Foreign Law to Bar Claims*, 20 N.Y. Bus. L.J. 25, 27 (2016). The best way to contract around this problem is to include language in the choice-of-law clause directing the court to apply the “statute of limitations” of the chosen state “without giving effect to any rule that would result in the application of the laws of a different jurisdiction.” This formulation directs the courts to apply the statute of limitations of the chosen jurisdiction without giving effect to any borrowing statute that would require the court to apply the statute of limitations of another state.

<sup>111</sup> A few courts have distinguished between the act of contract “interpretation” and the act of contract “construction.” *See, e.g.*, *Fashion Fabrics of Iowa, Inc. v. Retail Investors Corp.*, 266 N.W.2d 22, 25 (Iowa 1978) (“Interpretation involves ascertaining the meaning of contractual words; construction refers to deciding their legal effect.”); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 200 cmt. c (“Interpretation is not a determination of the legal effect of words or other conduct. Properly interpreted, an agreement may not be enforceable as a contract, or a term such as a promise to pay a penalty may be denied legal effect, or it may have a legal effect different from

In principle, this linguistic variation could be important. If the court were to conclude that the act of interpreting a contract was fundamentally different from the act of determining the rights and obligations of the parties under the contract, for example, then the parties' choice of words could matter a great deal. In practice, however, most courts have recognized the formulations set forth above are essentially interchangeable. This is the *canon of linguistic equivalence*. This canon posits that it is unlikely that the parties would want to choose the law of one state to interpret their agreement and the law of another state to determine the scope of their rights and obligations under that same agreement. Accordingly, the canon holds that each of the words "interpreted" and "construed" and "governed" is the functional equivalent of the other two in the context of a choice-of-law clause.<sup>112</sup>

To illustrate the workings of this canon, it is useful to focus on the reasoning invoked by three different courts in three different cases. In each of these cases, the courts were interpreting the same choice-of-law clause taken from the same form contract. Although all three courts interpreted the same clause, they did not all reach the same conclusion as to its meaning.

In *Boat Town U. S. A., Inc. v. Mercury Marine Division of Brunswick Corporation*, the Florida Court of Appeals was called upon to determine the proper scope of a contract that stated: "This Agreement and all its provisions are to be interpreted and construed according to the laws of the State of Wisconsin."<sup>113</sup> The issue before the court was whether the parties intended for Wisconsin law to apply only to the *interpretation and construction* of the agreement or whether they also intended for this law to *govern* their substantive rights and obligations under the agreement.<sup>114</sup> The Florida Court of Appeals concluded that the language evidenced the parties' intent that Wisconsin law apply exclusively to interpretive issues:

A distinction exists between the words "interpretation" and "govern." Interpretation is defined as "(t)he art or process of discovering and expounding the meaning of a . . . written document." On the other hand, govern means "to direct and control the actions or conduct of, either by established law or by arbitrary will; to direct and control, rule, or regulate, by authority." The difference between "interpretation" and "govern" is more than a technical distinction. It goes to the very heart of the purpose underlying a contract. [ . . . ] In the instant case, there is no assertion, nor could any be substantiated, that ambiguities exist in the terms of the contract. Thus, the interpretation clause of the

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that agreed upon, as in a case of employment at less than a statutory minimum wage."). So far as I have been able to determine, no U.S. court has ever invoked the distinction in the context of interpreting a choice-of-law clause. In any event, most U.S. courts now view the terms "interpret" and "construe" as interchangeable. *See supra* note 7 (surveying literature on this issue).

<sup>112</sup> Several courts have construed the word "enforced" to evidence the parties' intent to select the procedural law of the chosen jurisdiction. *See supra* note 109. Accordingly, the word "enforced" is not the linguistic equivalent of "governed" or "interpreted" or "construed" and does not fall within the scope of the canon.

<sup>113</sup> 364 So. 2d 15, 17 (Fla. Dist. Ct. App. 4th Dist. 1978).

<sup>114</sup> *Id.*

contract has no effect and does not provide an explicit choice of Wisconsin law to govern the conduct of the parties.<sup>115</sup>

In short, the court concluded that while the parties had specifically selected the law of Wisconsin to resolve any *interpretive* questions arising under the contract, they had failed to make any choice-of-law determination with respect to their *substantive rights and obligations*.<sup>116</sup> In order to achieve this end, the parties would have had to have used the word “govern” in their agreement. Accordingly, the court deemed it necessary to perform a conflict-of-laws analysis to identify the state whose law would determine the rights and obligations of the parties under the contract.<sup>117</sup>

In interpreting the very same choice-of-law clause in *Boatland, Inc. v. Brunswick Corporation*, the Sixth Circuit came to a different conclusion about the meaning of the contractual language:

Brunswick . . . argues that the Interpretation Clause of the contract, which states in part that the contract shall “be interpreted and construed according to the laws of the State of Wisconsin”, means only that Wisconsin law was to give “meaning and effect” to the terms of the contract, rather than to be “governed” by the laws of Wisconsin. This is a strained and narrow construction of the language, which we think is unwarranted. There was no evidence that the parties intended to limit Wisconsin law to the mere interpretation of the terms of the contract. They intended, rather, that the substantive law of Wisconsin should determine their rights and obligations.<sup>118</sup>

The Sixth Circuit goes too far when it states that there is “no evidence” that the parties intended the clause apply exclusively to interpretive issues. The parties did, after all, use the phrase “interpreted and construed” rather than the phrase “governed by.” In the view of the court, however, the former phrase evidenced the parties’ intention to choose the law of Wisconsin to govern all of their substantive rights and obligations. The linguistic distinction between the various phrases was, in the opinion of the court, immaterial.

The Fifth Circuit interpreted this same choice-of-law clause in *C. A. May Marine Supply Company v. Brunswick Corporation*.<sup>119</sup> Its reading of the clause was consistent with that of the Sixth Circuit:

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*; see also *Washington Life Ins. Co. v. Lovejoy*, 149 S.W. 398, 404 (Tex. Civ. App. 1912) (“This language simply provides a rule of law for the construction of the contract. It is evident that the parties were not providing for the contingency of a breach of the contract, nor stipulating that the general rule of law should not govern in case of a breach.”).

<sup>117</sup> At the conclusion of its analysis, the court concluded that Wisconsin law applied because Wisconsin was both the place of contracting and the place of performance. *Id.* at 18.

<sup>118</sup> 558 F.2d 818, 821-822 (6th Cir. 1977).

<sup>119</sup> 557 F.2d 1163, 1164-1166 (5th Cir. 1977).



The court is aware that the term “construe in accordance with” is technically distinguishable from the term “governed by”, but doubts that such a fine distinction was intended by the parties. *In this regard, the court can conceive of few circumstances where resort must be had to state law to determine the meaning of ambiguous terms, but not to impose state substantive law upon the parties.* It seems apparent that, by including the “interpretation and construction” clause in the contract, and by specifically reciting that the contract was entered into in Wisconsin . . . the defendant hoped to insure that Wisconsin law would govern its relations with all its dealers, wherever they may be situated around the country.<sup>120</sup>

Since it was highly unlikely that the parties would go to the trouble of including a choice-of-law clause solely to provide guidance to the courts on how best to interpret ambiguous language within the contract, the Fifth Circuit reasoned, the clause should be read to apply to matters other than those relating to interpretation.

The interpretive rule adopted by the Fifth and Sixth Circuits—the canon of linguistic equivalence—is now followed by the majority of U.S. courts.<sup>121</sup> The reasoning of the Florida Court of Appeals has attracted virtually no adherents. A clause stating that a contract shall be “interpreted” or “construed” in accordance with the law of a state is viewed as the functional equivalent of a clause stating that the contract shall be “governed” by the law of that same state. An appeals court in Wisconsin applied this canon, and offered several additional rationales in support of it, in the context of interpreting a clause stating that a contract was to be “construed” according to Missouri law:

Common sense tells us that the process of construing an agreement includes, in addition to the definition of possible ambiguous terms, the application of the terms to the case in question. This application may require resort to extrinsic sources such as the substantive law. Thus, by indicating the law to be used in construing a contract, the parties effectively involve the substantive law of that state. We . . . can conceive of few instances where it would be reasonable to look to the law of a specific state to define contractual terms but to the law of a second jurisdiction to ascertain the legal effect of the agreement. Such a maneuver would be unreasonable because the meaning associated with a term by one jurisdiction might not mesh with the statutory and common-law scheme of another. The meaning given a word or phrase by the lawmakers

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<sup>120</sup> *Id.* (emphasis added).

<sup>121</sup> See *Kipin Indus. v. Van Deilen Int’l, Inc.*, 182 F.3d 490, 493-494 (6th Cir. 1999); *SPX Corp. v. Shop Equip. Specialists, Inc.*, 2001 U.S. Dist. LEXIS 4602 (W.D. Mich. Mar. 28, 2001); *Eckert Int’l v. Government of Sovereign Democratic Republic of Fiji*, 834 F. Supp. 167, 170 (E.D. Va. 1993); *Enter. Bank & Trust v. Barney Ashner Homes, Inc.*, 300 P.3d 115 (Kan. Ct. App. 2013); *AAA Delivery v. Airborne Freight Corp.*, 646 So. 2d 1113, 1116 (La. App. 1994). One can find courts applying this canon as early as 1891. See *Dugan v. Lewis*, 79 Tex. 246, 254 (Tex. 1891) (“The question as it is involved in this case can hardly be said to be a question of the *construction* of the contracts. We think, however, that the expression should be taken as a circumstance to be considered in ascertaining and giving effect to the intention of the parties to the contracts.”) (emphasis added).

of a particular jurisdiction is necessarily bound to the statutory and common law of that state.<sup>122</sup>

This intuition is so widely shared that it is common today for the courts to conclude that a choice-of-law clause containing the words “interpret” or “construe” supplies the governing law without discussion.<sup>123</sup> While one can find isolated exceptions to this general rule, they are few and far between.<sup>124</sup>

It is indeed difficult to imagine why the parties would ever specifically choose a law to inform the interpretation of their agreement while declining to choose a law to regulate the substance of that same agreement. It is also difficult to see how the substantive law of a state could be sensibly pried apart from that same state’s interpretive law. Nevertheless, it is important to recognize the significance of what the courts have done in these cases. They have announced that the precise *words* used by the parties in their choice-of-law clauses are not particularly important. So long as the parties say “interpret” or “construe” or “govern,” the legal consequences will be the same—the law of the chosen U.S. state will determine their substantive rights and obligations under the agreement.

In some cases, of course, sophisticated parties will draft their contracts in such a way as to make this act of construction unnecessary. Consider the following choice-of-law clauses:

This Mortgage shall be *governed by and construed and interpreted under* the laws of the State of North Dakota (without giving effect to conflicts of laws principles).<sup>125</sup>

This Agreement shall be *construed, governed, interpreted and applied* in accordance with the laws of the Commonwealth of Pennsylvania, without giving effect to conflict of law principles.<sup>126</sup>

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<sup>122</sup> Hammel v. Ziegler Financing Corp., 113 Wis. 2d 73, 75-78 (Wis. Ct. App. 1983); *see also* New England Mortgage Security Co. v. McLaughlin, 87 Ga. 1, 13 S.E. 81 (1891) (“We . . . have little doubt that the parties to this contract distinctly meant by this very stipulation that the contract as to interest and every other essential feature and particular, should be *not only construed but enforced according to the laws of the State where it was made.*”) (emphasis added); *cf.* Siegelman v. Cunard White Star, 221 F.2d 189, 194-195 (2d Cir. 1955) (“The language of the clause, covering ‘all question,’ indicates that validity as well as interpretation is embraced.”).

<sup>123</sup> *See, e.g.,* Fastpath, Inc. v. Arbela Techs. Corp., 760 F.3d 816, 819 (8th Cir. 2014); Digital Ally, Inc. v. Z3 Tech., LLC, 754 F.3d 802, 807 (10th Cir. 2014); Konica Minolta Bus. Solutions v. Lowery Corp., 2016 U.S. Dist. LEXIS 160383 (E.D. Mich. 2016); M.C. v. Jiminy Peak Mt. Resort, LLC, 2016 U.S. Dist. LEXIS 116504 (D. Mass. 2016); Fin. Cas. & Sur., Inc. v. Parker, 2015 U.S. Dist. LEXIS 148360 (S.D. Tex. 2015); Folkening v. Petten, 22 N.E.3d 818, 820 (Ind. Ct. App. 2014).

<sup>124</sup> *See* Heating & Air Specialists, Inc. v. Jones, 180 F.3d 923, 930 (8th Cir. 1999); America’s Favorite Chicken Co. v. Cajun Enters., 130 F.3d 180, 182 (5th Cir. 1997); Procter v. Mavis, 203 Ore. App. 499, 504 (Or. Ct. App. 2005); GMC v. Northrop Corp., 685 N.E.2d 127, 135 (Ind. Ct. App. 1997).

<sup>125</sup> Macquarie Bank v. Knickel, 723 F. Supp. 2d 1161, 1179 n.6 (D.N.D. 2010).

<sup>126</sup> License Agreement, dated as of January 22, 2016, by and between The Wistar Institute of Anatomy and Biology and Oncocyte Corporation, § 10.9.2, filed with the SEC on May 24, 2016 (emphasis added).

Each of these provisions uses all of the relevant words to eliminate all doubt as to the parties' intent. In so doing, each provision makes it unnecessary for the court to apply the canon of linguistic equivalence. However, the widespread use of the canon means that courts will generally read all of these words into a contract even when they are absent.

#### D. The Canon of Federal Inclusion and Preemption

When a choice-of-law clause selects the law of a U.S. state, it is not always clear whether the parties are choosing the law of that state *and* any laws enacted by the federal government or the law of that state *to the exclusion of* any laws enacted by the federal government. When the relevant rule of federal law is mandatory, of course, the distinction is immaterial. A private party cannot opt out of a mandatory federal law by means of a choice-of-law clause.<sup>127</sup> When the relevant rule of federal law is a mere default, however, it clear that the parties *may* opt out of the federal law rule and choose to have their contract governed exclusively by the law of a particular state. This ability notwithstanding, when a choice-of-law clause selects the law of New York, the courts generally assume that the parties intended to select the law of New York *and* any relevant provisions of U.S. federal law. The courts further assume that the parties intend for federal law to preempt New York law in the event of a conflict.<sup>128</sup> This is the *canon of federal inclusion and preemption*.

The most commonly cited justification for this canon is that it follows logically from the Supremacy Clause.<sup>129</sup> When the parties select the law of New York to apply to their agreement, they must have also intended to select federal law because “[t]he federal law is law in the State as much as laws passed by the state legislature.”<sup>130</sup> Since federal law ordinarily preempts the law of New York, the parties must also have intended that federal law prevail in the event of a conflict. A second justification for this canon is that it serves to advance important national policies as reflected in federal law.<sup>131</sup> While the parties may choose to opt out, the courts will assume that the parties support these policies in the absence of clear evidence to the contrary. The mere act of selecting the law of a particular state does not, on this line of reasoning, constitute clear evidence of the parties' intent to exclude federal law.

One example of this canon in action involves the interplay between state and federal arbitration law. The Federal Arbitration Act (“FAA”) is a federal law that makes arbitration

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<sup>127</sup> See *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 675 (4th Cir. 2016) (“[A] party may not underhandedly convert a choice of law clause into a choice of no law clause -- it may not flatly and categorically renounce the authority of the federal statutes to which it is and must remain subject.”).

<sup>128</sup> On occasion, the parties will expressly incorporate federal law into their choice-of-law clause. See, e.g., *CNA Ins. Co. v. Hyundai Merch. Marine Co., Ltd.*, 747 F.3d 339, 343 (6th Cir. 2014) (“This Agreement shall be, insofar as relevant, governed by the terms of the Shipping Act of 1984, and otherwise by the laws of the State of New York and of the United States of America.”)

<sup>129</sup> *Haunstein v. Lynham*, 100 U.S. 483, 490 (1879) (observing that federal law is “as much a part of the law of every State as its own local laws and Constitution”); see also *Travelers Prop. Cas. Co. of Am. v. St.-Gobain Tech. Fabrics Can., Ltd.*, 474 F. Supp. 2d 1075, 1081-1082 (D. Minn. 2007).

<sup>130</sup> *Howlett v. Rose*, 496 U.S. 356, 380 (1990).

<sup>131</sup> See *Preston v. Ferrer*, 552 U.S. 346, 360-63 (2008).

agreements enforceable, makes arbitral awards enforceable, and sets out procedures for enforcing arbitration agreements and awards.<sup>132</sup> A number of states have enacted state arbitration acts that seek to achieve many of these same ends.<sup>133</sup> When the state and federal rules relating to arbitration come into conflict, it is not always clear whether the parties, in selecting the law of a particular U.S. state, intended to select the state arbitration rule or the federal arbitration rule.<sup>134</sup>

In the absence of specific contractual language to the contrary, U.S. courts have held that parties generally intend to select the federal arbitration rule.<sup>135</sup> The Third Circuit, for example, has stated that:

Because the presence of a generic choice-of-law clause tells us little (if anything) about whether contracting parties intended to opt out of the FAA's default standards and incorporate ones borrowed from state law, we must announce and apply a default rule. We hold that a generic choice-of-law clause, standing alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default regime. This rule will: (1) ensure that parties who have never thought about the issue will not be found to have elected out of the FAA's default regime; (2) be comparatively simple for arbitrators and district courts to apply; and (3) preserve the ability of sophisticated parties to opt out.<sup>136</sup>

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<sup>132</sup> Federal Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (2006)).

<sup>133</sup> See MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION § 7:2 (2010).

<sup>134</sup> The Supreme Court has made clear that the parties have the ability to exclude federal arbitration rules if they clearly state their intent to do so. *Volt Information Sciences, Inc. v. Stanford University*, 489 U.S. 468, 476 (1989) ("Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration . . . simply does not offend the rule of liberal construction . . . nor does it offend any other policy embodied in the FAA."); see also Thomas A. Diamond, *Choice of Law Clauses and Their Preemptive Effect Upon the Federal Arbitration Act: Reconciling the Supreme Court with Itself*, 39 ARIZ. L. REV. 35, 64 (1997).

<sup>135</sup> See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) ("[W]hen a court interprets such provisions in an agreement covered by the FAA, due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration"); see also *Preston v. Ferrer*, 552 U.S. 346 (2008); *Jung v. Association of American Medical Colleges*, 300 F. Supp. 2d 119, 152 (D.D.C. 2004) ("Numerous courts of appeals have concluded that *Mastrobuono* requires that the intent of the contracting parties to apply state arbitration rules or law to arbitration proceedings [] be explicitly stated in the contract and that . . . a general choice of law provision does not evidence such intent.").

<sup>136</sup> *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 288-89 (3d Cir. 2001), *overruled on other grounds by* *Hall St. Assocs.*, 552 U.S. 576 (2008).

Every federal court of appeal to have considered the issue has taken a similar position.<sup>137</sup> Many state courts have followed suit.<sup>138</sup> Where a state arbitration statute addresses an issue not covered by the FAA—such as whether arbitration may be stayed pending concurrent litigation regarding the rights of third parties who had not agreed to arbitrate—the courts have held that the state law is not preempted so long as it is consistent with the general policies underlying the FAA.<sup>139</sup> Where the state and federal arbitration law come into direct conflict, however, then the state law must give way unless the clause evidences an explicit intent to exclude the federal rule.<sup>140</sup> A clause that merely states “this agreement shall be governed by the law of New York” is not sufficiently explicit to opt out of the federal regime.

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<sup>137</sup> See *Painewebber Inc. v. Elahi*, 87 F.3d 589, 594 (1st Cir. 1996); *Nat’l Union Fire Ins. Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 135 (2d Cir. 1996); *Porter Hayden Co. v. Century Indem. Co.*, 136 F.3d 380, 383-84 (4th Cir. 1998); *Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. of Tex., Inc.*, 343 F.3d 355, 361-362 (5th Cir. 2003); *Ferro Corp. v. Garrison Indus.*, 142 F.3d 926, 938 (6th Cir. 1998); *UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992, 996-97 (8th Cir. 1998); *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1213 (9th Cir. 1998); *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1189 (11th Cir. 1995). *But see* Note, *An Unnecessary Choice of Law: Volt, Mastrobuono, and Federal Arbitration Act Preemption*, 115 HARV. L. REV. 2250, 2261-62 (2002) (criticizing the breadth of the courts’ reasoning in these cases).

<sup>138</sup> See *Homes of Legend, Inc. v. McCollough*, 776 So.2d 741, n.9 (Ala. 2000); *1745 Wazee, LLC v. Castle Builders, Inc.*, 89 P.3d 422, 425 (Colo. App. 2003); *Levine v. Advest, Inc.*, 714 A.2d 649, 659 (Conn. 1998); *Credit Suisse Secs. LLC v. Hunter, LLC*, 2010 Del. Ch. LEXIS 121 (2010); *Anderson v. Maronda Homes, Inc.*, 98 So.3d 127, 129-30 (Fla. 2012); *Autonation Fin. Servs. Corp. v. Arain*, 592 S.E. 2d 96, 98 (Ga. Ct. App. 2003); *Roubik v. Merrill Lynch, Pierce, Fenner & Smith*, 692 N.E. 2d 1167 (Ill. 1998); *Schmidt v. UBS Fin. Servs.*, 10 N.E. 3d 1145, n.15 (Mass. App. Ct. 2014); *Estate of Sandefur v. Greenway*, 898 S.W. 2d 667, 671 (Mo. Ct. App. 1995); *L & L Kempwood Assocs., L.P. v. Omega Builders, Inc. (In re L & L Kempwood Assocs., L.P.)*, 9 S.W.3d 125, 127-128 (Tex. 1999); *cf. Frizell Constr. Co. v. Gatlinburg*, 9 S.W. 3d 79, 85-86 (1999). *But see* *Glazer’s Distribs. of Ill., Inc. v. NWS-Ill., LLC*, 876 N.E.2d 203, 212-13 (Ill. Ct. App. 2007) (concluding that choice-of-law clause selecting Illinois law excluded FAA);

<sup>139</sup> See *Cronus Investments, Inc. v. Concierge Services*, 35 Cal. 4th 376, 387 (2007); *Moscatiello v. Hilliard*, 595 Pa. 596, 603 (2007) (concluding that a Pennsylvania procedure allowing for a 30-day time limit for the enforcement of arbitration proceedings did not conflict with the FAA); *Sec. Ins. Co. v. Trustmark Ins. Co.*, 283 F. Supp. 2d 602 (D. Conn. 2003); *see also Volt Information Sciences, Inc. v. Stanford University* 489 U.S. 468, 476 (1989).

<sup>140</sup> GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 228 (2007) (“After *Volt*, courts typically allowed parties to freely incorporate state arbitration rules . . . where those rules do not impact enforceability and do not undermine the federal policy favoring arbitration.”). It is rare to see contract language in which the parties formally exclude the FAA from their agreement. It is somewhat more common to see parties specifically select state arbitration rules by referencing them in their agreement. *See, e.g., Cohen v. UBS Fin. Servs.*, 799 F.3d 174 (2d Cir. 2015) (“[Y]ou and UBS agree that any disputes between you and UBS including claims concerning compensation, benefits or other terms or conditions of employment . . . will be determined by arbitration as authorized and governed by the *arbitration law of the state of New York*.”) (emphasis added); Purchase and Installation Agreement, dated as of April 10, 2003, by and between Gartner Storage & Sorter Systems of Pennsylvania and Ashworth, Inc., §§ 24.1, 26, filed with the SEC on June 13, 2003 (“This Agreement shall be governed by and construed in accordance with the internal laws of the State of California. [ . . . ] Any Arbitration permitted pursuant to this Section shall be commenced and conducted *in accordance with the California Code of Civil Procedure Section 1281, et. seq.*, and the discovery procedures established by the American Arbitration Association. California Code of Civil Procedure Section 1283.05 shall apply.”) (emphasis added). On occasion, however, parties will specifically select the FAA and exclude state arbitration rules. *See, e.g., Franchise Agreement*, dated as of August 14, 2012, by and between ESIO Franchising LLC and Tempco, Inc., § 16.9(b)(i), filed with the SEC on August 20, 2012 (“The Federal Arbitration Act shall govern, excluding all state arbitration laws.”).

The courts have taken a similar interpretive approach to the question of whether a federal treaty—the United Nations Convention on Contracts for the International Sale of Goods (“CISG”)—preempts Article 2 of the Uniform Commercial Code (“UCC”).<sup>141</sup> The CISG expressly provides that parties may exclude it from their international sales agreements if they include a statement to that effect in their contract.<sup>142</sup> One question that sometimes arises is whether a choice-of-law provision selecting the law of a U.S. state is sufficient to exclude the CISG and to select that state’s version of UCC Article 2. The courts have generally held that merely selecting the law of a state is not enough to opt out of the CISG.<sup>143</sup> As the Federal District Court for the District of Minnesota has explained:

A majority of courts interpreting [generic] choice of law provisions . . . conclude that a reference to a particular state’s law does not constitute an opt out of the CISG; instead, the parties must expressly state that the CISG does not apply. These courts reason that even if a choice of law clause refers to the laws of a particular state, the state would be bound by the Supremacy Clause to the treaties of the United States. Accordingly, under the Supremacy Clause, the law in every state is that the CISG is applicable to contracts where the contracting parties are from different countries that have adopted the CISG. Thus, absent an express statement that the CISG does not apply, merely referring to a particular state’s law does not opt out of the CISG. [ . . . ] An affirmative opt-out requirement promotes uniformity and the observance of good faith in international trade, two principles that guide interpretation of the CISG.<sup>144</sup>

Although the court in this case focuses on furthering the objectives of a *treaty* rather than the objectives of a federal *statute*, the rule is essentially the same as in cases involving the FAA. Again, the court acknowledges that the parties *can* draft their choice-of-law clause in such a way so as to preclude the application of federal law.<sup>145</sup> Again, the court concludes that a clause that merely selects the law of a particular state will generally not suffice. The presumption, in other words, is that the parties’ choice of state law evidences their intent to choose any and all relevant provisions of federal law. In the event that these two bodies of law come into conflict, moreover, the courts further presume that the parties intended that the federal law displace the law of the state. This is the canon of federal inclusion and preemption.

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<sup>141</sup> United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 (entered into force Jan. 1, 1988) [hereinafter CISG].

<sup>142</sup> CISG art. 6.

<sup>143</sup> See, e.g., VLM Food Trading Int’l, Inc. v. Illinois Trading Co., 748 F.3d 780, 787 (7th Cir. 2014); Honey Holdings I, Ltd. v. Alfred L. Wolff, Inc., 81 F. Supp. 3d 543, 552 (S.D. Tex. 2015). For a rare contrary decision, see Am. Biophysics Corp. v. Dubois Marine Specialties, 411 F. Supp. 2d 61, 63 (D.R.I. 2006), which concluded that a choice-of-law clause selecting the law of Rhode Island was sufficient to opt out of the CISG.

<sup>144</sup> Travelers Prop. Cas. Co. of Am. v. St.-Gobain Tech. Fabrics Can., Ltd., 474 F. Supp. 2d 1075, 1081-1082 (D. Minn. 2007) (internal citations and quotation marks omitted).

<sup>145</sup> See, e.g., Amended and Restated Supply and Manufacturing Agreement, dated as of July 18, 2011, by and between Salix Pharmaceuticals, Inc., and Glenmark Pharmaceuticals Ltd, § 9.7, filed with the SEC on November 9, 2012 (“The Parties agree to exclude the application to this Agreement of the United Nations Convention on Contracts for the International Sale of Goods.”).

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Each of the lexical canons assigns interpretive meaning to a word or phrase contained in a generic choice-of-law clause. The canon in favor of internal law makes clear that the term “law” or “laws” refers to the internal law of the chosen state rather than its whole law. The canon in favor of substantive law holds that the term “law” or “laws” refers to the substantive law of the chosen state rather than its procedural law. The canon of linguistic equivalence establishes that the word “governed” is functionally the same as the word “interpreted” or “construed.” And the canon of federal inclusion and preemption holds that the selection of the law of “New York” or “California” includes the federal law of the United States and that federal law will displace state law in the event of a conflict.

There exists, however, a second set of interpretive rules that serve a different purpose. The primary goal of these canons is not to assign meaning to individual words and phrases in a choice-of-law clause but to determine the breadth of the clause as a matter of law. These canons—the canons relating to scope—are discussed in the next Part.

### III. THE CANONS RELATING TO SCOPE

It is possible to draft a choice-of-law clause that is broad enough to cover any and all claims—including tort and statutory claims—that may arise out of a particular contract.<sup>146</sup> Such a clause might look like this:

Any and all claims, controversies, and causes of action arising out of or relating to this Agreement, whether sounding in contract, tort, or statute, shall be governed by the laws of the State of Illinois.<sup>147</sup>

In practice, most choice-of-law clauses are not drafted so broadly. Particularly when the drafter is unsophisticated, the contractual language will instead look like this:

This agreement shall be governed by and construed in accordance with the laws of the State of New York.<sup>148</sup>

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<sup>146</sup> GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 762-63 (5<sup>th</sup> ed. 2011); see also SYMEON SYMEONIDES, CHOICE OF LAW 393 (2016) (“American courts do not seem to doubt the parties’ power to choose in advance a law that will govern a future tort between them, as long as their intention to that effect appears clearly from the language of the choice-of-law clause.”).

<sup>147</sup> If the parties want the clause to apply to claims that are *unrelated* to the contract, then they could add the phrase “arising out of the relationship of the parties” to the clause.

<sup>148</sup> See *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 90 (2002) (quoting near-identical contract language); *J. Alexander Sec. v. Mendez*, 511 U.S. 1150 (1994) (same); *Common Law Settlement Counsel v. Travelers Indem. Co. (In re Johns-Manville Corp.)*, 759 F.3d 206 (2d Cir. 2014) (same); *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733 (9th Cir. 2014) (same).

The Article refers to this latter formulation as a “generic” choice-of-law clause.<sup>149</sup> A question that sometimes arises is whether a generic clause supplies the governing law for *all* claims that the parties may have against one another or whether it only supplies the law for *contractual* claims. If the clause encompasses all claims, there is no need for the court to conduct a conflict-of-laws analysis for tort or statutory claims. If the clause covers only contract claims, then it will be necessary for the court to conduct a conflict-of-laws analysis to determine what law governs any tort and statutory claims.<sup>150</sup>

There is a wide range of practice among U.S. courts when it comes to determining the proper scope of a generic choice-of-law clause.<sup>151</sup> Some courts have held that a generic clause *does not* cover non-contractual claims. Other courts have held that a generic choice-of-law clause *does* cover non-contractual claims if these claims are related to the contract claims. These two differing approaches are discussed below.

#### A. The Canon Against Non-Contractual Claims

The courts in a number of states have adopted a presumption that a generic choice-of-law clause does not cover non-contractual claims. In a case in which one party sues another for breach of contract and fraud, for example, these courts will conclude that the law chosen by the parties will govern the contract claim but that it will not govern the fraud claim. This presumption is the *canon against non-contractual claims*.

The state where this canon is most frequently applied is New York. The seminal case is *Knieriemen v. Bache Halsey Stuart Shields*, in which the New York Appellate Division was called upon to determine whether a choice-of-law clause stating that “[t]his contract shall be governed by the laws of the State of New York” applied to the plaintiff’s claims for negligence, fraud, and punitive damages.<sup>152</sup> In concluding that this clause did not reach the tort claims, the court observed that: “That the parties agreed that their contract should be governed by an expressed procedure does not bind them as to causes of action sounding in tort, and, as to the tort causes of action, there is no reason why all must be resolved by reference to the law of the same jurisdiction.”<sup>153</sup> The court then proceeded to conduct a conflict-of-laws analysis. It concluded that (1) the contract claim would be governed by the law of New York (per the choice-of-law clause), and (2) the tort claims would be governed by the law of Louisiana (per the conflict-of-laws analysis).

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<sup>149</sup> *Roadway Package Sys. v. Kayser*, 257 F.3d 287, 296 (3d Cir. 2001).

<sup>150</sup> See Glenn D. West & W. Benton Lewis Jr., *Contracting to Avoid Extra-Contractual Liability—Can Your Contractual Deal Ever Really Be the “Entire” Deal?*, 64 BUS. LAW 999, 1029-30 (2009) (discussing issues relating to breadth of choice-of-law clause).

<sup>151</sup> S. Symeonides, *Oregon’s Choice of Law Codification for Contract Conflicts: An Exegesis*, 44 WILLAMETTE L. REV. 205 (2007) (“[C]ourts tend to scrutinize clauses that purport to encompass tort-like issues much more closely than clauses confined to purely contractual issues.”).

<sup>152</sup> *Knieriemen v. Bache Halsey Stuart Shields, Inc.*, 74 A.D.2d 290, 293 (N.Y. App. Div. 1st Dep’t 1980); see also *Twinlab Corp. v. Paulson*, 283 A.D.2d 570, 724 N.Y.S.2d 496, 496 (App. Div. 2d Dep’t 2001).

<sup>153</sup> *Id.*



At the time *Knieriemen* was decided in 1980, it attracted little attention. Over the next several decades, however, it would exert significant influence over the case law of the federal courts in New York. In 1984, a federal court in the Southern District of New York was asked to determine whether a clause stating that a contract was to be “governed by” the laws of the State of New York swept broadly enough to encompass a cause of action for common law fraud.<sup>154</sup> Invoking *Knieriemen*, the court concluded that it did not because “it has been held in New York that a contractual choice of law provision governs only a cause of action sounding in contract.”<sup>155</sup> In 1996, the Second Circuit similarly held that a choice-of-law clause stating that the contract would be “governed by and construed in accordance with the laws of the Commonwealth of Massachusetts” did not cover a claim for fraudulent misrepresentation.<sup>156</sup> The federal courts in New York would go on to render dozens of decisions interpreting the scope of generic choice-of-law clauses under New York law.<sup>157</sup> In each of these cases, they concluded that the clauses did not apply to tort and statutory claims and that it was necessary to perform a separate conflict-of-laws analysis to identify the law to govern these claims.<sup>158</sup>

The courts in a number of other states have adopted a similar approach. The Texas Supreme Court, for example, has held that a choice-of-law clause stating that the agreement was to be “interpreted and enforced in accordance with the Laws of the State of Texas” did not cover a plaintiff’s tort claims for personal injury.<sup>159</sup> The Fifth and Eleventh Circuits have similarly held that generic choice-of-law clauses do not cover tort claims.<sup>160</sup> The federal courts in Pennsylvania have consistently refused to apply the law selected in generic clauses to tort and

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<sup>154</sup> *Klock v. Lehman Bros. Kuhn Loeb, Inc.*, 584 F. Supp. 210, 215 (S.D.N.Y. 1984).

<sup>155</sup> *Id.* at 215 (citing *Knieriemen*).

<sup>156</sup> *Krock v. Lipsay*, 97 F.3d 640, 645 (2d Cir. 1996).

<sup>157</sup> See *Warman v. Am. Nat’l Stds. Inst.*, 2016 U.S. Dist. LEXIS 87415 (S.D.N.Y. 2016) (collecting cases).

<sup>158</sup> See *Champlain Enters., Inc. v. United States*, 945 F. Supp. 468 (N.D.N.Y. 1996) (“Under New York law, a choice-of-law provision indicating that a contract will be governed by a certain body of law does not dictate the law that will govern non-contract based claims.”); see also *Dessert Beauty, Inc. v. Platinum Funding Corp.*, 2006 WL 3780902 (S.D.N.Y. Dec. 26, 2006); *Drenis v. Haligiannis*, 452 F. Supp. 418 (S.D.N.Y. 2006); *E\*Trade Fin. Corp. v. Deutsche Bank AG*, 420 F. Supp. 2d 273 (S.D.N.Y. 2006); *Williams v. Deutsche Bank Secs., Inc.*, 2005 WL 1414435 (S.D.N.Y. Jun. 13, 2005); *Frazer Exton Dev. LP v. Kemper Envtl., Ltd.*, 2004 WL 1752580 (S.D.N.Y. Jul. 29, 2004); *Telemedia Partners Worldwide, Ltd. v. Hamelin Ltd.*, 1996 WL 41818 (S.D.N.Y. 1996). But see *Deloitte (Cayman) Corporate Recovery Servs., LTD. v. Sandalwood Debt Fund A, LP*, 31 Misc. 3d 1225(A), 1225A (N.Y. Sup. Ct. 2011) (observing that “the scope of the choice-of-law provision in this case is . . . governed by Delaware law”).

<sup>159</sup> *Stier v. Reading & Bates Corp.*, 992 S.W.2d 423, 433-434 (Tex. 1999) (“This provision, by its terms, applies only to the interpretation and enforcement of the contractual agreement. It does not purport to encompass all disputes between the parties or to encompass tort claims.”); see also *Red Roof Inns, Inc. v. Murat Holdings, L.L.C.*, 223 S.W.3d 676, 684 (Tex. App. Dallas 2007); *Covert Chevrolet-Oldsmobile, Inc. v. GMC*, 2001 Tex. App. LEXIS 5661, 4-5 (Tex. App. Dallas Aug. 21, 2001).

<sup>160</sup> See *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1162 (11th Cir. 2009) (stating that “[a] choice of law provision that relates only to the agreement will not encompass related tort claims”); *Benchmark Elecs. v. J.M. Huber Corp.*, 343 F.3d 719, 726-727 (5th Cir. 2003); *Green Leaf Nursery v. E.I. Dupont de Nemours & Co.*, 341 F.3d 1292, 1301 (11th Cir. 2003); *Thompson & Wallace, Inc. v. Falconwood Corp.*, 100 F.3d 429, 432-433 (5th Cir. 1996); *Caton v. Leach Corp.*, 896 F.2d 939, 942-943 (5th Cir. 1990).

statutory claims.<sup>161</sup> Decisions from state and federal courts in Arizona,<sup>162</sup> Connecticut,<sup>163</sup> Florida,<sup>164</sup> Iowa,<sup>165</sup> Indiana,<sup>166</sup> Louisiana,<sup>167</sup> Massachusetts,<sup>168</sup> Michigan,<sup>169</sup> New Jersey,<sup>170</sup> North Carolina,<sup>171</sup> Oregon,<sup>172</sup> and Wisconsin<sup>173</sup> are all generally in accord with this approach.<sup>174</sup>

In jurisdictions that follow the canon against non-contractual claims, courts have refused to apply the law selected by a choice-of-law clause to claims alleging fraud,<sup>175</sup> tortious interference,<sup>176</sup> conversion,<sup>177</sup> misrepresentation,<sup>178</sup> good faith and fair dealing,<sup>179</sup> and misappropriation of trade secrets.<sup>180</sup> They have declined to apply the law chosen by the parties to claims sounding in consumer protection statutes.<sup>181</sup> They have refused to apply the chosen

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<sup>161</sup> See *Panthera Rail Car LLC v. Kasgro Rail Corp.*, 985 F. Supp. 2d 677, 692-696 (W.D. Pa. 2013); *Am. Hearing Aid Assocs. v. GN ReSound N. Am.*, 309 F. Supp. 2d 694, 704 (E.D. Pa. 2004); *Black Box Corp. v. Markham*, 127 Fed. App'x. 22 (3d Cir. 2005); *Coram Healthcare Corp. v. Aetna U.S. Healthcare Inc.*, 94 F. Supp. 2d 589, 593-594 (E.D. Pa. 1999).

<sup>162</sup> *Winsor v. Glasswerks PHX, L.L.C.*, 204 Ariz. 303, 306 (Ariz. Ct. App. 2003).

<sup>163</sup> See *DelMonaco v. Albert Kemperle, Inc.*, 2014 Conn. Super. LEXIS 2965, 18-20 (Conn. Super. Ct. Nov. 26, 2014) (collecting cases); *United States Fid. & Guar. Co. v. S.B. Phillips Co., Inc.*, 359 F. Supp. 2d 189 (D. Conn. 2005).

<sup>164</sup> See *Florida Evergreen Foliage v. E.I. DuPont De Nemours, Co.*, 135 F. Supp. 2d 1271 (S.D. Fla. 2001); see also *Motmanco, Inc. v. McDonald's Corp.*, 2005 WL 1027261 (M.D. Fla. Mar. 30, 2005).

<sup>165</sup> See *Schuller v. Great-West Life & Annuity Ins. Co.*, 2005 U.S. Dist. LEXIS 37265, 39-41 (N.D. Iowa Sept. 15, 2005); *SNB Farms, Inc. v. Swift & Co.*, 2003 U.S. Dist. LEXIS 2063 at \*7, n.2 (N.D. Iowa Feb. 7, 2003); see also *Jones Distrib. Co. v. White Consol. Indus., Inc.*, 943 F. Supp. 1445, 1458 (N.D. Iowa 1996); *World Plan Executive Council-U.S. v. Zurich Ins. Co.*, 810 F. Supp. 1042, 1046 (S.D. Iowa 1992).

<sup>166</sup> *Lynch v. Math-U-See, Inc.*, 2013 U.S. Dist. LEXIS 29460 (N.D. Ind. 2013).

<sup>167</sup> See *Wright's Well Control Servs., LLC v. Oceaneering Int'l, Inc.*, 2015 U.S. Dist. LEXIS 154559, 31-34 (E.D. La. Nov. 16, 2015) (collecting cases); see also *Thomas v. Fidelity Brokerage Services, Inc.*, 977 F. Supp. 791 (W.D. La. 1997).

<sup>168</sup> *Computer Sales Int'l, Inc. v. Lycos, Inc.*, 2006 U.S. Dist. LEXIS 46847, 3-5 (D. Mass. July 11, 2006).

<sup>169</sup> *AGA Gas, Inc. v. Wohler Corp.*, 1999 U.S. Dist. LEXIS 11137, 6-9 (W.D. Mich. 1999).

<sup>170</sup> See *Barton v. RCI, LLC*, 2011 U.S. Dist. LEXIS 80134, 7-9 (D.N.J. July 22, 2011) (collecting cases). But see *Brauser Real Estate, LLC v. Meecorp Capital Mkts., LLC*, 2008 U.S. Dist. LEXIS 8000 (D.N.J. Feb. 4, 2008) (reaching opposite conclusion).

<sup>171</sup> *Synovus Bank v. Coleman*, 887 F. Supp. 2d 659, 669 (W.D.N.C. 2012).

<sup>172</sup> *Vesta Corp. v. Amdocs Mgmt.*, 80 F. Supp. 3d 1152, 1163 (D. Or. 2015).

<sup>173</sup> *Kuehn v. Childrens Hosp.*, 119 F.3d 1296, 1302 (7th Cir. 1997).

<sup>174</sup> It appears that this approach is also followed by the courts in England. See *Vichi v. Koninklijke Philips Elecs, N.V.*, 85 A.3d 725, 770 (Del. Ch. 2014) (surveying English case law and practice and concluding that a generic clause selecting English law did not encompass the plaintiff's tort claims). There are scattered hints—but no conclusive evidence—that the courts of Maine, Puerto Rico, the U.S. Virgin Islands, and Washington also follow this approach. See *Financial Trust Co. Inc. v. Citibank, N.A.*, 268 F. Supp. 2d 561 (D.V.I. 2003); *Shelley v. Trafalgar House Pub. Ltd. Co.*, 918 F. Supp. 515 (D.P.R. 1996); *Schnall v. AT & T Wireless Servs., Inc.*, 259 P.3d 129, 140 (Wash. 2011) (Sanders, J., dissenting); *Scotia Prince Cruises, Ltd. v. Pricewaterhousecoopers*, 2005 WL 2708311 (Me. Super. Mar. 25, 2005).

<sup>175</sup> *Knieriemen v. Bache Halsey Stuart Shields, Inc.*, 74 A.D.2d 290, 293 (N.Y. App. Div. 1st Dep't 1980).

<sup>176</sup> *Valley Juice Ltd. v. Evian Waters of Fr., Inc.*, 87 F.3d 604, 610-611 (2d Cir. Conn. 1996); *Red Roof Inns, Inc. v. Murat Holdings, L.L.C.*, 223 S.W.3d 676, 684 (Tex. App. Dallas 2007).

<sup>177</sup> *Am. Hearing Aid Assocs. v. GN ReSound N. Am.*, 309 F. Supp. 2d 694, 704 (E.D. Pa. 2004).

<sup>178</sup> *Panthera Rail Car LLC v. Kasgro Rail Corp.*, 985 F. Supp. 2d 677, 692-696 (W.D. Pa. 2013).

<sup>179</sup> *Caton v. Leach Corp.*, 896 F.2d 939, 942-943 (5th Cir. Tex. 1990).

<sup>180</sup> *Wright's Well Control Servs., LLC v. Oceaneering Int'l, Inc.*, 2015 U.S. Dist. LEXIS 154559, 31-34 (E.D. La. Nov. 16, 2015).

<sup>181</sup> *Barton v. RCI, LLC*, 2011 U.S. Dist. LEXIS 80134, 7-9 (D.N.J. July 22, 2011).

law to claims such as fraudulent inducement that bear directly on the validity of the contract.<sup>182</sup> In cases in which a generic choice-of-law clause is paired with an expansive choice-of-forum clause, these courts have refused to use the scope of the latter to expand the reach of the former.<sup>183</sup> There are, to be sure, a few exceptions. Some courts have held that claims for attorney's fees incurred in connection with a contract action are governed by the law selected by the parties.<sup>184</sup> And a court in New York has held that the parties' chosen law may apply where the parties seek supplemental damages to their contract claims.<sup>185</sup> On the whole, however, the courts in the jurisdictions listed above hew closely to the rule that a generic choice-of-law clause does not determine the law to be applied to non-contractual claims.

It should be emphasized at this juncture that the focus of the judicial inquiry in these cases is not *relatedness*. The courts are generally uninterested in how closely the tort or statutory claims relate to the underlying contract claims. The judicial focus is on *characterization*. The courts want to know whether the claim sounds in contract or in tort or in a statute. If the claim sounds in tort, or if the claim is statutory, then it will not be covered by a generic choice-of-law clause. Such claims will only be covered if the choice-of-law clause is drafted so as to make clear the parties' intent that the chosen law apply to non-contractual claims.

Cases involving such broad clauses do sometimes arise.<sup>186</sup> In 2011, for example, the Second Circuit held that a clause stipulating that "with respect to any claim arising from the employment relationship," the applicable law "shall be the substantive and procedural law of New York" swept broadly enough to encompass a tort claim for wrongful death when an

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<sup>182</sup> Sherwin-Williams Co. v. BEI Enters., 2012 U.S. Dist. LEXIS 169990, 10-7 (W.D. Pa. Nov. 30, 2012); Coram Healthcare Corp. v. Aetna U.S. Healthcare Inc., 94 F. Supp. 2d 589, 593-594 (E.D. Pa. 1999); Rosenberg v. Pillsbury Co., 718 F. Supp. 1146, 1150 (S.D.N.Y. 1989); Kitner v. CTW Transport, Inc., 53 Mass. App. Ct. 741, 762 N.E.2d 867, 871-72 (Mass. App. 2002); *see also* Britelink, Inc. v. Telecorp PCS, Inc., 2004 U.S. Dist. LEXIS 29683, 9-10 (E.D. Ark. May 7, 2004); Gloucester Holding Corp. v. U.S. Tape & Sticky Prods., LLC, 832 A.2d 116, 123-124 (Del. Ch. 2003); Young v. W.S. Badcock Corp., 222 Ga. App. 218, 474 S.E.2d 87 (1996). Other courts have held that these clauses do apply to claims for fraudulent inducement. *See* Nw. Airlines, Inc. v. Astraea Aviation Servs., Inc., 111 F.3d 1386, 1392-93 (8th Cir. 1997); Moses v. Business Card Express, Inc., 929 F.2d 1131, 1140 (6th Cir. 1991); In re Allegheny Int'l, Inc., 954 F.2d 167, 178 (3d Cir. 1992); Ot CIC Group, Inc. v. Mitchell, 2013 U.S. Dist. LEXIS 26878, 12-17 (N.D. Ohio Feb. 27, 2013); Evangelical Lutheran Church in Am. Bd. of Pensions v. Spherion Pac. Workforce LLC, 2005 U.S. Dist. LEXIS 8098 (D. Minn. May 4, 2005); Shoney's, Inc. v. Morris, 100 F.Supp.2d 769, 774 (M.D.Tenn.1999); *see generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 201 cmt c (discussing relationship between choice-of-law clause and fraudulent inducement claim).

<sup>183</sup> Fin. One Pub. Co. v. Lehman Bros. Special Fin., Inc., 414 F.3d 325, 332-336 (2d Cir. 2005) (expressly rejecting this approach). *But see* Turtur v. Rothschild Registry Int'l, 26 F.3d 304, 309-310 (2d Cir. 1994) (relying on expansive consent-to-jurisdiction clause to give broad reading to choice-of-law clause).

<sup>184</sup> *See* Smith v. EMC Corp., 393 F.3d 590 (5th Cir. 2004); RLS Assocs. LLC v. United Bank of Kuwait PLC, 464 F. Supp. 2d 206 (S.D.N.Y. 2006); Midwest Med. Supply Co., L.L.C. v. Wingert, 317 S.W.3d 530, 536-537 (Tex. App. Dallas 2010); Fairmont Supply Co. v. Hooks Indus., 177 S.W.3d 529, 534-537 (Tex. App. Houston 1st Dist. 2005); Precision Tune Auto Care, Inc. v. Radcliffe, 815 So.2d 708 (Fla. App. 2002); Walls v. Quick & Reilly, Inc. 824 So. 2d 1016 (Fla. App. 2002).

<sup>185</sup> Winter-Wolff Int'l, Inc. v. Alcan Packaging Food & Tobacco, Inc., 499 F. Supp. 2d 233, 243-244 (E.D.N.Y. 2007).

<sup>186</sup> *See* Roby v. Corporation of Lloyd's, 996 F.2d 1353, (2d Cir. 1993); El Pollo Loco, S.A. de C.V. v. El Pollo Loco, Inc., 344 F. Supp. 2d 986 (S.D. Tex. 2004).

employee died at work.<sup>187</sup> In 2009, the Eleventh Circuit held that a clause stating that “all disputes arising out of or in connection with” the agreement “shall be construed in accordance with and shall be governed by the Dutch law” was sufficiently expansive to cover a tort claim for negligence.<sup>188</sup> And in 2014, the Federal District Court for the Western District of Texas concluded that a clause stating that “[a]ll other claims, including claims regarding consumer protection laws, unfair competition laws, and in tort, will be subject to the laws of [the plaintiff’s] state of residence in the United States” covered the plaintiff’s tort and statutory claims.<sup>189</sup> These decisions highlight the *ability* of the contracting parties to draft broad choice-of-law clauses that will apply to tort and statutory claims arising out of their contractual relationship. To date, however, many contracting parties have declined to redraft their clauses to give them a more expansive scope.<sup>190</sup>

## B. The Canon in Favor of Non-Contractual Claims

The courts in a number of jurisdictions follow a canon of construction that is the precise opposite of the one discussed in the previous Section.<sup>191</sup> These courts generally presume that a generic choice-of-law clause covers all claims—contract, tort, and statutory—relating to or arising out of the contract. This is the *canon in favor of non-contractual claims*.

There are two iterations of this canon. The first—the California iteration—can be traced to a decision by the California Supreme Court in 1992. The second—the Minnesota iteration—stems from a decision by the Eighth Circuit in 1997. In practice, the two approaches are more alike than they are different. Both posit that tort and statutory claims that are “related” to a contract claim are generally governed by the law set forth in a generic choice-of-law clause. The only meaningful difference between them is the rigor with which the courts police the boundary between related and unrelated claims. In California, it is quite rare to find a court decision concluding that a tort or statutory claims was not “related” to the contract claim and hence not covered by the choice-of-law clause. In Minnesota, by comparison, it is more common to find cases in which the courts decide that a tort or statutory claim is not sufficiently

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<sup>187</sup> *McPhee v. GE Int’l, Inc.*, 426 Fed. Appx. 33, 34-35 (2d Cir. 2011); *see also* *Capital Z Fin. Servs. Fund II, L.P. v. Health Net, Inc.*, 43 A.D.3d 100, 109 (N.Y. App. Div. 1st Dep’t 2007) (concluding that a clause stating that it would govern “all issues” concerning “enforcement of the rights and duties of the parties” covered tort and statutory claims).

<sup>188</sup> *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1162-1163 (11th Cir. 2009).

<sup>189</sup> *Mendoza v. Microsoft, Inc.*, 1 F. Supp. 3d 533, 546 (W.D. Tex. 2014).

<sup>190</sup> *See* Mitchell J. Geller, *Ensuring Choice-of-Law Provision Includes Non-Contractual Claims*, NEW YORK LAW JOURNAL, July 7, 2009, at 1 (expressing disbelief that “corporate attorneys continue to rely on ‘standard’ language used in prior agreements that do not contain [expansive choice-of-law clauses]”).

<sup>191</sup> This state of affairs is not at all remarkable. It is common in the law to encounter two interpretive canons that are in direct conflict with one another. *See* Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) (observing that it is possible to find two opposing canons on virtually every point); *see also* Daniel B. Kostrub & Roger S. Christenson II, *Canons of Construction for the Interpretation of Mineral Conveyances, Severances, Exceptions, and Reservations in Producing States*, 88 N. DAK. L. REV. 649, 651 (2013) (discussing cases that ascribe different meanings to the term “minerals” in different states).

“related” to the underlying contract claim to be covered by the choice-of-law clause. Each of these two approaches is discussed below.

### 1. *The California Iteration*

In 1992, the California Supreme Court decided *Nedlloyd Lines B.V. v. Superior Court*.<sup>192</sup> In that case, a shareholders’ agreement contained a choice-of-law clause stating that “[t]his agreement shall be governed by and construed in accordance with Hong Kong law.”<sup>193</sup> The plaintiff argued that the clause was too narrow to cover a tort claim for breach of fiduciary duty that that, accordingly, it was necessary to perform a conflict-of-laws analysis. The defendant argued that the choice-of-law clause swept broadly enough to cover the tort claim. The *Nedlloyd* court sided with the defendant. The court justified this interpretation, in part, by pointing out that the parties had utilized the phrase “governed by” in their agreement. In the court’s opinion, this phrase “was a broad one signifying a relationship of absolute direction, control, and restraint.”<sup>194</sup> The court then cited a more general rationale as to why its broad interpretation of the clause was appropriate:

When a rational businessperson enters into an agreement establishing a transaction or relationship and provides that disputes arising from the agreement shall be governed by the law of an identified jurisdiction, the logical conclusion is that he or she intended that law to apply to all disputes arising out of the transaction or relationship. We seriously doubt that any rational businessperson, attempting to provide by contract for an efficient and business-like resolution of possible future disputes, would intend that the laws of multiple jurisdictions would apply to a single controversy having its origin in a single, contract-based relationship. Nor do we believe such a person would reasonably desire a protracted litigation battle concerning only the threshold question of what law was to be applied to which asserted claims or issues. Indeed, the manifest purpose of a choice-of-law clause is precisely to avoid such a battle . . . While the rule of easily pleaded ambiguity creates much business for lawyers and an occasional windfall to some clients, it leads only to frustration and delay for most litigants and clogs already overburdened courts. We need not envelop choice-of-law clauses in this fog of uncertainty and ambiguity.<sup>195</sup>

The court concluded by announcing the following rule of construction with respect to scope:

We hold a valid choice-of-law clause, which provides that a specified body of law “governs” the “agreement” between the parties, encompasses all causes of action arising from or related to that agreement, regardless of how they are characterized,

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<sup>192</sup> 3 Cal. 4th 459, 468-470 (Cal. 1992).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* (internal citations and quotation marks omitted).

including tortious breaches of duties emanating from the agreement or the legal relationships it creates.<sup>196</sup>

It should be emphasized at this juncture that the focus of the judicial inquiry here is *relatedness* rather than *characterization*. The court is concerned with how closely the tort or statutory claims relate to the underlying contract claims. The court is generally uninterested in whether the claim sounds in contract, in tort, or in statute.

This interpretive approach, needless to say, is quite different from the approach taken by the courts in New York. Indeed, the rule announced by the *Nedlloyd* majority was criticized by Justice Kennard in his dissent in that case:

[U]nder the majority's approach, as I understand it, when two commercial entities agree to a choice-of-law clause in a contract, as a matter of law the clause applies to all conceivably related noncontractual causes of action, regardless of any ambiguous language in the clause or of the parties' actual intent regarding its coverage. [. . .] This rigid rule has, in my view, serious defects. [. . .] It is not at all difficult to foresee situations in which contracting parties intend a choice-of-law clause such as the one at issue here to govern only contractual causes of action. [. . .] Because the clause refers only to "this Agreement," and not . . . to "matters arising under or growing out of this agreement," it appears on its face not to apply to noncontractual causes of action. [. . .] Under the majority's approach, contractual obligations flow, not from the intention of the parties but from the fact that they used certain magic words. The majority's primitive "magic words" approach is inconsistent with statutory rules of contract interpretation.<sup>197</sup>

In the twenty-five years since *Nedlloyd* was decided, the state and federal courts of California have scrupulously adhered to its holding. California courts called upon to adjudicate the scope of generic choice-of-law clauses have consistently held that they reach related statutory and tort claims.<sup>198</sup> In 2015, a federal district court in the Eastern District of California went so far as to hold that a choice-of-law clause stating that "[t]he choice of law of the parties is the law of the State of California" was broad enough to cover tort claims arising between the parties.<sup>199</sup> While the court acknowledged that this clause did not contain the magic words "agreement" and "governed by" as specified in *Nedlloyd*, it concluded that the more general rationale

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<sup>196</sup> *Id.*

<sup>197</sup> *Id.* (internal citations and quotation marks omitted).

<sup>198</sup> See, e.g., *O'Connor v. Uber Techs., Inc.*, 2013 U.S. Dist. LEXIS 171813, 9-12 (N.D. Cal. Dec. 5, 2013); *Dos Beaches, LLC v. Mail Boxes Etc., Inc.*, 2012 U.S. Dist. LEXIS 18619, 48-51 (S.D. Cal. Feb. 15, 2012); *Menlo Logistics, Inc. v. Western Exp., Inc.*, 2005 WL 2334358 (N.D. Cal. Sep. 23, 2005); *Olinick v. BMG Entm't*, 138 Cal. App. 4th 1286, 42 Cal. Rptr. 3d 268 (Cal. App. 2 Dist. Apr. 27, 2006); *VFD Consulting, Inc. v. 21st Servs.*, 425 F. Supp. 2d 1037 (N.D. Cal. 2006).

<sup>199</sup> *G.P.P., Inc. v. Guardian Prot. Prods.*, 2015 U.S. Dist. LEXIS 85999, 42-45 (E.D. Cal. June 30, 2015).

underlying that decision—that any rational businessperson would want the clause to apply broadly—compelled the result.<sup>200</sup>

Although California is the most influential state to have adopted the canon in favor of non-contractual claims, it is not the only one. In 2013, a federal district court in the Western District of Virginia was called upon to determine the scope of a choice-of-law clause in *Pyott-Boone v. IRR Trust*.<sup>201</sup> The clause there at issue stated that “[t]his Agreement shall be governed by the laws of the State of Delaware without regard to any jurisdiction’s conflicts of laws provisions.”<sup>202</sup> After canvassing the relevant literature, the court decided to follow the lead of the California courts and held that the clause covered non-contractual claims:

I believe that the Virginia Supreme Court would seek to apply sound commercial law that promotes outcomes consistent with the intent of the parties. For that reason, the scope of a choice-of-law provision should, absent a showing of intent otherwise, be read to encompass all disputes that arise from or are related to an agreement. If parties wish to exclude causes of action arising in tort or by statute from the coverage of their agreement, they may do so, but they should reflect that intent in their contract. I believe this disposition will most closely reflect the actual intent of the parties at the time they reached their agreement.<sup>203</sup>

In the years since this decision was rendered, a number of other federal district courts in Virginia have found its reasoning persuasive and have similarly held that generic choice-of-law clauses reach tort and statutory claims.<sup>204</sup>

In 2015, the Montana Supreme Court cited approvingly to *Nedlloyd* and to *Pyott-Boone* in concluding that a generic choice-of-law clause applied to tort and contract claims.<sup>205</sup> The courts of Delaware have also expressed sympathy for the *Nedlloyd* approach. In 2006, the Delaware Court of Chancery held that a clause stating that the agreement was to be “governed by, and construed in accordance with, the Laws of the State of Delaware, regardless of the Laws that might otherwise govern under applicable principles of conflicts of law” encompassed the plaintiff’s tort claim for fraudulent inducement. In justifying this decision, the court cited to *Nedlloyd* and offered the following rationale that echoed the one given by the California Supreme Court in that case:

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<sup>200</sup> *Id.*

<sup>201</sup> *Pyott-Boone Elecs., Inc. v. IRR Trust for Donald L. Fetterolf* Dated December 9, 1997, 918 F. Supp. 2d 532, 542-548 (W.D. Va. 2013).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *See, e.g.,* *Bans Pasta, LLC v. Mirko Franchising, LLC*, 2014 U.S. Dist. LEXIS 19953 (W.D. Va. Feb. 12, 2014); *Zaklit v. Global Linguist Solutions, LLC*, 2014 U.S. Dist. LEXIS 92623 (E.D. Va. July 8, 2014); *Stoney Glen, LLC v. S. Bank & Trust Co.*, 944 F. Supp. 2d 460, 465-66 (E.D. Va. 2013).

<sup>205</sup> *Masters Group International, Inc. v. Comerica Bank*, 2015 MT 192 (Mont. 2015).

Parties operating in interstate and international commerce seek, by a choice of law provision, certainty as to the rules that govern their relationship. To hold that their choice is only effective as to the determination of contract claims, but not as to tort claims seeking to rescind the contract on grounds of misrepresentation, would create uncertainty of precisely the kind that the parties' choice of law provision sought to avoid [ . . . ] To layer the tort law of one state on the contract law of another state compounds that complexity and makes the outcome of disputes less predictable, the type of eventuality that a sound commercial law should not seek to promote.<sup>206</sup>

The Delaware Supreme Court subsequently quoted this passage in its entirety in a case decided in 2016.<sup>207</sup>

## 2. *The Minnesota Iteration*

Another seminal case involving the canon in favor of non-contractual claims is *Northwest Airlines v. Astraia Aviation Services*.<sup>208</sup> This case was decided by the Eighth Circuit in 1997 and has played an important role in shaping the way this canon is applied by courts in the heartland of the United States. The dispute in *Northwest Airlines* arose out of allegations of negligent repair work performed on a commercial aircraft.<sup>209</sup> The choice-of-law clause in the agreement stated: "This Agreement shall be deemed entered into within and shall be governed by and interpreted in accordance with the laws of the State of Minnesota."<sup>210</sup> The plaintiff sued in federal district court in Minnesota. It argued that this clause was broad enough to encompass its tort claims as well as its contract claims. The defendant argued that the clause applied only to the plaintiff's claim for breach of contract. The Eighth Circuit sided with the plaintiff. It reasoned that the tort claims at issue were closely related to the underlying contract claim and were therefore covered by the clause:

[Plaintiff's] claims for negligent performance, misrepresentation, deceptive trade practices, and unjust enrichment raise issues of performance and compensation for work done under the refurbishment contracts. Although mainly styled as torts, these claims stem from [defendant's] alleged failure promptly to provide functioning parts and adequate support for the refurbishment project, as required under the contracts. The

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<sup>206</sup> *ABRY Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1048 (Del. Ch. 2006); *see also* *Transdigm Inc. v. Alcoa Glob. Fasteners, Inc.*, No. CIV.A. 7135-VCP, 2013 WL 2326881, at \*5 (Del. Ch. May 29, 2013) (citing approvingly to *ABRY*). *But see* *Gloucester Holding Corp. v. U.S. Tape & Sticky Prods., LLC*, 832 A.2d 116, 123-124 (Del. Ch. 2003) (concluding that a standard choice-of-law clause was "not sufficiently broad enough to cover tort claims such as fraud in the inducement"); *Eby v. Thompson*, 2005 WL 1653988 (Del. Supr. Apr. 20, 2005) (holding that a rental agreement was not drafted broadly enough to encompass tort claims).

<sup>207</sup> *Hazout v. Ting*, 134 A.3d 274, fn. 69 (Del. 2016). The court decided that the issue of the clause's scope was not properly before it and must be "determined in the first instance by the Superior Court upon briefing by the parties." *Id.*; *see also* *English Mt. Spring Water Co. v. AIDCO Int'l, Inc.*, 2008 U.S. Dist. LEXIS 43478 (E.D. Tenn. May 30, 2008) (concluding that a generic choice-of-law clause covered non-contractual claims).

<sup>208</sup> 111 F.3d 1386 (8th Cir. 1997).

<sup>209</sup> *Id.* at 1392-93

<sup>210</sup> *Id.*



unjust enrichment claim concerns the amount of compensation which [plaintiff] should receive for refurbishing aircraft pursuant to a contract. *These claims are closely related to the interpretation of the contracts and fall within the ambit of the express agreement that the contracts would be governed by Minnesota law.*<sup>211</sup>

This decision would exert considerable influence on the subsequent case law of the federal district courts in Minnesota. In case after case, these courts weighed the question of whether the tort claims were sufficiently related to the contract claims to bring them within the ambit of the choice-of-law clause.<sup>212</sup> In *Superior Edge, Inc. v. Monsanto*, for example, the district court concluded that the plaintiff's claims for fraud, deceptive trade practices, and misappropriation of trade secrets were so closely related to the contract claim that they were covered by the choice-of-law clause.<sup>213</sup> The plaintiff's claims for tortious interference, however, was found not to be "intertwined" with the contract and was therefore not covered by the clause.<sup>214</sup>

The federal courts in other states in the Eighth Circuit have adopted a similar interpretive approach. In 2013, a federal district court in Arkansas was presented with a clause stating "[t]his Agreement shall be governed by the laws of the State of Arkansas, without regard to its choice of law provisions."<sup>215</sup> That court held that the plaintiff's claims for tortious interference, fraudulent representation, negligent representation, and conspiracy "relate[d] to performance of the underlying contract" and were therefore covered by the clause.<sup>216</sup> In 2010, a federal district court in Nebraska similarly concluded that a trade secrets claim was covered by a generic choice-of-law clause because the claim was "sufficiently intertwined" with the interpretation of the contract.<sup>217</sup> Courts in states outside of the Eighth Circuit—such as Arizona, Illinois, and Kansas—have also rendered decisions in which they looked to the relatedness of the tort claims to the contract on a case-by-case basis to determine whether they were covered by a choice-of-law clause.<sup>218</sup>

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<sup>211</sup> *Id.* (emphasis added). The Eighth Circuit has not always been fully consistent in its treatment of this issue. See *Inacom Corp. v. Sears. Roebuck & Co.*, 254 F.3d 683, 687 (8th Cir. 2001) (concluding that a standard choice-of-law clause was "not broad enough to govern the choice of law for the fraudulent concealment claim, which sounds in tort").

<sup>212</sup> See, e.g. *Holden Farms, Inc. v. Hog Slat, Inc.*, 347 F.3d 1055, 1061 (8th Cir. 2003) ("The essential principle of *Northwest Airlines* is that, under Minnesota law, if analysis of the claims connected to a contract involves interpretation of the contract, then the forum will apply the contractual choice-of-law provisions to the tort claims."); *Warren E. Johnson Cos. v. Unified Brand, Inc.*, 735 F. Supp. 2d 1099, 1105 (D. Minn. 2010) (finding a clause stating that the "Agreement will be construed in accord with the laws of Mississippi" governed only those statutory and tort claims that were "closely related to the contract's terms"); *Fla. State Bd. of Admin. v. Law Eng'g & Envtl. Servs.*, 262 F. Supp. 2d 1004, 1013 (D. Minn. 2003) (concluding that "plaintiff's tort claims are closely related to the parties' contractual relationship").

<sup>213</sup> 964 F. Supp. 2d 1017, 1031-1032 (D. Minn. 2013).

<sup>214</sup> *Id.* at 1032.

<sup>215</sup> *J.D. Fields & Co. v. Nucor-Yamato Steel*, 976 F. Supp. 2d 1051, 1064 (E.D. Ark. 2013).

<sup>216</sup> *Id.* at 1066; see also *Baldor Elec. Co. v. Sungard Recovery Servs., LP*, 2006 WL 3735980 (W.D. Ark. Dec. 15, 2006).

<sup>217</sup> *Peter Kiewit Sons, Inc. v. Atser, LP*, 684 F. Supp. 2d 1126, 1134-1135 (D. Neb. 2010).

<sup>218</sup> *Magellan Real Estate Inv. Trust v. Losch*, 109 F. Supp. 2d 1144, 1161 (D. Ariz. 2000) ("[S]everal of the claims in this action require the application of the law of Ontario, Canada, while others require application of the law of Arizona"); *Amakua Development LLC v. Warner*, 411 F. Supp. 2d 941, 955 (N.D. Ill. 2006) ("Under Illinois law,

In a perfect world, the parties would relieve the courts of the burden of having to discern their true intentions by drafting a choice-of-law clause that states its scope in an unambiguous manner. Many sophisticated parties already do this by writing the phrase “and claims relating to this agreement” into their choice-of-law clauses. In the imperfect world in which we live, however, where parties do not always use the magic words that would make their intentions clear, the courts in Arkansas, California, Delaware, Illinois, Kansas, Minnesota, Montana, Nebraska, and Virginia have concluded that it is sometimes appropriate to interpret generic choice-of-law clauses to cover tort and statutory claims that relate in some way to the underlying contract claim.

### C. A Word on Conflict-of-Laws Rules

In light of the conflicting canons outlined above, it is important to examine how the courts go about determining *which* canons to apply to determine the scope of a choice-of-law clause. There are two possibilities. First, the court could apply the canons prescribed by the law of the *forum*. Second, the court could apply the canons prescribed by the law of the *jurisdiction selected in the clause*.<sup>219</sup> This choice is an important one. Consider a case in which the scope of a generic choice-of-law clause selecting the law of California is litigated in New York. If the New York court applies the canons of the forum to determine the scope of the clause, then it will very likely conclude that the clause does not encompass tort or statutory claims because New York—per *Knieriemen*—follows the canon against non-contractual claims. If the New York court applies the canons of the jurisdiction selected in the clause, by contrast, then it will very likely conclude that the clause covers any tort and statutory claims because California—per *Nedlloyd*—follows the canon in favor of non-contractual claims.

In applying New York law, the Second Circuit has held that the canons of the forum should always be applied to determine the scope of a choice-of-law clause.<sup>220</sup> As that court has explained:

Determining which jurisdiction’s law governs the scope of a valid choice-of-law clause is not a simple matter. On the one hand, once a court finds that a contractual choice-of-

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‘regardless of the breadth of the choice of law provision, tort claims that are dependent upon the contract are subject to a contract’s choice of law provision,’ and the court will consider the following factors in making that determination: (1) the claim is ‘based on the construction and interpretation of the contract;’ (2) ‘the tort is closely related to’ the contractual arrangement; and (3) ‘the tort could not exist without the contract.’”); *Enter. Bank & Trust v. Barney Ashner Homes, Inc.*, 300 P.3d 115 (Kan. Ct. App. 2013) (“This is a case where both the rule and the choice-of-law clauses should be applied to the tort claims since they are inextricably tied to the specific debtor-creditor transactions otherwise being litigated.”); *see also* *Medline Indus., Inc. v. Maersk Med. Ltd.*, 230 F. Supp. 2d 857 (N.D. Ill. 2002); *Twohy v. First Nat. Bank of Chicago*, 758 F.2d 1185 (7th Cir. 1985); *Wireless Distribs., Inc. v. Sprintcom, Inc.* 2003 WL 22175607 (N.D. Ill. Sept. 13, 2003).

<sup>219</sup> *Wright’s Well Control Servs., LLC v. Oceaneering Int’l, Inc.*, 2015 U.S. Dist. LEXIS 154559 (E.D. La. Nov. 16, 2015) (discussing the two approaches).

<sup>220</sup> *See* Gruson, *supra* note 32, at n.115 (“New York courts apparently always determine the effectiveness and scope of governing law clauses according to New York conflict-of-laws rules.”).

law clause is valid, the law selected in the clause dictates how the contract's provisions should be interpreted, and so arguably that law should also dictate how the choice-of-law clause—which is itself one of the contract's provisions—should be interpreted. More commonly, however, courts consider the scope of a contractual choice-of-law clause to be a threshold question like the clause's validity. Courts therefore determine a choice-of-law clause's scope under the same law that governs the clause's validity—the law of the forum.<sup>221</sup>

This conflict-of-laws rule is, for lack of a better word, imperialistic. It indicates that the federal courts in New York will bring their own canons of construction to bear on the issue of a choice-of-law clause's scope even if the parties have chosen the law of another jurisdiction as the governing law. Once the case is filed in New York, there is no escaping the application of the canon against non-contractual claims. This approach to the choice-of-law issue—which directs the courts to apply the canons of construction used by the courts in the forum state—is followed by courts in Illinois,<sup>222</sup> Maryland,<sup>223</sup> Minnesota,<sup>224</sup> Mississippi,<sup>225</sup> Pennsylvania,<sup>226</sup> Texas,<sup>227</sup> and Virginia.<sup>228</sup>

The California Supreme Court, by contrast, has held that the canons of the state chosen by the parties should be applied to determine the scope of the clause. As that court explained in *Nedlloyd*:

[T]he choice-of-law clause states: "This agreement shall be governed by and construed in accordance with Hong Kong law ...." The agreement, of course, includes the choice-of-law clause itself. Thus the question of whether that clause is ambiguous as to its scope . . . is a question of contract interpretation that in the normal course should be determined pursuant to Hong Kong law.<sup>229</sup>

This conflict-of-laws rule is far more ecumenical. It indicates that the California courts will happily apply a different canon—the canon against non-contractual claims, for example—to determine the scope of a choice-of-law clause if the courts of the state named in the clause would apply that rule. This rule gives the parties the ability to select the interpretive rule that

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<sup>221</sup> *Fin. One Pub. Co. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 332-333 (2d Cir. 2005) (citing *Krock v. Lipsay*, 97 F.3d 640, 645 (2d Cir. 1996)).

<sup>222</sup> *Cunningham Charter Corp. v. Learjet, Inc.*, 870 F. Supp. 2d 571, 575 (S.D. Ill. 2012).

<sup>223</sup> *Tomran, Inc. v. Passano*, 391 Md. 1, 13-17 (Md. 2006).

<sup>224</sup> *Schwan's Sales Enters., Inc. v. SIG Pack, Inc.*, 476 F.3d 594, 597 (8th Cir. 2007); *Warren E. Johnson Cos. v. Unified Brand, Inc.*, 735 F. Supp. 2d 1099, 1104-1109 (D. Minn. 2010).

<sup>225</sup> *Cypress Pharms., Inc. v. CRS Mgmt.*, 827 F. Supp. 2d 710, 724 (S.D. Miss. 2011).

<sup>226</sup> *Am. Hearing Aid Assocs. v. GN ReSound N. Am.*, 309 F. Supp. 2d 694, 704 (E.D. Pa. 2004).

<sup>227</sup> *Fairmont Supply Co. v. Hooks Indus.*, 177 S.W.3d 529, 534-537 (Tex. App. Houston 1st Dist. 2005).

<sup>228</sup> See *Pyott-Boone Elecs., Inc. v. IRR Trust for Donald L. Fetterolf* Dated December 9, 1997, 918 F. Supp. 2d 532, 542-548 (W.D. Va. 2013).

<sup>229</sup> *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 469 (Cal. 1992).

will be used to determine the scope of their agreement.<sup>230</sup> This approach has been followed by courts in Delaware,<sup>231</sup> Florida,<sup>232</sup> Massachusetts,<sup>233</sup> and North Carolina.<sup>234</sup>

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The preceding Parts have examined the lexical canons, the canons relating to scope, and the conflicts rules for determining which canons to apply. The goal in these Parts was to provide a detailed descriptive account of these canons and the ways in which courts choose between them. The next two Parts tackle the normative question of whether these canons are the *right* canons for the courts to use. Part IV discusses several theories of contract interpretation in search of a normative framework within which to assess current judicial practice. Part V then applies this framework to the canons discussed in the preceding Parts in an attempt to separate those canons that operate as efficient default rules from those that do not.

#### IV. THEORIES OF CONTRACT INTERPRETATION

The purpose of contract interpretation, generally speaking, is to give effect to the intent of the parties as expressed in the text of the agreement. As previously discussed, however, it is doubtful that this text constitutes a particularly reliable guide to party intent when it comes to boilerplate choice-of-law clauses.<sup>235</sup> Accordingly, the courts have developed canons of construction that serve as statements of judicial preference as to how to resolve textual ambiguities that are commonly found in choice-of-law clauses. In developing these canons, the courts have typically sought to construe these clauses in a manner that is consistent with the preferences of most contracting parties. The courts have, in other words, sought to develop canons that function as majoritarian default rules.

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<sup>230</sup> Over the years, there have been a number of cases in which the federal courts in California concluded that a generic choice-of-law clause selecting the New York canons did not encompass tort claims because these courts applied the law of New York to determine the scope of the clause. See, e.g., *Narayan v. EGL, Inc.*, 616 F.3d 895, 899 (9th Cir. 2010); *JMP Sec. LLP v. Altair Nanotechnologies Inc.*, 880 F. Supp. 2d 1029, 1036 (N.D. Cal. 2012); *Sarandi v. Breu*, 2009 U.S. Dist. LEXIS 79252, 11-15 (N.D. Cal. Sept. 2, 2009); *Benson v. Merck*, 1995 U.S. Dist. LEXIS 22579, 13-14 (N.D. Cal. Mar. 9, 1995).

<sup>231</sup> See *Vichi v. Koninklijke Philips Elecs, N.V.*, 85 A.3d 725, 766 (Del. Ch. 2014) (“Where a choice of law provision is valid, the question of its proper scope is a question of the selected jurisdiction’s laws, as it turns on how the choice of law provision should be read.”); *Weil v. Morgan Stanley DW Inc.*, 877 A.2d 1024, 1032 (Del. Ch.), *aff’d*, 894 A.2d 407 (Del. 2005) (concluding that, as “a matter of hornbook law,” the scope of a choice of law provision is determined under the law that the provision selects).

<sup>232</sup> *Razi v. Razavi*, 2012 U.S. Dist. LEXIS 187072 (M.D. Fla. Dec. 13, 2012); see also *Bunker Holdings, Ltd. v. Green Pac. A/S*, 346 Fed. Appx. 969, 973 (4th Cir. 2009) (“The scope of the choice-of-law provisions, however, being a matter of contract interpretation, must be determined by the law of the state chosen by the parties in the contract.”).

<sup>233</sup> *Stagecoach Transp. v. Shuttle, Inc.*, 50 Mass. App. Ct. 812, 817-819 (Mass. App. Ct. 2001).

<sup>234</sup> *Wachovia Bank v. Harbinger Capital Partners Master Fund I, Ltd.*, 2008 NCBC 6, 105 (N.C. Super. Ct. 2008).

<sup>235</sup> See *supra* note 52 & accompanying text.

This Part argues that this approach is basically correct. The Part acknowledges, however, that there are two alternative theories of contract interpretation that one could use to evaluate the choice-of-law canons. The first alternative—the penalty default rule—proposes that contract provisions should be interpreted in a way that is undesirable to at least one of the parties as a means of inducing information disclosure.<sup>236</sup> The second alternative—contracts originalism—maintains that judges should seek to ascertain the intent of the original drafters of the contract language in order to unpack the meaning of the clause. This Part first discusses the reasons why a majoritarian approach provides the best normative baseline against which to evaluate current judicial practice. It then explains why the two possible alternatives are less well suited to this task.

#### A. Majoritarian Defaults

It is broadly accepted in the legal literature that an efficient contractual default rule is the one that most parties would have agreed to ex ante.<sup>237</sup> Majoritarian defaults reduce the costs of drafting a contract.<sup>238</sup> They reduce verification costs because there is often no evidence that the parties intended a result that is any different from the default.<sup>239</sup> And they increase accuracy because the majoritarian rule is, by definition, broadly consistent with the preferences of most parties.<sup>240</sup>

In the boilerplate context, where the notion of party intent is largely a fiction, the argument that the courts should strive to interpret choice-of-law clauses in a manner that is consistent with majoritarian preferences is particularly compelling.<sup>241</sup> When a court construes a clause in a manner that is inconsistent with these preferences, sophisticated parties will be forced to incur drafting costs to rewrite their agreements to contract around the canon. Unsophisticated parties, by comparison, will not redraft their contracts to account for this decision because they will generally be unaware of it. These parties will then be forced to incur litigation costs to litigate the “correct” meaning of the choice-of-law clause. To construe a

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<sup>236</sup> Michelle Boardman, *Penalty Default Rules in Insurance Law*, 40 FLA. ST. U.L. REV. 305, 306 (2013).

<sup>237</sup> See Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 941 (2010); Schwartz & Scott, *supra* note 6, at 569; see also ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW* 250 (1997) (observing that “the efficient . . . default rule is what most parties would want”); Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 971 (1983) (default rules should be created by asking “what arrangements would most bargainers prefer?”); Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1631-32 (2009) (noting that “[w]ith a few possible exceptions, contract default rules are best understood as attempts to impute into contracts terms that most similarly situated parties would have wanted to include had they considered them” (footnote omitted)). But see Steven J. Burton, *A Lesson on Some Limits of Economic Analyses: Schwartz and Scott on Contract Interpretation*, 88 IND. L.J. 339, 360 (2013) (arguing that “a singular focus on efficiency obscures important concerns about the nature of language, ambiguity and vagueness, the legal context in which interpretation questions arise, alternatives not based on efficiency, and rule of law values”).

<sup>238</sup> Gregory Klass, *Intent to Contract*, 95 VA. L. REV. 1437, 1462 (2009).

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> See Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1581-84 (2005).

clause a manner that is inconsistent with the majoritarian preferences, in short, is to impose needless drafting costs on sophisticated parties and to impose needless litigation costs on the unsophisticated.

When it comes to crafting efficient majoritarian default rules, therefore, the conventional wisdom suggests that a court should proceed along the following lines. First, it should acknowledge that the language is boilerplate and hence unlikely to provide any meaningful evidence as to the actual intent of the parties involved in the dispute. Second, the court should recognize that its interpretation of the boilerplate is likely to have third-party effects.<sup>242</sup> The court's interpretation will, in other words, impact all of the other parties that have similar or identical clauses in their own contracts.<sup>243</sup> Third, the court should inquire as to what most non-idealized, hypothetical real-world parties—removed from the specific context of the particular case at hand—would generally want the choice-of-law clause to mean.<sup>244</sup> In answering this question, the court should consider any prior decisions in which other courts have had occasion to interpret the language in question. The end goal should be to minimize the likelihood that the court adopts a reading of the language that is inconsistent with the preferences and expectations of the many parties that have previously incorporated the boilerplate language into their agreements.

#### B. Penalty Defaults

The notion that majoritarian defaults are efficient defaults is widely accepted in the literature.<sup>245</sup> In a well-known article, however, Ian Ayres and Robert Gertner argued that courts and legislatures should sometimes adopt rules that are specifically *contrary* to the preferences of most parties.<sup>246</sup> The goal of these so-called “penalty default” rules is to induce the parties to reveal information to one another by contracting around the penalty.<sup>247</sup> These rules are sometimes described as “information-forcing” defaults. In at least some situations, Ayres and Gertner argue, the most efficient rule of contract law may not necessarily be a majoritarian default.<sup>248</sup> Drawing on this line of argument, Michelle Boardman has suggested that the rule of *contra proferentem*, which directs courts to interpret ambiguities in a contract against the

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<sup>242</sup> Its interpretation of the language in this contract, in other words, may well determine how future courts will interpret this same language in future cases. See Stephen J. Choi & C. Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129, 1131-32 (2006).

<sup>243</sup> *Id.* at 1132.

<sup>244</sup> David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1820 (1991) (proposing a “hypothetical bargains” framework for determining interpretive conventions); see also Baude & Sachs, *supra* note, at 48 (“[T]he ‘touchstone’ of legal interpretation is not the specific thoughts in the heads of any particular historical people . . . but rather the hypothetical understandings of a reasonable person.”) (internal citations and quotation marks omitted).

<sup>245</sup> Gregory Klass, *Intent to Contract*, 95 VA. L. REV. 1437, 1462 (2009).

<sup>246</sup> Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) [hereinafter Ayres & Gertner, *Filling Gaps*]; see also Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591 (1999) [hereinafter Ayres & Gertner, *Majoritarian vs. Minoritarian*].

<sup>247</sup> Ayres & Gertner, *Filling Gaps*, *supra* note 246, at 91.

<sup>248</sup> *Id.* at 91-92.

drafter, is a classic example of a penalty default rule.<sup>249</sup> She has further argued that a version of this penalty default rule should be applied to interpret boilerplate contract provisions in insurance agreements.<sup>250</sup>

This argument raises the question of whether choice-of-law clauses should be similarly construed. The answer is clearly no. The principal justification for adopting a penalty default rule is information disclosure. By setting a default rule that is inconsistent with what most parties would want, the parties are induced to negotiate around the rule. In so doing, they reveal information to one another (and to courts) that increases the total gains from contracting. It is difficult to see, however, how a penalty default rule could ever be economically efficient in the context of a choice-of-law clause. The benefits of adopting such a rule—in the form of newly revealed information about the parties’ intent—would be minimal. The costs of such an approach, by contrast, would be significant. The courts would routinely read these clauses in a manner that was contrary to the preferences of most parties. Such an approach would inflict drafting costs on sophisticated parties and litigation costs on the unsophisticated with little to offer in the way of offsetting benefits.<sup>251</sup>

### C. Contracts Originalism

A few scholars have argued that courts should interpret contract boilerplate by looking to the intent of the original drafters of that boilerplate.<sup>252</sup> They argue that such an approach will “minimize[] the influence of any one set of contract parties who happen to litigate over the meaning of a boilerplate term.”<sup>253</sup> While these scholars maintain that this approach ought to be used to interpret boilerplate of all different types, they are most interested in the way that the courts interpret a particular piece of boilerplate—the *pari passu* clause—that is commonly used in sovereign debt agreements.<sup>254</sup>

While an originalist approach may be well suited to interpreting the *pari passu* clause—an issue upon which this Article takes no position—it is ill-adapted to interpreting choice-of-law clauses for at least two reasons. First, a generic choice-of-law clause has no easily identifiable “original drafter.” It is therefore not possible to seek to uncover the original intent of this

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<sup>249</sup> Michelle Boardman, *Penalty Default Rules in Insurance Law*, 40 FLA. ST. U.L. REV. 305, 306 (2013)

<sup>250</sup> *Id.*

<sup>251</sup> Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 669 (1998) (“If the status quo bias will cause some parties to fail to contract around default terms that are inefficient for them, the best response is for lawmakers to create default terms that are efficient for as many parties as possible, reducing the total social cost of status quo bias friction.”).

<sup>252</sup> Stephen J. Choi & C. Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129, 1131-32 (2006).

<sup>253</sup> *Id.* at 1161.

<sup>254</sup> See, e.g., Mark Weidemaier, Robert Scott & Mitu Gulati, *Origin Myths, Contracts, and the Hunt for Pari Passu*, 38 LAW & SOC. INQUIRY 72 (2013); MITU GULATI & ROBERT E. SCOTT, *THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN* 109-38 (2013); William W. Bratton, *Pari Passu and a Distressed Sovereign's Rational Choices*, 53 EMORY L.J. 823 (2004); Lee C. Buchheit & Jeremiah S. Pam, *The Hunt for Pari Passu*, 23 INT’L FIN. L. REV. 20, 20 (2004); Lee C. Buchheit & Jeremiah S. Pam, *The Hunt for Pari Passu (Part II)*, 23 INT’L FIN. L. REV. 47, 47 (2004).

mythical individual.<sup>255</sup> Second, even if it were possible to identify the person who drafted the first choice-of-law clause, it is not clear why that person’s interpretation of the clause should be binding on all future parties. Contract practice can and does evolve over time. To suggest the intent of parties long dead should control future interpretations of a particular piece of contract language is to adopt an originalist view of contract interpretation that is difficult to reconcile with both the prevailing scholarship and the actual practice of courts called upon to interpret ambiguous contract language. As one critic of contracts originalism has argued:

When asked to interpret an ambiguous clause, judges do not normally become amateur archaeologists. They do not try to unearth the first relevant usage of the disputed clause—perhaps long ago, in other contracts between other parties—with a mind to impute that usage to these parties . . . . Whatever the merits of originalism as an approach to constitutional interpretation, surely the originators of a contract term have only a modest claim to authority.<sup>256</sup>

There is no compelling reason as to why courts should look to the intent of the original drafter of a choice-of-law clause—rather than the presumed intent of the majority of contracting parties entering into contracts in the present day—to determine the meaning of that clause.

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When a court is called upon to interpret a boilerplate choice-of-law clause, in summary, it should adopt an interpretation that is in line with majoritarian preferences. The next Part seeks to ascertain how the existing choice-of-law canons fare when measured against this baseline.

## V. EVALUATING THE CANONS

In many cases, courts striving to develop efficient majoritarian default rules to interpret choice-of-law clauses will have limited insight into the true preferences of most contracting parties. Each litigant will invariably argue that *its* reading of the contract language is the one that effectuates the preferences of most contract users and the court will have no easy way to determine which account is the correct one. What is needed are studies of practicing lawyers conducted *outside the context of ongoing litigation* that set forth their preferences when they

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<sup>255</sup> One of the earliest U.S. contracts containing an express choice-of-law clause dates to 1869. See *Kirtland v. Hotchkiss*, 42 Conn. 426, 444 (Conn. 1875) (noting that a bond issued in 1869 stated that it was “made under, and is in all respects to be construed, by the laws of the state of Illinois”). In the decades following the Civil War, life insurance companies and mortgage lenders made extensive use of such clauses as they expanded their operations nationally. See, e.g., *Union Central L. Ins. Co. v. Pollard*, 94 Va. 146 (1896) (discussing choice-of-law clause in 1882 life insurance contract); *Farrior v. New England Mortg. Sec. Co.*, 88 Ala. 275, 277 (Ala. 1889) (discussing choice-of-law clause in 1886 lending agreement).

<sup>256</sup> W. Mark C. Weidemaier, *Indiana Jones: Contracts Originalist*, 9 CAP. MARKETS L.J. 255, 256 (2014).



are not constrained to advance a position that favors their client's immediate interest.<sup>257</sup> Such studies would provide useful data to courts as they go about deciding which interpretive rule to adopt in a particular case. They would also provide useful benchmarks for evaluating whether the canons of construction currently used by the courts are broadly consistent with majoritarian preferences.<sup>258</sup>

In this Part, I present the results of precisely such a study. I interviewed eighty-six lawyers over a period of approximately fifteen months in 2015 and 2016 in an attempt to obtain a better understanding of party preferences when it comes to choice-of-law clauses. A detailed description of the methods by which I gathered this information is set forth in the Appendix. While more empirical research is sorely needed in this area, these sources provide some insight into which of the choice-of-law canons are consistent with the preferences of most contracting parties and which are not.<sup>259</sup>

This Part first considers whether the lexical canons—the canon in favor of internal law, the canon in favor of substantive law, the canon of linguistic equivalence, and the canon of federal inclusion and preemption—approximate the preferences of most parties. It then considers which of the canons relating to scope comes closest to achieving this goal. Finally, the Part analyzes the question of how to choose among conflicting canons when construing choice-of-law clauses.

#### A. Assessing the Lexical Canons

The canon in favor of internal law likely *does* generate the result that most parties would have reached if they had thought about it at the time of drafting. It is difficult, after all, to see why any contracting party would ever want to select the whole law of a jurisdiction to govern their agreement if the goal is to reduce uncertainty and to ensure a uniform choice of law. The canon in favor of linguistic equivalence would also appear to be consistent with party preferences. Most parties do not want their contract to be interpreted in accordance with the laws of one jurisdiction, but enforced in accordance with the laws of another. To the extent that these two interpretive rules give effect to the unstated preferences of most parties, they should be retained in their current form.

The canon in favor of substantive law and the canon in favor of federal inclusion and preemption, by contrast, present more complicated questions. Whether these two canons constitute efficient majoritarian default rules is explored below.

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<sup>257</sup> See *supra* note 22 (surveying burgeoning scholarly literature that looks to surveys and experiments to assist in contract interpretation).

<sup>258</sup> This methodological approach may be fairly characterized as *empirical majoritarianism*. See *supra* note **Error! Bookmark not defined.** (explaining the concept).

<sup>259</sup> As noted above, this analysis assumes that the contracting parties are firms that possess roughly equal bargaining power and that they are entering into a commercial agreement. See *supra* note 6. When a choice-of-law clause is set forth in a consumer contract, or where there is a significant disparity in terms of party bargaining power, a different analytical approach may be warranted. *Id.*

### 1. *The Canon in Favor of Substantive Law*

The canon in favor of substantive law posits that when the parties choose to have their contract governed by the “law” or “laws” of a particular jurisdiction, they intend for courts to apply that jurisdiction’s substantive law rather than its procedural law.<sup>260</sup> Two justifications are commonly proffered in support of this canon. First, it would be unduly burdensome to require a court to apply the procedural law of another jurisdiction.<sup>261</sup> Second, parties rarely think about matters of judicial administration when they are contracting and generally do not intend for their choice-of-law clauses to encompass the procedural law of the chosen jurisdiction.<sup>262</sup>

As applied to certain rules—pleading rules, for example—each of these justifications is quite compelling. It would be administratively challenging if the courts in one state were required to apply the pleading rules of another. And it is quite unlikely that most contracting parties would have intended this result when they wrote their choice-of-law clause. As applied to certain other rules—statutes of limitation, for example—these justifications are less compelling. It is not particularly difficult for the courts in one state to apply the statute of limitations of another. And it is at least plausible that when the parties choose to have their contract governed by the “law” of a particular jurisdiction, they expect this law to include any relevant statutes of limitations.

These intuitions about party intent notwithstanding, there is no information in the academic literature about how contracting parties perceive the relationship between choice-of-law clauses and statutes of limitations. Do these parties generally intend for their choice-of-law clauses to *select* the statutes of limitations of the chosen jurisdiction? Or do they generally intend to *exclude* statutes of limitations from the scope of their choice-of-law clauses? In an attempt to answer these questions, I interviewed fifty-three transactional lawyers. Thirty-nine of the interviewees worked at law firms. Fourteen worked as in-house counsel. There were twenty-two interviewees who practiced in North Carolina, eleven in Texas, five in New York, three in Oklahoma, three in Tennessee, and two in Georgia. The remaining interviewees hailed from Arizona, California, Colorado, the District of Columbia, Kansas, Pennsylvania, and Utah. The questions that I asked each of these lawyers are reproduced in the Appendix.

The overall goal of the inquiry was to determine whether these lawyers generally intend to select the statutes of limitations of a jurisdiction when they name that jurisdiction in their choice-of-law clause. The results of these interviews were striking. The overwhelming majority of the interviewees—forty-five out of fifty—stated that they generally want their choice-of-law clause to cover statutes of limitations.<sup>263</sup> When the contract selects the law of a particular state, in other words, the expectation among most of the interviewees was that this selection

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<sup>260</sup> See *supra* Part II.B.

<sup>261</sup> See *supra* note 76 & accompanying text.

<sup>262</sup> See *supra* note 77 & accompanying text.

<sup>263</sup> Three attorneys declined to answer the question.

*included* any relevant statutes of limitations. As one attorney commented: “I always thought you were signing up for substantive and procedural laws, unless otherwise specified.”<sup>264</sup> Another stated that “when we have accepted Choice of Law, it was our understanding that it covered all aspects of that state’s law.”<sup>265</sup> Still another observed that “I would think that the statute of limitations for contract actions . . . would be governed by the [statute of limitations] of the identified state.”<sup>266</sup>

Notwithstanding the fact that almost all of the interviewees reported that they wanted their choice-of-law clause to cover statutes of limitations, a majority—thirty-two out of fifty-three—confessed that they had never really given the matter much thought. One explained that “in terms of choice of law issues, the statute of limitations is unlikely to be the most pressing difference in the laws that I would care about.”<sup>267</sup> Another noted that “this rarely comes up and, but for those few instances where it’s been an issue in the contracts I’ve worked on, I wouldn’t have thought of singling out statute of limitations provisions.”<sup>268</sup> Still another commented that “I would anticipate that the [statute of limitations] provisions of the identified state would govern, but it is not generally the top of mind issue around why a given state was chosen.”<sup>269</sup> So while the interviewees were in general agreement that choice-of-law clauses *should* generally cover statutes of limitations, this was more of a shared intuition than a carefully researched position.

In explaining their answers to this question, which implicates the canon in favor of *substantive* law, several of the interviewees made reference to the canon in favor of *internal* law.<sup>270</sup> One observed that the sample clause provided failed to address the statutes of limitation issue because it did not “exclude[] conflicts of law principles that would cause the laws of another jurisdiction to apply.”<sup>271</sup> Another responded to this query by observing that standard clauses generally “include statute of limitations of [the] selected state because [we] intend to be governed by all the ‘internal’ laws of that state.”<sup>272</sup> Still another lawyer suggested that adding the phrase “without regard to its conflict of laws provisions” to the clause would ensure that the clause would cover statutes of limitation.<sup>273</sup> In each case, the lawyer was mistaken as to the effect of the additional language relating to conflict-of-laws rules. A clause directing a court not to apply a particular jurisdiction’s conflict-of-laws rules has no bearing on question of whether the clause covers statute of limitations. A number of courts have similarly

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<sup>264</sup> See E-mail to Author from Lawyer at DC Law Firm, Oct. 18, 2016.

<sup>265</sup> See E-mail to Author from In-House Lawyer at NY Company, Oct. 18, 2016.

<sup>266</sup> See E-mail to Author from Lawyer at NC Law Firm, Oct. 18, 2016.

<sup>267</sup> See E-mail to Author from Lawyer at NC Law Firm, Oct. 18, 2016.

<sup>268</sup> See E-mail to Author from Lawyer at NY Law Firm, Oct. 18, 2016.

<sup>269</sup> See E-mail to Author from Lawyer at GA Company, Oct. 26, 2016.

<sup>270</sup> Compare Part II.A with Part II.B.

<sup>271</sup> See E-mail to Author from Lawyer I at TX Law Firm, Nov. 17, 2016.

<sup>272</sup> See E-mail to Author from Lawyer II at TX Law Firm, Nov. 17, 2016.

<sup>273</sup> See E-mail to Author from Lawyer at TN In-House Counsel, Oct. 18, 2016.

confused the two canons and misunderstood the import of a contractual clause excluding a particular state's conflict-of-laws rules in relation to a discussion of statutes of limitations.<sup>274</sup>

When the interviewees were asked to predict how a court in their home state would rule on this question, the vast majority—forty-two out of fifty-two—predicted that the court would hold that a standard choice-of-law clause covered statutes of limitations.<sup>275</sup> In many cases, these predictions were incorrect. The courts in New York, North Carolina, and Texas, for example, have consistently held that statutes of limitations are procedural rather than substantive and hence *not* covered by choice-of-law clauses. This fact notwithstanding, a majority of the lawyers from each of these jurisdictions predicted that their state's courts would construe a generic choice-of-law clause to cover statutes of limitations. This finding suggests that there is currently a disconnect between party expectations and judicial practice in this area. Transactional attorneys frequently believe that statutes of limitations are covered by choice-of-law clauses. Judges in many U.S. jurisdictions, however, have expressly held that they are not.

There are two possible ways of resolving this disconnect. First, the parties could redraft their choice-of-law clauses specifically to address the issue of statutes of limitations. Second, the courts in the majority of states that currently take the position that statutes of limitations are procedural—and hence not covered by choice-of-law clauses—could reclassify them as substantive.<sup>276</sup> All other things being equal, the latter approach is to be preferred because it will (1) make it unnecessary for sophisticated parties to incur the drafting costs that would be required to rewrite their agreements to specifically address statutes of limitations, and (2) make it unnecessary for unsophisticated parties to incur litigation costs to resolve an issue that they believe to be addressed by the choice-of-law clause. The proper goal of a canon of construction, after all, is to provide a reading of the text that is consistent with the preferences of most contracting parties and the evidence presented above suggested that most transaction attorneys expect their choice-of-law clauses to cover statutes of limitations.<sup>277</sup> Courts in jurisdictions that classify statutes of limitations as procedural when construing choice-of-law clauses, therefore, would be well advised to rethink this position in order to align outcomes with party expectations.

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<sup>274</sup> See, e.g., *Brill v. Regent Communications, Inc.*, 12 N.E.3d 299, 306-308 (Ind. App. 2014); *OrbusNeich Med. Co. v. Boston Sci. Corp.*, 694 F.Supp.2d 106, 113 (D.Mass 2010).

<sup>275</sup> One attorney declined to answer the question.

<sup>276</sup> If a court wanted to take a new position on this issue, it could do so in one of two ways. First, the court could argue that statutes of limitations are “substantive” and hence covered by the choice-of-law clause. This is the approach that the Florida courts have taken. See *supra* note 90. Second, the court could interpret the word “laws” in the choice-of-law clause to encompass statutes of limitations. This is the approach that the California courts have taken. See *supra* note 100.

<sup>277</sup> See *supra* Part IV.A.

## 2. *The Canon in Favor of Federal Inclusion and Preemption*

The canon of federal inclusion and preemption posits that the selection of a law of a U.S. state also demonstrates the parties' presumptive intent to select any and all relevant provisions of federal law.<sup>278</sup> It also posits that the parties want federal law to preempt state law if the two come into conflict. In order to assess whether this canon accurately captures the unstated preferences of most contracting parties, it is helpful to explore its application in the context of the Federal Arbitration Act ("FAA"), on the one hand, and the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), on the other.

### a) The Federal Arbitration Act

When the parties write an arbitration clause into their agreement, they relinquish their right to bring suit in a court and choose instead to submit any and all disputes to a private arbitrator. These arbitral proceedings will be initiated and conducted in accordance with the rules selected by the parties in their contract. In the event that the contract does not specify the relevant rules, the judge will look to the parties' choice-of-law clause for guidance. When a generic clause selects the law of California, the courts will ordinarily (per the canon of federal inclusion and preemption) interpret this clause as selecting both the state arbitration law of California and the FAA. Where there is no conflict between these two bodies of law, there is no issue. When a conflict exists, however, the question that arises is whether the parties intended to select California state arbitration law or federal arbitration law as set forth in the FAA.

In the arbitration context, there are good reasons to think that—consistent with the canon in favor of federal inclusion and preemption—the parties generally intend the FAA to apply and to preempt state law when they use a generic choice-of-law clause.<sup>279</sup> For better or worse, the FAA is the bright sun and the dark moon of U.S. arbitration law. The U.S. Supreme Court has repeatedly held that the FAA preempts state arbitration law across a range of issues.<sup>280</sup> It is also rare for the parties to expressly exclude the FAA from contracts that contain an arbitration clause. To the contrary, it is common for these parties to expressly name it as the governing law. The canon's presumption with respect to party intent, therefore, would seem to track the general expectations of two hypothetical parties who enter into a contract that contains an arbitration clause as well as a generic choice-of-law clause. As applied to the

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<sup>278</sup> See *supra* Part II.D.

<sup>279</sup> See generally George A. Bermann, *Ascertaining the Parties' Intentions in Arbitral Design*, 113 PENN. ST. L. REV. 1013, 1017-18 (2009) (discussing the problem of ascertaining the parties' intent when they use a generic choice-of-law clause); Archis A. Parasharami & Kevin Ranlett, *Supreme Court Addresses Volt's Choice-of-Law Trap: Is the End of the Problem in Sight*, in DISPUTE RESOLUTION JOURNAL 2 (May/July 2009) ("Most drafters of arbitration agreements intend the FAA to apply.").

<sup>280</sup> See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Southland Corp. v. Keating*, 465 U.S. 1 (1984). But see Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 407-09 (2004) (identifying unresolved questions relating to the extent of FAA arbitration). The state and federal courts interpret the FAA far more frequently than they do the Uniform Arbitration Act. A LexisNexis search in all state and federal courts for the term "federal arbitration act" between July 25, 2014 and July 25, 2016 resulted in 2744 hits. This same search for the term "uniform arbitration act" during the same time period resulted in only 340 hits.

FAA, therefore, the canon of federal inclusion and preemption seems to function as an efficient majoritarian default rule.

b) The United Nations Convention on Contracts for the International Sale of Goods

The CISG presents a more complicated question. The CISG, it will be recalled, is a federal treaty that supplies a set of default contract rules to govern contracts for the sale of goods when the contract counterparty is located in another country. Some commentators have described it as an “international” version of UCC Article 2. In contrast to the FAA—which requires the parties to *opt in* to arbitration via an arbitration clause—the CISG will automatically apply as a default rule unless the parties *opt out*. To illustrate the workings of this opt-out regime, consider the following example. A company headquartered in New York enters into a sales agreement with a company headquartered in Michigan. That agreement contains choice-of-law clause selecting the law of New York. The resulting contract will be governed by New York’s version of UCC Article 2. If the same New York company were to enter into an identical sales agreement containing an identical choice-of-law clause with a company headquartered in Canada, however, the resulting contract would be governed by the CISG. In the latter case, the court would hold—per the canon of federal inclusion and preemption—that the parties chose the CISG indirectly by selecting New York law and that the CISG preempted New York’s version of UCC Article 2.

Is this outcome the one that most U.S. parties would have intended when they write a generic choice-of-law clause in their agreement? In order to answer this question, I worked with a team of research assistants to review several thousand contracts contained in the online EDGAR database maintained by the SEC to assemble a dataset comprised of international supply agreements involving at least one U.S. company that selected the law of a U.S. state but did not specifically exclude the CISG.<sup>281</sup> I then sent letters to 44 of these companies to ask them what they intended when they selected the law of a U.S. state. Did they intend for the contract to be governed by the CISG? Or did they intend for the contract to be governed by the chosen state’s version of Article 2 of the Uniform Commercial Code?

I received nine responses.<sup>282</sup> Significantly, not a single respondent indicated that the company intended to select the CISG when it chose the law of a U.S. state to govern its international sales agreement. One respondent stated: “We did not consider CISG at all.”<sup>283</sup> Another noted (somewhat ruefully) that: “We had no clue. Our intent when we signed that agreement was absolutely that it was going to be governed by the law of the state of Florida.”<sup>284</sup> Another respondent observed that: “[W]e did not intend for the stated choice of law to be eviscerated by the CISG. We have an updated provision in our new contracts to explicitly disclaim

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<sup>281</sup> See Coyle, *supra* note 34 (describing the methodology by which this dataset was assembled and discussing its limitations).

<sup>282</sup> In two cases, a company responded merely to inform me that it would not provide an answer to the question.

<sup>283</sup> E-mail to Author from In-House Counsel at U.S. Pharmaceutical Company I, February 29, 2016.

<sup>284</sup> Telephone Interview with General Counsel at U.S. Manufacturing Company, April 11, 2016.

the effect of the CISG, but several legacy agreements (done when we were less sophisticated) have not been updated.”<sup>285</sup> Another respondent queried whether the contract in question would actually have been governed by the CISG—it dealt with a number of issues in addition to sales—but stated that the company’s general policy was to opt out of the CISG: “We do not have a policy of choosing the CISG indirectly and we would affirmatively state that it was to govern if that was the intent.”<sup>286</sup> Another respondent declared that “I am not aware that we have ever had occasion to think about the point you raise.”<sup>287</sup> Another respondent stated that: “We would never select the law of Indiana, say, as a means of getting the [CISG]. We are just not that Machiavellian.”<sup>288</sup> Still another responded stated that he “would bet that the folks on both sides of the agreement were not aware of the CISG and the manner in which it trumps local law.”<sup>289</sup>

These responses suggest that the canon of federal inclusion and preemption does not accurately capture the baseline preferences of *U.S. companies* when it comes to the application of the CISG to international sales contracts. It is possible, however, that this canon does capture the baseline preferences of *foreign companies* who transact with U.S. counterparties. When given a choice between litigating a dispute under the UCC or the CISG, a foreign company may prefer the CISG because it is more likely to have been translated into their native language or because it is more favorable to their interests or because it is more familiar to them than the law of a particular U.S. state. More research is necessary to determine the expectations of foreign companies that enter into contracts with U.S. counterparties. For now, however, it is sufficient to note that the canon does not appear to produce outcomes that are consistent with the preferences of many U.S. companies.

The fact that a canon of construction does not accurately reflect the intent of some subset of the parties to a contract does not mean, of course, the canon serves no purpose. In some cases, the goal of a particular canon is not to capture private preferences but, rather, to advance some government policy.<sup>290</sup> The courts should, therefore, be cautious when they are called upon to apply the canon in favor of federal inclusion and preemption in CISG cases. In deciding how best to construe the choice-of-law clause, they should carefully weigh (1) the expectations of the U.S. party, (2) the expectations of the foreign counterparty, and (3) any applicable federal policies.<sup>291</sup>

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<sup>285</sup> E-mail to Author from In-House Counsel at U.S. Technology Company, March 4, 2016.

<sup>286</sup> E-mail to Author from In-House Counsel at U.S. Pharmaceutical Company II, February 29, 2016.

<sup>287</sup> E-mail to Author from In-House Counsel at U.S. Energy Company I, March 18, 2016.

<sup>288</sup> Telephone Interview with General Counsel at U.S. Investment Company, April 15, 2016.

<sup>289</sup> E-mail to Author from In-House Counsel at U.S. Energy Company II, Mar. 3, 2016.

<sup>290</sup> Baude & Sachs, *supra* note, at 18.

<sup>291</sup> Some courts have suggested, for example, that the CISG promotes the federal policy of promoting good faith in international trade. See *Travelers Prop. Cas. Co. of Am. v. St.-Gobain Tech. Fabrics Can., Ltd.*, 474 F. Supp. 2d 1075, 1081-1082 (D. Minn. 2007). Others have suggested that the application of the CISG serves to promote worldwide uniformity in the law relating to international sales agreements. See *BP Oil Int’l, Ltd. v. Empresa Estatal Petroleos de Ecuador (PetroEcuador)*, 332 F.3d 333, 337 (5th Cir. 2003). In the view of the author, it is far from clear that the U.S. government is strongly committed, as a matter of policy, in promoting worldwide uniformity in commercial law in situations where it would upset the settled expectations of U.S. parties. The CISG is the quintessential private law treaty. It does not bind public actors. It merely operates to define the rights and obligations of private

## B. Assessing the Canons Relating to Scope

The canons relating to scope, it will be recalled, provide a shorthand rule for courts asked to determine whether a choice-of-law clause applies exclusively to contract claims or whether it also applies to related tort and statutory claims.<sup>292</sup> The canon against non-contractual claims—which is applied by the courts in Florida, New York, and Texas—holds that a generic choice-of-law clause only covers contractual claims.<sup>293</sup> The canon in favor of non-contractual claims—which is applied by the courts in California, Minnesota, and Virginia—holds that a generic choice-of-law clause covers all claims arising out of or relating to the contract.<sup>294</sup> The question at hand is which of these two approaches most closely approximates the outcome that the parties would have wanted if they had thought about the issue at the time of drafting.

### 1. *Attorney Interviews*

In order to answer this question, I interviewed fifty-seven lawyers to ask them which interpretive rule they generally preferred.<sup>295</sup> Did they want the parties' choice of law to apply exclusively to contract claims? Or did they want that law to apply to related tort and statutory claims? The views of these attorneys provide a useful window into the minds of transactional lawyers with experience in drafting legal agreements. Forty-two of the interviewees worked at law firms. Fifteen worked as in-house counsel. There were twenty-three interviewees who practiced in North Carolina, eight in New York, four in Colorado, four in Texas, three in the District of Columbia, three in Oklahoma, three in Tennessee, and two in Minnesota. The remaining interviewees hailed from Arizona, California, Georgia, Kansas, Minnesota, New Jersey, and Utah.

The views expressed by these attorneys were remarkably consistent. The overwhelming majority—fifty-four out of fifty-seven respondents—stated that they generally wanted their choice-of-law clause to cover tort and statutory claims as well as contract claims. A clear majority of interviewees—forty out of fifty-three—stated that they wanted their clauses to cover *related* tort and statutory claims.<sup>296</sup> Ten attorneys went further. They reported that they wanted the chosen law to apply to *all* contract, tort, and statutory claims between the parties *regardless* of whether these claims were related to any underlying contractual claims. Only

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actors who transact with foreign counterparties. Whether the federal government has a strong interest in having the CISG apply in cases where the U.S. company chose the law of a particular U.S. state without realizing that this selection would result in the application of the CISG is a topic that warrants further research.

<sup>292</sup> See *supra* Part III.

<sup>293</sup> See *supra* Part III.A.

<sup>294</sup> See *supra* Part III.B.

<sup>295</sup> With respect to many other contract provisions, there is a danger that the views of the lawyers may not accurately track the views of the business principals. When it comes to choice-of-law issues, however, the principals will generally defer to the views of their attorneys.

<sup>296</sup> Four attorneys declined to answer the question.



three interviewees indicated that they wanted the choice-of-law clause to cover contract claims exclusively.

I also asked these same attorneys to predict how a court in their home jurisdiction would view the scope the following choice-of-law clause: “This Agreement shall be governed by and interpreted in accordance with the law of State X.” Three attorneys declined to answer this question. Among the fifty-four attorneys who provided an answer, thirty-three guessed—generally inaccurately—that a court in their home jurisdiction would read the clause to cover related tort and contract claims.<sup>297</sup> Sixteen interviewees guessed—generally accurately—that the court would read the clause to cover only contract claims. Five guessed that the court would read the clause to cover all claims regardless of whether they were related to the contract. On the whole, the interviewees’ predictions as to what the courts *would* do generally tracked their preferences as to what they *wanted* the court to do.

The issue of clause scope was familiar to some interviewees but not to others.<sup>298</sup> Some attorneys noted that they were always careful to include broad language in their choice-of-law clauses. One remarked that “I always ask to add ‘arising out of’ language to my NY docs to get the tort & statutory claims coverage” and added that “[i]n the absence of knowledge, I’d ask for ‘arising out of’ language to bring all contract-related claims in scope.”<sup>299</sup> Another attorney remarked on the importance of having a unified choice-of-law when dealing with issues relating to trade secret protection.<sup>300</sup> Still another attorney stated that he routinely drafted around the scope issue:

Invariably, in the M&A context, we use a comprehensive merger clause akin to the following: “This Agreement . . . and all claims or causes of action (whether in contract or tort or otherwise) that may be based upon arise out of or relate to this Agreement, or the negotiation, execution, performance, non-performance, interpretation, termination or construction thereof or hereof, shall be governed by the internal Laws of the State of Delaware, without regard to conflicts of law principles.”<sup>301</sup>

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<sup>297</sup> It was not possible to evaluate the accuracy of every attorney’s prediction because many of them hailed from jurisdictions where the courts have yet to adopt a clear rule on the issue.

<sup>298</sup> With respect to the issue of relatedness, the overwhelming majority of interviewees commented that the standard choice-of-law clause cannot cover claims that were unrelated to the contract. As one attorney put it: “If wholly unrelated, I don’t think I can reasonably expect to bind my counterparty to a negotiated choice of law that does not relate to the agreement we are negotiating.” E-mail to Author from In-House Lawyer at Kansas Company, June 7, 2016.

<sup>299</sup> E-mail to Author from In-House Counsel at Major U.S. University, June 6, 2016.

<sup>300</sup> E-mail to Author from Firm Lawyer at California Law Firm, June 7, 2016 (“At least when considering trade secret issues – my area of practice – and without going into anything privileged, companies generally want a single, unified choice of law.”).

<sup>301</sup> E-mail to Author from Firm Lawyer at Colorado Law Firm, June 16, 2016; *see also* E-mail to Author from Firm Lawyer at New York Law Firm, July 29, 2016 (“A majority of the deals I have worked on apply the choice of law provision to ‘any action or proceeding arising out of or relating to’ the Agreement at issue.”).

Other attorneys, however, noted that they had never encountered this issue. One stated that “this has never come up in any contract that has been disputed that I have been involved.”<sup>302</sup> Another stated that “I cannot remember seeing a choice of law provision in 40 years of real estate practice drafted to respond to the distinctions you are raising. We real estate lawyers are poor, simple folk (apparently).”<sup>303</sup> Still another interviewee—who worked as an in-house counsel for many years and who served as a general counsel for a publicly traded company in Minnesota—candidly acknowledged that this was an issue that neither he nor his team had ever thought about:

Although I worked for a public company, I can’t say that our analysis of choice-of-law clauses was as sophisticated as you might suggest by your questions. I’d be little more proud of my efforts if I could state that we had policy positions on your questions. With a small staff and a commitment to “getting the transactions completed” I admit that your [question] suggests a level of sophistication that did not exist in our practice. We were mindful of the choice-of-law clauses, and generally preferred to identify our home state with which we were most comfortable, but that was generally the extent of our focus on that specific clause.<sup>304</sup>

The interviews, in summary, revealed that there exists a wide range of attorney knowledge and sophistication when it comes to the precise wording of choice-of-law clauses on questions relating to their scope.

## 2. *Implications and Analysis*

While more empirical work is sorely needed in this area, the evidence discussed above suggests that attorneys across a range of jurisdictions generally prefer the canon *in favor of* non-contractual claims to the exclusion of the canon *against* non-contractual claims.<sup>305</sup> When it comes to making educated guesses about the preferences of hypothetical real world parties, in other words, the guesses made by the California courts in *Nedlloyd* would appear to be closer to the mark than the guesses made by the New York courts in *Knieriemen*.<sup>306</sup>

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<sup>302</sup> E-mail to Author from Firm Lawyer at North Carolina Law Firm, June 8, 2016.

<sup>303</sup> E-mail to Author from Firm Lawyer at Colorado Law Firm II, June 16, 2016.

<sup>304</sup> E-mail to Author from In-House Lawyer at Minnesota Law Firm, June 28, 2016.

<sup>305</sup> Burton, *supra* note **Error! Bookmark not defined.**, at 1072 (observing that “there are few empirical studies to support particular defaults”).

<sup>306</sup> The mode of interpretation utilized by the New York courts in *Knieriemen* may be fairly characterized as textualist. See Gilson et al., *supra* note 6, at 26 (noting that textualist doctrines “direct courts to look to a contract’s formal language and disregard claims, unless anchored in the text, that the parties . . . intended to supplement the formal contract by unwritten understandings and undertakings”). The approach utilized by the California Supreme Court, by comparison, may be fairly characterized as contextualist. See *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.*, 69 Cal. 2d 33, 40 (Cal. 1968) (“If the court decides . . . that the language of a contract, in the light of all the circumstances, is fairly susceptible of either one of the two interpretations contended for, extrinsic evidence relevant to prove either of such meanings is admissible.”).

Defenders of the *Knieriemen* approach might argue that courts should give effect to the *written text* of a generic choice-of-law clause rather than to the *general preferences* of the parties. The parties are perfectly capable of drafting broad choice-of-law clauses, so this argument goes, and it is not the court's job to fix their drafting mistakes. Since a generic choice-of-law clause lacks any language stating that the chosen law shall apply to claims "relating to" the contract, the court should give effect to the clause as written and apply the chosen law exclusively to contract claims. To do otherwise is to rewrite the parties' agreement without their consent. On this account, the decision rendered by the New York court in *Knieriemen* was correct because it is a faithful reading of the contractual text. The *Nedlloyd* decision rendered by the California Supreme Court, by contrast, was flawed because the court rewrote the parties' agreement without their consent.

While this argument has a certain surface appeal, it suffers from a number of weaknesses. First, courts routinely read language into generic choice-of-law clauses. A court applying the canon in favor of internal law, for example, will read the phrase "excluding its conflict of law rules" into a clause that omits it. A court applying the canon in favor of substantive law will read the phrase "substantive but not procedural" into a clause that omits it. In neither of these instances, however, is there an explicit textual basis for the court to do what it does. If the practice of reading words and phrases into generic choice-of-law clauses is acceptable in these other contexts, as it appears to be, then it is difficult to understand why a court should refrain from reading the phrase "relating to" into a generic clause that omits it if, in fact, such a reading is consistent with the likely intent of most parties.

Second, a strict commitment to textualism when it comes to issues of scope unfairly penalizes unsophisticated parties. As evidenced in the attorney interviews discussed above, many parties are often unaware of the canons relating to scope and fail to use the requisite "magic words" to expand the scope of the clause to reveal their true preferences to the court.<sup>307</sup> The vast majority of contracts in this world are not insurance contracts or merger agreements but run-of-the mill commercial agreements. These day-to-day agreements involve relatively small dollar amounts and generally do not attract the same level of attorney scrutiny as merger agreements or insurance contracts.<sup>308</sup> To hold these ordinary commercial contracts to the same standard of care as an M&A agreement—and to require the parties to these contracts to litigate the choice-of-law issue for a tort or statutory claim because their generic choice-of-law clause did not specifically address the issue—is to adopt an interpretive rule that functions as a penalty default. As discussed above, there is no persuasive reason as to why a penalty default rule should be adopted in the context of formulating canons to construe choice-of-law clauses.<sup>309</sup>

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<sup>307</sup> See E-mail to Author from In-House Lawyer at Minnesota Law Firm, June 28, 2016. In theory, contract drafters respond to judicial decisions interpreting contract language by revising their agreements to account for those decisions.

<sup>308</sup> See *supra* note 45 (stating that the analysis in this Article relating to choice-of-law clauses presupposes that such clauses are being deployed in contracts between two businesses).

<sup>309</sup> See Part IV.B.

Boilerplate choice-of-law clauses are by their nature ambiguous. This is why the courts have developed canons of construction—rules that express a judicial preference as to how a particular type of ambiguity should be resolved—to construe them. These rules should not serve to punish the unwary. They should seek to effectuate the preferences of most contracting parties. The interview data presented above suggests that when parties write a generic choice-of-law clause into their agreement, they almost always want that clause to cover tort and statutory claims that relate to the agreement in addition to contract claims.<sup>310</sup> Courts should therefore aspire to give effect to this preference when construing these clauses.

### C. Assessing the Conflict-of-Laws Rules

When a court is called upon to determine the proper scope of a generic choice-of-law clause, it must determine which canons to apply. Should it apply the canons prescribed by the law of the forum? Or should it apply the canons prescribed by the law of the state named in the choice-of-law clause? While the majority of U.S. courts to have considered the issue have applied the canons of the forum, this approach is flawed a number of respects. The better approach, as explained below, is to apply the canons of the state named in the choice-of-law clause.

First, applying the canons prescribed by the law of the state chosen by the parties ensures that the choice-of-law clause will have the same scope regardless of where the suit is brought. Courts and commentators have frequently pointed out the need for uniform and predictable results in this area of law.<sup>311</sup> If the courts were to apply the canons of the forum, the same clause would be subject to divergent interpretations as to its scope depending on where the suit was brought. The exact same choice-of-law clause would have one scope in New York, which applies the canon against non-contractual claims, and a different scope in Virginia, which applies the canon in favor of non-contractual claims. The simplest and most straightforward means of addressing this problem is to apply the canons of the state named in the choice-of-law clause to determine the scope of the clause. Such an approach ensures that the clause will have the same scope regardless of the forum in which a claim is asserted.

Second, using the law chosen by the parties to determine the issue of scope is more consistent with the terms of the hypothetical bargain that would be struck by most parties ex ante. It would be quite unusual for two parties to agree that (1) the contract will be governed by the substantive law of Ohio but that (2) the interpretive rules relating to the scope of the clause will be the rules of any jurisdiction in which the lawsuit was brought.<sup>312</sup> Viewed purely

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<sup>310</sup> See *supra* Part V.B.1 (reporting that fifty-four out of the fifty-seven attorneys interviewed wanted their choice-of-law clause to cover tort and statutory claims in addition to contract claims).

<sup>311</sup> See, e.g., RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 492 (4th ed. 2001) (“[T]he primary goal for adjudicators is to reach a uniform and predictable result no matter where the forum.”); see also *supra* notes 61-64 & accompanying text (discussing rationales underlying canon in favor of internal law).

<sup>312</sup> It would be especially odd if the court reached this conclusion in a case where the choice-of-law clause specifically stated that the contract was to be “interpreted in accordance with” the laws of Ohio. The same result

through the lens of hypothetical party intent, therefore, it seems implausible that the application of the interpretive rules followed by the forum is the result that the parties would have chosen. The courts should therefore apply the canons of the state named in the clause.

Third, applying the canons of the chosen state is consistent with the approach suggested by the Second Restatement of Conflict of Laws.<sup>313</sup> When it is possible to determine the actual intent of the contracting parties, the Restatement directs the court to apply the rules of the forum to interpret the contract.<sup>314</sup> When the intent of the parties cannot be satisfactorily ascertained, however, the Restatement directs the courts to apply the canons of the state named in the choice-of-law clause.<sup>315</sup> As discussed above, it will not be possible to satisfactorily ascertain the actual intent of the parties with respect to the scope of a generic choice-of-law clause in the vast majority of cases. Under the logic of the Restatement, therefore, the courts should apply the canons of the jurisdiction chosen by the parties rather than the canons of the forum.

Fourth, and finally, it is universally acknowledged by conflict-of-laws commentators that the parties generally possess the ability to choose the body of law that will be used to interpret their contract.<sup>316</sup> If the parties can write a broad choice-of-law clause that covers tort and statutory claims into their agreement, then surely it must be permissible for them to achieve

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should, however, obtain even if the parties use the word “govern” or “construe,” per the canon of linguistic equivalence. *See supra* Part II.B.

<sup>313</sup> The Restatement specifically directs the courts to enforce choice-of-law clauses under most circumstances. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187.

<sup>314</sup> *Id.* at § 204 cmt. a (“The forum will first seek to interpret the contract in the manner intended by the parties. It will consider the ordinary meaning of the words, the context in which they appear in the instrument, and any other evidence that casts light on the parties’ intentions, including an intention, if any, to give a word the meaning given it in the local law of another state. The forum will apply its own rules in determining the relevancy of the evidence, and it will use its own judgment in drawing conclusions from the facts. This process, which is called interpretation . . . does not involve application by the forum of its choice of law rules.”)

<sup>315</sup> *Id.* at cmt. b. (“When the meaning which the parties intended to convey by words used in a contract cannot satisfactorily be ascertained, the forum must determine the meaning of these words by a process . . . called construction. This process involves the application of the rules of construction of a particular state. Consequently, a choice-of-law problem arises whenever a contract has a substantial relationship to two or more different states with different rules of construction. The courts will give effect to a provision in the contract that it should be construed in accordance with a particular law.”). While the Restatement makes a great deal of the distinction between interpretation and construction, this distinction is widely ignored by most courts today. *See supra* note 7 (observing that the overwhelming majority of U.S. courts view these two terms as interchangeable).

<sup>316</sup> WILLIAM M. RICHMAN ET AL., UNDERSTANDING CONFLICT OF LAWS 238 (4th ed. 2013) (“Interpretation of contractual language . . . is what § 187(1) permits; and interpretation, no matter what form it takes, can always be controlled by the parties to the contract.”); EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 956 (4th ed. 2004) (“When the parties choose a law solely for the purpose of construing or interpreting the items of their contract, their choice is not restricted.”); CLYDE SPILLINGER, PRINCIPLES OF CONFLICT OF LAWS 127-28 (2010) (arguing that “a state’s rules with respect to contract interpretation are ‘default rules’” and that the parties may therefore “contract around such rules if they wish” in accordance with Section 187(1)); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 492 (4th ed. 2001) (“When the conflicts problem concerns the construction of a contract, permitting the parties to determine the issue by a choice-of-law clause in the contract raises no objection similar to those voiced above when discussing validity.”).

this same end by selecting the law of a jurisdiction that directs its courts to interpret generic choice-of-law clauses broadly.

These practical and doctrinal arguments notwithstanding, a surprising number of courts in the United States currently do not apply the canons of the law of the state named in the choice-of-law clause to determine the scope of that clause.<sup>317</sup> Indeed, a number of courts have specifically held that it is inappropriate to apply the canons of the chosen jurisdiction because it might violate the public policy of the forum state.<sup>318</sup> As the federal district court for the Western District of Virginia has explained:

Although applying chosen law may lead to greater certainty in future interpretations of a choice-of-law provision, such an approach is inconsistent with the manner in which modern courts evaluate the enforceability of these provisions. Enforceability is a threshold issue determined according to forum law. Most states give effect to these provisions absent a showing that the chosen law has no substantial relationship with the agreement or would contravene the public policy of the forum state. Courts in Virginia enforce these agreements unless the provision is unfair or unreasonable or the result of unequal bargaining power. *Whether a provision violated the public policy of a state, or whether it is unfair or unreasonable, will often depend on the scope of that provision's application and whether it would preclude otherwise meritorious claims. The scope of the choice-of-law provision is, therefore, a necessary part of the threshold inquiry into enforceability.*<sup>319</sup>

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<sup>317</sup> This is not the universal practice. Some courts apply the law of the state named in the clause to determine its scope. *See supra* notes 229-233. The more common practice, however, is for the courts to apply the law of the forum to determine the scope of a choice-of-law clause. *See supra* notes 221-228.

<sup>318</sup> At least one commentator has argued that the law of the forum should be applied to interpret contractual provisions generally. *See Hoffheimer, supra* note 7, at 656. The essence of his argument is the chosen law may sometimes assign a meaning to the contract term that was unintended by the parties and that, in these situations, the decision to “enforc[e] choice of law neither furthers intent nor promotes party autonomy.” *Id.* at 650. This commentator also argues that “applying chosen law to interpretation and construction aggravates uncertainty, increasing the probability of conflicts.” *Id.* at 651. With respect to the first point, it is certainly possible that an interpretive rule in the chosen law could result in a reading of the contract that was not intended by the parties. It is also possible, however, that an interpretive rule of the forum could generate the same result. Unless one is willing to peek behind the curtain of the choice-of-law analysis to see what the outcome will be—which is generally disfavored—there is no way to know whether the problematic interpretation will arise as a result of the application of the chosen law or the forum law. With respect to the second point, applying the chosen law to interpretation and construction arguably results in *less* uncertainty because the whole contract will be interpreted and enforced—with the exception of this issue of validity—in a manner consistent with the law of a single jurisdiction. Given the potential for gamesmanship and forum shopping with respect to questions of scope, this certainty is desirable and can only be achieved by applying the chosen law.

<sup>319</sup> *Pyott-Boone Elecs., Inc. v. IRR Trust for Donald L. Fetterolf* Dated December 9, 1997, 918 F. Supp. 2d 532, 543 (W.D. Va. 2013) (emphasis added); *see also* *Schwan's Sales Enterprises, Inc. v. SIG Pack, Inc.*, 476 F.3d 594, 597 (8th Cir. 2007) (stating that interpreting a choice-of-law clause's scope under the chosen law rather than the forum law would “give effect to that provision before the court's analytical determination of what effect it should have”); *Fin. One Pub. Co. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 333 (2d Cir. 2005) (“[C]ourts consider the scope of a contractual choice-of-law clause to be a threshold question like the clause's validity. Courts therefore determine a

This analysis improperly conflates the issue of whether a clause is *valid* with the issue of the clause's intended *scope*.<sup>320</sup> A clause that is valid will be enforced.<sup>321</sup> A clause that is invalid will not be enforced. A clause that is interpreted to have a narrow scope will apply exclusively to contract claims. A clause that is interpreted to have a broad scope will also apply to related tort and statutory claims. Either a clause is invalid and unenforceable—in which case the canons of the chosen state should not be applied at all—or the clause is valid and the canons of the chosen state should be applied to determine the scope of the clause.<sup>322</sup> There is no logical reason why the issue of scope should be conflated with the issue of validity in the general run of cases.<sup>323</sup>

To be sure, there may be cases in which the validity of contract is intertwined with the issue of its scope. In cases where the forum state's public policy would be offended by the application of the tort law of the chosen state but not by its contract law, for example, then the scope of the clause will impact the question of its validity. To argue that a court should *always* apply the canons of the forum in order to address these unusual cases, however, is to use a sledgehammer to crush a gnat. In the overwhelming majority of cases, the public policy of the forum state will *not* distinguish between the chosen jurisdiction's tort and contract law.<sup>324</sup> The

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choice-of-law clause's scope under the same law that governs the clause's validity—the law of the forum.”); *Cypress Pharms., Inc. v. CRS Mgmt.*, 827 F. Supp. 2d 710, 724 (S.D. Miss. 2011).

<sup>320</sup> Symeon C. Symeonides, *Choice of Law in the American Courts in 2001*, 50 AM. J. COMP. L. 1, 21 (2002) (identifying “existence, validity, scope, and enforceability” as “the four sequential logical steps that a court takes before applying the law chosen by the clause”); see also HAY ET AL., *supra* note 2, at 1129 (“[T]heoretically at least, there is always a preliminary question of which law will determine the existence and validity of the choice-of-law agreement itself.”); Michael Gruson, *Governing--Law Clauses in International and Interstate Loan Agreements -- New York's Approach*, 1982 U. ILL. L. REV. 207, 223 (1982) (“The parties to a contract cannot change this conflict-of-laws rule relating to the validity of governing-law clauses.”).

<sup>321</sup> The validity of a choice-of-law clause will typically be determined in accordance with a two-step analysis. In the first step, the court asks whether the particular issue could have been resolved by an explicit provision in the parties' agreement. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1). If so, then the clause is valid. If not, then the court proceeds to step two. In the second step, the court will inquire into whether (1) the chosen state has a substantial relationship to the parties or the transaction, and (2) the application of the law of the chosen state would be contrary to a fundamental public policy of another state (usually the forum state) with a materially greater interest in the transaction than the chosen state. *Id.* at 187(2). If there exists a substantial relationship with the chosen state, and if the selection of that state's law is not contrary to a fundamental public policy of another state with a materially greater interest, then the clause is valid and will be enforced by the courts. See also UCC 1-301(a) (2008) (“[W]hen a transaction bears a reasonable relation to this state and also to another state or nation, the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.”).

<sup>322</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 204 cmt. b (“If ... the law chosen by the parties is not applied to govern issues involving the validity of the contract, this [chosen] law will nevertheless be applied to determine questions of construction.”).

<sup>323</sup> *Cf. Martinez v. Bloomberg LP*, 740 F.3d 211, 220 (2d Cir. 2014) (“It would undermine the predictability fostered by forum selection clauses, however, if federal law—rather than the law specified in a choice-of-law clause—were to govern the interpretation as well as the enforceability of a forum selection clause.”).

<sup>324</sup> See CLYDE SPILLINGER, *PRINCIPLES OF CONFLICT OF LAWS* 127 (2010) (“[M]ore often than not, choice-of-law clauses operate to clarify matters of performance and interpretation, rather than fundamental questions of enforceability.”). The Restatement “assigns to the *lex fori* issues of misrepresentation, duress, undue influence, or

courts should not adopt a rule of general application to resolve an issue that arises only rarely.<sup>325</sup> In cases in which the public policy of the forum state distinguishes between the tort and contract law of the chosen state, and where the issue of a clause's scope therefore has a direct and immediate impact on its validity, then it is appropriate for a court to apply the canons of the forum. In all other cases, however, the court should apply the canons of the jurisdiction named in the clause when construing its scope.<sup>326</sup> This approach (1) will produce consistent interpretations of the clause regardless of forum, (2) is more consistent with the terms of the hypothetical bargains likely to be struck by most parties *ex ante*, (3) is in keeping with the Second Restatement of Conflict of Laws, and (4) respects the ability of the parties to choose the body of law that will be used to interpret their contract.

## CONCLUSION

Much ink has been spilled in the literature about the interplay between courts and lawmakers. In the public law context, it is common for scholars to observe that Congress can always overrule the Supreme Court when it misinterprets a statute.<sup>327</sup> In the private law context, it is routine to see claims that private actors write their contracts in the shadow of prior judicial decisions interpreting contract language and that parties can draft around such decisions if they so choose.<sup>328</sup> While these observations are undoubtedly true in the abstract, they ask a great deal of the lawmakers, both public and private. In the real world, it is rare to find a lawyer who possesses an encyclopedic knowledge of past judicial decisions interpreting particular contract phrases. It is even rarer to find one who is savvy enough to draft language in the shadow of these interpretations so as to advance the interests of her client.<sup>329</sup>

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mistake, and to the chosen law all other questions of formation and validity, including capacity and form." HAY ET AL., *supra* note 2, at 1129-30.

<sup>325</sup> Where the public policy of the forum state does draw this distinction, moreover, there is no obvious reason to why applying the forum state's canons of construction will help to resolve the problem.

<sup>326</sup> This insight is not new. See Note, *Choice-of-Law Rules for the Construction and Interpretation of Written Instruments*, 72 HARV. L. REV. 1154, 1164 (1959) (observing that "express stipulations of the legal system to be applied in interpreting the contract have not been considered objectionable"); Note, *Commercial Security and Uniformity through Express Stipulations in Contracts as to Governing Law*, 62 HARV. L. REV. 647, 649 (1949) ("When the issue concerns only the construction or interpretation of the contract, there is no valid reason for denying full effect to the expressed intent of the parties. For once, the authorities are in unanimous accord. The parties may freely select any law, even if totally unconnected with their contract.").

<sup>327</sup> See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (discussing instances where Congress enacted legislation to overturn the Supreme Court's interpretation of a statute).

<sup>328</sup> *Cape Flattery Ltd. v. Titan Mar., LLC*, 647 F.3d 914, 923 (9th Cir. 2011) ("There is a good reason to indicate clearly to contracting parties what specific language will signify that the scope of their . . . agreement is narrow. Once they know the specific language that is required, they can rely on that language to produce a result they jointly desire."); Gerhard Wagner, *The Dispute Resolution Market*, 62 BUFFALO L. REV. 1085, 1152 (2014) ("Where the court, in a prior judgment . . . interpreted contract language, the litigants of the future will know better which words and phrases to use and which to avoid.").

<sup>329</sup> See Boardman, *supra* note 41 (noting that insurance lawyers constitute an exception to this general rule).



When a court interprets a choice-of-law clause in a manner that is inconsistent with party expectations, therefore, it is not enough to point out that the parties can always draft around that interpretation. Invariably, some percentage of the lawyer population, unaware of this decision, will continue to draft their contract language in precisely the same manner as before. It is essential, therefore, that courts interpret such clauses in a way that is consistent with the preferences of *most* contracting parties *most* of the time. While there is a place for penalty defaults that force the parties to reveal information to one another, the interpretation of boilerplate choice-of-law provisions is not that place.

The choice-of-law canons discussed in this Article have been intermittently successful in approximating the preferences of most contracting parties. The canon in favor of internal law and the canon of linguistic equivalence clearly function as efficient majoritarian default rules. The canon in favor of substantive law and the canon of federal inclusion and preemption do so in some cases but not in others. On the basis of the available evidence, the canon in favor of non-contractual claims would appear to be a more efficient default than the canon against non-contractual claims because it more accurately captures the preferences of most parties. Finally, a conflict-of-laws rule directing the court to apply the canons of the state chosen by the parties to determine the scope of the clause is more likely to promote consistency and to effectuate party intent than one directing the courts to apply the canons of the forum.

In closing, it should be emphasized that there is no need to apply any of these canons if the choice-of-law clause is drafted so as to address each of these issues. It is possible, in other words, for sophisticated parties to render these canons essentially irrelevant through a few well-chosen words. Such a clause might read something like this:

Choice of Law. This Agreement shall be interpreted and construed in accordance with the laws of the State of X. Any and all claims, controversies, and causes of action arising out of or relating to this Agreement, whether sounding in contract, tort, or statute, shall be governed by the laws of the State of X, including its statutes of limitations, without giving effect to any rule that would result in the application of the laws of a different jurisdiction. The United Nations Convention on Contracts for the International Sale of Goods shall not apply to this Agreement.<sup>330</sup>

Until the day when every choice-of-law clause in every contract is drafted in such a manner, however, the canons of construction discussed herein will continue to play a key role in the interpretation of choice-of-law clauses in the United States.

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<sup>330</sup> The proposed clause omits any language relating to the Federal Arbitration Act to guard against the possibility that a court would inadvertently interpret the choice-of-law clause as a de facto arbitration clause. If the contract contains a separate arbitration clause, however, and if the parties wish to clearly signal that they want the FAA to govern that arbitration, then they may add the following language to the end of the clause: “Any arbitration conducted pursuant to the terms of this Agreement shall be governed by the Federal Arbitration Act.”

## APPENDIX

### *Methods I: Attorney Interviews and Statutes of Limitations*

In order to evaluate the general preferences of transactional lawyers as to whether choice-of-law clauses covered statutes of limitation, I first prepared a short questionnaire with queries about their preferred scope. I then e-mailed that questionnaire to approximately 80 people. Some of these individuals were transactional lawyers that I had worked with in practice. Others were longtime friends and acquaintances who happened to be transactional lawyers. Others were family members and former students now in practice who knew a significant number of transactional lawyers. Still others were attorneys at firms where I presented this paper. The people who were interviewed, in short, did not constitute a representative sample of attorneys in the United States. They were transactional lawyers at large law firms or public companies who are generally more knowledgeable and sophisticated about contract drafting than the typical lawyer in the United States. There was considerable (though not perfect) overlap between these attorneys and the ones I interviewed to ask about clause scope.

When I e-mailed the questionnaire to a particular person, I would typically include a cover note asking the recipient to forward the questionnaire on to any of their colleagues who were transactional lawyers and ask if they could also provide a response. In some instances, the respondents included commentary in their responses to the questions posed. I have included a representative sampling of these comments in the main body of the Article.

#### **Question 1**

When your company enters into a contract that contains a choice-of-law clause selecting the laws of State X, does it generally intend to **select the statutes of limitations** of State X? Or does your company generally intend to **exclude statutes of limitations** from the scope of its choice-of-law clauses?

#### **Question 2**

Had you ever thought about the questions posed in Question 1 before just now?

#### **Question 3**

There is a contract that contains the following choice-of-law clause:

This Agreement shall be governed by and interpreted in accordance with the laws of State X.

Without conducting any research, please select the answer that reflects your best guess as to how **a court in your home state** would interpret this clause.

- a) The choice-of-law clause **selects** the statute of limitations of State X.
- b) The choice-of-law clause **does not select** the statute of limitations of State X.

### *Methods II: International Supply Agreements, Choice-of-Law Clauses, and the CISG*

In order to evaluate whether companies that wrote generic choice-of-law clauses selecting the law of a U.S. state into their international supply agreements intended to select the CISG, I worked with a team of research assistants to assemble a dataset of contracts. This dataset consisted of international supply contracts filed with the SEC between 2011 and 2015. Each research assistant was instructed to conduct a search for “supply /2 agreement” in the “Material Contracts” section of the EDGAR database. These searches were conducted through the LexisNexis portal. These searches resulted in 5549 hits. A research assistant then reviewed each of these agreements to determine whether the contract at issue was an “international” supply agreement involving at least one U.S. party and one foreign counterparty. Once this process was complete, I was left with 248 international supply agreements.

I then reviewed each of these agreements to determine (1) whether it excluded the CISG, (2) whether the foreign counterparty had its principal place of business in a country that had not ratified the CISG, (3) whether the agreement was an amendment to a prior agreement, (4) whether the agreement in question selected foreign law, and (5) whether it was a repeat of another contract in the secondary dataset. If the answer to any of the preceding queries was yes, I eliminated the contract from the dataset.<sup>331</sup> After this review was complete, I was left with a group of 44 international supply agreements that (1) contained a choice-of-law clause selecting the law of a U.S. state, and (2) did not exclude the CISG. I then sent letters to the 44 U.S. companies that were party to each of these contracts to ask what they intended when they selected the law of a U.S. state. I received nine responses. Each of these responses is reproduced in the main body of the Article. It should be emphasized that all of these responses came from attorneys at *public* companies. To the extent that public companies are larger and wealthier than the typical U.S. company, the views of the attorneys who work there may not be representative of the views of attorneys who work at smaller companies.

### *Methods III: Attorney Interviews and the Canons Relating to Scope*

In order to evaluate the general preferences of transactional lawyers as regards the scope of their choice-of-law clauses, I first prepared a short questionnaire with queries about their preferred scope. I then e-mailed that questionnaire to approximately 80 people. Some of these individuals were transactional lawyers that I had worked with in practice. Others were longtime friends and acquaintances who happened to be transactional lawyers. Others were family members and former students now in practice who knew a significant number of transactional lawyers. Still others were attorneys at firms where I presented this paper. The people who were interviewed, in short, did not constitute a representative sample of attorneys in the United States. They were

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<sup>331</sup> Ultimately, I eliminated 49 contracts from the secondary dataset because they opted out of the CISG, 44 contracts because the counterparty had its place of business in a country that had not ratified the CISG, 37 contracts because they selected the law of a country that had ratified the CISG, and one contract because it opted in to the CISG. The remaining 74 contracts were excluded because they (1) were repeats, (2) were amendments to previous contracts, (3) were formatted in a manner that made them unreadable, or (4) did not contain a choice-of-law clause.

transactional lawyers at large law firms or public companies who are generally more knowledgeable and sophisticated about contract drafting than the typical lawyer in the United States. There was considerable (though not perfect) overlap between these attorneys and the ones I interviewed to ask about statutes of limitations.

When I e-mailed the questionnaire to a particular person, I would typically include a cover note asking the recipient to forward the questionnaire on to any of their colleagues who were transactional lawyers and ask if they could also provide a response. In many instances, the respondents included commentary in their responses to the questions posed. I have included a representative cross sampling of these comments in the main body of the Article.

### **Question 1**

When your company enters into a contract that contains a choice-of-law clause selecting the law of State X, what is your general preference as to the scope of that clause? Do you want the law of State X to apply only to **contract claims** (such as breach of contract) that may arise between you and your counterparty? Or do you also want the law of State X to apply to any **tort claims** (such as fraud) and **statutory claims** (such as theft of trade secrets) that may arise between you and your counterparty?

### **Question 2**

If you indicated in Question 1 that you wanted the law of State X to apply only to contract claims, please skip this question. If you indicated in Question 1 that you wanted the law of State X to apply to tort and statutory claims, do you want the law of State X to apply to **all** such claims, including claims that are **unrelated** to the contract? Or do you want the law of State X to apply only when the tort and statutory claims are **related** to the contract in some way?

### **Question 3**

There is a contract between Party A and Party B that contains the following choice-of-law clause:

This Agreement shall be governed by and interpreted in accordance with the law of State X.

Without conducting any research, please select the answer that reflects your best guess as to how a **court in your home state** would interpret the scope of this clause.

- a) The law of State X will apply to all **contract claims** brought by Party A against Party B but it will not apply to **tort or statutory claims**.
- b) The law of State X will apply to all contract claims brought by Party A against Party B. It will also apply to tort and statutory claims brought by Party A that are **related** to the contract. The Law of State X will not, however, apply to tort and statutory claims brought by Party A that are **unrelated** to the contract.
- c) The law of State X will apply to **all** contract, tort, and statutory claims brought by Party A against Party B regardless of whether these claims are related to the contract.