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FASTER RESOLUTIONS IN TARIFF CLASSIFICATION LITIGATION: USING PATENT LAW AS A MODEL

*Lawrence M. Friedman**

INTRODUCTION

The United States Court of International Trade has exclusive nationwide jurisdiction to review United States Customs and Border Protection ("Customs") decisions concerning the tariff classification of imported merchandise.[1] Tariff classi-

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* Lawrence Friedman is a partner in the Chicago office of Barnes, Richardson & Colburn where he practices exclusively in the areas of customs, export, and trade law. He is also an Adjunct Professor of Law at the John Marshall Law School Center for International law. He began his career as a law clerk to the Honorable Dominick L. DiCarlo of the Court of International Trade. He holds a J.D. and LL.M. in Intellectual Property law from the John Marshall Law School and serves on the Board of Directors of the Customs and International Trade Bar Association. Brad Opfermann, J.D., a recent graduate of the John Marshall Law School Center for International Law, provided invaluable assistance in completing this article.

fication is important to both the United States and to importers because it controls, among other things, the rate of duty applicable to goods entering the United States. Importers may challenge the classification that Customs assigns to merchandise in an effort to seek the refund of duties,[2] to avoid the imposition of monetary penalties for noncompliance,[3] to avoid the application of quantitative quotas, or for other reasons.

Most tariff classification cases do not involve disputed facts concerning the structure, operation, or other physical aspects of the merchandise. Consequently, these cases often turn entirely on questions of law involving the interpretation of the Harmonized Tariff Schedule of the United States.[4] Consistent with the legal nature of these disputes, most classification cases are resolved via motions for summary judgment because there are no material facts in dispute.[5]

Nevertheless, the parties to classification disputes generally engage in sometimes lengthy and expensive discovery involving document production and deposition testimony from both lay and expert witnesses. The focus of this discovery is often to confirm, on the record, the nature of the merchandise in a way that fits each party's understanding of the tariff language. Discovery may also involve expert opinion as to the common and commercial meaning of the tariff language.[6] Each party then argues for the Court of International Trade to adopt its interpretation of the tariff language and then to apply the usually uncontroverted facts to the interpreted text.

The result is that customs practitioners—both private and governmental—may expend considerable time and effort developing facts to fit a legal interpretation of the law that the court

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1. 28 U.S.C. § 1581(a) (2012).
2. 19 U.S.C. § 1514 (2012).
3. *See* 19 U.S.C. § 1592 (2012).
4. *See* Levi Strauss Co. v. United States, 21 C.I.T. 677, 679 (1997) ("[T]he purely legal question found in most classification cases has already been answered.") *rev'd on other grounds*, 222 F.3d 1344 (Fed. Cir. 2000).
5. A review of decisions of the Court of International Trade showed that from January 1, 2011 through April 8, 2014, there were forty-five published opinions on tariff classification. Of those, only six referred to a trial. The remainder were motions for summary judgment or motions to dismiss. That means that only about 13% of classification cases involve a dispute regarding facts.
6. *See, e.g.,* Samsung International, Inc. v. United States, 887 F. Supp. 2d 1330, 1342 (2012).

will not ultimately accept. For one party or the other, that will be wasted effort.

This Article proposes that practitioners adopt an alternative approach modeled on the U.S. Supreme Court decision in the patent case *Markman v. Westview Instruments, Inc.*[7] Following a *Markman* model, practitioners would ask the Court of International Trade to hold a hearing or entertain motions, preferably early in the dispute, to determine the scope of the tariff headings at issue. With that information, the parties would be able to devise a discovery plan that, given the court's guidance as to the controlling law, focuses on any relevant questions of fact that may be necessary to resolve. It is suggested that practitioners adopting this approach may find a quicker and more efficient resolution of customs classification disputes. Given the expense of customs litigation, this approach may also encourage more cases to be brought to the Court of International Trade, which would result in greater business and legal certainty in the application of the tariff laws. As an alternative, absent adoption by practitioners, the court might choose to adopt rules modeled on local patent rules in district courts in order to force the early resolution of questions of law.

I. *MARKMAN* HEARINGS

Markman was a patent infringement dispute relating to a system for tracking clothing and other articles brought into dry cleaning shops.[8] The specific question brought to the Supreme Court was whether the correct interpretation of patent claims was a question of law to be decided by the court or a question of fact to be decided by a jury.

As background, a patent must describe the scope of the claimed invention.[9] In American patent law, the scope of the patent is defined by two elements. The first is the specification, which is a clear and concise description of the invention.[10] The specification must provide enough detail to permit someone skilled in the relevant art (i.e., the relevant area of technology or industry) to implement the invention.[11] The second part is

7. Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996).
8. *Id.*
9. *Id.* at 373.
10. *Id.*
11. *Id.*

made up of the patent claims, which "distinctly claim" the subject matter the patent applicant regards as the invention.[12] According to the Supreme Court in *Markman*, the claim defines the scope of the patent. Assuming the application matures into a granted patent, infringement results when the patent claim covers the infringer's product or process.[13]

Thus, like tariff language, the patent claim sets the metes and bounds of the subject merchandise. The claims define the scope of the patented invention in much the same way that a tariff heading defines the scope of the merchandise it covers. And, also like tariff language, the interpretation of the patent claim is purely a question of law.

The fundamental question before the Supreme Court in *Markman* was whether claims interpretation is a question for the judge or for the jury. In tariff litigation, the question of what issues go to a jury is not relevant because actions challenging tariff classification determinations may not be tried before a jury.[14] Nevertheless, in language strikingly similar to language used in myriad tariff classification cases from the Court of International Trade and the Court of Appeals for the Federal Circuit,[15] the Supreme Court characterized a patent case as consisting of two elements. "The first is a question of law, to be determined by the court, construing the letters-patent, and the description of the invention and specification of claim annexed to them. The second is a question of fact, to be submitted to a jury."[16] In the end, the Supreme Court determined that the interpretation and construction of patent claims is the province of judges. According to Justice Souter:

> The construction of written instruments is one of those things that judges often do and are likely to do better than jurors unburdened by training in exegesis. Patent construction in

12. 35 U.S.C. § 112 (2012).

13. *See Markman*, 517 U.S. at 373.

14. Rule 38 of the Rules of the Court of International Trade ("C.I.T.") preserves the right to a jury trial in cases where that right is conferred by the Seventh Amendment to the U.S. Constitution. In other cases, including classification cases, an "advisory jury" is possible. 28 U.S.C.A. C.I.T. Rule 39(c) (2010).

15. *See, e.g.,* Faus Group Inc., v. United States, 581 F.3d 1369, 1371-72 (Fed. Cir. 2009); Hewlett-Packard Co. v. United States, 189 F.3d 1346, 1348 (Fed. Cir. 1999).

16. *Markman*, 517 U.S. at 384.

> particular "is a special occupation, requiring, like all others, special training and practice. The judge, from his training and discipline, is more likely to give a proper interpretation to such instruments than a jury; and he is, therefore, more likely to be right, in performing such a duty, than a jury can be expected to be."[17]

As a result of this finding, a practice has developed in which district court judges hold so-called *Markman* hearings. By way of example, consider the Local Patent Rules of the Northern District of Illinois.[18] These rules require patent litigants to exchange lists of phrases the court should construe, the proposed construction of those terms, and, among other things, the elements of the subject merchandise or process that relate to the terms.[19] Within seven days of this exchange, the parties must agree on up to ten claims to be submitted to the court.[20]

After the list of claims for construction has been submitted, the party opposing infringement is given thirty-five days to submit briefs supporting their respective constructions of the claims.[21] The brief may contain extrinsic and intrinsic evidence in support of the proposed constructions. Furthermore, the parties may rely on testimony in a sworn statement. The rules then provide for response and reply briefs concerning claim construction and a joint appendix of supporting evidence. Finally, within twenty-eight days of the submission of the last brief, the judge may hold an oral argument or hearing on the proper construction of the tariff terms.[22]

Using this process, the district court ensures that the questions of law arising out of claims construction are addressed by the court. The process, however, also has the potential to allow the court, through early intervention on questions of law, to narrow the issues to be addressed in discovery and subsequent proceedings. As a result, early claims construction may lead to settlement or the entry of summary judgment, which is explicitly recognized by the Northern District of Illinois in its comments to Local Patent Rule 4.1. According to that Comment:

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17. *Id.* at 388-89 (citation omitted).
18. N.D. Ill. Local Patent Rules [hereinafter LPR].
19. *Id.* at 4.1(a).
20. *Id.* at 4.1(b).
21. *Id.* at 4.2(a).
22. *Id.* at 4.3.

> In some cases, the parties may dispute the construction of more than ten terms. But because construction of outcome-determinative or otherwise significant claim terms *may lead to settlement or entry of summary judgmen*t, in the majority of cases the need to construe other claim terms of lesser importance may be obviated. The limitation to ten claim terms to be presented for construction is *intended to require the parties to focus upon outcome-determinative or otherwise significant disputes*.[23]

II. TARIFF CLASSIFICATION

When merchandise is imported to the United States, the importer is required to identify the nature of the merchandise by providing an eight-digit tariff classification number under the Harmonized Tariff Schedule of the United States.[24] Customs uses this information, in part, to assess duties on the importation. Because of the tariff classification's importance to the administration of the customs laws, importers are required to exercise "reasonable care" when reporting classifications, as well as other information, to Customs.[25] When Customs finally determines the classification of the goods and otherwise completes its processing of the importation, it "liquidates the entry."[26] Liquidation is the final determination of the duties owed with respect to that entry of merchandise.[27]

The Harmonized System ("HS") for tariff classification was developed by the Customs Cooperation Council —now known as the World Customs Organization. The United States implemented the Harmonized Tariff Schedule of the United States

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23. N.D. Ill. LPR 4.1. cmt. (emphasis added).

24. 19 U.S.C. § 1484(a)(1)(B) (2012). Two additional digits are appended to the tariff item for use by the Bureau of Census and do not affect the rate of duty applicable to the imported merchandise. *See, e.g.,* Figure 1, infra, illustrating the eight-digit heading/subheading combination and the two-digit statistical suffix.

25. 19 U.S.C. § 1484(a)(1) (2012). "Reasonable care," in this context, has been defined as the absence of negligence. United States v. Optrex America, Inc., 30 C.I.T. 650, 661 (2006). More specifically, customs negligence occurs when an importer fails "to exercise the degree of reasonable care and competence expected from a person in the same circumstances . . . " *See* 19 C.F.R. Pt. 171 app. B(C)(1) (2012).

26. 19 U.S.C. § 1500 (2012).

27. Heartland By-Products, Inc. v. United States, 568 F.3d 1360, 1363 (Fed. Cir. 2013).

("HTSUS") in 1989 pursuant to the Convention on the Harmonized System.[28]

Internationally, the HS is broken down into twenty-one sections and ninety-seven chapters describing, in varying degrees of detail, all physical merchandise that might be imported into the United States. There are additional U.S.-specific provisions providing for special rates of duties, quotas, and other special treatment.

As is illustrated in Figure 1, each chapter of the HTSUS is broken down into four-digit headings, which are the main operational units of the classification system. In this example, Heading 9205 covers "Wind musical instruments (for example keyboard pipe organs, accordions, clarinets, trumpets, bagpipes) other than fairground organs and mechanical street organs." Headings are further broken down into six-digit subheadings and eight-digit tariff items (e.g., brass-wind instruments of 9205.10.00 and bagpipes of 9205.90.20). The applicable rate of duty is identified in column 1 under the heading "General." For example, brass instruments are subject to a 2.9% rate of duty while bagpipes are duty free. The "Special" rate of duty identifies applicable duty preference programs such as NAFTA ("CA" or "MX"), Chile ("CL"), and the Generalized System of Preferences ("A").

Importers, government officials, and courts seeking to interpret the HTSUS apply the included General Rules of Interpretation, shown in Figure 2. These rules, and the binding section and chapter notes, are designed to differentiate between multiple headings that might otherwise appear to describe the same merchandise. The *Explanatory Notes to the Harmonized System*, which are published by the World Customs Organization, provide commentary on the scope of the various components of the Harmonized System, but are not binding on Customs or the courts.[29] Prior decisions of the Court of International Trade and the Court of Appeals for the Federal Circuit are also useful tools for interpreting the tariff schedule. Lastly, Customs and Border Protection publishes private letter rulings to import-

28. *See* 19 U.S.C. § 3011(a)(1)(A) (2012).

29. Although not binding, the *Explanatory Notes* are considered persuasive and generally indicative of the meaning of a tariff term. LeMans Corp. v. United States, 675 F. Supp. 2d 1374, 1380 (Ct. Int'l Trade 2010), *aff'd*, 660 F.3d 1311 (Fed. Cir. 2011).

ers.[30] The rulings illustrate the agency's understanding of the relevant tariff language.

30. The rulings are published by U.S. Customs and Border Protection online. *See CROSS Customs Rulings Online Search System*, U.S. CUSTOMS AND BORDER PROTECTION, http://rulings.cbp.gov (last visited April 5, 2014).

Harmonized Tariff Schedule of the United States (2012) - Supplement 1 (Rev. 1)
Annotated for Statistical Reporting Purposes

XVIII
92-3

Heading/ Subheading	Stat. Suf-fix	Article Description	Unit of Quantity	Rates of Duty 1 General	Rates of Duty 1 Special	Rates of Duty 2
9205		Wind musical instruments (for example, keyboard pipe organs, accordions, clarinets, trumpets, bagpipes), other than fairground organs and mechanical street organs:				
9205.10.00		Brass-wind instruments		2.9%	Free (A,AU,BH,CA, CL,CO,E,IL,J,JO, KR,MA,MX,OM, P,PA,PE,SG)	40%
	40	Valued not over $10 each	No.			
	80	Valued over $10 each	No.			
9205.90		Other:				
		Keyboard pipe organs; harmoniums and similar keyboard instruments with free metal reeds:				
9205.90.12	00	Keyboard pipe organs	No.	Free		35%
9205.90.14	00	Other	No.	2.7%	Free (A,AU,BH,CA, CL,CO,E,IL,J,JO, KR,MA,MX,OM,P, PA,PE,SG)	40%
		Accordions and similar instruments; mouth organs:				
		Accordions and similar instruments:				
9205.90.15	00	Piano accordions	No.	Free		40%
9205.90.18	00	Other	No.	2.6%	Free (A,AU,BH,CA, CL,CO,E,IL,J,JO, KR,MA,MX,OM, P,PA,PE,SG)	40%
9205.90.19	00	Mouth organs	doz.	Free		40%
		Woodwind instruments:				
9205.90.20	00	Bagpipes	No.	Free		40%
9205.90.40		Other		4.9%	Free (A,AU,BH,CA, CL,CO,E,IL,J,JO, KR,MA,MX,OM, P,PA,PE,SG)	40%
	20	Clarinets	No.			
	40	Saxophones	No.			
	60	Flutes and piccolos (except bamboo)	No.			
	80	Other	No.			
9205.90.60	00	Other	No.	Free		40%

Figure 1

GENERAL RULES OF INTERPRETATION

Classification of goods in the tariff schedule shall be governed by the following principles:

1. The table of contents, alphabetical index, and titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions:

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled.

   (b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

3. When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

   (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

   (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

   (c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

5. In addition to the foregoing provisions, the following rules shall apply in respect of the goods referred to therein:

   (a) Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and entered with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This rule does not, however, apply to containers which give the whole its essential character;

   (b) Subject to the provisions of rule 5(a) above, packing materials and packing containers entered with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provision is not binding when such packing materials or packing containers are clearly suitable for repetitive use.

6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.

Figure 2

III. TARIFF LITIGATION IN THE UNITED STATES

The U.S. Court of International Trade is an Article III court[31] and has exclusive jurisdiction to hear challenges to tariff classification determinations by Customs.[32] In most cases, the importer challenges the determination via an administrative protest.[33] Customs decides the protest internally and, if denied, the protesting party may file a summons in the Court of International Trade.[34]

In contrast to most forms of administrative review in U.S. courts, tariff classification cases are reviewed de novo.[35] The judge is statutorily directed to decide the case upon the record developed in the judicial proceeding. The parties engage in discovery including the exchange of interrogatories and depositions to prepare for a trial on the merits.[36] As stated above, there are few disputes as to the nature of the imported merchandise and questions of fact are often absent or limited. As a result, these cases are most often decided on the basis of cross motions for summary judgment without the need for a trial.

Like a district court in a patent case, the Court of International Trade applies a two part analysis to decide a classification case. In the first part, the court determines the proper meaning of the relevant tariff terms.[37] This is purely a question of law. In the second part, the court determines whether the merchandise at issue falls within a particular tariff provision.[38] The court is then charged with applying the law to the available facts to arrive at a correct tariff classification, even if the correct result is not one proposed by one of the parties.[39] Appeals from the Court of International Trade go to the Court of

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31. 28 U.S.C. § 251(a) (2012).

32. 28 U.S.C. § 1581(a) (2012).

33. *See* 19 U.S.C. § 1514(a) (2012); *see also* 19 C.F.R. § 174.11(b)(2).

34. *See* 19 C.F.R. §§ 174.21, 174.29 (2012). In classification cases, the summons is the initial pleading in the action. DaimlerChrysler Corp. v. United States, 442 F.3d 1313, 1318 (Fed. Cir. 2006).

35. *See* 28 U.S.C. § 2640(a)(1) (2012). Tyco Fire Prods. L.P. v. United States, 918 F. Supp. 2d 1334, 1339 (Ct. Int'l Trade 2013).

36. *See* 28 U.S.C.A. C.I.T. Rule 26 (2012).

37. *Faus Group*, 581 F.3d at 1371-72; Orlando Food Corp v. United States, 140 F.3d 1437, 1439 (Fed. Cir. 1998).

38. *Id*.

39. Jarvis Clark Co. v. United States, 733 F.2d 873, 878 (Fed. Cir.), *reh'g denied*, 739 F.2d 628 (Fed. Cir. 1984).

Appeals for the Federal Circuit[40] and then ultimately—but rarely—to the Supreme Court. It is important to this discussion that the Federal Circuit is also the sole Court of Appeals for patent cases appealed from the regional district courts.[41]

When construing the tariff language as a matter of law, the court is to determine the "common and commercial meaning" of the tariff terms.[42] Absent evidence to the contrary, the common and the commercial meaning are presumed to be the same.[43] In making this determination, the judge may rely upon his or her own understanding of the words, so-called lexicographical sources, and expert testimony.[44]

With respect to the development of a factual record, the parties may engage in detailed discovery concerning the physical nature of the merchandise. Often, this involves responding to numerous interrogatories and producing corporate records concerning the design, production, marketing, and use of the product as well as depositions of both fact and expert witnesses.

There are no reliable statistics available concerning discovery practices at the Court of International Trade. Nevertheless, the nature of these cases is that the plaintiff, which is usually the importer, holds all of the knowledge and expertise concerning the nature of the imported product. The defendant, which is the United States Government, must use the mandatory disclosure information and discovery tools to learn about the product. At the same time, the plaintiff may engage in discovery to determine, to the extent that it is documented, the government's decision making process and analysis. As would be expected in a case that might turn on the resolution of disputed facts, both parties use discovery tools to look for inconsistencies in testimony, probe credibility, create evidentiary foundations, and to find facts that, based on their understanding of the relevant tariff terms, support their desired outcome. In other words, the parties engage in potentially expensive and time-consuming discovery as would careful lawyers in most federal litigation. But, unlike most other kinds of litigation, much of that time

40. 28 U.S.C. § 1295(a)(5) (2012).

41. 28 U.S.C. § 1295(a)(1) (2012).

42. Cummins Inc. v. United States, 454 F.3d 1361, 1364 (Fed. Cir. 2006) (citation omitted).

43. *Id.*

44. Baxter Healthcare v. United States, 22 C.I.T. 82, 88-89 (Ct. Int'l Trade 1998) (citation omitted) *aff'd,* 182 F.3d 1333 (Fed. Cir. 1999).

and effort is often wasted because the court's interpretation of the controlling statute—the HTSUS—decides or substantially focuses the dispute as a matter of law.

IV. CLASSIFICATION CASE STUDIES

The following cases are presented to illustrate the principles discussed in this paper and as examples for practitioners to consider whether the *Markman* model would present a means of achieving a faster resolution of the case.

A. Firstrax v. United States

This case[45] involved the tariff classification of collapsible pet crates made of a steel frame and textile covering.[46] Upon liquidation of the entries, Customs determined that the correct tariff classification for the crates was in Heading 4202,[47] which provides for:

> Trunks, suitcases, vanity cases, attaché cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper. . .

Classification in this heading, specifically in tariff item 4202.92.90, resulted in an applicable rate of duty of 17.6%.[48] For its part, the plaintiff believed the correct classification to be as an "other made up article" of textiles, classifiable in tariff item 6307.90.98, which carries a rate of duty of 7%.[49]

In other cases, the Court of International Trade and Federal Circuit had held that products properly classifiable in Heading 4202 are designed to protect, organize, store, and transport

45. Firstrax v. United States, No. 07-00097, 2011 WL 5024271 (Ct. Int'l Trade Oct. 21, 2011).
46. *Id.* at *1.
47. *Id.*
48. *Id.*
49. *Id.*

personal property of some kind.[50] As a result, the discovery process focused on the factual questions of whether the pet crates were designed, marketed, and used to organize, store, protect and transport pets, primarily dogs.

B. Del Monte Corp. v. United States

Del Monte Corp. imported prepackaged tuna meat prepared with the addition of a flavored sauce in an airtight pouch.[51] The sauce contained a small amount of oil, which was intended to function as a flavor dispersant or emulsifier. The amount of the oil was between 0.62% and 2.48% by weight of the contents.[52] According to counsel for the importer, the predominant additive to the tuna was water.[53] The question before the court was whether the tuna was classifiable as tuna in airtight containers "[n]ot in oil."[54]

Practitioners familiar with customs litigation can imagine the scope and nature of discovery involved in this case. It is likely that Del Monte personnel provided detailed factual information concerning the formulation and function of the sauce mixture. There may also have been significant time spent with both lay and expert witnesses explaining the function performed by the small amount of oil in the mixture. Nevertheless, the case turned on the question of whether there is a de minimis amount of oil permissible in tuna "[n]ot in oil."

C. Salem Minerals v. United States

The last case for illustration involves the importation of decorative glass vials containing small amounts of gold leaf in a liquid suspension.[55] These items were sold to tourists in gold producing regions and were not considered to be items of jewelry or fine goods.[56] The importer wanted to have the goods clas-

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50. Avenues in Leather, Inc. v. United States, 317 F.3d 1399, 1401 (Fed. Cir. 2003).

51. Del Monte Corp. v. United States, 885 F. Supp. 2d 1315, 1316 (Ct. Int'l Trade 2012).

52. *Id.* at 1317.

53. *Id.* at 1318.

54. *Id.* at 1319.

55. Salem Minerals, Inc. v. United States, No. 07-00227, 2012 WL 2700424, at *1 (Ct. Int'l Trade June 26, 2012).

56. *Id.* at *2.

sified as other articles of precious metals.[57] Customs classified the goods as articles of goldsmith's wares.[58] Thus, the sole question presented to the court to resolve the case was the meaning of the term "goldsmith's wares." There appears to have been no material dispute as to the nature of the product or its production. Nevertheless, there seems to have been significant inquiry into the facts surrounding the production process involved in making the gold leaf as well as the vial and decorative cap.

V. APPLYING THE *MARKMAN* MODEL TO CLASSIFICATION CASES

Practitioners who adopt an approach similar to that undertaken in patent cases in the wake of *Markman* may reduce the scope of discovery undertaken in customs classification cases and improve the efficiency of deciding these issues. If, for example, either party in a classification case identifies a controlling question of tariff interpretation, that question can be presented to the court early as a motion for partial summary judgment under CIT Rule 56.[59] A prompt decision by the court on the scope of the tariff heading might sufficiently clarify the controlling law to permit a stipulated judgment, settlement, or voluntary dismissal of the action. Even if the legal determination is not dispositive as to the entire case, at least counsel, who knows the scope of the tariff headings involved, can then tailor discovery accordingly.

For example, in the *Firstrax* case, the main question to be decided was the scope of HTSUS Heading 4202. Specifically, whether the collapsible pet crates were similar to the exemplars of, among other things, traveling bags, knapsacks and backpacks, tool bags, and sports bags. Plaintiff's argument was based partly on the premise that none of the containers used as exemplars in Heading 4202 are used to contain a living animal.[60] As a result, the pet crates were not "similar to" the items included in Heading 4202 and were therefore excluded from 4202 classification.[61] This is a question that could have been put to the Court of International Trade prior to either party

57. *Id.* at *1.
58. *Id.*
59. 28 U.S.C.A. C.I.T. Rule 56(a) (2013).
60. *Firstrax*, 2011 WL 5024271, at *1.
61. *Id.* at *7.

conducting any discovery. Further, had the court agreed, it is entirely possible that the case would have settled because of the lack of an alternative classification. Had the court disagreed, the parties could then have proceeded to discovery on whether the pet crates were able to protect, organize, store, and transport pets.

Del Monte turned on the meaning of the tariff term "[n]ot in oil." Thus, given a product that unquestionably contains a small amount of oil in the closed pouch, the possibly dispositive question was whether there existed a de minimis amount of oil. The court eventually held that 0.62% by weight of oil was a sufficient amount for the tuna to be considered packed "in oil."[62] Had the parties asked the court whether that level of oil in the sauce mixture would be sufficient to make the tuna classifiable as "in oil," that determination may have resolved the case. Or, the parties may have wanted a decision on additional legal questions such as whether the oil needed to act as a flavoring or preservative agent.

Finally, in *Salem Minerals*, had the parties asked the court to define "goldsmith's wares" prior to the commencement of discovery, the parties may have avoided significant time and expense. In particular, the parties might have resolved the matter had they known at the start of the case that the court would find goldsmith's wares to be limited to useful articles formed of gold for household, office, or religious use—including jewelry.[63] This definition excluded the gold leaf from the meaning of goldsmith's wares, as leaf is a semi-manufactured form of gold, not an article of gold.[64] Furthermore, the court's definition excluded objects plated in gold, including the stoppers in the vials.[65] Without regard to any factual disputes to be resolved in discovery, the definition of the term "goldsmith's wares" may have resolved this case or substantially facilitated an early resolution.

VI. POSSIBLE CONCERNS

For practitioners, the application of *Markman*-style procedures to tariff classification litigation may appear to present

62. *Del Monte Corp.,* 885 F. Supp. 2d at 1320.
63. *Salem Minerals, Inc.,* 2012 WL 2700424, at *7.
64. *Id.*
65. *Id.*

practical problems and raise questions for both the private litigant and the U.S. Department of Justice. The most obvious question is whether this approach might result in the conclusion of litigation in the absence of a full record made before the court. The short answer to that concern is that it is *intended* to result in cases being decided before a full record is developed with respect to the facts involved. This approach is based on practical experience in customs litigation as well as the observation that the Court of International Trade holds very few trials in the course of any given year. Rather, the court resolves almost all classification disputes on motions for summary judgment. This is an acknowledgement that these cases turn on legal interpretations rather than factual disputes and that discovery that is often considered necessary by a prudent lawyer may not be necessary or particularly useful in classification cases.

More important, a party seeking an early determination as to the meaning of relevant tariff terms has few limitations on what can be submitted to the court. The court has repeatedly noted that to determine the common and commercial meaning of an undefined tariff term, it may consult dictionaries, scientific authorities, and other reliable information sources including "lexicographic and other materials."[66] The court may also rely on its own understanding of the term used.[67] Lastly, the court may consider expert opinions regarding the common meaning or understanding of a term in a particular industry or context. These expert opinions are advisory in nature, and the court will give them weight only to the extent they are consistent with lexicographic and other reliable sources.[68]

What this means is that the parties to a classification case who opt to seek an early resolution of a classification matter may present to the court fully formed arguments concerning the legal issues. These arguments can be based on standard and technical dictionaries, expert opinions, and lexicographical sources. While it is true that much discovery in tariff litigation is directed at cataloging particular examples of use by the parties and the relevant industry, individual examples of usage by

66. *See, e.g.,* Simod America Corp. v. United States, 872 F.2d 1572, 1576 (Fed. Cir. 1989).

67. *See, e.g.,* Airflow Tech., Inc. v. United States, 524 F.3d 1287, 1291 (Fed. Cir. 2008) (citation omitted).

68. *Samsung*, 887 F. Supp. 2d at 1342.

the importer or Customs personnel are of limited value in identifying the common, English meaning of a term. Furthermore, those examples of usage could easily be included in early, mandatory disclosures to the opposing party. Consequently, it does not appear that adopting a *Markman* style approach to resolving questions of law in tariff litigation will produce decisions on the question of law that were based on an undeveloped record.

A second area of concern might be the appealability of the isolated legal determination as to the meaning of the tariff term. Given that the majority of tariff classification decisions appealed from the Court of International Trade are currently taken from decisions on motions for summary judgment, this does not appear to present a problem. The party that disagrees with the decision rendered on the legal question would, presumably, not agree to an early settlement or stipulation. As a result, the case would continue until such time as either party believed it had sufficient grounds to move for complete summary judgment. Assuming a decision on the merits, the case would not be different than any other summary judgment decision. Should the Court of Appeals reverse the Court of International Trade's legal interpretation, the case would be remanded for further proceedings. Given the change in legal interpretation necessitated by a reversal, additional discovery may be required in order to determine how the court should interpret the tariff language. The Court of International Trade would need to permit that discovery to occur. Given the similarity of this process to patent litigation, it is likely that the Court of Appeals for the Federal Circuit will be comfortable with this type of bifurcated process.

VII. RECOMMENDATIONS

Counsel in customs classification cases should realistically review their cases and make an early determination as to the real, controlling questions. It is possible that there may be significant disputes as to material facts that will prevent a case from being decided on the basis of a motion for summary judgment. Those cases are, however, in the minority.

In the more usual circumstance, the case turns on a question of law based on the interpretation of the Harmonized Tariff Schedule. In these cases, practitioners should seek to engage the court early to receive a definitive ruling as to the meaning of the disputed tariff language. That step will either promote

the resolution of the case through voluntary dismissal or stipulated judgment, or it will focus the parties on discovery relevant to the tariff term's legal meaning.

The most obvious means of implementing this approach is a motion on the initiative of one or both parties through the Rule 56(a) partial summary judgment process.[69] Another possibility is for the assigned judge or a party to request that the classification be referred to Court-Annexed Mediation pursuant to CIT Rule 16.1.[70] In mediation, a judge of the Court of International Trade could provide an expert and impartial view as to the meaning and scope of the tariff language. This might encourage the parties to more realistically evaluate the strengths and weaknesses of their cases and, as discussed above, might limit and focus discovery to the relevant physical characteristics of the merchandise.

If, however, litigants do not approach the tariff litigation using these tools and the court sees value in this approach, the court is not without recourse. Under Rule 16.1, a judge can refer the action to mediation.[71] Or, if the Court of International Trade chooses, it can follow the lead of district courts that have promulgated local rules to implement the *Markman* process.

Specifically, if necessary or desirable, the Court of International Trade could consider adopting rules similar to local patent rules under which the parties would be required to consult and present to the court a list of tariff terms to be construed. Each party would then be permitted to submit briefs supporting their respective constructions of the disputed tariff terms. Those briefs would contain any available evidence of common and commercial meaning or commercial designation, including lexicographical materials and expert opinion. The parties would then be permitted to submit reply briefs, and, if deemed necessary, the court could hold an oral argument during which the experts could speak.

CONCLUSION

Customs litigation, as it is typically undertaken, looks very much like commercial litigation in any federal court. Practitioners, who understandably do not know what information the

69. 28 U.S.C.A. C.I.T. Rule 56(a) (2013).
70. 28 U.S.C.A. C.I.T. Rule 16.1 (2009).
71. *Id.*

other side may have, often engage in multiple rounds of depositions, interrogatories, and requests for production. Much of that effort is directed at finding out the detailed specifications of the imported product, which is not realistically in dispute. Furthermore, both sides use discovery to explore and catalog the language individuals and companies use in relation to the product. This is also of minimal probative impact when trying to determine the common meaning of a term in the English language, as opposed to that term's common meaning within a particular company or in the parlance of a handful of individuals.

More often than not, there is no smoking gun in corporate file drawers. There is rarely a "Gotcha!" moment when the president of the importer testifying in a deposition changes her statement as to the meaning of a term. Moreover, on an occasion when that happens, the impact of the evidence is of limited value when weighed against dictionaries, technical references, and expert opinion. Consequently, there is significant lawyering invested in fact-based discovery, the related questions of evidence law, and linguistic hunts for needles in the haystacks of business records.

The Court of Appeals for the Federal Circuit is familiar with *Markman* and has experience reviewing the decisions of the district courts where there have been bifurcated proceedings to resolve questions of law and fact. As a result, adopting a similar approach to customs litigation should not present any analytical problems for the Federal Circuit. Furthermore, the Court of International Trade bases most of its tariff classification decisions exclusively on questions of law, without regard to disputed material facts. Thus, the process for appealing a bifurcated classification case will present no procedural or administrative difficulties for the parties or either court.

Reversing the current process of tariff litigation by resolving questions of law early in the process will likely result in significantly more efficient resolutions of these matters. An early judicial decision as to the scope of tariff language will, at a minimum, focus discovery on the relevant questions. In many cases, a decision as to what the disputed language means may result in the complete resolution of the case without the need for any discovery. Thus, this suggested process, which can be undertaken by practitioners without a change in the court's rules, will benefit the parties, the court, and the public.

PARTY AUTONOMY AND ITS LIMITS: CONVERGENCE THROUGH THE NEW HAGUE PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS

Marta Pertegás[*] *& Brooke Adele Marshall*[†]

INTRODUCTION

In a cross-border contract, courts and arbitral tribunals are required to determine the applicable law—also known

[*] First Secretary of the Hague Conference on Private International Law (Netherlands); Part–time Professor at the Faculty of Law, University of Antwerp (Belgium). Parts of this article are extracted from previous publications authored by the Permanent Bureau as well as a contribution by Marta Pertegás: Hague Principles on Choice of Law in International Contracts, in ESSAYS IN HONOUR OF MICHAEL BOGDAN (Juristförlaget, 2013).

as the governing law—to resolve disputes arising out of it. The ability of the parties to choose the applicable law is justified by reference to the classical principle of party autonomy.

Inspired by Kant, party autonomy is the bedrock of the modern law of contract. In the early twentieth century, however, the use of party autonomy in an international context was a highly contentious issue on both sides of the Atlantic.[1] Scholars and judges alike were divided as to the ability of contracting parties to exalt themselves above the otherwise applicable law by exercising their liberty and preferring another law. Scholars such as Mancini and Rabel were joined by courts in France, England, and the United States of America in their support for the principle. Among its skeptics were Beale on one side of the Atlantic, and Batiffol and Niboyet on the other.

Over the course of the twentieth century, as international trade increased, and indeed in the twenty-first century with the rise of globalization, the principle of party autonomy in conflict of laws has garnered greater support. Party autonomy is considered to be the most practical solution for conflict of laws in international contracts[2] and reigns, or ought to reign, subject to certain clearly defined limits. Although many jurisdictions commit in principle to party autonomy, this commitment does not often translate into practice.[3] Many jurisdictions also call

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† Senior Research Fellow, Max Planck Institute for Comparative and International Private Law (Germany). This co-authored article formed the basis of a presentation by Marta Pertegás at the Brooklyn Law School Symposium, "What Law Governs International Commercial Contracts? Divergent Doctrines and the New Hague Principles," 18 October 2013.

1. *See generally* JEAN-PAULIN NIBOYET, *La Théorie de l'Autonomie de la Volonté* (1927) 16 Recueil des Cours 1; PETER NYGH, AUTONOMY IN INTERNATIONAL CONTRACTS 8–13 (1999); Gisella Rühl, *Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency*, *in* CONFLICT OF LAWS IN A GLOBALIZED WORLD (Eckart Gottschalk, et al. eds., 2007).

2. Andrew Dickinson, *Third–Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu?*, 3 J. PRIVATE INT'L L. 53, 59 (2007).

3. Jürgen Basedow, *Theorie der Rechtswahl oder Parteiautonomie als Grundlage des Internationalen Privatrechts,* 75 RABELSZ 33 (2011); MARY KEYES, PARTY AUTONOMY IN PRIVATE INTERNATIONAL LAW (Oxford University Press (forthcoming)); *Compare* Symeon C. Symeonides, *Choice of Law in the American Courts in 2012: Twenty–Sixth Annual Survey*, 61 AM. J. COMP. L. 217, 241–47 (2013) [hereinafter 2012 Survey], *with* Symeon C. Symeonides,

for different approaches to choice of law where parties have chosen to submit disputes to arbitration, as opposed to litigation, both in terms of the law that the parties may choose and the limits of that choice. Moreover, the approaches that State courts and legislators take to party autonomy often diverge.

Differences in approach may lead, in practice, to two fora, confronted by the same dispute over the same contract, recognizing and circumscribing the parties' choice to different degrees. This naturally affects the outcome of the dispute and incentivizes parties to "shop around" for the best result by selecting a forum that the parties anticipate will apply its conflict of laws rules favorably.[4]

Given the importance of this issue for international commerce, the Hague Conference on Private International Law ("Hague Conference") has sought to create some consistency in approach to choice of law in international contracts. The draft Hague Principles on International Commercial Contracts[5] (the

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Choice of Law in the American Courts in 2013: Twenty–Seventh Annual Survey, 62 AM. J. COMP. L. (forthcoming 2014) [hereinafter 2013 Survey].

4. ANDREW S. BELL, FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION 15 (2003).

5. It is anticipated that the Council on General Affairs and Policy of the Hague Conference will approve the Principles and their accompanying Commentary, in their final form, in 2014 or at its meeting in 2015. The Council on General Affairs and Policy of the Hague Conference of April 2014 decided as follows

> 2. The Council welcomed the work completed by the Working Group. The Council welcomed the text of the Hague Principles and the draft Commentary. The Council requested the Working Group to undertake the editorial finalisation of the Principles in the two official languages of the Hague Conference. Members are invited to submit comments on the changes introduced in the draft Commentary after January 2014, bearing in mind the explanatory nature of the Commentary. Any comments should be submitted in writing to the Permanent Bureau by 31 August 2014. The Working Group will then review those comments and finalise the Principles and the draft Commentary in both languages, where after the final version of the texts will be submitted to Members for approval in a written procedure. The Principles and draft Commentary will be approved if no objection is raised within 60 days.

Hague Conference on Private International Law, COUNCIL ON GENERAL AFFAIRS AND POLICY OF THE CONFERENCE, *Conclusions and Recommendations*

"Hague Principles") and their accompanying Commentary, developed principally by a Working Group, seek to harmonize certain rules of private international law applicable to international[6] commercial[7] contracts.

The Hague Principles reinforce party autonomy and espouse a principle according to which the law chosen by the parties will govern the contract to the greatest possible extent, subject to clearly defined limits. Consistent with this principle, under

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adopted by the Council, April 8-10, 2014, para. 2 (2014), *available at* http://www.hcch.net/upload/wop/genaff2014concl_en.pdf.

6. Article 1(2) of the Hague Principles contains a negative definition to the effect that a contract is international unless "the parties have their establishments in the same State and the relationship of the parties and all other relevant elements, regardless of the chosen law, are connected only with that State." Hague Conference on Private International Law, PERMANENT BUREAU, *The Draft Hague Principles on Choice of Law in International Commercial Contracts, Prel. Doc. No. 6,* art. 1(2) (Mar. 2014), *available at* http://www.hcch.net/upload/wop/gap2014pd06_en.pdf; Hague Conference on Private International Law, SPECIAL COMMISSION ON CHOICE OF LAW IN INT'L CONTRACTS, *Draft Hague Principles as Approved by November 2012 Special Commission Meeting on Choice of Law in International Contracts and Recommendations For Commentary*, Nov. 12-16, art.1(2) (2012) [hereinafter 2012 Draft Hague Principles], *available at* http://www.hcch.net/upload/wop/contracts2012principles_e.pdf; see also Hague Conference on Private International Law*, Convention on Choice of Court Agreements*, June 30, 2005 [hereinafter *2005 Hague Choice of Court Convention*], *available at* http://www.hcch.net/upload/conventions/txt37en.pdf, which contains a similar definition.

7. Article 1(1) of the Hague Principles makes it clear that they apply to contracts "where each party is acting in the exercise of its trade or profession." Article 1(1) also contains an express exclusion for consumer and employment contracts. The rationale for the decision to confine the Principles to business–to–business contracts was considered to be a sufficient counterbalance to the promotion of party autonomy. The rationale is to enhance and establish party autonomy in international contracts, but only where both parties are professionals and therefore the risks from an abuse of party autonomy are viewed as remote. *See* Hague Conference on Private International Law, COUNCIL ON GENERAL AFFAIRS AND POLICY OF THE CONFERENCE, *Conclusions and Recommendations Adopted by the Council,* April 1-3, 2008, 1 (2008), *available at* http://www.hcch.net/upload/wop/genaff_concl08e.pdf; *see also,* Hague Conference on Private International Law, COUNCIL ON GENERAL AFFAIRS AND POLICY OF THE CONFERENCE, *Conclusions and General Recommendations Adopted by the Council*, Mar. 31- April 3, 2009, 2 (2009) [hereinafter *2009 Conclusions and Recommendations*], *available at* http://www.hcch.net/upload/wop/genaff_concl09e.pdf.

the Hague Principles, the parties may choose the law of a State, non-State rules of law, or a combination of these as the law governing their contract.

The Hague Principles seek to harmonize approaches to choice of law in international contracts in two ways. First, they provide a universal model that lawmakers can use to create, supplement, or develop their existing choice of law rules. Complemented by their explanatory Commentary, the Hague Principles seek to serve as an international code of current "best practice" with respect to the recognition and limits of party autonomy. Some provisions cement an internationally accepted approach. Other provisions reflect an approach that the Hague Conference considers to be the best practice for issues that often lack consensus, and novel solutions are occasionally introduced. One of the best practice provisions is Article 2(4), which allows for the choice of a law that bears no connection to the parties or their transaction. The law of several jurisdictions in which the Hague Principles may have particular influence requires that the chosen law be objectively connected to the transaction or to the parties. One of the Hague Principles' innovative provisions is Article 6, which seeks to provide a practical solution to the widely recognized problem of "the battle of the forms," where parties exchange standard forms, each containing a choice of law clause (Article 6).

Secondly, the Hague Principles seek to "level the playing field" between arbitration and litigation. Indeed, many jurisdictions call for different approaches depending on the chosen dispute settlement mechanism, both in terms of the law that the parties may choose and the limits of that choice. The Hague Principles allow parties, within the parameters set out by Article 3, to choose not only State law but also rules of law—non-State law—whether their eventual contractual disputes are subject to litigation or arbitration. The Hague Principles also ensure that the choice of the law by parties does not have the effect of excluding overriding mandatory rules or *ordre public* where applicable.

Before exploring each of these aspects of the Hague Principles, and offering points of comparison with the conflict of laws rules applicable in the United States, the European Union, and China, this article traces the development of the Hague Principles.

I. DEVELOPMENT OF THE HAGUE PRINCIPLES

A. History

In 2006, the Hague Conference conducted a series of feasibility studies concerning the development of an instrument relating to choice of law in international commercial contracts. These surveyed, existing rules and practices regarding choice of law agreements in the judicial[8] and arbitral[9] arenas. In addition, the Permanent Bureau—the Hague Conference's Secretariat—sent a questionnaire to members of the organization, the International Chamber of Commerce, and a large number of international arbitral centers and entities. The purpose of the questionnaire was to explore the use of choice of law agreements in current practice and the extent to which such agreements are respected, as well as to ascertain what provisions would be required in a future instrument.[10]

In 2009, following the outcome of and recommendations flowing from the studies, the Council of General Affairs and Policy, the Hague Conference's Governing Organ, mandated that the Permanent Bureau set up a Working Group to draft a nonbinding international instrument for conflict rules applicable to international contracts, which would later become the draft Hague Principles.[11] The group consisted of specialists in pri-

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8. *See* Hague Conference on Private International Law, Thalia Kruger, PERMANENT BUREAU, *Feasibility Study on the Choice of Law in International Contracts – Overview and Analysis of Existing Instruments*, Prel. Doc. No 22 B (Mar. 2007) [hereinafter Prel. Doc. No 22 B], *available at* http://www.hcch.net/upload/wop/genaff_pd22b2007e.pdf.

9. Hague Conference on Private International Law, Ivana Radic, *Feasibility Study on the Choice of Law in International Contracts – Special Focus on International Arbitration*, ¶ 3, Prel. Doc. No 22 C (Mar. 2007) [hereinafter Arbitration Focus], *available at* http://www.hcch.net/upload/wop/genaff_pd22b2007e.pdf.

10. Hague Conference on Private International Law, PERMANENT BUREAU, *Feasibility Study on the Choice of Law in International Contracts – Report on Work Carried Out and Preliminary Conclusions*, ¶ 3, Prel. Doc. No 22 A (Mar. 2007), *available at* http://www.hcch.net/upload/wop/genaff_pd22a2007e.pdf; Hague Conference on Private International Law, PERMANENT BUREAU, *Feasibility Study on the Choice of Law in International Contracts – Report on Work Carried Out and Conclusions (Follow–up Note)*, ¶3, Prel. Doc. No 5 (Feb. 2008) [hereinafter Follow–up Note], *available at* http://www.hcch.net/upload/wop/genaff_pd05e2008.pdf.

11. *See 2009 Conclusions and Recommendations*, *supra* note 7.

vate international law and international arbitration law drawn from different legal systems from all corners of the globe. In successive years, the Working Group, chaired by Professor Daniel Girsberger of Switzerland, met on various occasions.

A Special Commission[12] met in The Hague from November 12–16, 2012, in order to examine the version of the Hague Principles submitted by the Working Group in 2011. The Special Commission unanimously approved a revised form of the Hague Principles and made a number of recommendations relating to the completion of the Hague Principles and their accompanying Commentary. In line with these recommendations, in April 2013 the Council on General Affairs and Policy of the Conference approved the Hague Principles, marking a significant milestone in their development. The Council also gave a mandate to the Working Group to prepare a commentary. The Commentary accompanies each article of the Hague Principles and serves as an interpretative and explanatory tool for a better understanding of the Hague Principles. Practical examples and scenarios are also provided to illustrate the application of the black letter rules.

The Permanent Bureau consolidated the Commentary in November 2013 and circulated it to the Members and Observers of the Hague Conference for consultation. Several Members submitted suggested changes to the Commentary, which informed the discussions of the Working Group at its meeting in January 2014. During this meeting, the Working Group established an Editorial Committee charged with finalizing the text of the Commentary with the assistance of the Permanent Bureau.

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12. In 2012, the Council decided to establish a Special Commission to discuss the proposals of the Working Group and make recommendations as to future steps to be undertaken, including the decision to be taken on the form of the nonbinding instrument and the process through which the Commentary would be completed. The Special Commission met from November 12–16, 2012. *Conclusion of the First Meeting of the Special Commission on Choice of Law in International Contracts*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (Nov. 16, 2012), http://www.hcch.net/index_en.php?act=events.details&year=2012&varevent=292.

B. Form of the Hague Principles

As a concise body of general principles that can be universally applied, the Hague Principles differ from other instruments developed by the Hague Conference. They do not constitute a binding convention that States, once signatory thereto, are obliged to incorporate into their domestic law. Although this nonbinding model is the first of its kind for the Hague Conference, its member states first approved it as a working method in 1980.[13]

As a nonbinding instrument, the Hague Principles are suitably adapted to their envisaged use.[14] The Hague Principles are designed to assist lawmakers—whether legislators or courts—in reforming the conflict of laws rules applicable to choice of law in international contracts. In particular, they may serve as a guide to States that do not sufficiently recognize party autonomy, refine the principle of party autonomy for those that do, and fill in the gaps for States that have only a partial set of established conflict of laws rules governing international contracts. The Hague Principles also provide guidance to contracting parties and lawyers as to the relevant considerations and limits of a choice of law, the law and rules of law that they may choose, and the drafting of an effective choice of law agree-

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> Recognizing that the use of certain methods of less binding effect than international conventions is in certain cases of a kind to promote the easier adoption and more wide–spread diffusion of common solutions, grants that the Conference, while maintaining as its principal purpose the preparation of international conventions, may nevertheless use other procedures of less binding effect, such as recommendations or model laws, where, having regard to the circumstances, such procedures appear to be particularly appropriate.

Hague Conference on Private International Law: Final Act, 19 INT'L LEGAL MATERIALS 1501, 1502 (1980). *See also* Georges Droz, *La Conférence de La Haye de Droit International Privé et Les Méthodes d'Unification du Droit: Traités Internationaux ou Lois Modèles*, 13 REVUE INTERNATIONALE DE DROIT COMPARÉ 507, 507–21 (1961); "Conférence de La Haye de droit international Privé", *Répertoire international Dalloz*, 1998, No 15.

14. The responses to questionnaires conducted as part of the Feasibility Study revealed that two-thirds of those member states that responded considered that a new instrument in this field would benefit contracting parties, courts, and arbitral tribunals. *See Follow-up Note*, *supra* note 10, ¶11.

ment.[15] Courts and arbitral tribunals, within the parameters of their legal frameworks, may also be guided by the Hague Principles when considering the validity and effects of a choice of law agreement and adjudicating a choice of law dispute.[16]

The nonbinding nature of the instrument offers considerable advantages. One of the objectives of the current instrument is the acceptance of its principles in private international law codes, on all levels, and eventually a substantial degree of harmonization of what are currently disparate sets of national or regional rules in choice of law in international contracts. The nonbinding nature of the instrument, however, avoids any immediate risk of conflict of standards, either with regional instruments such as the Rome I Regulation in the European Union or the Mexico Convention,[17] or of any interference with the 1955 Hague Sales Convention, the Hague Convention on the Law Applicable to Agency, or the 1986 Hague Sales Convention.[18]

While the promulgation of a nonbinding instrument is novel for the Hague Conference, such instruments are relatively common. Indeed, the Hague Principles add to a growing number of nonbinding instruments of other organizations that have achieved particular success in developing and harmonizing law. See, for example, the influence of the United Nations Convention on Contracts for the International Sale of Goods and the UNIDROIT Principles of International Commercial Contracts on the respective development of sales and contract law.

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15. Preliminary Document 6, March 2014, *supra* note 6.

16. *Id*.

17. *See* José Antonio Moreno Rodríguez & María Mercedes Albornoz, *Reflections on the Mexico Convention in the Context of the Preparation of the Future Hague Instrument on International Contracts*, 7 J. PRIVATE INT'l L. 491, 493 (2011).

18. *See generally* Hague Conference on Private International Law, *Convention on the Law Applicable to International Sales of Goods* (June 15, 1955), *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=31; Hague Conference on Private International Law, *Convention on the Law Applicable to Agency* (Mar. 14, 1978) [hereinafter *1978 Convention*], *available at* http://www.hcch.net/upload/conventions/txt27en.pdf; Hague Conference on Private International Law, *Convention on the Law Applicable to Contracts for the International Sale of Goods* (Dec. 22, 1986) [hereinafter *1986 Convention*], *available at* http://www.hcch.net/upload/conventions/txt31en.pdf.

II. TOWARD A SOUND INTERNATIONAL STANDARD

The Hague Principles seek to serve as a universal model in providing a uniform approach to the recognition and limits of the principle of party autonomy in choice of law for international contracts. Part II analyzes various best practice and innovative provisions of the Hague Principles that are the subject of divergent approaches among legal systems.

A. Express Choice v. Express and Tacit Choice

The Hague Principles, underpinned by the principle of party autonomy, allow the parties to choose the law applicable to their contract. This is said to ensure certainty and predictability within the context of the parties' arrangement for several reasons. By designating the applicable law, parties know the legal regime according to which they perform their obligations,[19] thus facilitating their intended transaction. By designating this law in advance of a dispute, parties are able to predict the way in which an eventual dispute will be resolved. This helps to achieve efficiency by reducing the costs of dispute resolution.[20]

One of the issues discussed at length during the development of the Hague Principles related to the manner in which parties could make a choice of law. Specifically, the question was whether an implicit choice of the applicable law would be admissible or whether an explicit choice was necessary. Some instruments, such as the Chinese Law on the Application of Law to Foreign-Related Civil Relations, appear to limit party choice to an explicit choice of law.[21]

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19. Amin Rasheed Shipping Corp v. Kuwait Insurance Co [1984] AC 50 (U.K.). Lord Diplock relevantly said at 67 that contracts must be "made with reference to some system of private law which defines the obligations assumed by the parties."

20. Nygh, *supra* note 1, at 2–3; *see also* ADRIAN BRIGGS, AGREEMENTS ON JURISDICTION AND CHOICE OF LAW 140–42 (2008) (explaining how courts use choice of law clauses to determine which law to apply during dispute resolution).

21. Brooke Adele Marshall, *Reconsidering the Proper Law of the Contract,* 13 MELB. J. INT'L L. 505, 526 (2013); Zhonghua Yenming Gongheguo Shewai Minshi Guanxi Falu Shiyong Fa (中华人民共和国涉外民事关系法律适用法) [Law on the Application of Law to Foreign-Related Civil Relations of the People's Republic of China] (Promulgated by the Standing Comm. Nat'l People's

A comparative review shows that most legal systems recognize an implicit choice of applicable law, albeit to varying degrees. Under some instruments, an implicit choice is construed restrictively. For instance, the Inter-American Convention on the Law Applicable to International Contracts[22] provides that "[t]he parties' agreement on this selection [of applicable law] must be express or, in the event that there is no express agreement, must be evident from the parties' behavior and from the clauses of the contract, considered as a whole."[23] That phrasing invites a twofold analysis: subjective (behavior of the parties) and objective (clauses of the contract).

Other instruments adopt a more flexible approach to the admission of an implicit choice. The Rome I Regulation requires that the choice be clearly demonstrated by the provisions of the contract *or* the circumstances of the case.[24] The Civil Code of Quebec, for its part, requires only that the designation of the applicable law be inferred with certainty from the terms of the contract, without recourse to the circumstances surrounding the deed.[25] Likewise, those twenty-three American states that follow the Restatement (Second) on the Conflict of Laws[26] consider that a reference to legal expressions or doctrines peculiar

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Cong., Oct. 28, 2010), arts 2-3. *See also* Guangjian Tu & Muchi Xu, *Contractual Conflicts in the People's Republic of China: The Applicable Law in the Absence of Choice*, 7 J. PRIVATE INT'l L. 179, 182–83 (2011).

22. Inter–American Convention on the Law Applicable to International Contracts art. 7, Mar. 17, 1994, O.A.S.T.S. no. 78 [hereinafter *The Mexico Convention*].

23. *Id.*

24. For a description of the background to adoption of the Rome I Regulation, see Regulation 593/2008, art. 3(1), 2008 O.J. (L 177/6) (EC); compare with the Rome Convention, which is phrased more restrictively: "The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case," Convention on the Law Applicable to Contractual Relations art. 3, 1980 O.J. (L 266) [hereinafter Rome I Regulation]. For a description of the background to the adoption of the Rome I Regulation, see R. Wagner, op. cit. note 36, p. 378.

25. "A juridical act, whether or not it contains any foreign element, is governed by the law expressly designated in the act or the designation of which may be inferred with certainty from the terms of the act," Civil Code of Québec, S.Q. 1991, c. 64, art. 3111 (Can.).

26. 2013 Survey, *supra* note 3, at 63–64.

to the law of a particular State is a valid implied choice.[27] The Restatement (Second) requires courts to construe this rule narrowly, so as to avoid admitting hypothetical choices of law.[28]

The Supreme Court of Texas's judgment in *Sonat Exploration Co. v. Cudd Pressure Control Inc.*[29] is an example of this narrow approach to construction. This case concerned a dispute over a master service agreement contemplating operations in multiple locations. The agreement specified that where operations were performed on navigable waters, maritime law would apply, and where operations were performed in Texas or New Mexico, Texas law would apply. A dispute concerning indemnity provisions arose in relation to an operation in Louisiana. The appellant argued before the Supreme Court of Texas that the parties had impliedly chosen Louisiana law to apply to operations in Louisiana by virtue of (1) the use of the term "statutory employer," a legal term peculiar to the state of Louisiana, and (2) the inclusion of an additional insured provision in the agreement.

The court rejected this argument on the basis that it was the indemnity provisions, not workers' compensation, that were in issue. The court reasoned, first, that the indemnity provisions were printed in capital letters, a form peculiar to the state of Texas, indicating Texas law. Secondly, the additional insured provision was inserted as a means of avoiding the effect of Louisiana's indemnity law and could not be treated as "an affirmative election of that law." Thirdly, the court reasoned that it could not surmise from these implied references to Louisiana law that the parties intended Louisiana law to apply to the entire master service agreement.

The narrow approach to implied choice in *Sonat* accords with the approach to tacit choice envisaged by the Hague Principles.

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27. Restatement, (Second) of Conflict of Laws § 187(2) cmt. a (1971) [hereinafter *Restatement*]. *See also* Burchett v. MasTec North America Inc., 93 P.3d 1247 (Mont. 2004); PETER HAY ET AL., CONFLICT OF LAWS 1131–32 (5th ed. 2010).

28. Restatement, *supra* note 27, at 63-64. The U.S. Supreme Court has long recognized the possibility of an implied choice of law. Wayman v. Southard, 23 U.S. 1, 1 (1825); SYMEON C. SYMEONIDES, AMERICAN PRIVATE INTERNATIONAL LAW 197 (2008).

29. Sonat Exploration Co. v. Cudd Pressure Control, Inc., 271 S.W.3d 228 (Tex. 2008).

Article 4 of the Hague Principles requires that the parties' choice "be made expressly or appear clearly from the provisions of the contract or the circumstances." An express choice of law is usually included in the main contract and takes the form of an explicit reference to the law to which any disputes between the parties should be subject. An express choice of law can also be made orally. A tacit choice of law by the parties is one that is not expressly stated in the contract but is nonetheless a real choice of law. It must be clear that there is a real intention on the part of the parties that a certain law be applicable. A hypothetical choice or presumed intention imputed to the parties is insufficient.[30]

This approach acknowledges a tacit choice made by reference to elements of the contract or other relevant circumstances.[31] Generally, the terms of the contract are given priority. However, either the terms of the contract or the circumstances of the case may conclusively indicate a tacit choice of law. As to relevant terms of the contract, a choice of court clause or an arbitration clause may, along with other factors, indicate that the parties intended the contract to be governed by the law of that forum. Article 4 clarifies that such a choice is not *in itself* equivalent to a choice of law. This express clarification avoids a common point of confusion in practice: the parties' decision to choose a particular court or arbitral tribunal as the forum in which to resolve disputes does not automatically mean that the parties have selected the law of that forum as the law governing the contract.[32] The particular circumstances of the case that may indicate the intention of the parties as to the applicable law may include their conduct and other factors surrounding the conclusion of the contract. Previous or related contracts between the parties containing an express choice of law clause

30. For arguments in favor of express choice only, see PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *Choice of Law in International Commercial Contracts: Hague Principles?,* 15 UNIFORM L. REV. 883, 895 (2010), *but cf.* Jan L. Neels & Eesa A. Fredericks, *Tacit Choice of Law in the Hague Principles on Choice of Law in International Contracts*, 44 DE JURE L. J. 101,101–10 (2011), *and* Marshall, *supra* note 21 at 517.

31. *See* Nygh *supra* note 1, at 113–20 (providing a survey of the indicators of tacit choice).

32. *Cf.* The former presumption under English law of *qui elegit judicem elegit jus.* Tzortzis v. Monark Line A/B, (1968) 1 W.L.R. 406, 413 (CA).

in favor of the same law may also indicate that the parties intended to have that law apply to all of their contractual relations.

B. Absence of a Connection Between the Contract or the Parties and the Designated Law

Article 2(4) of the Hague Principles establishing that the parties' freedom to choose the applicable law is not circumscribed by the requirement of a connection, be it geographical or otherwise, between the contract or the parties and the chosen law. This provision is designed to reflect the reality of largely delocalized commercial transactions brought about by globalization. The provision also reflects the fact that parties may choose a particular law for a number of reasons: its neutrality inter se,[33] because it is highly developed in the type of transaction or transactions contemplated by the contract, or because it is most familiar to their legal advisors on whose advice the parties rely.

In allowing the parties to choose the law applicable to their contract, without requiring a particular connection, the Hague Principles' methodology is consistent with many modern instruments relating to the law applicable to contracts.[34] For example, Article 7(1) of the 1955 Hague Convention on the Law Applicable to International Sales of Goods (the "1955 Hague Sales Convention") promotes the parties' freedom without requiring any connection between the chosen law and the parties' transaction. A similar provision exists for choice of court agreements in the 2005 Hague Choice of Court Convention. Furthermore, neither the Rome I Regulation nor the Mexico Convention requires a connection between the chosen law and the contractual situation.

The Hague Principles differ, however, from the choice of law rules in some legal systems that accept party autonomy, but which require an objective, substantial connection between the

33. Selecting a neutral forum is what game theory labels the second best strategy. Choosing the law and forum of an unfamiliar State imposes an additional cost on both parties and ensures that neither party has an informational advantage. *See* Stefan Voegenauer, *Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence*, 1 EUR. REV. PRIVATE L. 13, 24–25 (2013).

34. Nygh, *supra* note 1, at 58–60.

transaction and the chosen law.[35] For example, the Restatement (Second) methodology, which is followed in the majority of American states,[36] calls for a substantial relationship between the law chosen and the parties or the transaction in a case where there is no other reasonable basis for the parties' choice, but only for issues which the parties could not have resolved by an explicit provision in their contract directed to that issue.[37] The Restatement (Second) subjects issues within the contractual power of the parties to the chosen law irrespective of whether that law is connected to the parties or their transaction.[38]

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35. It was recommended, following the Special Commission, that this requirement be referred to in the Commentary. *See* 2012 Draft Hague Principles, *supra* note 6. The Restatement (Second)'s substantial relationship requirement restricts party autonomy in an instrument which applies to a broad range of contracts, including those involving presumptively vulnerable parties such as consumers and employees. The Hague Principles, which do not call for a substantial connection, arguably can afford to be more liberal because these sorts of vulnerable parties are excluded from the scope of the instrument. The Hague Principles only apply to commercial contracts. *See generally*, SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD 164 – 65 (2014).

36. The Uniform Commercial Code ("U.C.C.") has been adopted in all American states and takes precedence over the Restatement (Second) for contracts falling within its scope. Courts, however, have tended to equate Section 1–105 of the former version of the U.C.C. with the Restatement (Second), viewing the two as interchangeable. Symeonides, *supra* note 28, at 216. Considering Section 1-301 of the Revised U.C.C. adopts the language of the former Section 1-105 (The American Law Institute, 85th Annual Meeting Program, 19-21 May 2008, p. 8, No 3; Keith A. Rowley, *The Often Imitated, But (Still) Not Yet Duplicated, Revised UCC Article 1*, Nev. L.J. 1, 8 (2011), *available at* http://www.law.unlv.edu/faculty/rowley/RA1.081511.pdf), there is nothing to suggest that Section 1-301 of the Revised U.C.C. will change the methodology that courts employ in those states.

37. Restatement, *supra* note 27, § 187(2) provides that

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by explicit provision in their agreement directed to that issue, unless …(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice …

For a breakdown of those states that employ the Restatement (Second) methodology, see 2013 Survey, *supra* note 3, at 62-64.

38. Restatement, *supra* note 27, § 187(1).

A number of states have abandoned the substantial connection requirement of the Restatement (Second).[39] In other states, the requirement's interpretation has been relaxed over time. One commentator has suggested that the cases premised upon it are so few that they ought to be regarded as exceptions.[40] A very recent case that applied a strict interpretation to the requirement is *Contour Design, Inc. v. Chance Mold Steel Co., Ltd.*[41] This case concerned a dispute over a nondisclosure agreement ("NDA"), drafted by a lawyer in Colorado, containing a choice of law clause selecting the law of Colorado. The Taiwanese respondent was the manufacturer of the goods of the appellant, a New Hampshire corporation. Under New Hampshire's choice of law rules, the methodology of the Restatement (Second) applied to the dispute.[42] The Court set aside the parties' choice, holding that there was an insignificant relationship between the NDA and the law of Colorado, the only alleged connection being the location of the drafting lawyer, and instead applied New Hampshire law.[43] Presumably, the Court did not see the familiarity of the drafting lawyer with Colorado law to be a "reasonable basis" for the parties' choice in accordance with §187(2)(a).

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39. See for example, Louisiana Civil Code Art. 3540 and Oregon Revised Statutes § 81.120. See also Texas Business & Commerce Code § 35.51 (c), New York General Obligations Law § 5-1401.735, California Civil Code § 1646.5 and Illinois Compiled Statute 105/5-5, which apply to choice of law in transactions above a monetary threshold.

40. *See* RÜHL, *supra* note 1, at 14 n.50.

41. Contour Design, Inc. v. Chance Mold Steel Co., Ltd., 693 F.3d 102 (1st Cir. 2012).

42. As the United States Federal Court of Appeals for the Second Circuit was sitting in diversity jurisdiction, it applied the choice of law rules of the forum state, New Hampshire. New Hampshire follows the Restatement (Second) choice of law methodology. *See* 2013 Survey, *supra* note 3, at 63. "Under New Hampshire law, '[w]here parties to a contract select the law of a particular jurisdiction to govern their affairs, that choice will be honored if the contract bears any significant relationship to that jurisdiction.'" *In re* Scott, 160 N.H. 354, 999 A.2d 229, 237–38 (2010) (alteration in original) (quoting Hobin v. Coldwell Banker Residential Affiliates, 144 N.H. 626, 744 A.2d 1134, 1137 (2000); *See also* Contour Design, Inc., 693 F.3d 102.

43. Contour Design, Inc., 693 F.3d 102. It is unclear on the face of the reasons for judgment whether the Court applied New Hampshire as the law most closely connected to the contract in accordance with § 188 of the Restatement Second or as the law of the forum.

While a "significant minority" of American states continue, in theory, to employ the Restatement (First) methodology[44]—which does not allow parties to choose the law applicable to their contract[45]—a number of modern Restatement (First) courts have seemingly broken with the traditional methodology. Instead, they have applied loosely a §187 Restatement (Second) type analysis to choice of law clauses referring to the law of the place with the most significant relationship to the contract.[46]

The requirement that the chosen law have a significant, objective connection to the parties or their contract can be likened to the theory of localization in a civil law context, which was fervently defended by Batiffol during the early nineteenth century.[47] According to this theory, the chosen law is excluded when it is unrelated to the objective center of gravity of the contract. The rationale behind the approach, under which a connection with the chosen law is required, is to police party autonomy so as to prevent *fraude à la loi*. As it is known in French, *fraude à la loi* focuses on the motives of the party who,

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44. Symeonides, *supra* note 3, at 63.

45. The principal objection to the ability of the parties to choose the law applicable to their contract is that it "practically creates a legislative body from any two persons who choose to get together and contract." JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 1079–80 (1935). This is based on Beale's and Dicey's vested rights theory according to which, a particular contract is the trigger for the vesting of a right in a given location. A.V. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS 17–25 (5th ed. 1932); William M. Richman & David Riley, *The First Restatement of Conflict of Laws on the Twenty–Fifth Anniversary of its Successor: Contemporary Practice in Traditional Courts*, 56 MD. L. REV. 1196, 1197–98 (1997). The law of the place where the right vests then controls the content of the right. In the case of contracts, Restatement (First) courts traditionally applied the law of the place where the contract was formed to control the content of contractual rights. *Id.* at 1206–13.

46. Richman, *supra* note 45, at 1206-13.

47. HENRI BATIFFOL, ASPECTS PHILOSOPHIQUES DU DROIT INTERNATIONAL PRIVÉ 83 (1956); HENRI BATIFFOL, LES CONFLITS DE LOIS EN MATIÈRE DE CONTRATS 38 (1938). For a discussion of this theory in English, see HORACIO A. GRIGERA NAÓN, CHOICE–OF–LAW PROBLEMS IN INTERNATIONAL ARBITRATION, 155–57 (1992).

by its choice of law, seeks to avoid the application of another law that is objectively applicable to the contract.[48]

The Hague Principles address, to a large extent, the concerns attending *fraude à la loi* through application of the exceptions of *ordre public* and overriding mandatory laws provided for in Article 11, which limit party autonomy. The exceptions were considered to be a sufficient counterbalance to the ability of the parties to choose an unconnected law to apply to their contract. This is especially so considering parties are likely to choose a neutral law because they have not been able to agree on the application of either of their own legal systems.[49]

C. The Battle of the Forms

A significant development at the November 2012 Special Commission meeting was the adoption of a provision on the vexed problem of the "the battle of the forms" or, more specifically, the question of the prevailing law—if any—when both parties make choices of law via the exchange of "standard form" contracts. [50]

At a national level, there are at least four different approaches to the battle of the forms.[51] Under Dutch law, the standard terms first used prevail ("first shot rule"); whereas under English law and the Contract Law of the People's Republic of China,[52] the standard terms referred to last prevail ("last shot rule"). In other jurisdictions, such as France and Germany, conflicting terms are to be ignored entirely ("knock out rule"). The United States' Uniform Commercial Code applies a hybrid so-

48. HENRI BATIFFOL & PAUL LAGARDE, TRAITÉ DE DROIT INTERNATIONAL PRIVÉ 596 (8th ed. 1993).

49. *See* D. MARTINY, MÜNCHENER KOMMENTAR ZUM BGB Art. 27, No., 28 (4th ed. 2006).

50. This problem, which is not canvassed here, is also experienced in a jurisdictional context. For a discussion of the problem concerning conflicting jurisdiction clauses, see Richard Garnett, *Co-existing and Conflicting Jurisdiction and Arbitration Clauses*, 9 J. OF PRIVATE INT'L L. 361 (2013).

51. Thomas Kadner Graziano, *Solving the Riddle of Conflicting Choice of Law Clauses in Battle of Forms Situations: The Hague Solution*, 14 Y.B. PRIVATE INT'L L. 71, 74 (2012/2013).

52. Zhonghua Yenming Gongheguo Hetong Fa (中华人民共和国合同法) [*Contract Law of the People's Republic of* China] (Promulgated by the Standing Comm. Nati'l People's Cong., 15 Mar. 1999, effective Oct. 1, 1999), Art. 19.

lution, adopting aspects of the first shot rule, last shot rule, and knock out rule.[53] Other jurisdictions do not yet have a solution for the issue of conflicting standard terms.[54]

A special drafting group, led by the delegation of Switzerland, in consultation with the Drafting Committee, considered this matter. Two drafting options, one more concise than the other, were set out and presented to the Special Commission. The shorter text was preferred and was widely considered by the experts present at the Special Commission to be an elegant and comprehensive solution to the problem of conflicting choice of law clauses.

Article 6 of the Hague Principles provides that whether or not the parties have agreed to a choice of law is to be determined by the law that was purportedly agreed to. If both parties' standard terms designate the same applicable law, or if only one party's standard terms contain a choice of law clause, Article 6, paragraph 1(a) applies and "the law that was purportedly agreed to" resolves the question of whether the parties "agreed" on the applicable law. Where standard terms used by the parties contain conflicting choice of law clauses, Article 6, paragraph 1(b) applies and the law that was purportedly agreed to resolves the question of whether the parties agreed on the applicable law.[55] If under these laws the same standard terms prevail, then the law designated in the prevailing standard terms governs the contract as the applicable law.

This provision attempts to bring clarity to the divergent approaches that exist under national law. Complemented by the Commentary, which contains illustrations of potential instances of a battle of the forms and how these situations would be resolved by the Hague Principles, Article 6 of the Hague Principles may prove to be a significant contribution to the development of an international standard for a highly complicated legal issue.

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53. U.C.C. § 2–207 (1958); Graziano, *supra* note 51, at 79.

54. Graziano, *supra* note 51, at 74–82.

55. For an analysis of how the provisions of Article 6 of the Hague Principles might apply where the parties have chosen rules of law as the applicable law under Article 3, see Brooke Adele Marshall, The *UNIDROIT Principles: A Dash of Pragmatism in the Non-State Law Pudding?*, (unpublished manuscript) (on file with the authors).

D. Partial and Multiple Choice of Law

The process of separating the elements comprising a legal relationship so as to subject them to the laws of several different legal systems is known as *dépeçage*.[56] Some commentators argue that *dépeçage* ought to be used restrictively in a contractual setting, asserting that it should only apply to contractual transactions that are clearly severable.[57] Notwithstanding, several instruments,[58] including the Resolution of the Institute of International Law on "The Autonomy of the Parties in International Contracts between Private Persons or Entities,"[59] the Rome I Regulation,[60] and the Restatement (Second),[61] permit *dépeçage* of a single contract.[62] Article 2(2) of the Hague Principles adopts a similar approach, allowing the parties to choose different laws to apply to separate elements of their contract or to choose a body of law to apply to only part of their contract. The Hague Principles reserve to the parties the option to use this process as a means of giving the greatest scope to party autonomy.[63] The Commentary, however, notes the risk of con-

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56. Paul Lagarde, *Le Dépeçage en Droit International Privé des Contrats*, 1 RIV. DI DIR. INT. PRIV E PROC., 649, 649 (1975) (It.).

57. Jean-Michel Jacquet, *Contrats*, *in* RÉPERTOIRE DE DROIT INTERNATIONAL, 1, 13, ¶ 57, (Dominique Carreau et al. eds., Dalloz 2011). According to Professor Bernard Audit, this restrictive view is inspired by the concern to observe the statutory establishments and the fear of imbalance between the parties. BERNARD AUDIT, DROIT INTERNATIONAL PRIVÉ 685 (5th ed. 2008).

58. In relation to arbitration, see Arbitration Focus, *supra* note 9, at 15.

59. Institute of International Law, The Autonomy of Private Parties in International Contracts between Private Persons or Entities, Sess. of Basel, art. 7 (Aug. 31, 1991) (providing that "the parties may choose the law to be applied to the whole or one or more parts of the contract.").

60. Rome I Regulation, *supra* note 24, at 10 ("The parties can select the law applicable to the whole or a part only of the contract.").

61. Restatement, *supra* note 27, § 187(2) cmt 1.

62. Regarding the discussions of this matter in connection with the 1986 Convention, see Hague Conference on Private International Law, *Convention on the Law Applicable to Contracts for the International Sale of Goods* (Dec. 22, 1986), *available at* http://www.hcch.net/upload/conventions/txt31en.pdf.

63. *Dépeçage* is a "form of accomplishment of contractual intent." Lagarde, *supra* note 48, at 652; RICHARD PLENDER & MICHAEL WILDERSPIN, THE EUROPEAN CONTRACTS CONVENTION: THE ROME CONVENTION ON THE CHOICE OF LAW FOR CONTRACTS 100-01 (2d ed. 2001) (stating that "*dépeçage* is simply a manifestation (or the logical conclusion) of the principle of party autonomy.");

tradiction or inconsistency that may result from *dépeçage* in the determination of the parties' rights and obligations. Parties should ensure that their choices "are logically consistent."[64]

The parties may also make a partial choice of law in accordance with Article 2(2)(i). Where the parties choose a law to apply to only part of their contract, the remainder of the contract—in default of a choice of law applicable to it—is governed by the law that would be applicable in the absence of a choice. As the Hague Principles do not provide rules for identifying the applicable law in the absence of a choice by the parties, this issue is left to be determined by the law of the forum. The parties may also choose several bodies of law to govern different aspects of their contract pursuant to Article 2(2)(ii). Partial or multiple choices of law may relate to, for example, the currency applicable to the contract, or clauses relating to specific obligations, such as obtaining governmental authorizations.

These are but a few illustrations of the solutions proposed by the Hague Principles. This Article now addresses the way in which the Hague Principles harmonize the approach to choice of law from the angle of the different dispute resolution mechanisms available to the parties.

III. LEVELING THE PLAYING FIELD BETWEEN COURTS AND ARBITRATION: EXPANDING DISPUTE RESOLUTION OPTIONS FOR PARTIES TO INTERNATIONAL CONTRACTS

In recent years, there has been a global trend, commercially, judicially, and legislatively, to favor arbitration.[65] This phenomenon has led some jurisdictions to a tacit or overt policy preference for arbitration, and a trend to craft legislation ac-

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Marc. Ekelmans, *Le Dépeçage du Contrat dans la Convention de Rome du 19 Juin 1980 sur la Loi Applicable aux Obligations Contractuelles*, *in* MÉLANGES OFFERTS À RAYMOND VANDER ELST 247, 247 (1986).

64. JAMES FAWCETT & JANEEN M. CARRUTHERS, CHESHIRE, NORTH AND FAWCETT: PRIVATE INTERNATIONAL LAW 691 (14th ed. 2008) ("[C]hoices must be logically consistent"]. *Cf.* Jacquet, *supra* note 57 ("the only limit of *dépeçage* is one of practice: the application of several laws to a single contract should not rupture its consistency."). Report on the Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (C 282) 1, 17 (E.C.) (by Mario Giuliano and Paul Lagarde).

65. Stavros Brekoulakis, *The Notion of the Superiority of Arbitration Agreements over Jurisdiction Agreements*, 24 J. INT'L ARB. 341, 341 (2007).

cordingly.[66] Domestic legislation implementing the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1985 UNCITRAL Model Law on International Commercial Arbitration has in turn "reinforced the legal status and position of arbitration,"[67] and enhanced its desirability as a dispute resolution mechanism in the eyes of commercial parties. Other commentators suggest that a preference for arbitration on the part of commercial actors is misplaced and that many are still attracted to the transparency, speed, and impartiality offered by judicial processes.[68]

With a view to subordinating any judicial or legislative preference in favor of arbitration to the will of the parties, the Hague Principles seek to harmonize the approach to choice of law between litigation and arbitration, while nonetheless acknowledging the different normative spaces in which State courts and arbitral tribunals operate. Below are several examples of how these differences converge under the Hague Principles.

A. Choice of Non-State Rules of Law

Where a dispute is to be resolved by litigation before a State court, most regimes of private international law require that the parties' choice of law clause designate a State system of law. Choice of norms or rules of law emanating from non-State sources has typically only been contemplated in an arbitral context. The phrase "rules of law" is derived from existing arbitration sources including State arbitration legislation, model arbitration laws, and private institutional arbitration rules.[69] Article 3 of the Hague Principles widens the scope of the party autonomy to allow parties to choose non-State rules of law to govern their contract in circumstances where their dispute is subject to litigation. Where the law of the forum restricts party

66. Garnett, *supra* note 50, at 361-62.

67. *Id.* at 362.

68. TREVOR HARTLEY, CHOICE OF COURT AGREEMENTS UNDER THE EUROPEAN AND INTERNATIONAL INSTRUMENTS 5 (2013).

69. *See* U.N. Comm. On Int'l Trade L. ["UNCITRAL"], UNCITRAL Model Law on International Commercial Arbitration, June 21, 1985, U.N. Doc. A/40/17 (1985); International Chamber of Commerce, *ICC Rules of Arbitration*, art. 21(1), 28(1) (2012).

choice to systems of State law, however, a choice of non-State rules of law will be set aside.

An earlier version of the draft Hague Principles, as originally proposed by the Working Group, extended party choice to non-State rules of law through a "bright-line" rule which provided that "a reference [in these Principles] to law includes rules of law."[70] This broad, open ended formulation was criticized by some experts at the Special Commission on the basis that it might lead to a proliferation of unfair, unilateral rules of law dictated by the party with the greatest bargaining power.[71] This could have adverse effects on weaker or unsuspecting parties. There was also a concern that allowing parties to employ any rules of law could make the judicial resolution of disputes more time consuming and complex, given the array of potential rules of law that could be applicable.

On the other hand, the experts who favored retaining the formulation suggested by the Working Group stressed that the fundamental purpose of the Hague Principles—the promotion of party autonomy—ought to extend to the freedom to choose rules of law. Several experts noted, in response to the concern about vulnerable parties, that many State laws already contained substantive provisions that prevent the application of unfair terms, and that parties transacting internationally in a commercial context should be considered capable of choosing the law or rules of law applicable to their transaction. Furthermore, if the Hague Principles disallowed the designation of rules of law, or remained silent as to whether parties could designate them, this would conflict with the promotion of uniform and harmonized choice of law principles.

After significant discussion and various constructive proposals, the experts reached a compromise. Article 3 of the Hague Principles, in its current form that allows parties to choose only rules of law that are "neutral and balanced," seeks to address the concern of unequal bargaining power leading to the application of unfair or inequitable rules of law. Moreover, the requirement that parties select a "set of rules" that are

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70. *See* 2012 Draft Hague Principles, *supra* note 6.

71. Cecilia Fresnedo de Aguirre, *Party Autonomy – a Blank Cheque?*, 17 UNIFORM L. REV. 655, 680 (2012).

"generally accepted" seeks to dissuade parties from choosing vague or uncertain categories of rules of law.

The Commentary elaborates on the elements comprising Article 3. As to the first (a "set of rules" that are "generally accepted"), the Commentary provides several examples—including the UNIDROIT Principles on International Commercial Contracts and the substantive rules of the United Nations Convention on Contracts for the International Sale of Goods (1980, Vienna) ("CISG")—as a free standing set of contract rules and not as a nationalized version of the CISG contained in the law of a CISG Contracting State. Second, the Commentary explains that the requirement of "neutrality" calls for a body of rules that are capable of resolving problems commonly encountered in transnational contracts. Finally, the requirement that the rules be "balanced" reflects the presumption that the parties exercise the same negotiating power. Accordingly, rules of law that are drafted to confer an advantage on one of the contracting parties are excluded under Article 3.

To ensure that all aspects of the parties' contract are governed by an applicable law, the Commentary urges parties to supplement their chosen rules of law by the choice of a body of State law. This "gap filling" law applies to those aspects of the contract to which the applicable rules do not extend.[72]

B. Overriding Mandatory Laws and ordre public

1. Definitions

The Hague Principles acknowledge that certain qualifications to party autonomy are necessary in the field of international commercial contracts, whether the parties' dispute is being resolved by arbitration or litigation. The most important qualifications to the application of parties' chosen law are those contained in Article 11. The purpose of Article 11 is to ensure that the choice of the law by parties to an international commercial contract does not have the effect of excluding overriding mandatory laws or the rules of *ordre public*. It is clear that overriding mandatory laws and public policy are "closely connected" and are united in the result that they achieve, namely, a setting aside of the chosen law to the extent of an inconsistency

72. *See generally* Marshall, *supra* note 55.

with the law against which it is being assessed. These exceptions affect the applicable law differently, however, and as such call for distinct inquiries.

Ordre public concerns situations in which application of the chosen law is displaced because its application in a particular case offends the fundamental policies of the forum or another State whose law would apply to the contract, absent the parties' choice. The exception concentrates on the content of the foreign, chosen law, which is otherwise properly applicable, to set that law aside. The chosen law is only displaced *to the extent* of the incompatibility with the fundamental policies of the forum or of the State whose law would apply in the absence of choice.[73] The threshold is high in that the application of the chosen law must violate a fundamental policy of the forum. The chosen law cannot be displaced simply because it implements a different legislative policy and adopts an approach different from that of the law of the forum.

Overriding mandatory provisions are those positive rules of the *lex fori*, or of a third legal system, that are essential to safeguard the public interests of the relevant legal system. The relevant inquiry, when one talks about overriding mandatory laws of the forum, is on those provisions themselves; that is, provisions which, on their proper construction, take priority over the chosen law, although the chosen law is still applied as far as possible consistently with the overriding mandatory provision.[74] The law of the forum determines whether and when the overriding mandatory provisions of a third legal system are to be taken into account.

Interestingly, the Hague Principles address public policy and overriding mandatory provisions in a single article. This approach is a departure from the Hague Conference's traditional approach, which has been to separate those two concepts.[75] It is

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73. *See* Preliminary Document 6, March 2014, *supra* note 6.

74. *Id*.

75. *E.g*., 1978 Convention, *supra* note 18, art. 16-17 *and* 1986 Convention, *supra* note 18, art. 17–18. *See also* Hague Convention on Private International Law, *Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary*, art. 11 (July 5, 2006).

also a departure from the prevailing approach to the treatment of these issues in the European Union.[76]

2. In an Arbitral Setting

Article 11(5) deals with the qualifications to the application of parties' chosen law in circumstances where the parties have agreed to submit disputes to arbitration. It envisages that the Hague Principles shall not prevent the tribunal from applying or taking into account both overriding mandatory provisions and *ordre public* of any law other than the law chosen by the parties if the tribunal is required to do so.[77] While the formulation in paragraph 5 may seem repetitive, it clearly conveys the intended meaning: that the first and second limbs, relating to overriding mandatory provisions and public policy, respectively, are to be treated separately.

The Hague Principles do not comment on the circumstances under which an arbitral tribunal might be required to have regard toward such matters, for this is a fraught issue.[78] From a contractualist perspective,[79] arbitral tribunals operate within their own normative space and are therefore not required to vindicate the mandatory laws or protect the *ordre public* of a particular State, other than those forming part of the law chosen by the parties. Within the paradigm of jurisdictional theory, however, arbitration is still very much tied to the Westphalian model, the nation-state being the source of legitimacy for the exercise of the tribunal's powers and the enforcement of an award, which the tribunal renders.[80] In accordance with this theory, arbitrators are required to have regard to the mandatory laws of both the seat where the arbitral powers are exer-

76. *See* Monika Pauknerová, *Mandatory Rules and Public Policy in International Contract Law*, 11 ERA F. 29, 29-43 (2010).

77. *See* Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth Inc., 473 U.S. 614, 635-37 (1985).

78. *See generally*, Andrew Barraclough & Jeff Waincymer, *Mandatory Rules in International Commercial Arbitration*, 6 MELB. J. INT'L L. 205, 208 (2005).

79. *Id.*

80. *See* P A Keane, C.J., Fed. Court of Austl., The Prospects for International Arbitration in Australia: Meeting the Challenge of Regional Forum Competition or Our House Our Rules (Sept. 25, 2012), *available at* http://www.amtac.org.au/assets/media/Papers/AMAMTACAddressKeaneCJ25September-2012.pdf.

cised[81] and the place of enforcement where the award will take effect. Somewhere in the middle of these two theories is a hybridized conception of arbitration.[82]

Without equivocating on any one of these theories, or on any hybrid conception, the Commentary to the Hague Principles cites as an example the situation where a tribunal is acting in accordance with arbitral rules that require it to make every reasonable effort to render an "enforceable award."[83] This may entail recourse to the overriding mandatory provisions of the State in which the award creditor is likely to seek enforcement. A further example might be where arbitrators are called upon to decide the enforceability of a contract for the payment of corrupt funds. In such a case, the arbitrators may have regard to the overriding mandatory laws of the place of performance of the contract.[84]

Article 11 does not *compel* arbitrators to apply overriding mandatory laws of the forum or rules of *ordre public*. Rather, it calls on arbitrators to exercise their discretion as to whether and in what circumstances they ought to do so. This is distinguishable from the provisions of Article 11 applying to State courts (paragraphs 1 to 4) that do compel State courts to have regard to such rules.

3. In Litigation

The first two paragraphs of Article 11 deal with overriding mandatory laws, which qualify the application of parties' chosen law in circumstances where the parties' dispute is being litigated before a State court. Article 11(1) and Article 11(2) deal respectively with the application of the "overriding mandatory provisions of the law of the forum" and the "overriding mandatory provisions of another law." It was suggested during the meeting of the Special Commission that the first two para-

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81. Barraclough, *supra* note 78, at 210-11. Although the powers may, in reality, be exercised in the venue, which may differ from the seat of the arbitration.

82. *See id.* at 210.

83. *See*, *e.g.*, The Rules of Arbitration of the International Chamber of Commerce, art. 41 (2012).

84. *See generally*, S Z Tang, *Corruption in International Commercial Arbitration,* Presentation at the Journal of Private International Law Conference, (Sept. 12 – 13, 2013) (attended by the authors).

graphs of Article 11 be amalgamated to preserve the brevity and succinctness of the Hague Principles. The Special Commission, however, agreed to retain the two separate paragraphs, principally on the basis that where the Hague Principles are used as a model, legislators may wish to make separate reference to the role of overriding mandatory provisions of the forum and of a third country. Under the Hague Principles, it is for the law of the forum to determine whether and when the overriding mandatory provisions of a third legal system are taken into account. This provision should prompt policymakers to enumerate expressly the circumstances in which the overriding mandatory provisions should displace the law chosen by the parties.

The third and fourth paragraphs of Article 11 deal with rules of *ordre public*, which similarly qualify the application of parties' chosen law in circumstances where the parties' dispute is being litigated before a State court. Article 11(3) requires State courts to apply the *ordre public* of the forum, and Article 11(4) leaves it to the law of the forum to determine the relevance, if any, of the *ordre public* of the State whose law would be applicable in the absence of a choice of law.

CONCLUSION

The Hague Principles reflect the overarching mandate of the Hague Conference: "[T]he progressive unification of the rules of private international law."[85] When implemented at the national or regional level, the Hague Principles will contribute to providing greater cohesion between approaches to choice of law rules relating to international contracts. The implementation of the Hague Principles should also alert parties to the issue of the law applicable to their contract, prompting them to plan their cross-border transactions more effectively. Whether these objectives will be met remains to be seen. It will be interesting to monitor the possible implementation and subsequent impact of such common international standards around the world.[86]

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85. *Statute of the Hague Conference on Private International Law* art. 1, July 15, 1955, COLLECTION OF CONVENTIONS (1951-2009) 2 (Hague Conference on Private International Law ed. 2009).

86. To our knowledge, the first State to formally consider implementing the Hague Principles on Choice of Law in International Contracts is Para-

For now, academic debate generated by symposia, such as the Brooklyn Law School Symposium, "What Law Governs International Commercial Contracts? Divergent Doctrines and the New Hague Principles," is indispensable to ensuring that the future instrument is rigorously reviewed by those who may be its ultimate users.

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guay. Legislation is currently before the Paraguayan Congress. *See Paraguayan draft legislation implementing Draft Hague Principles on Choice of Law in International Contracts*, *Hague Conference on Private International Law* (April. 22, 2014, 4:09 p.m.), http://www.hcch.net/index_en.php?act=events.details&year=2013&varevent=336.

THE *NIPPON* QUAGMIRE: ARTICLE III COURTS AND FINALITY OF UNITED STATES COURT OF INTERNATIONAL TRADE DECISIONS

Jane Restani[*] *& Ira Bloom*[†]

The jurisdiction of the United States Court of International Trade ("CIT"), an Article III court with national jurisdiction,[1] extends to various challenges to governmental decisions involving imports.[2] In recent decades, most of the CIT's work has involved review of decisions of the International Trade Commission ("ITC") and the United States Department of Commerce ("Commerce") in unfair trade cases.[3] Judicial review of such decisions is provided under 19 U.S.C. § 1516(a), and jurisdiction over such review is found in 28 U.S.C. § 1581(c). Various decisions of the Court of Appeals for the Federal Circuit ("CAFC"), to which decisions of the CIT may be appealed,[4] have raised the issue of whether the CIT is authorized to give complete relief through reversal of agency unfair trade decisions. This Article resolves that issue by concluding that the relief available in unfair trade cases is essentially the same as that permitted under the Administrative Procedure Act ("APA") for reviews on the agency record,[5] and that agency decisions may be reversed if contrary to law and when the record will support only one result. Furthermore, as an Article III court, the CIT is empowered by the U.S. Constitution to issue final decisions subject only to appeal to higher courts. This Article discusses both statutory and constitutional law underlying these conclusions, as well as various decisions that have otherwise impeded efficient and effective final court relief.

The problem is easiest to understand in the context of ITC injury determinations, which gave rise to the CAFC decisions of

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[*] Judge, United States Court of International Trade.

† Professor of Political Science, Lehman College of The City University of New York.

1. 28 U.S.C. §§ 251, 1581 (2012).

2. 28 U.S.C. § 1581 (2012).

3. *See generally* 19 U.S.C. § 1671 (2012) (regarding countervailing of subsidies); 19 U.S.C. § 1673 (2012) (regarding antidumping duties).

4. 28 U.S.C. § 1295(a)(5) (2012).

5. *See* 5 U.S.C. § 706(2) (2012).

most concern here. Injury, except in very unusual circumstances, is a prerequisite to duties to offset the effects of unfair trade practices, namely, dumping or subsidization.[6] Only if injury to

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6. 19 U.S.C. § 1671(a) (2012) provides:

General Rule

If–

(1) the administering authority determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States, and

(2) in the case of merchandise imported from a Subsidies Agreement country, the Commission determines that–

(A) an industry in the United States–
(i) is materially injured, or
(ii) is threatened with material injury, or
(B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,

then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net countervailable subsidy . . .

19 U.S.C. § 1673 (2012) provides:

If–

(1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and

(2) the Commission determines that–

(A) an industry in the United States–
(i) is materially injured, or
(ii) is threatened with material injury, or
(B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,

then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise . . .

a domestic industry is found may dumping or governmental subsidization be remedied through additional duties—that is, duties in addition to ordinary tariffs. Injury determinations are "thumbs up" or "thumbs down." Either there is injury—including threat of injury—or not.[7] By way of contrast, Commerce calculates through complex methodologies the rates of dumping or governmental subsidization, rates which are to be converted into duty assessments.[8] In most cases where judicial relief is granted, rates change; they do not vanish. Thus, if the reviewing court finds the methodology applied by Commerce wanting, there are complex tasks for the agency to perform.

Some CIT decisions have found the affirmative injury determination in error to the degree that the determination cannot be supported by any reasonable reading of the record. These decisions have been difficult for the CAFC to accept. Why that is so is not a question this Article attempts to answer. In the course of rejecting such results, however, the CAFC has raised the issue, which this Article addresses.

The issue is set forth most clearly in *Nippon Steel Corp. v. United States*,[9] ("*Nippon VI*"), which cites the other cases of immediate concern. The relevant passage is set forth in its entirety:

> The United States also argues that the Court of International Trade acted ultra vires in directing the Commission to enter a negative material injury determination, and asserts that [19 U.S.C.] § 1516a does not permit the court to reverse a determination of the Commission, directly or indirectly. We have stated in dicta that "[s]ection 1516a limits the Court of International Trade to affirmances and remand orders; an outright reversal without a remand does not appear to be contemplated by the statute." *Altx*[, *Inc. v United States*, 370 F.3d 1108,] 1111 n.2 (Fed. Cir. 2004). However, we implied the opposite in *Atlantic Sugar*[, *Ltd. v. United States*, 744 F.2d 1556, 1561(Fed. Cir. 1994)], also in dicta, where we said that if the evidence supporting a material injury determination is "in-

7. For purposes of this Article we need not distinguish between determinations of injury or threat of injury. *Compare* 19 U.S.C. § 1677(7)(A)–(C) (2012) (concerning material injury) *with* § 1677(7)(F) (2012) (concerning threat of material injury).

8. *See* 19 U.S.C. §§ 1671e(a), 1673e(a) (2012).

9. Nippon Steel Corp. v. United States, 458 F.3d 1345, 1359 (Fed. Cir. 2006).

> substantial, then the reviewing court must either reverse the [Commission]'s determination or remand the case for further fact-finding." Because, here, substantial evidence supports the Commission's original affirmative material injury determination, we need not and do not decide the scope of Court of International Trade authority to reverse under § 1516a. It may well be that, in another situation, the trade court may be faced with a Commission determination that is unsupported by substantial evidence, and for which a remand would be "futile." *Nippon IV*, 350 F. Supp. 2d at 1222. We hold only that this is not the case today.

19 U.S.C. § 1516a(c)(3), innocently enough, provides:

> (3) Remand for final disposition
>
> If the final disposition of an action brought under this section is not in harmony with the published determination of the Secretary, the administering authority, or the Commission, the matter shall be remanded to the Secretary, the administering authority, or the Commission, as appropriate, for disposition consistent with the final disposition of the court.

Although this particular paragraph of § 1516a is not cited by the CAFC in *Nippon VI*, it is the only subsection of § 1516a that comes close to the idea expressed that perhaps the CIT can only affirm or remand, but never reverse. Obviously, a straight affirmance requires no action by the agency, but we assert here that anything else—specifically, remand to reconsider, remand to apply a different methodology, or remand to publish a totally different result—requires remand, and the last is effectively a reversal. In other words, 19 U.S.C. § 1516a reflects the procedures required to effectuate dumping and countervailing duties. It is not a provision that prohibits substantive reversals, as the *Nippon VI* court may have implied.

The way unfair trade duties are actually imposed is quite complicated. When ITC and Commerce make preliminary unfair trade determinations, the determination must be published, liquidation[10] of entries by the United States Customs

10. "[L]iquidation[] [is] long honored in customs procedure as the final reckoning of an importer's liability on an entry. It is defined as 'the final computation or ascertainment of the duties or drawback accruing on an entry.'" Farrell Lines, Inc. v. United States, 69 C.C.P.A. 7, 12, 667 F.2d 1017, 1020 (1982) (Markey, C.J., dissenting) (quoting 19 C.F.R. § 159.1 (2014)); *accord* Travenol Labs., Inc. v. United States, 118 F.3d 749, 753 (Fed. Cir. 1997).

and Border Protection ("Customs") must be suspended, and cash deposit rates must be calculated and imposed on new entries of merchandise.[11] When a final ITC decision is issued, if Commerce has reached a final determination of dumping or

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11. 19 U.S.C. § 1671b(d) (2012) provides:

> If the preliminary determination of the administering authority under subsection (b) of this section is affirmative, the administering authority–
>
> (1)(A) shall–
>
> (i) determine an estimated individual countervailable subsidy rate for each exporter and producer individually investigated, and, in accordance with section 1671d(c)(5) of this title, an estimated all-others rate for all exporters and producers not individually investigated and for new exporters and producers within the meaning of section 1675(a)(2)(B) of this title, or
>
> (ii) if section 1677f-1(e)(2)(B) of this title applies, determine a single estimated country-wide subsidy rate, applicable to all exporters and producers, and
>
> (B) shall order the posting of a cash deposit, bond, or other security, as the administering authority deems appropriate, for each entry of the subject merchandise in an amount based on the estimated individual countervailable subsidy rate, the estimated all-others rate, or the estimated country-wide subsidy rate, whichever is applicable,
>
> (2) shall order the suspension of liquidation of all entries of merchandise subject to the determination which are entered, or withdrawn from warehouse, for consumption on or after the later of–
>
> (A) the date on which notice of the determination is published in the Federal Register, or
>
> (B) the date that is 60 days after the date on which notice of the determination to initiate the investigation is published in the Federal Register, and
>
> (3) shall make available to the Commission all information upon which its determination was based and which the Commission considers relevant to its injury determination, under such procedures as the administering authority and the Commission may establish to prevent disclosure, other than with the consent of the party providing it or under protective order, of any information to which confidential treatment has been given by the administering authority.
>
> The instructions of the administering authority under paragraphs (1) and (2) may not remain in effect for more than 4 months.

The provisions of 19 U.S.C. § 1673b(d), applicable to antidumping duties, provide very similar procedures.

subsidization, Commerce publishes an antidumping or countervailing duty order and instructs Customs to assess the corresponding duties.[12]

Diamond Sawblades Manufacturers Coalition v. United States[13] illustrates very well the administrative necessity of a remand to effectuate the court's decision. In that case, the CAFC upheld the CIT decision sustaining a determination after remand by the CIT to the ITC.[14] On remand the ITC switched from a negative to an affirmative injury determination.[15] That switch required the issuance of the actual antidumping duty order by Commerce.[16] The court noted the duty of the ITC to advise Commerce of a final material injury determination under 19 U.S.C. § 1673d(d),[17] and that upon such

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12. 19 U.S.C. § 1671e(a) (2012) provides:

> (a) Publication of countervailing duty order
>
> Within 7 days after being notified by the Commission of an affirmative determination under section 1671d(b) of this title, the administering authority shall publish a countervailing duty order which–
>
> > (1) directs customs officers to assess a countervailing duty equal to the amount of the net countervailable subsidy determined or estimated to exist, within 6 months after the date on which the administering authority receives satisfactory information upon which the assessment may be based, but in no event later than 12 months after the end of the annual accounting period of the manufacturer or exporter within which the merchandise is entered, or withdrawn from warehouse, for consumption,
> >
> > (2) includes a description of the subject merchandise, in such detail as the administering authority deems necessary, and
> >
> > (3) requires the deposit of estimated countervailing duties pending liquidation of entries of merchandise at the same time as estimated normal customs duties on that merchandise are deposited.

19 U.S.C. § 1673e(a), applicable to antidumping duties, is similar.

13. Diamond Sawblades Mfrs. Coal. v. United States, 626 F.3d 1374 (Fed. Cir. 2010).

14. *Id.* at 1377, 1383.

15. *Id.* at 1377.

16. *See* 19 U.S.C. § 1673e(a) (2012).

17. 19 U.S.C. § 1673d(d) (2012) provides:

advisement Commerce is required to issue the antidumping duty order under 19 U.S.C. § 1673e(a) and to collect duty deposits under 19 U.S.C. § 1673e(a)(3). As the appellate court stated:

> Sections 1673d(d) and 1673e(a) apply when the Commission issues a material injury determination, regardless of whether that determination is made in the first instance or on remand, and regardless of whether there is any subsequent judicial review of that determination.[18]

The court held that the ITC was required to notify Commerce as soon as its decision on remand was issued, and Commerce was required to fulfill its statutory duties immediately.[19]

Finally, the court held that the CIT did not abuse its discretion in ordering Commerce to issue the order and to instruct Customs to collect duty deposits.[20] The important point for this Article is that it is the agency's action on remand that triggers the essential parts of the statutory scheme for the imposition of unfair trade remedies. That is why 19 U.S.C. § 1516a(c)(3) refers to matters "remanded."[21] There is no statutory bar to substantive reversal, expressed or implied. It is simply that reversal is accomplished through actions the agency takes pursuant to the court remand. Perhaps this is all that *Nippon VI* meant in suggesting remand might always be necessary in response to error. This interpretation of the statute is fully in accord with and is informed by 19 U.S.C. § 1516a(b)(1), which directs the reviewing court, the CIT, to "hold unlawful any determination, finding, or conclusion found . . . not in accordance with law," or, depending on the type of action, any determination that is arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence.[22]

> Whenever the administering authority or the Commission makes a determination under this section, it shall notify the petitioner, other parties to the investigation, and the other agency of its determination and of the facts and conclusions of law upon which the determination is based, and it shall publish notice of its determination in the Federal Register.

18. *Diamond Sawblades*, 626 F.3d at 1381 (footnote omitted).
19. *Id.* at 1378.
20. *Id.* at 1382–83.
21. 19 U.S.C. § 1516a(c)(3) (2012).
22. 19 U.S.C. § 1516a(b)(1)(A) (2012).

The standards of review for decisions under 19 U.S.C. § 1516a(b) and 5 U.S.C. § 706(2) (APA)[23] are essentially the same. Both require unlawful, arbitrary, and unsupported decisions to be set aside. This is what federal courts do when they exercise the judicial power of the United States in reviewing agency decisions. Anything else would make the statutes hollow promises of judicial review.[24]

Returning to the more common course of events which do not involve reversals, if there is no court affirmance, there will be remands for various purposes, such as to require reassessment under a different interpretation of the law than previously applied by the agency, to rethink methodologies, or to consider previously rejected or ignored evidence. Furthermore, rates often must be recalculated by Commerce for various exporters and producers, and changes to the "all others rate" for companies not individually examined may occur.[25] These are all deci-

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23. 5 U.S.C. § 706(1) refers to compelled agency action. The CIT does not enjoin action under Section 1516a and its corresponding jurisdictional provision, 28 U.S.C. § 1581(c). If such relief is necessary because actions under 28 U.S.C. § 1581(c) provide manifestly inadequate relief, 28 U.S.C. § 1581(i) jurisdiction is available. Consol. Bearings Co. v. United States, 348 F.3d 997, 1002 (Fed. Cir. 2003) ((i) jurisdiction if no other subsection confers jurisdiction or remedy is manifestly inadequate). Thus, together the various trade statutes give the CIT all of the authority found in 5 U.S.C. § 706.

24. Apparently there is considerable controversy as to whether the CAFC should repeat this type of review. *See* NSK Corp. v. U.S. Int'l Trade Comm'n, 542 F. App'x 950, 951 (Fed. Cir. 2013) (nonprecedential). In voting to deny rehearing en banc, five judges observed that "The pertinent review provisions of the trade statutes track the APA. At the time it enacted those statutes, Congress expressed a desire that agency review by the Court of International Trade and this court would be modeled on APA review." *Id*. at 953.
While not disputing this particular point as to CIT review, three judges voted for rehearing en banc to consider whether review in the CAFC of the CIT's APA type review should be more limited, giving enhanced deference to CIT decisions. *See id.* at 955-62 (Wallach, J., dissenting).

25. 19 U.S.C. § 1673b(d) states:

> If the preliminary determination of the administering authority under subsection (b) of this section is affirmative, the administering authority–
>
> (1)(A) shall–
>
> (i) determine an estimated weighted average dumping margin for each exporter and producer individually investigated, and

sions that may be challenged anew. These matters are the results of substantive remands to reconsider or explain, not remands to effectuate a reversal. It is the latter type of remand that confronted the court in *Nippon VI*.

The finality problem discussed here likely is caused in part by the Court of Appeals' rejection of attempts by the United States to appeal remand orders that seem effectively to dispose of the case. While the CAFC has never really resolved whether reversals of ITC injury determinations are appealable, as indicated in *Nippon VI*, or even whether remands ordering reversal of ITC determinations are appealable, it has specifically rejected appeals of remand orders to Commerce.[26] In both *Badger-Powhatan v. United States* and *Cabot Corp. v. United States*, the appellate court concluded that it lacked appellate jurisdiction because the CIT's remand orders were not "final judgments," nor were they appealable collateral orders or appealable under any other exception to the final judgment rule.[27] Because these two cases seem to involve remand orders most like final judgments, it is fair to assume that there are no other types of remand orders issued by the CIT to Commerce pursuant to 28 U.S.C. § 1581(c) jurisdiction that will pass appellate jurisdictional muster under CAFC precedent.

We cannot fault the appellate court for not accepting these particular remands as collateral orders of the type found appealable in *Cohen v. Beneficial Industrial Loan Corp.*[28] After all, these remand orders resolved the central issue in the case. But the principle set forth in *Gillespie v. United States Steel*

> (ii) determine, in accordance with section 1673d(c)(5) of this title, an estimated all-others rate for all exporters and producers not individually investigated, ...

26. *See, e.g.*, Badger-Powhatan v. United States, 808 F.2d 823 (Fed. Cir. 1986) (involving authority to amend antidumping duty order to conform to revised ITC injury determination); Cabot Corp. v. United States, 788 F.2d 1539 (Fed. Cir. 1986) (involving what constitutes a bounty or grant for countervailing duty law).

27. *Badger-Powhatan*, 808 F.2d at 825-26; *Cabot Corp.*, 788 F.2d at 1543.

28. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545–47, 552 (1949) (dealing with a state law claim for security for expenses of a potentially successful defendant in a stockholder derivative action. The Court was concerned that without a right to appeal the collateral order regarding security, the right conferred by the state statute at issue would be lost by the time the main action was resolved).

Corp.,[29] that finality is not a fixed concept and an appellate court should determine if the order appealed from essentially decides the case, does not seem to function in the area of concern here.[30] Principles of fundamental fairness and preservation of rights in a more than technical sense deserve some consideration. It is true that in many, if not most, cases there is room for something to occur on remand that will require further resolution by the CIT so that immediate appeal is not appropriate; this, however, is not true of every remand to Commerce, just as it is not true of every remand to the ITC. The result is that even when great expense and effort could be avoided by resolving the case at the appellate level immediately, the agency is faced with complying with a "non-final" remand. The remand results in a new draft determination, comments thereon, and then a "final" remand determination. The inability of the agency to obtain review of these "almost final" decisions may be one reason why the agencies often seem reluctant to comply fully with CIT remand orders, and why multiple remands are required to get to a stage where the CIT can approve the remand results.[31] Once the CIT approves the remand results, a judgment that is acceptably final for the CAFC appellate jurisdiction is entered. This lack of immediate appellate access is also somewhat hazardous for the agency, because when it finally does comply to the CIT's satisfaction, it must

29. Gillespie v. United States Steel Corp., 379 U.S. 148, 149–155 (1964), involved a wrongful death action in which the district court restricted plaintiff's claim to its Jones Act cause of action. The Supreme Court permitted the challenge to the pretrial dismissal of state law and unseaworthiness claims to go forward because, inter alia, the question presented was "fundamental to the further conduct of the case." *Id.* at 154.

30. An efficient road to the conclusion of an unfair trade case is particularly important because in most cases no changes occur at the agency until there is a *conclusive*, not simply an appealable, final order. *See* Timken Co. v. United States, 893 F.2d 337, 339–40 (concluding that "final court decision" in 19 U.S.C. § 1516a(e) means a "conclusive" decision in the action). Essentially, if the government agency loses, it obtains an automatic stay pending appeal of its duty to publish a new effective determination.

31. Besides the saga represented by *Nippon Steel Corp. v. United States* (*Nippon VI*), 458 F.3d 1345 (Fed. Cir. 2006), various other cases illustrate the problem of multiple remands. *See, e.g.*, Hontex Enters. v. United States, 425 F. Supp. 2d 1315, 1319 (Ct. Int'l Trade 2006) (on fourth go-round, sufficient finality for appeal of Commerce determination achieved); Elkem Metals Co. v. United States, 2008 WL 4097463 (Ct. Int'l Trade Sept. 5, 2008) (on fifth go-round, ITC determination achieved sufficient finality for appeal).

take care to make clear that it is only complying under compulsion. If it is seen to acquiesce, presumably the appellate court would find no controversy to resolve.[32]

It is difficult to get out of this loop, but not impossible. First, in order to get the CIT to enter a remand order as a final judgment, the government, upon a decision not in its favor, would have to seek the kind of remand order that directs a result—a result that resolves the case. As indicated, this has not helped Commerce bypass potentially futile remand proceedings in the past. The ITC also would not seek the entry of such an order because apparently it confuses procedural remand with substantive reversal via remand.[33] If such a remand order or judgment effectively ending the case were then analyzed on practical grounds, such as those discussed in *Gillespie*, the CAFC might accept it as a final appealable judgment.

Second, the agencies could accept the status quo with respect to the appealability of remand orders at the CAFC but comply quickly and reasonably, neither under-interpreting nor over-interpreting the CIT remand order. This should end multiple remands. Finally, the agencies could request certification for interlocutory appeal more often.[34] If the agencies used the process wisely, the CIT likely would certify more issues, particularly if the CAFC exhibited more interest in such certifications.[35] This potentially would also lead to faster resolution of important issues.[36]

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32. The CIT described this process in GPX Int'l Tire Corp. v. United States, 942 F. Supp. 2d 1343, 1348 n.2 (Ct. Int'l Trade Oct. 30, 2013).

33. *See, e.g.*, Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 932 (Fed. Cir. 1984) (discussing ITC's argument that even if the CIT were correct in finding no evidence to support the agency's finding, remand rather than reversal would be required).

34. 28 U.S.C. § 1292(d)(1) permits a CIT judge to certify for interlocutory appeal an issue the resolution of which will "advance the ultimate termination of the litigation" and that involves a controlling question of law as to which there is substantial ground for a difference of opinion. This parallels the procedure for certification for appeal by a district judge. *See* 28 U.S.C. § 1292(b) (2012).

35. *See* Alexandra Hess et al., *Permissive Interlocutory Appeals at the Court of Appeals for the Federal Circuit: Fifteen Years in Review (1995-2010)*, 60 AM. U.L. REV. 757, 779–83 (2011) (discussing limited instances of such appeals at the CAFC).

36. Of course, finality and increased efficiency could be accomplished by eliminating two tiered judicial review and having trade determinations reviewed by a panel of three judges of the CIT. *See* Herbert C. Shelley, *The*

It was not only this legal quagmire that may have caused the court in *Nippon VI* to raise the issue of effective reversals, but the *Nippon VI* court also may have understood the practical problem of interpreting the statute to forbid reversals that would be final enough for appellate review. It described the futility of not reversing when a record could support only one result, and when that acceptable result was not the one the agency reached.[37] In a decision such as that of the ITC involving injury, where multiple economic factors are weighed to reach a "yes" or "no" result, it may be difficult to say in a particular case that there is no substantial evidence for a certain result, and that the record will support only the opposite. This assessment is difficult, but not impossible, at least theoretically. There is also the possibility that assessment of the record under a legal framework newly declared by the reviewing court can lead to only one result. Directing the agency to undertake a new substantive assessment in such situations is inefficient and futile. Effectively, reversal is required in such a case, and if the case needs to be remanded to trigger various actions under the statute, it is simply remanded for implementation of the reversal.

We must point out one more problem of reaching finality that has plagued these cases. There sometimes appears to be a lack of understanding that the two key litigating interests are not parties representing the United States and the entity with goods on which duties are imposed. The key combatants in the referenced cases are foreign exporters or producers and domestic industries.[38] Commerce—or the ITC—lines up through its determination on one side or the other of a particular claim. In

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Standard of Review Applied by the United States Court of Appeals for the Federal Circuit in International Trade and Customs Cases, 45 AM. U.L. REV. 1749, 1805 (1996); *see also* Thomas J. Aquilino, Jr., The Third Dominick L. DiCarlo U.S. Court of International Trade Lecture: To Amend the Course of Judicial Review of International Trade Cases in the United States (November 4, 2004) (on file with the Library, U.S. Court of International Trade); *Proceedings of the Sixth Annual Judicial Conference of the United States Court of International Trade, Judicial Review: Is It Proving Effective in Resolving Trade Cases?*, 131 F.R.D. 217, 305 (1990). Three judge panels are permitted now under 28 U.S.C. § 255(a) for cases of particular significance.

37. *See Nippon VI*, 458 F.3d at 1359.

38. The "foreign" interest may be a product, an exporter, a U.S. importer of foreign made goods, or a foreign country. 28 U.S.C. § 2631(j)(1)(B), (k) (2012); *see* 19 U.S.C. § 1677(9) (2012).

SKF USA, Inc. v. United States,[39] the court discounted the importance of finality and reaching the resolution of the case promptly. It stated that the CIT should grant voluntary requests for remand by the agency except in very limited circumstances.[40] It was almost as if the appellate court were viewing the case as a denial of benefits by the government. Although applicable to other areas of CAFC appellate jurisdiction,[41] this view does not reflect the true nature of these particular cases. Changes in policy, not required by the statute, can injure the domestic party just as they may lower the duty obligation of the importer of foreign goods. If the government asks for a remand for reasons of policy change rather than error, perhaps the court should be required to, or at least exercise its discretion to, deny such a request, contrary to one reading of *SKF*.[42] As noted in *SKF*, the agency may have a right to defend its position on grounds first asserted in litigation, and it may obtain a remand to apply its new position if it succeeds in such litigation, but changing a result that is entirely consistent with the statute is another matter. Here, there is another party, besides the government, with a valid interest in the finality of the victory obtained. The better rule would be one that values the finality of permissible agency decisions and which leaves policy changes to later cases.[43]

Nippon VI is almost the converse of *SKF*. It appears to assume the ITC is a neutral referee that will come to the right decision if only given a(nother) chance. Neither of these cases is a two party case where the United States acts as a referee or a source of benefits. These are three party cases. The government

39. *See* SKF USA Inc. v. United States, 254 F.3d 1022, 1030 (Fed. Cir. 2001) (requiring remand at Commerce's request to recalculate an expense to exporters' or importers' benefit).

40. *Id.* at 1029–30.

41. *See, e.g.*, 28 U.S.C. § 1295(a)(9) (2012) (Merit Systems Protection Board appeals); 38 U.S.C. § 7292(e) (2012) (Veterans Claims appeals).

42. *SKF*, 254 F.3d at 1029–30.

43. *See* Am. Trucking Ass'ns v. Frisco, 358 U.S. 133, 146 (1958) (finding that the Interstate Commerce Commission may not, without specific statutory authority, reconsider license and certificate decisions because of policy changes); Corus Staal BV v. United States, 259 F. Supp. 2d 1253, 1257 (Ct. Int'l Trade 2003) (discussing finality concerns and gathering cases in conflict with *SKF*).

has its own policy interests at stake in trade cases.[44] The government often makes some decisions in one side's favor and other decisions for the other side. What is important is for the government to be treated as other parties are. If it loses, it should comply, and it should be able to appeal promptly. Endless remands are not the answer, nor are midstream unfettered changes in policy.

We note the case of *Essar Steel Ltd. v. United States*[45] where the CAFC seemed to be moving in a direction of valuing efficiency and finality by limiting the CIT's discretion to order reopening of the agency record.[46] In normal practice, reopening of the record is left to the discretion of the agency if the court finds fault with specific findings of the agency.[47] *Essar Steel* did not hold that an order to reopen the record is never appropriate, although it mentioned only a few "exceptions" where reopening may be directed, finally concluding that reopening could not be directed in "this case."[48] The CAFC's espoused goal of finality would not be served by allowing the agency to make the reopening decision in virtually all instances. Sometimes it is the court that needs to end a case by barring reopening. Sometimes reopening is required where the agency fails to do its investigative duties, or when it disobeys the law by not accepting

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44. The government collects duties, but the financial impact of duties is very limited, in contrast to the early days of the Republic. Although duties were imposed to protect nascent American industries, customs duties were also used to meet the revenue needs of the new nation. WILLIAM B. FUTRELL, THE HISTORY OF AMERICAN CUSTOMS JURISPRUDENCE 26–29 (1941). *See* United States v. Laurenti, 581 F.2d 37, 40 n.12 (2d Cir. 1978) (citing ENCYCLOPEDIA OF AMERICAN HISTORY 733 (R. Morris ed., Harper & Row bicentennial ed. 1976)). Income taxes did not appear until the 1913 ratification of the Sixteenth Amendment to the Constitution. The Historical Budget Data of the Congressional Budget Office, August 2013, shows customs duties as about 1% of total revenue. *See* CONGRESSIONAL BUDGET OFFICE, HISTORICAL DATA—AUGUST 2013, *available at* www.cbo.gov/publication/44507. Today, control and oversight of trade issues is at the forefront, rather than duty collection. The ITC is an independent agency, but the commissioners often have different institutional concerns and views of trade policy. There is no reason to conclude that commissioners do not have the usual decision makers' preference for their previous conclusions, which can become difficult to set aside as a case proceeds through numerous remand proceedings.

45. Essar Steel Ltd. v. United States, 678 F.3d 1268 (Fed. Cir. 2012).

46. *Id.* at 1276–77.

47. *See id.* at 1277–78.

48. *Id.* at 1278.

certain documents. *Essar Steel* may be seen as a case where the party seeking to have information newly considered did not meet its burdens, but it is also a case where the CAFC may have failed to recognize Commerce's investigative responsibilities and the CIT's obligations to ensure fair agency proceedings.[49]

Finality is important, not just because it preserves properly obtained administrative and litigation results, but also because it aids prompt judicial review of the entire case and conclusive resolution of the dispute. The agencies and the courts, however, settle the problem of reaching finality for purposes of resolving the case quickly or for purposes of appellate review. It seems clear that any attempt to read 19 U.S.C. § 1516a(c)(3) to forbid substantive reversal of agency decisions through specific remand directions must be rejected as a matter of statutory construction. Perhaps more importantly, the ability of the court to effectively order reversal is the only statutory interpretation that will pass constitutional muster.

As an Article III court, the CIT is statutorily and constitutionally empowered to issue decisions that are final, subject only to review by higher courts in the Article III hierarchy. It is fundamental that Article III courts cannot be required to decide cases that are subject to revision by an executive branch agency, such as Commerce, or an independent regulatory agency, such as the ITC. Whatever its constitutional status, the ITC is not a part of the Judicial Branch.[50] These fundamental principles are also at play where the executive branch agency or independent regulatory agency is a key party to the litigation, as is almost always the case with CIT cases, and when control of the timing of the litigation is important, as is often the case with the court's decisions in trade matters.[51]

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49. *Id.* at 1279 (Newman, J., dissenting).

50. The peculiar status of independent agencies has been addressed in various cases. *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (Federal Trade Commission); Morrison v. Olson, 487 U.S. 654, 685–96 (1988) (gathering independent agency cases in addressing independent counsel provisions of Ethics in Government Act).

51. For example, high duties have been alleged as the reason for failure of a business. *See, e.g.*, *More on GPX Bankruptcy, Alliance Acquisition*, TIRE REVIEW (Oct. 27, 2009), www.tirereview.com/Article/67688/more_on_gpx_bankruptcy_alliance_acquisition.aspx. *See also In Re* GPX Int'l Tire Corp., No. 09–20170–JNF, 2009 WL 8032840 (Bankr. D. Mass) (July 21, 2010). And, concomitantly, low duties

As discussed, under CAFC holdings, unless the agency invokes something close to the magic words—we are following the CIT's direction, with which we disagree—an appeal to the CAFC is not available to the agency absent extraordinary circumstances. This may have led to a lack of immediate and full compliance with, at a minimum, the intent of the CIT decision on the part of the agency in a number of cases.[52] If the agency is forced to comply with a judicial ruling that it views as fundamentally flawed, it must resist the natural tendency not to comply fully and reasonably. Because remand is needed to effectuate judicial review, however, the United States, a party to the litigation, effectively obtains control of the case's timing and, if the agency is never compelled to comply with the court's order because reversal is not available, control of the outcome as well.[53] This raises serious constitutional problems.

It is well settled that a statute should be interpreted to avoid constitutional issues.[54] The extreme interpretation of 19 U.S.C. § 1516a(c) to prohibit reversals raises serious constitutional questions as to an Article III court's powers. Several questions are presented, including the power of an Article III court to issue a final decision, whether one constant party in these cases—the United States government—would be favored by giving it effective control of the disposition of the case, and whether the CIT would, in essence, issue an advisory opinion.

In regard to Article III courts, the constitutional infirmities of a lack of finality and advisory opinions are often conflated and perhaps represent mirror images of each other. Decisions of

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may not give the domestic industry the protection it requires to survive. Duty deposits at the rate determined by Commerce continue to be paid to the United States until litigation is conclusively resolved. *See* Diamond Sawblade Mfrs. Coal. v. United States, 626 F.3d 1374, 1380–82 (Fed. Cir. 2010) (discussing 19 U.S.C. § 1516a(e)). Obviously, failure to resolve a case promptly can have disastrous business consequences.

52. *See supra* note 31 and accompanying text; *see also, e.g.*, Qingdao Taifa Grp. Co. v. United States, 780 F. Supp. 2d 1342, 1346 n.2 (Ct. Int'l Trade July 12, 2011).

53. While the court sets time limits for the return of remand results, agency needs often delay the results, and failures to comply fully often require further remands, as noted. Obviously, if outright contempt were involved, other remedies are available as the CIT has all the power in law and equity of a district court. *See* 28 U.S.C. § 1585.

54. *See, e.g.*, Ashwander v. Tennessee, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

Article III courts must include the element of finality. The infirmity of a lack of finality creates an advisory opinion, which is beyond the powers of an Article III court. In its decision in *Plaut v. Spendthrift Farm, Inc.*,[55] the U.S. Supreme Court declared:

> [T]he Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that "a judgment conclusively resolves the case" "because a 'judicial power' is one to render dispositive judgments."[56]

The CIT's decisions are, of course, subject to CAFC review and, ultimately, review by the U.S. Supreme Court. But finality is not achieved if a decision of an Article III court is subject to revision by an executive agency outside the judicial branch, such as the ITC or Commerce, and, concomitantly, not effectively subject to appeal to a higher Article III court.

It has been a fundamental principle, as far back as *Hayburn's Case*,[57] that Article III courts cannot be required to decide cases subject to further action by an agency—legislative or executive—outside the judicial branch because such decisions then lack finality. If remands are endless because the CIT cannot direct a result or because the CAFC will not accept an "interlocutory" appeal, there is no finality. *Hayburn's Case* is not ancient lore; rather it has been reinforced by later decisions—*United States v. Ferreira*[58] and *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*[59]—that emphasize the constitutional infirmity of revision by the executive branch.

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55. Plaut v. Spendthrift Farms, Inc., 514 U.S. 211, 218-19 (1995).

56. *Id.* at 218–19 (citation omitted). In *Plaut*, the Supreme Court recognized that Congress could change the law and thus, the outcome of a particular case, so long as that case had not yet been decided by the highest court available to resolve the matter. The CAFC had reason to cite *Plaut* in *GPX Int'l Tire Corp. v. United States*, 678 F.3d 1308, 1312 (Fed. Cir. 2012), when amendments to the countervailing duty law were made to overturn a CAFC decision before the Supreme Court could act or the CAFC's mandate had been issued.

57. Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792).

58. United States v. Ferreira, 54 U.S. (13 How.) 40, 49–52 (1851).

59. Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113–14 (1948). *Waterman* itself was cited for the same proposition in *Nat'l Cable &*

Ferreira involved an 1849 statute that authorized an Article III federal district judge to assess specified war damage claims against the United States, as required by the 1819 Treaty between the United States and Spain that ceded Florida to the United States.[60] As in *Hayburn's Case*, however, the determinations of the judge were subject to review by an executive branch officer—in this case the Secretary of the Treasury—who retained the ultimate authority to settle these claims.[61] The Supreme Court ruled that "the power [given to the federal judge] was not judicial within the grant of the Constitution."[62] Consequently, the district judge was acting as "a commissioner"[63] rather than as a judicial officer, and thus there was no judgment from which to appeal.[64] In *Waterman*, the statute involved review of actions of the Civil Aeronautics Board granting or denying air routes for foreign air carriers or denying foreign air routes to U.S. carriers.[65] As in *Ferreira*, the final decisions of the Article III courts would be subject unconditionally to the president's approval. The Supreme Court ruled that the reviewing court's decision would be an impermissible advisory opinion:

> This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action.[66]

If an agency's decisions are reviewed by the courts for lawfulness, as the CIT does under 19 U.S.C. § 1516a(b), they may not then be subject to revision by that agency, whether the revision is by means of further tasks assigned by Congress or be-

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Telecomm. Assn. v. Brand X Internet Serv., 545 U.S. 967, 1017 (2005) (Scalia, J., dissenting).

60. *Ferreira*, 54 U.S. at 45.

61. *Id.* at 45–47.

62. *Id.* at 51.

63. *Id.* at 47.

64. "But the acts of Congress certainly do not authorize him to convert a proceeding before a commissioner into [a] judicial one, nor to bring an appeal from his award before this court." *Id.* at 49.

65. Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 105–06 (1948).

66. *Id.* at 113–14.

cause noncompliance is permitted. The long accepted holdings of *Plaut*, *Ferreira*, *Waterman*, and *Hayburn's Case* teach that the Constitution bars such practices.

The question also arises whether prohibiting reversals would cross the constitutional line of an imposed rule of decision forcing favoritism to the government, a line drawn by *United States v. Klein*[67] and reinforced by *United States v. Sioux Nation of Indians*.[68] By this we do not mean deference to agency interpretations of ambiguous statutes under *Chevron*,[69] or abuse of discretion review for necessarily discretionary decisions, such as reasonable methodological choices.[70] Such deference to resolution of issues necessarily delegated to an agency with particular expertise is not the same as forced resolution of a particular case in the government's favor.

The plaintiff in *Klein* was the administrator of the estate of a deceased owner of cotton which was sold by representatives of the U.S. government during the Civil War and the proceeds of which were placed in the United States Treasury.[71] The plaintiff sued to recover those proceeds of the sale under legislation authorizing recovery by noncombatant Confederate owners upon proof of loyalty.[72] The Supreme Court had earlier held that loyalty could be established by a presidential pardon.[73] After the plaintiff won in the U.S. Court of Claims and during the pendency of the government's appeal to the Supreme Court, Congress enacted legislation providing not only that a presidential pardon would not be admissible as proof of loyalty, but that acceptance, without a written disclaimer, of a pardon that reported that the claimant had supported the Confederates would be conclusive evidence of the claimant's disloyalty.[74] The statute directed the Court of Claims and the Supreme Court to

67. United States v. Klein, 80 U.S. (13 Wall.) 128, 136, 147 (1871).

68. United States v. Sioux Nation of Indians, 448 U.S. 371, 402–04 (1980).

69. *See generally* Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1987).

70. *See, e.g.*, Magnesium Corp. of America v. United States, 166 F.3d 1364, 1372 (Fed. Cir. 1999) (Commerce has discretion in choosing methods of calculating normal value for goods of nonmarket economy origin.).

71. *Klein*, 80 U.S. at 132.

72. *Id.* at 139–41.

73. United States v. Padelford, 76 U.S. (9 Wall.) 531, 542 (1870).

74. United States v. Klein, 80 U.S. (13 Wall.) 128, 143 (1871).

dismiss for lack of jurisdiction any pending claims based upon a presidential pardon.[75]

In *Klein*, the Supreme Court held the supervening Congressional statute unconstitutional for two reasons. First, by forbidding the Court "to give the effect to evidence which, in its judgment, such evidence should have"[76] and directing the Court "to give it an effect precisely contrary . . . Congress ha[d] inadvertently passed the limit which separates the legislative from the judicial power."[77] Second, "the rule prescribed [was] also liable to just exception as impairing the effect of a pardon, and thus infring[ed] the constitutional power of the Executive."[78] The Court thus sought to protect the judicial and executive branches in the exercise of their core constitutional responsibilities from the intrusion of Congress.

Much debate has ensued about the significance and implications of the *Klein* decision. A key interpretation of *Klein* relating to this Article was made by the Supreme Court in *United States v. Sioux Nation of Indians*: "[I]t prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor."[79] And, while distinguishing the circumstances of *Sioux Nation*, the decision stated: "First, of obvious importance to the *Klein* holding was the fact that Congress was attempting to decide the controversy at issue in the Government's own favor. Thus, Congress' action could not be grounded upon its broad power to recognize and pay the Nation's debts."[80] *Sioux Nation* was a long-running and complex dispute involving an 1877 taking of Sioux Treaty lands based upon an 1877 statute and subsequent claims under a 1978 Act that provided for de novo review by the Court of Claims and waived a valid defense to the legal claim against the United States.[81] The Court reinforced *Klein* but distinguished its result by determining that a waiver of a defense by the United States was different from seeking to force a decision in favor of the United States.[82] As

75. *Id.* at 143–44.
76. *Id.* at 147.
77. *Id.*
78. *Id.*
79. United States v. Sioux Nation of Indians, 448 U.S. 371, 404 (1980).
80. *Id.* at 405.
81. *Id.* at 382–83, 389.
82. *Id.* at 402–07.

discussed, if taken literally, the inability of a court to reverse is a direction to affirm, and here, because it is the decision of the United States or an agency thereof that is reviewed, it is the United States that would obtain the victory. This is *Klein*.

Lack of finality also creates an advisory opinion. Leaving the result to action of another branch of government following the final decision of an Article III court makes the decision an advisory opinion. Relying upon *Hayburn's Case* and *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*,[83] Dean Erwin Chermerinsky concludes that the Supreme Court holds: "[A] case is a nonjusticiable request for an advisory opinion if there is not a substantial likelihood that the federal court decision will have some effect."[84] The lack of real world effect is the consequence of permitting foot dragging and noncompliance by the reviewed agency and thus is a mirror image of the lack of finality. In a dissenting opinion Justice Stewart concluded that the Article III bar to advisory opinions precludes Article III courts from deciding issues that do not directly affect the parties,[85] a somewhat different statement of the same proposition. The continual remands caused partly by the CAFC's refusal to accept, or discouragement of, appeals following dispositive remands by the CIT, together with lack of clear recognition of the authority of the CIT to issue a substantive reversal, can result in decisions that have no effect upon the parties and thus are purely advisory opinions. Under current practice, the CIT's decisions cease to be advisory and have some effect only when the administrative agency agrees to accept the CIT's direction, under protest, often after several remands, and the case proceeds to a final conclusive result. This is not a rational system for resolving cases in our constitutional system. This Article suggested various practical remedies, but the one principle that is clear is that Article III courts reviewing agency action for lawfulness have the power to reverse the decision of the reviewed agency. It may take more steps to get to this point than is optimal, but this is the only answer to the question posed by *Nippon VI*.

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83. Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948); Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792).

84. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.2 (6th ed. 2012).

85. Super Tire Eng'g Co. v. McCorkle, 416 U.S. 115, 127–33 (1974) (Stewart, J., dissenting, writing for four justices) (involving mootness).

LIMITS OF PROCEDURAL CHOICE OF LAW

*S.I. Strong**

INTRODUCTION

Commercial actors have long been allowed to exercise a significant amount of autonomy over the substantive law that governs their legal controversies.[1] Not only can parties choose to have the law of a particular state apply to their dis-

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* Ph.D. (law), University of Cambridge; D.Phil., University of Oxford; J.D., Duke University; M.P.W., University of Southern California; B.A., University of California, Davis. The author, who is admitted to practice as an attorney in New York and Illinois and as a solicitor in England and Wales, is an Associate Professor of Law at the University of Missouri and Senior Fellow at the Center for the Study of Dispute Resolution. The author would like to thank the participants at the Brooklyn Law School Symposium, "What Law Governs International Commercial Contracts? Divergent Doctrine and the New Hague Principles," for helpful comments on earlier drafts of this Article. All errors of course remain the author's own.

1. *See* LAWRENCE COLLINS ET AL., DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS ¶¶ 32-004, 32-044, 32R-061 (14th ed. 2006). Party autonomy regarding substantive choice of law appears to be higher in North America and Europe than in Latin America. *See* Symeon C. Symeonides, *The Hague*

pute,[2] they can also in a growing number of cases choose to adopt one of several forms of non-state law[3] ranging from the International Institute for the Unification of Private Law ("UNIDROIT") Principles of International Commercial Contracts[4] to the United Nations Commission on International Trade Law ("UNCITRAL") Convention on the International Sale of Goods ("CISG")[5] to the *lex mercatoria*.[6]

Parties' procedural options are much more limited.[7] Although international commercial actors can exercise a limited amount of discretion by deciding to take their disputes to arbitration or

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Principles on Choice of Law for International Contracts: Some Preliminary Comments, 61 AM. J. COMP. L. 873, 875–76 (2013).

2. The law does not necessarily need to have a connection to one of the parties or the dispute. *See* GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 169 (4th ed. 2013) [hereinafter BORN, DRAFTING].

3. The ability to choose the substantive law that governs a dispute is somewhat wider in arbitration than in litigation, although that phenomenon may be changing. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2243–44 (2009) [hereinafter BORN, ICA]; *see also* Permanent Bureau, Hague Conference on Private International Law, Draft Commentary on the Draft Hague Principles on Choice of Law in International Contracts 14–17 (Nov. 2013), *available at* http://www.hcch.net/upload/wop/princ_com.pdf; Permanent Bureau, Hague Conference on Private International Law, Choice of Law in International Contracts: Draft Hague Principles and Future Planning, Annex I, art. 2 (Feb. 2013), *available at* http://www.hcch.net/upload/wop/gap2013pd06en.pdf [hereinafter Draft Hague Principles].

4. *See* UNIDROIT, Principles of International Commerical Contracts, http://www.unidroit.org/news (select "Instruments"; then select "Commerical Contracts"; then follow links to access the various versions from 1994, 2004, and 2010) (last visited Apr. 5, 2014).

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

6. *See* BORN, ICA, *supra* note 3, at 2232–37. The term *lex mercatoria* is typically used to refer to various uncodified principles of international commercial law, although there is a wide-ranging debate about the content, scope, and existence of *lex mercatoria. See* KLAUS PETER BERGER, THE CREEPING CODIFICATION OF THE NEW LEX MERCATORIA (2d ed. 2010); MATTI S. KURKELA & SANTTU TURUNEN, DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION 6–7 (2d ed. 2010) (suggesting the UNIDROIT Principles of International Commercial Contracts constitute a codified version of the *lex mercatoria*); Abul F.M. Maniruzzaman, *The* Lex Mercatoria *and International Contracts: A Challenge for International Commercial Arbitration?*, 14 AM. U. INT'L L. REV. 657, 665 (1999).

7. *See* David A. Hoffman, *Whither Bespoke Procedure?* 2014 U. ILL. L. REV. 389, 392–95, 402–25 (2014).

to a particular forum,[8] once a matter is in litigation, the case is typically heard pursuant to the procedural norms of the forum court.[9]

For many years, this practice was explained in terms of "a 'State sovereignty prerogative'" that was rooted in the fact that "judicial power is one of the three main . . . branches" of government.[10] However, the procedural hegemony of the state has arguably begun to break down,[11] and some commentators have suggested that it may now be possible to view judicial procedures as "sticky default" rules[12] rather than as immutable and "non-negotiable parameters."[13]

Although many domestic litigants would likely welcome an increased ability to choose the procedural law that governs their disputes, the desire for procedural autonomy may be heightened in international matters, since discrepancies in national practice can make it difficult for parties not only to pursue their claims[14] but also to have confidence in the legitimacy

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8. *See* BORN, DRAFTING, *supra* note 2, at 4–14.

9. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971); COLLINS ET AL., *supra* note 1, ¶¶ 7-002, 32-054, 32-060; Erin A. O'Hara O'Connor & Christopher R. Drahozal, *Carve-Outs and Contractual Procedure* (Vanderbilt Univ. Law Sch., Pub. Law & Legal Theory Working Paper No. 13-29, Law & Econ. Working Paper No. 13-16, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2279520 (noting little actual individualization).

10. Jorge A. Sánchez-Cordero Dávila, *Preface* to AMERICAN LAW INSTITUTE (ALI) & UNIDROIT, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE xxix, xxxiii (2006) (citation omitted); *see also* Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 780, 859 (2012) [hereinafter Born, *Adjudication*] (discussing the longstanding presumption that parties appearing in national court are subject to a single, uniform set of mandatory procedures established by the state).

11. Commentary is split on this point, and empirical research focuses primarily on the domestic realm. *See* Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 517 (2011); Hoffman, *supra* note 7, at 392–93, 394–95, 403, 425; O'Connor & Drahozal, *supra* note 9 (considering some international matters); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 667–68 (2005).

12. Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1155, 1165 (2013).

13. Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 462 (2007).

14. Transnational litigation gives rise to a number of procedural problems not seen in domestic suits, including unusual difficulties relating to jurisdiction and the enforcement of judgments. *See* Hannah L. Buxbaum, *Transna-*

of the proceedings themselves.[15] Furthermore, one party will often have a significant "home court" advantage in national litigation[16] unless the action has been brought in a neutral (unaffiliated) jurisdiction.[17]

Concerns about procedural diversity in international disputes have typically led to calls for procedural harmonization.[18] Per-

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tional Regulatory Litigation, 46 VA. J. INT'L L. 251, 272–93 (2006); Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 19–41 (2009); S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. (forthcoming 2014) [hereinafter Strong, *Judgments*].

15. For example, civil law lawyers typically regard U.S.-style discovery with "horror," while U.S. lawyers find the absence of discovery to be akin to a denial of justice. *See* Javier H. Rubinstein, *International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions*, 5 CHI. J. INT'L L. 303, 304 (2004); s*ee also* Jalal El Ahdab & Amal Bouchenaki, *Discovery in International Arbitration: A Foreign Creature for Civil Lawyers?*, *in* ARBITRATION ADVOCACY IN CHANGING TIMES, XV ICCA CONG. SER. (2010 Rio) 65, 73 (Albert Jan van den Berg ed., 2011); Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1694 (1998) [hereinafter Hazard, *Secrets*].

16. Not only will one party typically be more familiar with the procedures used in the forum court, it will also have structured its business dealings so as to comply with the underlying expectations of that national legal system. This phenomenon is perhaps most apparent in terms of evidentiary privileges. A U.S. corporation will likely structure its internal communications so as to take full advantage of U.S. principles concerning the attorney-client and work product privilege. Other countries do not protect legal communications in the same manner, which means that a foreign company's internal documents may be discoverable simply because that company was not in the habit of framing its communications to comply with U.S. law. *See* JEFF WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 800–15 (2012); Klaus Peter Berger, *Evidentiary Privileges: Best Practice Standards Versus/and Arbitral Discretion,* 22 ARB. INT'L 501, 517–18 (2006) [hereinafter Berger, *Privileges*]. Though courts make some efforts to address these issues, such initiatives are often unsatisfactory. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 (1971); WAINCYMER, *supra*, at 805.

17. *See* BORN, DRAFTING, *supra* note 2, at 3. However, not every legal system is willing to accept jurisdiction over every dispute involving foreign parties. *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) (concerning "foreign-cubed" actions).

18. *See* Simona Grossi, *Rethinking the Harmonization of Jurisdictional Rules*, 86 TUL. L. REV. 623, 625 (2012); Burkhard Hess, *Procedural Harmonisation in a European Context*, *in* CIVIL LITIGATION IN A GLOBALISING WORLD 159 (X.E. Kramer & C.H. van Rhee eds., 2012); Thomas O. Main, Book Review, 61 AM. J. COMP. L. 467, 467 (2013) [hereinafter Main, Review] (reviewing CIVIL LITIGATION IN A GLOBALISING WORLD, *supra*); Richard Marcus, *Bomb*

haps the most notable initiative in this regard involves the American Law Institute ("ALI") and UNIDROIT Principles of Transnational Civil Procedure, which attempt "to overcome fundamental differences between common-law and civil-law systems and, among common-law systems, to cope with the peculiarities of the U.S. system."[19] However, the sometimes significant disparities in national procedures and the vehemence with which such practices are defended have acted as significant obstacles to harmonization.[20]

As a result, some reformers have shifted their focus from harmonization to privatization.[21] Some success has been

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Throwing, Democratic Theory, and Basic Values—A New Path to Procedural Harmonization?, 107 NW. U. L. REV. 475, 486 (2013) [hereinafter Marcus, *Bomb*].

19. Geoffrey C. Hazard, Jr. et al., *Reporters' Preface* to ALI & UNIDROIT, *supra* note 10, xxvii, xxvii; *see also* E. Bruce Leonard, *Preface* to ALI & UNIDROIT, *supra* note 10, at xxix, xxx. However, even the ALI and UNIDROIT take the view that "[t]he procedural law of the forum applies in matters not addressed in these Principles." *See* ALI & UNIDROIT, *supra* note 10, at 16.

20. *See* RICHARD GARNETT, SUBSTANCE AND PROCEDURE IN PRIVATE INTERNATIONAL LAW 67–70 (2012) (noting limited successes); Marcus, *Bomb*, *supra* note 18, at 477; Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 836 (2010) [hereinafter Main, *Substantive*] (noting that many states "may be more likely to consider abandoning their own substantive regimes of commercial law . . . than they would surrender their own procedure"). Thus, the ALI/UNDROIT Principles of Transnational Civil Procedure have not yet been adopted by any national legal system. *See* ALI & UNIDROIT, *supra* note 10, at xxix, xxxviii–xxxix (noting effect of the ALI/UNIDROIT Principles in Mexico); OSCAR G. CHASE ET AL., CIVIL LITIGATION IN COMPARATIVE CONTEXT 574–75 (Oscar G. Chase & Helen Hershkoff eds., 2007); Scott Dodson & James M. Klebba, *Global Civil Procedure Trends in the Twenty-First Century*, 34 B.C. INT'L & COMP. L. REV. 1, 23 (2011). However, the European Law Institute (ELI) has recently announced its intention to adapt the ALI/UNIDROIT Principles of Transnational Civil Procedure for use in the European Union. *See* ALI & UNIDROIT, *supra* note 10; European Law Institute, *Meeting of ELI Representative and Secretary-General of UNIDROIT*, http://www.europeanlawinstitute.eu/news-events/news-contd/article/discussions-underway-for-eliunidroit-joint-conference-in-au-tumn/?tx_ttnews%5BbackPid%5D=132848&cHash=dde59166ad7d6019d15947f19e5e7327 (last visited Apr. 6, 2014).

21. *See* ALI & UNIDROIT, *supra* note 10, at 3; H. Patrick Glenn, *Prospects for Transnational Civil Procedure in the Americas*, 8 REVUE DE DROIT UNIFORME [UNIFORM L. REV.] 485, 489–90 (2003). Procedural privatization

achieved in this regard, most notably in the form of the Convention on Choice of Court Agreements ("COCA"), which increases the ability of private commercial parties to choose the forum that will be used to resolve their disputes.[22] Because choice of forum has traditionally dictated choice of procedure,[23] parties can use forum selection provisions as a means of exercising a limited amount of procedural autonomy. However, as useful as COCA may be, it still does not permit parties to adopt individual procedures *a la carte*.[24]

For years, this holistic approach to procedure was unquestioned. However, a number of recent developments have suggested a possible shift in thinking about procedural autonomy.[25] For example, "some distinguished scholars now argue that parties' greater ability to contract out of federal and state procedure [through arbitration agreements] entails the lesser power to modify it."[26] Other commentators have suggested that the high degree of judicial respect for freedom of contract and

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relates to autonomous procedural choices by individual parties, as opposed to procedural harmonization, which takes place at the state level. *See* Sánchez-Cordero, *supra* note 10, at xxxiii.

22. *See* Hague Conference on Private International Law, Convention on Choice of Court Agreements, June 30, 2005, *reprinted in* 44 I.L.M. 1294, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=98 [hereinafter COCA]. Although COCA has been finalized, it has not yet come into force. *See id.* Ratification in the United States has been delayed pending debate about the nature of the implementing legislation. *See* U.S. Department of State Advisory Committee on Private International Law: Notice of Public Meeting of the Study Group on the Hague Convention on Choice of Court Agreements, 77 FED. REG. 72,904 (Nov. 29, 2012); Memorandum of the Legal Adviser Regarding U.S. Implementation of the Hague Convention on Choice of Courts Agreements (Jan. 19, 2013), *available at* http://www.state.gov/s/l/releases/2013/206657.htm.

23. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 & cmt. a (1971) (stating that "[a] court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case"); COLLINS ET AL., *supra* note 1, ¶¶ 7-002, 32-054, 32-060.

24. *See* COCA, *supra* note 22.

25. *See* Colter L. Paulson, *Evaluating Contracts for Customized Litigation by the Norms Underlying Civil Procedure*, 45 ARIZ. ST. L.J. 471, 473 (2013); *see also* Glenn, *supra* note 21, at 490 ("There is thus a disguised or hidden rule of party autonomy within domestic procedural law.").

26. Hoffman, *supra* note 7, at 391.

procedural waivers provides a sufficiently strong foundation for private procedural contracts.[27]

However, some boundaries to procedural autonomy must necessarily exist, either as a matter of prudence, policy, or practice.[28] Indeed, one need look no farther than arbitration to see that there are limits to what courts will allow in terms of procedural autonomy, even in jurisdictions that grant broad respect to arbitration.[29]

The debate about the propriety of private procedural contracts in the domestic context is extensive and ongoing.[30] How-

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27. *See* Shutte v. Thompson, 82 U.S. (15 Wall.) 151, 159 (1872) (noting that "[a] party may waive any provision, either of a contract or of a statute, intended for his benefit"); Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579, 595 (2007); G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 433 (1993).

28. For example, transactional costs may make individualized procedures too expensive to pursue. *See* O'Connor & Drahozal, *supra* note 9. Alternatively, unbounded procedural autonomy could create situations that are procedurally unfair. *See* Davis & Hershkoff, *supra* note 11, at 551 (noting "contract procedure could produce a court system in which the rules of the game reflect a set of narrow interests and not the overall welfare").

29. *See* Hall St. Assoc., L.L.C. v. Mattel, Inc., 552 U.S. 576, 588 (2008) (striking a provision purporting to expand the grounds of judicial review of an arbitral award); *In re* Wal-Mart Wage & Hours Emp't Practices Litig., 737 F.3d 1262, 1267–68 (9th Cir. 2013) (striking a contractual provision allegedly waiving the parties' right to judicial review of an arbitral award); *see also infra* notes 262–386 and accompanying text.

30. An impressive body of literature already exists. *See* Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1362–67 (2012); Davis & Hershkoff, *supra* note 11, at 520–64; Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 776–83 (2011); Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103 (2011); Hoffman, *supra* note 7, at 426–28; David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 607–08 (2010); Daphna Kapeliuk & Alon Klement, Contractualizing Procedure (Dec. 31, 2008) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323056; Daphna Kapeliuk & Alon Klement, *Changing the Litigation Game: An* Ex Ante *Perspective on Contractualized Procedures*, 91 TEX. L. REV. 1475, 1475–77 (2013) [hereinafter Kapeliuk & Klement, *Ex Ante*]; David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 974–75 (2008); Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 293–96 (1988); Paulson, *supra* note 25, at 471; Resnik, *supra* note 11, at 609–22; Robert J. Rhee, *Toward Procedural*

ever, no one appears to have yet considered the special case of international commercial litigation. This lacuna is somewhat surprising, since the United States Supreme Court has indicated on numerous occasions that the unique nature of international commerce requires courts to give an increased amount of respect to existing forms of procedural contracts (i.e., forum selection provisions and arbitration agreements).[31]

To some extent, the absence of academic interest in cross-border disputes may be explained by the overwhelming popularity of international commercial arbitration.[32] If parties can achieve the desired degree of procedural autonomy in arbitration, then there may be little need to develop similar principles in litigation.

However, it is by no means clear that international commercial arbitration is going to retain its status as the preferred means of resolving cross-border business disputes.[33] Recent

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Optionality: Private Ordering of Public Adjudication, 84 N.Y.U. L. REV. 514, 516–17 (2009); Moffitt, *supra* note 13, at 462; Noyes, *supra* note 27, at 581; Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 856–69 (2006); John W. Strong, *Consensual Modifications of the Rules of Evidence: The Limits of Party Autonomy in an Adversary System*, 80 NEB. L. REV. 159, 160–61 (2001) [hereinafter Strong, *Consensual*]; David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1085–86 (2002); Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181, 183 (2006).

31. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506, 516–17 (1974); M/S Bremen v. Zapata Off-Shore Co. (The Bremen), 407 U.S. 1, 13–15 (1972).

32. International commercial arbitration is the preferred means resolving disputes arising out of international business transactions. *See* S.I. STRONG, INTERNATIONAL COMMERCIAL ARBITRATION: A GUIDE FOR U.S. JUDGES 6 (2012) [hereinafter STRONG, GUIDE], *available at* http://www.fjc.gov/public/pdf.nsf/lookup/strongarbit.pdf/$file/strongarbit.pdf. Procedural autonomy is one of the primary reasons parties arbitrate their disputes, although arbitration provides a number of other benefits as well. *See* BORN, ICA, *supra* note 3, at 1748; JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ¶ 21-3 (2003).

33. *See* WILLIAM W. PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE 3–27 (2012); Loukas Mistelis, *International Arbitration—Corporate Attitudes and Practices—12 Perceptions Tested: Myths, Data and Analysis Research Report*, 15 AM. REV. INT'L ARB. 525, 584 (2004); Jacqueline Nolan-Haley, *Mediation: The "New Arbitration,"* 17 HARV. NEGOT. L. REV. 61, 66–67 (2012); S.I. Strong, *Increasing Legalism in*

concerns about arbitration's rising costs and increased formalities have led many multinational companies to explore other dispute resolution options.[34] One possibility involves so-called "bespoke" litigation, where parties can customize the procedures used in court so as to lessen or eliminate any "home court" advantages and avoid any procedural practices that pose problems for domestic or foreign litigants.[35]

The interest in customized litigation processes goes beyond individual commercial parties. A number of institutional and industry groups have also indicated their support for private procedural contracts, thereby signaling the possibility that significant change is afoot.[36] For example, the International Institute for Conflict Prevention and Resolution ("CPR") has recently created an Economical Litigation Agreement (known colloquially as the Model Civil Litigation Prenup)[37] that allows parties to individualize their dispute resolution procedures.[38] Somewhat similarly, the international construction industry (often an innovator in dispute resolution procedures) has proposed a process known as "guided choice," whereby a neutral third party, similar to a mediator, helps parties create an indi-

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International Commercial Arbitration: A New Theory of Causes, A New Approach to Cures, 7 WORLD ARB. & MEDIATION REV. 117, 117 (2013).

34. *See* Noyes, *supra* note 27, at 591. International commercial mediation has been touted as a promising alternative to arbitration, but there are a number of potential problems with that proposition. *See* Nolan-Haley, *supra* note 33, at 63–64; S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 42 WASH. U. J.L. & POL'Y (forthcoming 2014).

35. U.S.-style discovery is one of the most often-mentioned concerns. *See* Rubinstein, *supra* note 15, at 304 (noting foreign litigants react to U.S. discovery "with horror"); Joanna C. Schwartz, *Gateways and Pathways in Civil Procedure*, 60 UCLA L. REV. 1652, 1657, 1671 (2013) (noting, with others, that discovery abuse leads even domestic parties to opt out of litigation).

36. Hoffman, *supra* note 7, at 389. Institutional support may be critical to the success of a particular procedural innovation. *See id.* at 429 (discussing "public credentialing moments").

37. *See Introduction: Economical Litigation Agreement*, INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION, http://www.cpradr.org/Resources/ADRTools/EconomicalLitigationAgreement.aspx (last visited Apr. 6, 2014) [hereinafter CPR Economical Litigation Agreement].

38. *Id.*

vidualized dispute resolution procedure that is then used to resolve the underlying substantive concerns.[39]

As useful as these and other initiatives may be, it is unknown whether and to what extent they will be embraced by U.S. and other courts.[40] Furthermore, at this point there is no clear consensus regarding how these sorts of agreements should be analyzed. For example, some commentators claim that analytical priority should be given to contract law, while other observers suggest that procedural law constitutes the proper conceptual paradigm.[41] Finding an appropriate balance between the two disciplines can be difficult, given the hybrid nature of procedural contracts.[42]

Another issue that arises in the international realm involves the variations in how different jurisdictions approach procedural and contract law.[43] While detailed consideration of a single nation's law may be sufficient in the domestic setting, a broader focus is necessary in cross-border conflicts.

Given these concerns, this Article adopts a new analytical paradigm that emphasizes structural and substantive issues rather than more narrow questions of contract or procedural law. In so doing, the Article overcomes the contract law-

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39. *See* Paul M. Lurie, *Guided Choice: Early Mediated Settlements and/or Customized Arbitrations*, 7 J. AM. C. CONSTR. LAW. 167, 169 (2013).

40. The propriety of a procedural contract may need to be considered from a variety of national perspectives, including that of the parties, the forum, and the place where the judgment will be enforced.

41. *Compare* Hoffman, *supra* note 7, at 430 (suggesting that "scholars of privatized procedure should spend more energy on contracts and less on procedure"), *with* Paulson, *supra* note 25, at 474 (suggesting that "contract procedure can be usefully evaluated by the norms underlying civil procedure"). Other commmentators emphasize potential differences that may arise depending on whether the dispute is heard in federal court, state court, or regulatory proceedings. *See* Resnik, *supra* note 11, at 597–98; Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1516 (2005).

42. Of course, the two lines of discussion reflect some overlap. For example, contract-based discussions often focus on the limits of party autonomy in the face of institutional concerns about judicial administration while procedure-oriented debates typically focus on due process considerations. *See* Hoffman, *supra* note 7, at 401–02; Davis & Hershkoff, *supra* note 11, at 551.

43. *See* E. Allan Farnsworth, *Comparative Contract Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 899, 905–34 (Mathias Reimann & Reinhard Zimmermann eds., 2008); Joachim Zekoll, *Comparative Civil Procedure*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra*, at 1327, 1327–61.

procedural law dichotomy and provides a more internationally oriented approach to procedural privatization.

The discussion begins in Part I with a brief discussion of why parties may have a heightened need or desire for procedural contracts in international commercial disputes. This section also considers whether and to what extent parties will actually begin to adopt private procedural agreements if those agreements are held to be enforceable.

The Article continues in Part II with an introduction to various structural concerns relating to private procedural contracts. Structural issues arise as a result of state interests in preserving the constitutionally mandated role of public institutions such as the courts.[44] Although the concept of "regulation"—which could be said to include questions relating to civil procedure—appears to be shifting away from a formal command-and-control model to a mixed public-private approach,[45] there still may be some elements of litigation that must remain immune from private contract. This section therefore provides both a theoretical and a practical evaluation of the structural limits on party autonomy in litigation and includes both consequentialist and deontological analyses.

Substantive issues are addressed in Part III. Substantive—meaning content based—concerns are triggered by the "substantial state interest" in preserving the fairness of trial.[46] If individualized procedures are to be allowed, courts must be assured that due process and procedural fairness are properly

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44. *See* Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1444, 1447 (2013).

45. For example, "[t]here is no consensus in policy or academic circles as to what exactly is connoted by the term regulation." Colin Scott, *Privatization and Regulatory Regimes*, *in* THE OXFORD HANDBOOK OF PUBLIC POLICY, 651, 653 (Michael Moran et al. eds., 2006). One classic definition states that regulation involves "sustained and focused control exercised by a public agency over activities that are socially valued," although modern critics have expanded the scope of application to include regulatory activity undertaken by private actors and other decentralized entities. *Id.* (citation omitted). Many of the changes come as a result of "new governance" theory. *See id.* at 651 (describing the privatization of regulatory regimes); Peer Zumbansen, *Sustaining Paradox Boundaries: Perspectives on Internal Affairs in Domestic and International Law*, 15 EUR. J. INT'L L. 197, 201 (2004).

46. *See* Gentile v. State Bar of Nevada, 501 U.S. 1030, 1076 (1991); *NCALJ Panel Discussion, ALJ Decisions—Final or Fallible?*, 25 J. NAT'L ASS'N ADMIN. L. JUDGES 191, 199 (2005).

respected and protected. Although this subject could be analyzed from a variety of perspectives, this Article attempts to identify the outer bounds of procedural autonomy in litigation through comparisons to international commercial arbitration. This analogy appears appropriate not only because international commercial arbitration addresses precisely those types of disputes that are at issue in this Article but also because various scholars have linked the expansion of procedural autonomy in litigation to procedural autonomy in arbitration.[47]

Part IV takes the analysis one step further by addressing various logistical concerns facing parties who wish to customize their litigation procedures. This discussion also analyzes several proposed models for private procedural contracts.

Finally, the Article concludes by tying together the various strands of analysis and offering a number of observations regarding the future of private procedural contracts in the international commercial realm. Notably, although this Article focuses primarily on international commercial disputes, a number of the analyses and conclusions reflected herein apply equally to domestic matters.

I. THE NEED (OR DESIRE) FOR PROCEDURAL AUTONOMY IN INTERNATIONAL COMMERCIAL RELATIONSHIPS

A. Rationales Supporting Procedural Autonomy in International Commercial Relationships

This Article takes as its starting point the notion that there is something about international commercial disputes that leads to a heightened need or desire for procedural autonomy. Although there are a variety of ways of proving this hypothesis, the most commonly enunciated rationale for party autonomy in commercial affairs involves concerns about predictability. This principle can be illustrated by a series of decisions rendered by the United States Supreme Court in the late twentieth century, although the need for certainty in cross-border business transactions has been recognized by numerous other authorities.[48]

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47. *See* Bone, *supra* note 30, at 1331, 1334; Dodge, *supra* note 30, at 736; Hoffman, *supra* note 7, at 390–91.

48. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974); M/S Bremen v. Zapata Off-Shore Co. (The Bremen), 407 U.S. 1, 11, 13–15 (1972) (noting England enforces forum selection provisions); Premium Nafta Prods.

The U.S. Supreme Court first considered procedural autonomy in international commercial disputes in 1972, in *M/S Bremen v. Zapata Off-Shore Co.* (*The Bremen*).[49] Although the Court had already upheld the validity of forum selection clauses in the domestic context,[50] *The Bremen* was the first case to address such provisions in the international realm.[51]

In its decision, the Supreme Court not only upheld the parties' agreement despite a historical antipathy to forum selection provisions,[52] but the Court also recognized the special status of international forum selection provisions, stating that

> [t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.[53]

Because "agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting,"[54] the Court "eschewed a provincial solicitude for the jurisdiction of domestic forums" and upheld the forum selection provision.[55]

A key element of the Court's analysis involved the link between autonomy and predictability or, in the Court's words, "certainty."[56] According to the Court, procedural autonomy exists so as to increase predictability in transnational com-

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Ltd. v. Fili Shipping Co., [2007] UKHL 40, [26] (appeal taken from Eng.), *aff'g* Fiona Trust & Holding Corp. v. Privalov, [2007] EWCA (Civ) 20 (Eng.) (discussing enforcement of forum selection clauses and arbitration agreements); BORN, DRAFTING, *supra* note 2, at 1.

49. *See The Bremen*, 407 U.S. at 1; Main, Review, *supra* note 18, at 475 (citing the desire for procedural certainty as reflected in empirical studies).

50. *See* Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315–16 (1964).

51. *See id.*; *see also The Bremen*, 407 U.S. at 9.

52. *See The Bremen*, 407 U.S. at 9–10.

53. *Id.* at 9.

54. *Id.* at 13–14, *as quoted in* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 630 (1985).

55. *Mitsubishi Motors Corp.*, 473 U.S. at 630 (construing *The Bremen*, 407 U.S. at 1).

56. *The Bremen*, 407 U.S. at 13–14, 17.

merce.[57] However, there are several different types of predictability.

First, predictability can involve issues of substantive law. Interestingly, although *The Bremen* is often cited as support for procedural autonomy, the decision also discussed how forum selection provisions ensure predictability in the substantive law.[58] This link between procedural and substantive law could be important to the current debate about customized procedural contracts.[59]

Second, predictability can refer to the place where the dispute will be heard. This is the feature that is most commonly associated with forum selection clauses and was at the heart of the decision in *The Bremen*.[60] Choice of court agreements facilitate a certain amount of procedural predictability because the law of the forum is presumed to control most, if not all, procedural matters.[61]

Third, predictability can relate to the enforceability of the judgment arising out of the chosen venue. This issue was not discussed in *The Bremen*, since that dispute involved the initial enforcement of a forum selection provision.[62] However, forum selection clauses have not traditionally provided any assurances regarding the enforcement of a judgment resulting from litigation in the preferred venue.[63] Instead, judgments arising out of a forum selection provision are subject to the same complicated, confusing, and often unpredictable process that applies to the recognition and enforcement of foreign judgments in other contexts.[64] This feature is relevant to the debate about pro-

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57. *See id.* at 17.

58. *See id.* at 13 n.15 (noting that "[i]t is . . . reasonable to conclude that the forum clause was also an effort to obtain certainty as to the applicable substantive law").

59. *See infra* notes 86–95 and accompanying text.

60. *See The Bremen*, 407 U.S. at 13–14.

61. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971); COLLINS ET AL., *supra* note 1, ¶ 7-002. However, this rule is not always as clear cut as it seems. *See infra* notes 86–95 and accompanying text.

62. *See The Bremen*, 407 U.S. at 10.

63. *See* BORN, DRAFTING, *supra* note 2, at 19, 151–52.

64. The problem is linked to the absence of any multinational treaty concerning the recognition and enforcement of foreign judgments. *See id.* at 19, 151–52; Strong, *Judgments*, *supra* note 14. Although COCA may eventually provide some limited assistance in this regard, COCA is not yet in force. *See* COCA, *supra* note 22, arts. 1–2, 8–9; *see also supra* note 22.

cedural contracts because some of the difficulties associated with the recognition and enforcement of foreign judgments arise because of concerns about the legitimacy of other states' procedural practices.[65] Thus, any process (including, perhaps, the use of a private procedural agreement) that helps harmonize some of the differences associated with national procedural practices could increase the international enforceability of civil judgments.[66]

Fourth and finally, predictability may refer to the actual procedures that are used to resolve the dispute at hand. This issue was also not discussed in *The Bremen*.[67] However, the common understanding, both then and now, is that the parties will adhere to the procedural rules applied by the forum court.[68] Although this approach may be defensible on policy grounds,[69] it is important to recognize as a factual matter that application of the forum's procedural law may not lead to the kind of predictability that commercial actors require. For example, there is no guarantee that a court designated by the parties can or will accept jurisdiction over any particular matter.[70] Furthermore, research has shown that procedures in the United States can

65. *See* Strong, *Judgments*, *supra* note 14 (discussing systemic and individual due process concerns).

66. *See* Main, Review, *supra* note 18, at 471.

67. *See The Bremen*, 407 U.S. at 13–14.

68. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 & cmt. a (1971); COLLINS ET AL., *supra* note 1, ¶ 7-002.

69. Judicial efficiency and convenience appear to be the primary policy rationales, although uniformity can also play a role in some contexts. *See* GARNETT, *supra* note 20, at 10–15 (also discussing rationales based on natural justice, public law, and territorial sovereignty); Brainerd Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 268, 271 n.179 (1959); Michael Steven Green, *Horizontal* Erie *and the Presumption of Forum Law*, 109 MICH. L. REV. 1237, 1245 (2011); James R. Pielemeier, *Constitutional Limitations on Choice of Law: The Special Case of Multistate Defamation*, 133 U. PA. L. REV. 381, 432 (1985).

70. For example, parties cannot contract around the requirement of subject matter jurisdiction in U.S. federal courts. *See* Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982). It is also possible for courts to set aside a forum selection provision. *See The Bremen,* 407 U.S. at 16–17. Certain commentators have suggested that U.S. courts set aside foreign forum selection clauses with some frequency. *See* Paulson, *supra* note 25, at 487–88.

differ significantly between individual state courts,[71] between state courts and federal courts,[72] and even between and within different federal courts.[73] Litigation in the United States is also said to be subject to a number of unwritten rules of procedure that makes it difficult for parties, particularly foreign parties, to anticipate how a dispute will be resolved.[74] Differences between the procedural rules of different countries are often even more extreme.[75]

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71. *See* Bone, *supra* note 30, at 1339; Catherine T. Struve, *Institutional Practice, Procedural Uniformity, and As-Applied Challenges Under the Rules Enabling Act*, 86 NOTRE DAME L. REV. 1181, 1218–29 (2011).

72. *See* Bone, *supra* note 30, at 1339; Struve, *supra* note 71, at 1218–29.

73. Parties proceeding in federal court are subject not only to the Federal Rules of Civil Procedure but also to the local rules of that particular court as well as the rules of the particular judge who hears the case. *See* FED. R. CIV. P. Sometimes these rules can vary significantly. *Compare* Local Rules of United States District Courts for the Southern and Eastern Districts of New York, http://www.nysd.uscourts.gov/courtrules.php, *with* Local Rules of Practice for the United States District Court for the Northern District of New York, http://www.nynd.uscourts.gov/news/nynd-2014-local-rules-effective-112014; *compare also* Individual Rules and Procedures for Judge Shira A. Scheindlin of the District Court of the Southern District of New York, http://www.nysd.uscourts.gov/judge/Scheindlin, *with* Individual Rules and Procedures for Judge Lewis A. Kaplan of the District Court of the Southern District of New York, http://www.nysd.uscourts.gov/judge/Kaplan. These individual rules can sometimes be outcome-determinative. *See* Chevron Corp. v. Donziger, No. 11 Civ. 0691 (LAK), 2013 WL 5548913, *1–3 (S.D.N.Y. Oct. 7, 2013); BORN, DRAFTING, *supra* note 2, at 1.

74. *See* Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*, 79 NOTRE DAME L. REV. 1981, 1983 (2004) (discussing an informal procedural system that "has no procedural rulebook, is largely ignored in law schools, and is seldom mentioned by judges. Yet it is a methodical and logical system that civil litigators are aware of and, increasingly, rely upon as a necessary complement to the formal system"). Judges are also given a great deal of discretion in how they decide certain matters, which further compounds the litigants' procedural uncertainty. *See* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1963 (2007) ("If we were not so accustomed to broad trial judge discretion over procedure, we would probably think it a rather strange way to manage the litigation environment."); Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853, 854–55 (1989) (noting excessive judicial discretion can violate the rule of law); S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 WASH. & LEE L. REV. 489, 530–32 (2010) [hereinafter Strong, *Discovery*].

75. *See* Main, Review, *supra* note 18, at 468.

Together, these features suggest that the rules of civil procedure may not be as uniform—and hence predictable—as is commonly believed to be the case.[76] Indeed, Professor Judith Resnik has suggested that a variety of "mini-codes of civil procedure are being created by [U.S.] courts, agencies, and a multitude of private providers."[77] As a result, "[t]he aspiration for a trans-substantive procedural regime embedded in the Federal Rules has been supplanted by an array of contextualized processes."[78]

Although forum selection provisions were the first type of international procedural contracts contemplated by the United States Supreme Court, they were not the last. The Court has also considered the validity of arbitration agreements as "specialized kind[s] of forum-selection clause[s]."[79] Predictability also figures largely in discussions relating to these types of agreements.

For example, one of the earliest cases on international commercial arbitration, *Scherk v. Alberto-Culver Co.*, stated that

> uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.
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> A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate

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76. *See* David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 373 (2010) [hereinafter Marcus, *Past*].

77. Resnik, *supra* note 11, at 597–98.

78. *Id.* at 597. Some scholars have questioned whether it is even appropriate to aspire to a trans-substantive approach to procedural law. *See* Robert M. Cover, *For James Wm. Moore: Reflections on a Reading of the Rules*, 84 YALE L. J. 718, 732–39 (1975). *But see* Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244–47 (1989) (defending trans-substantivity in procedural law).

79. Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974).

> these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.[80]

Scherk therefore reinforced the principle enunciated in *The Bremen* that parties need predictability (and hence autonomy) with respect to both the place where a dispute will be heard and the substantive law that will apply.[81] However, *Scherk* went one step further and also protected the parties' ability to choose the procedures by which their dispute is resolved.[82] In reaching its decision, the Court held that arbitration agreements are enforceable to the same extent and for the same reasons as forum selection clauses, particularly in the international realm.[83]

The Supreme Court's support for predictability in dispute resolution processes reached its zenith in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, which stated that

> concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, *even assuming that a contrary result would be forthcoming in a domestic contex*t.[84]

These decisions show how respect for procedural autonomy has evolved in the United States over time. In each of these cases, the Supreme Court has overcome a tradition of judicial hostility to the various practices due to the need to encourage

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80. *Id.* at 516–17 (footnote omitted).

81. *See id.* at 518; *see also* M/S Bremen v. Zapata Off-Shore Co. (The Bremen), 407 U.S. 1 (1972).

82. *See Scherk*, 417 U.S. at 519 (noting that an arbitration agreement "posits not only the situs of suit but also the procedure to be used in resolving the dispute"). The final type of predictability involves enforcement of the decision arising out of the arbitration or litigation. Arbitration is clearly the better process in this regard, since parties can take advantage of one of the numerous international treaties facilitating the recognition and enforcement of foreign arbitral awards. *See* BORN, ICA, *supra* note 3, at 68–71. However, this principle was not discussed in *Scherk*, since the Court was addressing the enforcement of an arbitration agreement, not an arbitral award. *See Scherk*, 417 U.S. at 519–20.

83. *See Scherk*, 417 U.S. at 518–19 (citing *The Bremen*, 407 U.S. at 9, 13–14).

84. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985) (emphasis added).

predictability in international commerce.[85] As a result, private procedural contracts stand a good chance of being upheld if they can be shown to promote predictability in international commercial transactions.

When making this argument, parties would be well-advised to demonstrate how private procedural contracts increase predictability in the interpretation and application of substantive law, since the U.S. Supreme Court has consistently focused on substantive concerns in its discussions of procedural autonomy. As it turns out, there are several ways to tie procedural contracts to matters involving substantive law. For example, the notion that procedure is neutral with respect to outcome has come under increased attack in recent years,[86] and parties are increasingly engaging in "forum shopping for jurisdictions in which procedural law has a likelihood of affecting the favourable resolution of a dispute when those transactions or relationships sour."[87] As a result, it appears increasingly likely that parties in an international transaction will use both a forum selection provision and a choice of law agreement, which could mean that the court chosen to resolve a particular dispute is

85. *See id.* at 625; *Scherk*, 417 U.S. at 516; *The Bremen,* 407 U.S. at 9–10. Some of this antipathy was based on the influence of "Joseph Beale, the reporter for the First Restatement of Conflicts of Laws, who condemned choice-of-law clauses as conferring the equivalent of legislative power on the contracting parties" and noting judicial "hostility towards choice-of-law clauses was [based on] the sense that they represented an impermissible usurpation of state power." Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2076 (2009); *see also* Joseph H. Beale, *What Law Governs the Validity of a Contract: III. Theoretical and Practical Criticisms of the Authorities*, 23 HARV. L. REV. 260, 261 (1910). However, these sentiments have been rejected not only with respect to substantive choice of law provisions but also with respect to forum selection clauses and arbitration agreements. *See* Miller & Eisenberg, *supra*, at 2076; *see also The Bremen,* 407 U.S. at 12 (discussing ouster of judicial jurisdiction through forum selection clauses); PETER B. RUTLEDGE, ARBITRATION AND THE CONSTITUTION 16–17 (2013) (discussing the concept that arbitration ousts the jurisdiction of the courts).

86. *See* GARNETT, *supra* note 20, at 15–43; Sagi Peari, Book Review, 14 MELB. J. INT'L L. 304, 309–10 (2013) (reviewing GARNETT, *supra* note 20) (discussing how damages calculations can be affected by the substantive-procedural divide).

87. Donald K. Anton, Book Review, 60 NETH. INT'L L. REV. 489, 490 (2013) (reviewing GARNETT, *supra* note 20).

not an expert in the substantive principles that apply.[88] However, some parties could want to have their disputes heard by a court that is expert in the substantive law that has been chosen but not want to expose themselves to a particular procedure, such as U.S.-style discovery. Since it is highly improbable at this point that states will curtail parties' ability to choose the substantive law that governs their contracts,[89] other steps must be taken to minimize the effect that procedural disparities have on substantive outcomes. Individualized procedural contracts may be one way to address that issue.

Another time-honored axiom that has recently come under fire involves the purported distinction between substance and procedure. Not only have numerous authorities recognized the impossibility of drawing strict lines between substance and procedure,[90] but several scholars have noted how the substantive law is often built on certain assumptions regarding the shape of the applicable procedural law.[91] As a result, it could very well be argued that claims made under foreign law should be decided under the procedural laws of that jurisdiction, at least in some regards, so as to take into account the legal environment that generated that particular substantive right and minimize the possibility of either underregulating or overregulating certain behaviors through the use of foreign procedural mechanisms.[92] A more liberal approach to procedural autonomy

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88. *See* Anton, *supra* note 87, at 490 (noting that the "internationally disparate procedural advantages and disadvantages tied to traditional *lex fori* rule can undermine the 'uniformity' of result of cases arising outside of the forum").

89. Indeed, it appears as if states are moving toward increased autonomy in choice of substantive law. *See* Draft Hague Principles, *supra* note 3; Symeonides, *supra* note 1, at 875–76.

90. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 & cmt. b (1971); COLLINS ET AL., *supra* note 1, ¶ 7-004; Anton, *supra* note 87, at 489.

91. *See* Main, *Substantive*, *supra* note 20, at 802; *see also* Peari, *supra* note 86, at 305. For example, a party might not be able to prove all the elements of a fraud claim arising under U.S. law unless U.S.-style discovery is permitted. Most civil law nations use adverse inferences and shifts in the burden of proof to avoid the need for discovery in these types of scenarios. *See* Hazard, *Secrets*, *supra* note 15, at 1682. However, it is unclear whether adverse inferences and burden-shifting would lead to the same substantive outcome as U.S.-style discovery or vice versa.

92. At this point, international commercial arbitration appears to be superior to litigation because arbitration permits an increased amount of jurisprudential consistency between substantive and procedural law while never-

might increase consistency between substantive and procedural law.

Finally, parties seeking to find a link between procedural contracts and predictability could attempt to demonstrate that the use of harmonized procedures could increase the enforceability of civil judgments across national borders.[93] Although predictability of enforcement is not precisely the same as predictability of substantive choice of law, the two goals are mutually consistent, since an unenforceable judgment is as bad as (or worse than) a judgment rendered pursuant to the wrong substantive law.[94] Therefore, courts could view any mechanism that increases the international enforceability of civil judgments as an effective means of promoting international commercial activity.[95]

B. Frequency of Procedural Contracts in Practice

Although private procedural contracts would appear to increase predictability in international commercial litigation, it is unclear whether and to what extent parties are actually at-

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theless allowing the parties to exercise procedural autonomy in other regards. This phenomenon does not arise as a result of any formal requirement that parties and arbitrators choose procedures that align with the substantive law governing the dispute. Instead, the alignment of procedure and substance occurs as a result of international arbitration's core values of procedural flexibility and harmonization of common law and civil law practices. Because arbitrators are allowed to adopt procedures that are tailored to the dispute and the parties, arbitral awards may be more consistent with judgments of the courts whose law has been chosen to control the substance of the dispute than judgments from foreign courts, since judges are at this point unable or unwilling to adopt procedures akin to those used in the country whose law controls the substance of the dispute.

93. *See supra* notes 67–75 and accompanying text.

94. A judgment rendered pursuant to the wrong substantive law might still reach the same outcome as would have occurred under the law chosen by the parties. However,"[a]n unenforceable judgment is at best valueless; at worst a source of additional loss." Alexander Hansebout, *The International Dimension of the Attachment of Debts*, 4 DISP. RESOL. INT'L 219, 219 (2010).

95. Notably, a procedural contract could increase international enforcement in two ways. First, a procedural contract may make a party more amenable to suit in a jurisdiction where assets are located, thereby removing the need to seek international enforcement of the resulting judgment. Second, a procedural contract may make the litigation process more familiar to a foreign court that will then be more inclined to recognize and enforce the resulting judgment. *See* Strong, *Judgments*, *supra* note 14 (discussing systemic and individual due process concerns).

tempting to adopt such contracts in practice.[96] Indeed, there are a number of reasons why parties may be disinclined to adopt these sorts of provisions.

For example, some parties may worry about the enforceability of individualized procedural contracts.[97] Other parties may prefer to use arbitration, particularly in international disputes, because arbitration offers various benefits—such as the easy enforceability of foreign awards—in addition to the possibility of customized procedures.[98] Still other parties may simply be unaware that individualized court procedures are possible. Finally, some parties may be influenced by inertia, or what might be called "the norm-creating power of the factual."[99]

This final proposition is particularly intriguing because it can be tied to the notion of defaults, a concept that is of some interest in the area of procedural contracts.[100] For example, some theorists believe that

> when lawmakers anoint a contract term [or legislative provision as] the default, the substantive preferences of contracting parties shift—that term becomes more desirable, and other competing terms becoming less desirable. Put another way, contracting parties view default terms as part of the status quo, and they prefer the status quo to alternative states, all other things equal.[101]

Although parties may prefer to retain the status quo, research suggests that individuals will begin to exercise their right (or, in more innovative contexts, test their right) to opt out of a default provision if and when the default becomes undesirable under a standard cost-benefit analysis.[102] This phe-

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96. *See* Bone, *supra* note 30, at 1346; Hoffman, *supra* note 7, at 393–94.

97. *See* BORN, DRAFTING, *supra* note 2, at 161; Hoffman, *supra* note 7, at 424–25.

98. *See* Bone, *supra* note 30, at 1351–52; Hoffman, *supra* note 7, at 423–24; S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. INT'L L. 1, 70–81 (2008) [hereinafter Strong, *Due Process*].

99. Gunnar Beck, *Legitimation Crisis, Reifying Human Rights and the Norm-Creating Power of the Factual: Reply to "Reifying Law: Let Them Be Lions,"* 26 PENN. ST. INT'L L. REV. 565, 568 (2008) (citation omitted).

100. *Id.*

101. Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 611–12 (1998).

102. *See* Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 STAN. L. REV. 1325, 1329 (2013). An interesting notion relates to how

nomenon is illustrated in the procedural realm through the rise in national[103] and international[104] arbitration as satisfaction with similar forms of litigation fell.

Conventional wisdom holds that legal developments take place steadily and incrementally.[105] However, empirical research suggests that innovation occurs "when sufficient, highly salient, exogenous shocks commence to rattle the status quo."[106] Interestingly, the world of procedural law seems to have recently experienced two of these types of "shocks."[107]

First, the United States Supreme Court's recent decisions concerning class arbitration have caused numerous commentators to question the limits of procedural autonomy in both arbitration and litigation.[108] For years, observers had believed that parties would be unable to waive class proceedings in arbitration because such actions were assumed to be impermissible in the judicial realm.[109] However, scholars are now wondering whether the Supreme Court's decision to uphold various types

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hard it is to contract out of a default provision. *See* Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. REV. 383, 390 (2007); *see also infra* notes 106–07 and accompanying text.

103. For example, the increase in domestic arbitration in the United States can be tied to corporations' desire to limit the possibility of class action litigation, which was seen as both expensive and risky. *See* S.I. STRONG, CLASS, MASS, AND COLLECTIVE ARBITRATION IN NATIONAL AND INTERNATIONAL LAW ¶ 1.16 (2013) [hereinafter STRONG, CLASS].

104. The increased use of international commercial arbitration can be linked to parties' desire to reduce the unpredictability and expense of transnational litigation. *See* BORN, ICA, *supra* note 3, at 76–78, 85–86.

105. *See* Hoffman, *supra* note 7, at 425, 428; *see also* Stephen J. Choi & G. Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 EMORY L.J. 929, 929 (2004).

106. Hoffman, *supra* note 7, at 428; *see also id.* at 425 (suggesting the "more common pattern is for the market as a whole to shift rather quickly to a new term or set of terms after a period of experimentation and innovation in different possibilities" rather than through slow, incremental change).

107. *Id.* at 428; *see also* Dodge, *supra* note 30, at 729; Paulson, *supra* note 25, at 473.

108. *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2312 (2013); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1751–53 (2011); STRONG, CLASS, *supra* note 103, ¶¶ 4.76–4.121; Bone, *supra* note 30, at 1362–67; Davis & Hershkoff, *supra* note 11, at 520–64; Dodge, *supra* note 30, at 776–83; Drahozal & Rutledge, *supra* note 30, at 1103; Hoffman, *supra* note 7, at 428; Paulson, *supra* note 25, at 471; Resnik, *supra* note 11, at 609–22.

109. *See* Hans Smit, *Class Actions and Their Waiver in Arbitration*, 15 AM. REV. INT'L ARB. 199, 203 (2004).

of class waivers in arbitration can be read as supporting an expansive view of procedural autonomy that extends beyond the arbitral context.[110]

Second, globalization has led to an ever-increasing amount of transnational litigation,[111] thereby generating a "growing need for legal certainty in a world where people and corporations have seemingly unfettered mobility."[112] Up until this point, international commercial actors' desire for both predictability and familiarity has been met through arbitration. However, a growing dissatisfaction with the cost and formality of international commercial arbitration could drive parties to consider the use of individualized procedural contracts.[113] Modified forms of litigation may be particularly attractive to the ever-increasing number of small and medium sized enterprises ("SMEs") that are now engaged in transnational commerce, since many of these smaller entities either may be unaware of the benefits of international commercial arbitration or may find the costs associated with arbitration to be prohibitively high.[114]

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110. *See* Bone, *supra* note 30, at 1333; Dodge, *supra* note 30, at 781; Drahozal & Rutledge, *supra* note 30, at 1106–07; Hoffman, *supra* note 7, at 428; Resnik, *supra* note 11, at 599.

111. *See* Katy Dowell, *International Litigants in London Rise by a Third in Three Years*, LAWYER (May 7, 2013), http://www.thelawyer.com/news-and-analysis/practice-areas/litigation/international-litigants-in-london-rise-by-a-third-in-three-years/3004520.article (noting rise of U.S. litigants in English courts); Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT'L L. 31, 37 (2011); William F. Sullivan et al., *A Global Concern: The Rise of International Securities Litigation*, BLOOMBERG L. (Apr. 8, 2013), http://about.bloomberglaw.com/practitioner-contributions/a-global-concern-the-rise-of-international-securities-litigation/.

112. Sánchez-Cordero, *supra* note 10, at xxxiv; *see also* Grossi, *supra* note 18, at 627.

113. *See* Sánchez-Cordero, *supra* note 10, at xxxv (noting the need for "efficiency, transparency, predictability, and procedural economy" in transnational litigation); *supra* notes 33–34 and accompanying text.

114. *See* Giuseppe de Palo & Linda Costabile, *Promotion of International Commercial Arbitration and Other Alternative Dispute Resolution Techniques in Ten Southern Mediterranean Countries*, 7 CARDOZO J. CONFLICT RESOL. 303, 303–04 (2006); Mistelis, *supra* note 33, at 582 (concluding "international [commercial] arbitration is at least as expensive as litigation for middle and smaller sized cases"). While international transactions were at one time conducted almost entirely by large, multinational corporations, improvements in technology and communication have opened global markets to a wide variety

II. STRUCTURAL CONCERNS ABOUT PROCEDURAL AUTONOMY IN INTERNATIONAL COMMERCIAL LITIGATION

Having described how and why parties in international commercial transactions have a heightened need or desire for procedural autonomy, it is now time to consider various structural concerns relating to the exercise of that autonomy through contracts creating individualized litigation procedures. Although the relevant issues can be viewed from a variety of perspectives,[115] perhaps the most compelling way of framing structural concerns is in terms of a presumption that national rules of civil procedure are non-derogable as a result of "a 'State sovereignty prerogative.'"[116] This approach holds that states are the only entities entitled to identify procedural norms in litigation because states are the only bodies that have the right and the responsibility of ensuring procedural fairness in national courts.[117] Under this model, private attempts to customize procedural rules are presumptively improper because such efforts necessarily conflict with the state's conception of procedural justice.[118]

Although the notion of a state procedural prerogative dominated the jurisprudential landscape for many years, commentators have recently identified a possible distinction between the law relating to litigation procedures and the law relating to judicial organization.[119] Under this model, some matters (such as those involving the relationship between the parties *inter se*) might be amenable to private procedural agreements even though other issues (such as those involving judicial admin-

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of participants, including SMEs. *See* Michael B. Carsella, *Payment Methods in International Trade*, *in* DOING BUSINESS WORLDWIDE: THE FOURTH ANNUAL INTERNATIONAL LAW FORUM FOR THE PRACTITIONER AND INTERNATIONAL BUSINESS EXECUTIVE sec. G, 1, 2 (1998).

115. For example, it is possible to describe structural concerns in terms of threats to democratic values. *See* Davis & Hershkoff, *supra* note 11, at 551.

116. Sánchez-Cordero, *supra* note 10, at xxxiii; *see also* Born, *Adjudication*, *supra* note 10, at 780, 859.

117. *See* Resnik, *supra* note 11, at 595–98. States may also have other interests (such as institutional or judicial efficiency) that they wish to further in litigation. *See* Andrew Le Sueur, *Access to Justice Rights in the United Kingdom*, 5 EUR. HUM. RTS. L. REV. 457, 473 (2000).

118. *See* Resnik, *supra* note 11, at 596; *see also* Hoffman, *supra* note 7, at 392.

119. *See* Sánchez-Cordero, *supra* note 10, at xxxiii (citing authorities).

istration or the relationship between the parties and the court) remained within the exclusive control of the state.[120]

Distinguishing between those procedures that are amenable to privatization and those that are not can be a difficult task. In considering these matters, it is useful to adopt both a theoretical and practical methodology, as in the discussion below.

A. Theoretical Perspectives

Structural concerns relating to procedural contracts are particularly well-suited to theoretical analyses, since constitutional and political philosophers have considered questions relating to institutional design at length and in a variety of contexts. As a result, matters relating to the privatization of litigation can be addressed from several different theoretical perspectives.

For example, some commentators have analyzed procedural contracts through the lens of law and economics.[121] This approach suggests "rethink[ing] the rules of procedure as a set of defaults. To set such defaults, scholars suggest that we look not simply at typical public law goals, such as distributive fairness and efficiency, but dynamically, focusing on parties' strategy, and consequently on the role of information exchange through rulemaking."[122]

Default rules provide the means of

> fill[ing] a gap in a contract where the parties have not selected a different rule. Default rules can be contracted around if the parties make an explicit choice to do so. . . . On the other

120. *See id.* Some sources define "judicial administration" as including matters relating to "the proper form of action, service of process, pleading, rules of discovery, mode of trial and execution and costs." RESTATEMENT (SECOND) OF CONFLICT OF LAWS §122 & cmt. a (1971). However, other authorities use "judicial administration" to describe matters relating to internal organization and institutional design. *See* Zoltán Fleck, *A Comparative Analysis of Judicial Power, Organisational Issues in Judicature and the Administration of Courts*, 27 IUS GENTIUM 3, 11–23 (2014); Russell R. Wheeler, *Roscoe Pound and the Evolution of Judicial Administration*, 48 S. TEX. L. REV. 943, 943 (2007). This Article will adopt the latter convention unless otherwise indicated.

121. *See* Bone, *supra* note 30, at 1391; Dodge, *supra* note 30, at 755; Hoffman, *supra* note 7, at 394 Kapeliuk & Klement, *Ex Ante*, *supra* note 30, at 1492; *see also* PROCEDURAL LAW AND ECONOMICS (Chris William Sanchirico ed., 2012).

122. Hoffman, *supra* note 7, at 394; *see also* Glenn, *supra* note 21, at 490.

> hand, a mandatory or immutable rule is one that the parties cannot contract around. . . .
>
> Efficiency theory, in general, supports the use of default rules, not mandatory rules. Indeed, law and economics scholars have long fought against the use of "immutable rules, including those based on public policy."[123]

Therefore, proponents of a law and economics approach would permit parties to adopt individualized procedural contracts so long as the parties can adequately protect their interests.[124] Since no evidence yet exists suggesting that procedural contracts result in an abuse of rights, proponents of law and economics would permit parties to engage in these sorts of private contracts.

This model doubtless will be persuasive to some observers. However, a pure law and economics approach to procedural contracts gives rise to several concerns. First, efficiency-based arguments have been said to be problematic in cases involving procedural rights because "[i]n many private relations, . . . courts and other decisionmakers have not allowed what would be the most efficient 'Coasean' result."[125]

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123. Wendy Netter Epstein, *Contract Theory and the Failure of Public-Private Contracting*, 34 CARDOZO L. REV. 2211, 2232 (2013) (citation omitted).

124. *See* Robert Gertner & Ian Ayres, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 88 (1989) ("Immutability is justified only if unregulated contracting would be socially deleterious because parties internal or external to the contract cannot adequately protect themselves.").

125. Michael I. Swygert & Katherine Earle Yanes, *A Unified Theory of Justice: The Integration of Fairness into Efficiency*, 73 WASH. L. REV. 249, 261 (1998); *see also* Paulson, *supra* note 25, at 526. Indeed, litigation currently reflects a multitude of inefficient practices that have been adopted for various reasons, including those relating to procedural fairness. *See* Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647, 647 (1994); Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 723 (2010); Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 627 (1994). Furthermore, one of the United States' most hallowed procedural practices, U.S.-style discovery, is extremely inefficient. *See* Martin H. Redish, *Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure*, 64 FLA. L. REV. 845, 849 (2012); Schwartz, *supra* note 35, at 1690. Other jurisdictions achieve similar ends without the same degree of inefficiency. *See* Strong, *Discovery*, *supra* note 74, at 509–12.

Second, using law and economics to consider the propriety of procedural contracts seems inappropriate to many observers, given the type of issues that are at stake.[126] For example, proponents of law and economics have suggested that "the focus of civil procedure rules should be to minimize transaction costs, not to maximize procedural justice."[127] Although there is value in trying to find ways to rationalize various fields of law, many people would be hesitant to set aside procedural fairness in favor of transactional efficiency.

However, law and economics is not the only theory available. It is also possible to analyze private procedural contracts from a deontological perspective.[128] One potential model involves John Rawls's concept of "justice as fairness," which has been said to constitute the strongest and most popular response to consequentialist legal theories such as law and economics.[129] Rawls's work also provides a useful response to the preceding analysis because he "has, on the whole, provided a much more penetrating account of our basic constitutional liberties than the law and economics movement has been able to articulate."[130]

Rawls's work is also particularly relevant here because the method by which he constructs his theory of justice as fairness is highly analogous to the way in which procedural contracts are most likely to arise. For example, his concept of "justice as fairness" is based on the concept of the "veil of ignorance," which involves

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126. *See* Robin Bradley Kar, *Contract Law and the Second-Person Standpoint: Why Efficiency-Maximization Principles Can Neither Explain Nor Justify the Expectation Damages Remedy*, 40 LOY. L.A. L. REV. 977, 980 (2007).

127. Hoffman, *supra* note 7, at 402.

128. *See* Beck, *supra* note 99, at 579–80.

129. *Compare* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (2001) [hereinafter RAWLS, RESTATEMENT], *and* JOHN RAWLS, A THEORY OF JUSTICE (1971) [hereinafter RAWLS, THEORY], *with* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 1.2 (7th ed. 2007), *and* Beck, *supra* note 99, at 579–80 (noting law and economics constitutes a consequentialist theory). Rawls's work has also been described as contractarian, which would correspond nicely with the types of issues at stake in this discussion. *See* Swygert & Yanes, *supra* note 125, at 300; *see also* Jeremy N. Sheff, *Marks, Morals, and Markets*, 65 STAN. L. REV. 761, 775 (2013) (discussing Rawls's place among social contract theorists).

130. Kar, *supra* note 126, at 979 n.10.

> what agreement the parties would reach if they were able to bargain costlessly and ex ante, assuming that they have full knowledge of all of the costs, benefits, and alternatives available to each of them, but that they do not know which party to the agreement they will be. Any agreement that the parties would reach under these assumptions is one that will resolve the distortions caused by disparities in bargaining power within non-competitive markets. Any consequent agreement will be mutually accommodative in attempting to preserve each party's original utility gain. In short, it will be based on a hypothetical consensus involving a condition of hidden identity and a principle of constructive empathy, together with the influence of the social norms of risk aversion and perceived fairness.[131]

Although this passage was written with Rawls's work in mind, the text also describes the type of bargaining that goes on when commercial parties are deciding what kind of dispute resolution mechanism to include in their transactional documents.[132] Since it is extremely difficult to anticipate at the time of contracting precisely what kinds of disputes might eventually arise, commercial actors have to identify a mechanism that will be fair regardless of how the parties are eventually situated to one another.[133]

The methodological similarities between the construction of justice as fairness and individualized procedural contracts sug-

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131. Swygert & Yanes, *supra* note 125, at 264–65; *see also* RAWLS, RESTATEMENT, *supra* note 129, at 15–18; RAWLS, THEORY, *supra* note 129, pt. 1, ch. III, § 24. Although this passage focuses on justice as "empathy," the concept of empathy is simply a more particularized means of describing justice as fairness. *See* Swygert & Yanes, *supra* note 125, at 291–95. Fairness can also be framed in the terms described herein (i.e., as synonymous with the principles of equality of arms and the ability to present one's case). *See infra* notes 338–40 and accompanying text.

132. *See* BORN, DRAFTING, *supra* note 2, at 13–14.

133. *See id.* Some commentators suggest that the lack of knowledge can be problematic. *See* Paulson, *supra* note 25, at 525; Thomas Schultz, *Human Rights: A Speed Bump for Arbitral Procedures? An Exploration of Safeguards in the Acceleration of Justice*, 9 INT'L ARB. L. REV. 1, 14 (2006) (suggesting pre-dispute waivers of procedural rights may only be possible if there is "true informed consent" or if special circumstances exist). However, the rules committee of the Judicial Conference operated in a similar type of information vacuum when it created trans-substantive rules of procedure, so there is litigation-oriented precedent for allowing pre-dispute agreements relating to procedure to stand. *See supra* note 78 (discussing propriety of trans-substantive approach to Federal Rules of Civil Procedure).

gest that Rawls would be in favor of these types of private agreements. However, the fit between Rawls's theory and procedural contracts is not perfect. For example, some people might object to using justice as fairness as a means of legitimizing procedural contracts because

> [t]he conventional view of Rawlsian political philosophy is that the private law lies outside the scope of the two principles of justice—it is not part of the "basic structure" of society, which, in this view, is limited to basic constitutional liberties and the state's system of tax and transfer.[134]

Of course, this sort of public law-oriented approach may be precisely what makes Rawls's work so appropriate in the current context, since questions of procedure have traditionally been treated as public law concerns falling within the sovereign prerogative.[135]

Problems and possibilities therefore exist at both ends of the ideological spectrum. However, the two theories do not necessarily have to be viewed as polar opposites, at least in this context.[136] Instead, it may be possible to identify a third approach to procedural contracts based on "a unified theory of justice in which a concept of fairness . . . is integrated into an efficiency

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134. Kevin A. Kordana & David H. Tabachnick, *Rawls and Contract Law*, 73 GEO. WASH. L. REV. 598, 598, 632 (2005); *see also* Swygert & Yanes, *supra* note 125, at 258. Interestingly, the law and economics approach has met with similar criticisms about its suitability in certain areas of law, including private law. *See* Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 830 (2003) ("[T]he economic approach does not explain the current system of contract law, nor does it provide a solid basis for criticizing and reforming contract law.").

135. *See* Sánchez-Cordero, *supra* note 10, at xxxiii; *see also* Born, *Adjudication*, *supra* note 10, at 780. There are also ways in which contract law can be brought within the Rawlsian fold, although such analyses are beyond the scope of the current Article. *See* Kordana & Tabachnick, *supra* note 134, at 600 (suggesting that "private ordering, specifically contract law, must be viewed as subject to the demands of the two principles of justice" and that "Rawlsian political philosophy, properly understood, is not neutral over conceptions of private ordering. For Rawlsianism, contract law is properly understood as one of the many loci of distributive justice"); Swygert & Yanes, *supra* note 125, at 258 (noting that "[a]lthough Rawls never applied his thesis to allocations of private rights and entitlements, two UCLA professors, Wesley Liebeler (law) and Armen Alchian (economics), have done so by developing a Hobbsean-Rawlsean ex ante contractarian rationale").

136. *See* Swygert & Yanes, *supra* note 125, at 255–57.

construct that acknowledges and responds to influences of social norms."[137] Thus, for example,

> Rawls's assumption that the parties to a consensus have limited knowledge about themselves under a "veil of ignorance" provides a theoretical way to create constructive empathy. Although Rawls primarily applied this restrictive knowledge assumption to the derivation of principles for public law, . . . by adding to the Coase Theorem a condition of "hidden identity," both efficiency and fairness considerations can be integrated into the realm of private law.[138]

This blended approach seems to resolve a number of the problems associated with each of the two theories in their pure form and provides a useful theoretical justification for privatized procedural contracts. Not only does this third model explain past behavior in this area of law (i.e., why courts have allowed procedural autonomy in cases involving forum selection clauses and international commercial arbitration), it also provides a useful analytical paradigm describing how parties can overcome various structural obstacles relating to the proper roles of public and private actors. Thus, there appears to be a sufficient amount of theoretical support for private parties to create their own procedural contracts, since such agreements not only allow individuals to maximize their own procedural efficiency but also allow the state to assert its institutional role in protecting certain fundamental notions of procedural fairness.[139]

B. Practical Perspectives

As useful as theoretical models can be, problems can arise when those theories are put into practice, since reality may generate the need to make certain distinctions and exceptions to the original construct.[140] Therefore, it is useful to consider procedural contracts in practical context.[141]

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137. *Id.* at 251.

138. *Id.* at 264.

139. *See infra* notes 330–53 and accompanying text (describing the standards of procedural fairness).

140. *See* Ronald J. Allen & Ross M. Rosenberg, *Legal Phenomena, Knowledge, and Theory: A Cautionary Tale of Hedgehogs and Foxes*, 77 CHI.-KENT L. REV. 683, 693 (2002) (concluding that "judges . . . are looking for answers to discrete questions, not solutions grounded in grand theory"); Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General Theory and Varied Con-*

1. Unbundling the Analysis

One of the problems in this area of law is the tendency to consider all procedural practices as analytically similar when in fact different procedural rules serve different structural purposes. For example, some procedures govern matters of judicial administration while others dictate the relationship between the litigants and the court.[142] Still other rules can be interpreted as involving no one but the parties themselves.[143] Therefore, it is necessary to deconstruct the analysis so as to understand precisely what is at stake in any individual situation.[144]

Interestingly, it has only recently become necessary to make these sorts of fine distinctions, since the earliest forms of procedural contracts (i.e., forum selection clauses) were made on a holistic basis, with parties simply choosing a particular forum and accepting that court's procedural requirements *in toto*.[145]

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texts, 2003 J. DISP. RESOL. 319, 329 (2003); Jordan M. Steiker, *"Post" Liberalism*, 74 TEX. L. REV. 1059, 1063 (1996) (reviewing ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995)) (discussing problems of overgeneralization in grand theory); Jane Stapleton, *Comparative Economic Loss: Lessons from Case-Law-Focused "Middle Theory*,*"* 50 UCLA L. REV. 531, 532 (2002) (suggesting "middle theory" is more persuasive to judges).

141. Some commentators believe there is a relative paucity of available case law in this field, although that view is not universally held. *Compare* Hoffman, *supra* note 7 at 393 (suggesting there is little case law in this field) *with* Noyes, *supra* note 27, at 599 (stating that "[c]ourts have enforced ex ante contracts that modify a broad array of litigation rights and rules," including those involving "constitutional rights, statutory rights, rights set forth in the Federal Rules of Civil Procedure, and rights set forth in the Federal Rules of Evidence").

142. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 & cmt. a (1971); Sánchez-Cordero, *supra* note 10, at xxxiii.

143. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 & cmt. a (1971); Sánchez-Cordero, *supra* note 10, at xxxiii.

144. *See* Menkel-Meadow, *supra* note 140, at 329 (suggesting the usefulness of narrower analyses).

145. *See* Atl. Marine Constr. Co. v. U.S. Dist. Ct., 134 S.Ct. 568, 579–80 (2013); Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595–97 (1991); M/S Bremen v. Zapata Off-Shore Co. (The Bremen), 407 U.S. 1, 17–18 (1972). The Restatement reflects this type of approach to the extent it contemplates the selection of one public procedural system over another rather than the choice of a private system of procedure over a public set of rules. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §122 & cmts. a, b (1971); Dodge, *supra* note 30, at 739, 744.

However, the question now is whether and to what extent parties can bypass the kind of "bundled" procedural choices inherent in choice of forum provisions (i.e., an undifferentiated combination of "forum, decision maker, and procedural rules") and instead opt for an "unbundled" approach that allows the selection of "individual procedures to create a customized 'mini-code of civil procedure.'"[146] Under the latter model, parties would be permitted to dispose of the rules set out by the forum and "agree to a different pleading standard, different timing and other conditions for raising defenses, limitations on joinder of additional parties, limitations on discovery, different summary judgment standards, shortened time for the pretrial stage, and so on."[147]

Critics of procedural contracts have claimed that "[t]he conversion of procedural rules from publicly created, mandatory guarantors of procedural justice to default rules subject to market forces" is problematic from a structural standpoint, since such measures could "alter[] the nature and function of civil procedure at a basic level."[148] However, there may be a way to differentiate between various procedures so as to identify those rules that may be amenable to customization.

a. Public Versus Private Concerns

The first way to separate permissible from impermissible procedural contracts is to focus on whether the procedure in question is private in nature (i.e., only implicating the relationship between the parties *inter se*) or whether it is public (i.e., affecting the court in some way).[149] Structurally, there can be few concerns if the agreement is entirely private.[150]

The problem of course is that distinctions between public and private concerns are far easier to make in the abstract than in

146. Dodge, *supra* note 30, at 732.

147. Bone, *supra* note 30, at 1345; *see also* Dodge, *supra* note 30, at 746. Parties in the United States can also agree to waive the constitutional right to a jury or agree not to enter objections to the introduction of certain types of evidence. *See* Bone, *supra* note 30, at 1348–49; *see also* U.S. CONST. art. III, § 2; Town of Newton v. Rumery, 480 U.S. 386, 391–98 (1987).

148. Dodge, *supra* note 30, at 725; *see also* Hoffman, *supra* note 7, at 401–02.

149. *See supra* notes 119–20 and accompanying text.

150. Of course, various substantive concerns could arise, as discussed below. *See infra* notes 262–386 and accompanying text.

practice. Indeed, almost every procedural matter can be framed in terms of both public and private concerns.[151]

For example, procedural contracts purporting to modify the rules of pleading could be characterized as entirely private in nature. Under this perspective, parties could be seen as simply expressing a desire to clarify the type of information that must be provided to each other at the time of filing in a post-*Iqbal*, post-*Twombly* world.[152] Private agreements regarding pleading issues might even be seen as economically prudent because such agreements can decrease costly litigation about pleading standards[153] and increase the likelihood of settlement by providing more or better information about the facts underlying a particular claim or defense at the time of filing.[154]

However, pleading issues can also be framed as affecting public rights or interests.[155] For example, making pleading standards more lenient could affect institutional design issues by allowing parties to bring cases that might otherwise be facially insufficient as a matter of law, thereby clogging judicial dockets.[156] Making pleading standards more rigorous could affect other institutional design concerns by limiting parties' ability to assert particular claims or defenses, thereby affecting the substantive rights of the parties and perhaps even leaving

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151. Some commentators have suggested that matters relating to timing of various procedures, class action status, bonds relating to injunctions, burdens of proof, discovery, and the introduction of evidence might be considered purely private procedures. *See* Hoffman, *supra* note 7, at 398–400; Strong, *Consensual*, *supra* note 30, at 161. However, other commentators have opposed this view. *See* Kapeliuk & Klement, *Ex Ante*, *supra* note 30, at 1493–94; Paulson, *supra* note 25, at 511–22 (arguing that rules relating to evidence are public in nature).

152. *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

153. There is some confusion about how the Supreme Court decisions in *Iqbal* and *Twombly* are to be applied. *See Iqbal*, 556 U.S. at 662; *Twombly*, 550 U.S. at 544; Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 339 (2013).

154. *See* Miller, *supra* note 153, at 358.

155. *See* Hoffman, *supra* note 7, at 398–402; Miller, *supra* note 153, at 365–67.

156. *See* Paulson, *supra* note 25, at 528. Alternatively, customizing the pleading standard could be framed as "impracticable." BORN, DRAFTING, *supra* note 2, at 161.

them without a remedy.[157] While a defensible compromise position does exist (i.e., parties may agree to make their individual pleading standard more rigorous than that established as a matter of law but may not agree to a more lenient standard), this exercise demonstrates the kinds of matters that must be considered before a court can determine whether a particular procedure is amenable to customization as a structural matter.

When attempting to determine whether a particular procedure is public or private in nature, it may be helpful to ask whether "the contract require[s] the judge (as opposed to the parties) to act in a different way or make a decision under a different standard" and whether "the contract impose[s] a burden on the court that is inconsistent with sound judicial administration."[158] These two questions address the two main structural concerns associated with procedural contracts, namely procedures that affect the relationship between the court and the parties and procedures that affect judicial administration.

Another way to frame these types of structural analyses is to consider whether the procedural contract in question somehow affects certain core values of public adjudication.[159] Professor Robert Bone has suggested that this inquiry could be carried out through a functional comparison of litigation and arbitration.[160]

In Bone's view, litigation involves the quintessentially public task of enforcing the substantive law while arbitration focuses

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157. Some commentators have suggested that procedural contracts should not change the outcome of a dispute. *See* Paulson, *supra* note 25, at 524, 529. However, this perspective seems somewhat anomalous, since parties are able to choose the substantive law that governs their dispute, regardless of the fact that such decisions will often have a bearing on the outcome of the matter. *See* Bakalar v. Vavra, 619 F.3d 136, 143–44 (2d. Cir. 2010) (noting difference of outcome under New York versus Swiss law).

158. Paulson, *supra* note 25, at 528.

159. For example, some commentators claim that the core duties of a judge are restricted by procedural contracts because the court is a necessary third party participant in the contract. *See id.* at 475–76. Other authors dispute this characterization. *See* Noyes, *supra* note 27, at 632. However, the analogy to third party contracts may be relevant to some types of contracts (i.e., those that affect matters of institutional design) but not others (i.e., those that affect the relationship between the parties *inter se*).

160. *See* Bone, *supra* note 30, at 1386–88; *see also* Ralf Michaels, *The Functional Method of Comparative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 43, at 339, 342, 357 (describing equivalence functionalism).

solely on the resolution of a particular dispute.[161] However, the "core distinctiveness" of litigation

> lies in its commitment to reasoning from general principle and doing so in a way that engages the facts of particular cases. Although respecting precedent does not follow inevitably from this commitment, it is closely linked to it either pragmatically (e.g., following precedent limits cognitive error, saves decision costs, or protects reliance interests) or morally (e.g., following precedent is required by equal concern and respect or a norm of integrity, which also supports the core commitment to principled reasoning).[162]

Bone's observations "point[] us in a productive direction for thinking about party rulemaking. If parties choose procedural rules that undermine the capacity of judges, and perhaps even juries, to engage in principled reasoning of the right sort, then perhaps their choices should not be honored."[163] However, Bone admits that this approach "is just a beginning, . . . for we must explain how procedure is connected to principled reasoning and why parties to a particular case should be constrained if they bear the risks and costs of their own choices."[164]

These commentators appear to suggest the need to conduct case-by-case analyses of various procedures to determine whether and to what extent those practices affect public versus private concerns. Although this process may appear labor-intensive, courts have already begun to address these issues, as discussed in the practical analysis below.

b. Efficiency

Another structural issue that courts and commentators may wish to consider when evaluating the propriety of individualized judicial procedures involves efficiency and the associated

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161. *See* Bone, *supra* note 30, at 1386–88.

162. *Id.* at 1388 (citation omitted). Because Bone is writing from the U.S. perspective, his analysis is largely rooted in principles associated with the common law tradition. Translating his hypothesis into a civil law context would require judges to keep faith with the relevant statutes. Interestingly, some people believe that U.S. law is becoming more like the civil law, due to the increased incidence of statutory and regulatory law. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 5–7 (1982).

163. Bone, *supra* note 30, at 1388.

164. *Id.*

need for uniformity.[165] While this Article's foray into legal theory has suggested that procedural contracts should not be evaluated solely in light of efficiency rationales, a hybrid approach that takes efficiency concerns into account does appear appropriate.[166]

The traditional conflict of law rule regarding procedure (i.e., that the procedural law of the forum court prevails on a holistic basis) is based in large part on the assumption that uniformity in procedural matters is necessary because it promotes efficiency in the courts.[167] Because most jurisdictions assert a state interest in judicial efficiency,[168] the longstanding assumption appears to have been that there must necessarily be a state interest in procedural uniformity.[169]

However, this analysis reflects a type of syllogistic fallacy that fails as a matter of logic.[170] Furthermore, the underlying assumptions demonstrate a number of factual errors.

First and foremost, the current rules of civil procedure are not as uniform as some people appear to believe. For example,

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165. *See* Paulson, *supra* note 25, at 479–84; *see also* Main, Review, *supra* note 18, at 471–74 (discussing the rationales underlying the desire for uniformity).

166. *See supra* notes 121–39 and accompanying text.

167. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 & cmt. a (1971); Edward J. Janger, *Universal Proceduralism*, 32 BROOK. J. INT'L L. 819, 819 (2007); Keeton, *supra* note 74, at 854, 860 (noting consistency also promotes justice by avoiding arbitrariness); Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1250 (2005).

168. *See* Le Sueur, *supra* note 117, at 473.

169. While it is possible that a need for uniformity could exist as a substantive matter, that issue should be considered separately from structural considerations. *See infra* notes 262–386 and accompanying text. Indeed, an excessive wish for uniformity could, like an excessive desire for efficiency, lead to unjust ends. *See* Adam A. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 651–52 (2006) (discussing Robert Dworkin and the possibility of diminishing returns in terms of procedural processes). Furthermore, scholars have questioned the wisdom of a fully trans-substantive procedural regime as well as the extent to which trans-substantivity currently exists in the United States. *See supra* note 78.

170. *See* IRVING M. COPI & CARL COHEN, INTRODUCTION TO LOGIC 189 (13th ed. 2008) (discussing the problem of the undistributed middle term); Stephen M. Rice, *Indiscernible Logic: Using the Logical Fallacies of the Illicit Major Term and the Illicit Minor Term as Litigation Tools*, 47 WILLAMETTE L. REV. 101, 116–20 (2010).

not only do many jurisdictions "delegate broad discretion to trial judges to tailor procedures to case-specific circumstances,"[171] but many countries also allow a significant amount of diversity between and within different courts operating within the same legal system.[172] This lack of commitment to uniformity by public institutions and actors suggests that procedural contracts cannot be considered jurisprudentially suspect simply because they result in a certain degree of procedural variation.[173]

Second, existing rules of civil procedure are not always efficient.[174] A number of these inefficiencies can be explained by a need to take other concerns, such as procedural fairness, into account.[175] However, some inefficiencies arise as a result of other, more questionable influences.[176] These latter practices give rise to doubts about whether the state has a defensible interest in efficiency such that private parties should not be able to customize their litigation procedures.

Third and finally, there does not appear to be any demonstrable link between efficiency and uniformity. While procedural diversity could very well create logistical problems (and therefore adjudicatory inefficiencies) when parties attempt to affect the relationship between the parties and the court, it is difficult to identify any efficiency-related concerns in cases where the parties want to alter the relationship between the parties *inter se*. Indeed, some commentators have claimed that individualized procedures can actually promote efficiency for both the parties and the courts.[177] For example,

> terms that specify the location in which disputes will be resolved can allow parties to minimize travel costs. Contractual provisions to curtail discovery might make sense . . . in disputes that are expected to turn on a court's interpretation of a

171. Bone, *supra* note 30, at 1371 (citation omitted).

172. *See* Resnik, *supra* note 11, at 597–98; *see also supra* notes 71–73 and accompanying text.

173. *See* Bone, *supra* note 30, at 1371–72.

174. *See* Alexander, *supra* note 125, at 647; Gensler, *supra* note 125, at 723.

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

176. For example, it has been said that "the rules of procedure are formulated by judges. If the self-interest of those judges conflicts with the efficiency criterion, it would seem plausible that the judges will formulate procedural rules that further their own interests rather than the interests of efficiency." Macey, *supra* note 125, at 627; *see also* Samaha, *supra* note 169, at 665–66.

177. *See* Davis & Hershkoff, *supra* note 11, at 526–29, 531–32; *see also* Dodge, *supra* note 30, at 746.

> limited number of documents. . . . Terms that designate a bench trial allow parties to choose adjudicators with professional expertise and avoid any additional delay or uncertainty associated with jury trials. Terms that provide for confidential proceedings allow parties to protect sensitive trade secrets. Terms that restrict class actions allow parties to forestall frivolous litigation initiated by self-interested attorneys.[178]

These types of savings inure primarily to the parties. However, the public can also benefit from efficiencies relating to individualized litigation procedures.[179] For example,

> [s]uppose A and B agree to a strict pleading rule that screens frivolous suits. If the presence of frivolous suits in litigation makes it more difficult for parties to settle meritorious suits, as is likely, a strict pleading rule in a case between A and B should make it easier for parties to settle and thereby save the public cost of a trial.[180]

The possibility that private procedural contracts can result in public savings may be particularly relevant in light of the budget constraints currently facing the U.S. and other judicial systems.[181] Indeed, many courts are now under an explicit or implicit duty to consider and encourage appropriate cost-saving mechanisms.[182]

However, some caution must be exercised when considering questions of efficiency because there is not always a direct correlation between public and private costs. In fact, some party-

178. Davis & Hershkoff, *supra* note 11, at 526–27.

179. *See* Bone, *supra* note 30, at 1356–57.

180. *Id.* at 1356 (citations omitted).

181. *See Federal Judiciary Braces for Broad Impact of Budget Sequestration*, THIRD BRANCH NEWS (Mar. 12, 2013), http://news.uscourts.gov/federal-judiciary-braces-broad-impact-budget-sequestration.

182. *See* Neil Andrews, *Relations Between the Court and the Parties in the Managerial Age*, *in* THE CULTURE OF JUDICIAL INDEPENDENCE: RULE OF LAW AND WORLD PEACE (Shimon Shetreet ed., forthcoming 2014); Máximo Langer & Joseph W. Doherty, *Managerial Judging Goes International, but Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms*, 36 YALE J. INT'L L. 241, 242 n.2, 296–97 (2011); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 422–24 (1982); *see also* Glenn, *supra* note 21, at 490 (suggesting that managerial judging supports the concept of private procedural contracts).

made rules that would initially appear to limit public costs could have the opposite effect.[183] For instance,

> an agreement to limit discovery could increase public costs if the expectation of a less onerous discovery burden and limited access to information reduced the size of the settlement surplus and with it the likelihood of settlement, thereby increasing the risk of trial. Also, by restricting access to information, discovery limits could generate trial or settlement outcomes with a higher-than-optimal error risk, thereby undermining deterrence goals. To be sure, parties will take account of private costs when they negotiate their contract, but there is no reason for them to take account of public costs like these.[184]

However, "[i]t is extremely difficult to identify cases where party rulemaking generates costs substantially in excess of those already created by the current system."[185] Therefore, this issue should not prove fatal to individualized procedures, at least as a general matter.

c. Timing

The third structural concern that courts and commentators should consider involves timing.[186] Some commentators believe that most examples of procedural individualization arise in the context of pre-trial stipulations, which could suggest that parties are not able to create procedural contracts until the nature of the dispute is known.[187]

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183. *See* Bone, *supra* note 30, at 1357, 1374.

184. *Id.* at 1357 (citations omitted).

185. *Id.* at 1374 (citation omitted).

186. *See* Hoffman, *supra* note 7, at 396; Kapeliuk & Klement, *Ex Ante*, *supra* note 30, at 1493–94; Paulson, *supra* note 25, at 491; *see also* RUTLEDGE, *supra* note 85, at 184–89; Schultz, *supra* note 133, at 10–12; *infra* notes 390–94 and accompanying text.

187. *See* Dodge, *supra* note 30, at 767; Hoffman, *supra* note 7, at 398–99; Noyes, *supra* note 27, at 603; Paulson, *supra* note 25, at 514. This approach may be the result of the presumption of flexibility, with the attendant opportunity for procedural individualization, inherent in certain aspects of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 16, 26, 29; Hoffman, *supra* note 7, at 396; *see also* FED. R. CIV. P. 6, 23, 65 (implying, rather than stating, the possibility of procedural amendments); Hoffman, *supra* note 7, at 398–99. Parties may also agree to limit enforcement of a judgment to a particular jurisdiction or curtail the type of remedies that are available. *See*

If true, this requirement could create some problems, since past experience with forum selection clauses and international commercial arbitration suggests that business entities may be most likely to enter into individualized procedural contracts before the dispute arises, when the "veil of ignorance" encourages parties to agree to mutually beneficial procedures free from the kind of tactical constraints that arise once the conflict has begun.[188]

To some extent, forum selection provisions and arbitration agreements support the notion that procedural contracts may be entered into on a pre-dispute basis, since forum selection provisions and arbitration agreements involve more comprehensive procedural variations than would likely be the case with private procedural contracts.[189] However, forum selection clauses and arbitration agreements could be distinguished from customized procedural contracts on the grounds that the first two types of agreements involve the withdrawal from a particular legal system rather than the alteration of that legal system's procedural norms.

Although concerns about timing may arise in particular circumstances, there are examples of courts upholding the parties' right to alter litigation procedures through contracts created prior to the time of the dispute. Perhaps the most prominent of these decisions comes from the U.S. Supreme Court, when it upheld a cognovit note contained in a pre-dispute contract and noted that the defendant "may not have been able to predict

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Bone, *supra* note 30, at 1350; Dodge, *supra* note 30, at 727. Other procedural alterations may also be possible. *See* Moffitt, *supra* note 13, at 467–78.

188. *See* BORN, DRAFTING, *supra* note 2, at 13–14; Hoffman, *supra* note 7, at 396–97 (identifying four types of dispute provisions and noting that most recent literature has focused on "Type 1" provisions, which involve pre-dispute, arms-length bargains); *see also* RAWLS, RESTATEMENT, *supra* note 129, at 15–18; RAWLS, THEORY, *supra* note 129, pt. 1, ch. III, § 24; *supra* notes 131–33 and accompanying text. Some commentators find pre-dispute agreements to be more jurisprudentially challenging than post-dispute agreements, although there is little discussion as to why that is so. *See* Hoffman, *supra* note 7, at 397.

189. *See* Atl. Marine Constr. Co. v. U.S. Dist. Ct., 134 S.Ct. 568, 579–80 (2013); Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595–97 (1991); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506, 516–17 (1974); M/S Bremen v. Zapata Off-Shore Co. (The Bremen), 407 U.S. 1, 17–18 (1972); RUTLEDGE, *supra* note 85, at 182–89; Hoffman, *supra* note 7, at 398.

with accuracy just how or when [the plaintiff] would proceed under the confession clause if further default by [the defendant] occurred, . . . but this inability does not in itself militate against effective waiver" of the defendant's procedural rights.[190] Other judicial decisions can also be interpreted as supporting pre-dispute agreements concerning procedural matters, as the following discussion shows.

2. Putting Theory into Practice

At this point, most of the commentary concerning individualized procedural contracts has focused on theoretical rather than practical concerns, largely because of an alleged shortage of case law considering private agreements relating to litigation procedure.[191] This phenomenon is potentially problematic, since courts are often more interested in practical applications of particular principles than in theoretical analyses.[192]

This is not to say that theory and practice cannot be mutually re-enforcing. Indeed, the recent case of *Delaware Coalition for Open Government v. Strine* may be particularly helpful in this regard.[193] Although *Strine* does not discuss procedural contracts per se, both the District Court of Delaware and the Court of Appeals for the Third Circuit considered a number of matters that are commonly associated with these types of agreements and demonstrate some of the analytical techniques discussed in the previous subsections.[194]

The facts of the case are relatively straightforward. The dispute arose out of a constitutional challenge to a statute enacted

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190. D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 187 (1972).

191. There is some debate on this issue. *Compare* Hoffman, *supra* note 7, at 393 (suggesting there is little case law in this field), *with* Noyes, *supra* note 27, at 599 (stating that "[c]ourts have enforced ex ante contracts that modify a broad array of litigation rights and rules," including those involving "constitutional rights, statutory rights, rights set forth in the Federal Rules of Civil Procedure, and rights set forth in the Federal Rules of Evidence").

192. *See* Allen & Rosenberg, *supra* note 140, at 693; Stapleton, *supra* note 140, at 533.

193. *See* Del. Coal. for Open Gov't v. Strine, 894 F. Supp. 2d 493 (D. Del. 2012), *aff'd*, 733 F.3d 510 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014).

194. *See Strine*, 733 F.3d at 510; *Strine*, 894 F. Supp. 2d at 493. For a detailed discussion of the lower court decision and the propositions asserted in the appeal, see Thomas J. Stipanowich, *In Quest of the Arbitration Trifecta, or Closed Door Litigation?: The Delaware Arbitration Program*, 6 J. BUS. ENTREPRENEURSHIP & L. 349, 357–60 (2013).

by the Delaware legislature that attempted to create a judicially supported form of arbitration in the Delaware state courts.[195] The law only contemplated arbitration of commercial matters "by agreement or by stipulation" of the parties and with the participation of all parties in the arbitral hearing.[196]

The procedure itself was largely innocuous. Arbitrations were to be initiated through the filing of a petition that outlined "the nature of the dispute, the claims made, and the remedies sought," and the arbitrator was to hold a preliminary conference within ten days of the initial filing.[197] The preliminary conference was to be followed by a preliminary hearing to identify "the claims of the case, damages, defenses asserted, legal authorities to be relied upon, the scope of discovery, and the timing, length, and evidence to be presented at the arbitration hearing" as well as "the possibility of mediation or other non-adjudicative methods of dispute resolution."[198] The law also required the merits hearing to take place within ninety days of the filing of the petition.[199]

The statute explicitly allowed the use of a number of procedures, including U.S.-style discovery, that are more common in litigation than in arbitration.[200] For example,

> [p]rior to the arbitration hearing, the parties exchange "information necessary and appropriate for the parties to prepare for the arbitration hearing and to enable the Arbitrator to understand the dispute." The parties can agree to the scope of information to be exchanged or can have the arbitrator decide the scope of discovery. Court of Chancery Rules 26 through 37, which govern depositions and discovery in all Chancery Court matters, apply to the arbitration proceeding

195. The law was intended to "preserve Delaware's pre-eminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters." Del. H.B. No. 49, 145th Gen. Assembl., at 4 (2009), *as quoted in Strine*, 733 F.3d at 512.

196. *Strine*, 733 F.3d at 512.

197. *Strine*, 894 F. Supp. 2d at 495.

198. *Id.* (citation omitted).

199. *See id.* Although this type of expedited timeline is not unheard-of in arbitration, it is unusual in litigation, even in Delaware, where court proceedings are considered relatively speedy. *See* William B. Chandler III & Anthony A. Rickey, *Manufacturing Mystery: A Response to Professors Carey and Shepherd's "The Mystery of Delaware Law's Continuing Success,"* 2009 U. ILL. L. REV. 95, 127–28 (2009).

200. *See Strine*, 894 F. Supp. 2d at 495.

> unless the parties and arbitrator together agree to different rules. Some discovery matters, such as the procedure for issuing subpoenas, must be created by the parties and the arbitrator.[201]

The importation of judicial rules of discovery is remarkable in a proceeding that purports to establish a new form of arbitration, since one of the primary benefits of arbitration is the elimination (or at least the curtailment) of discovery.[202] However, the Delaware approach is less problematic if the proceeding is characterized as a type of customized litigation, with judicial rules of procedure existing as a default mechanism.[203]

The Delaware statute granted arbitrators broad but relatively standard powers, including "the power to issue a final award and to make interim, interlocutory, or partial rulings during the course of the proceeding."[204] The final award, which could "be enforced as any other judgment or decree," was required to include the basis for the arbitrator's decision.[205] The statute allowed arbitral awards to be stayed or vacated, but only in accordance with the terms set forth in the Federal Arbitration Act (FAA).[206]

All of these elements passed judicial scrutiny.[207] However, some aspects of the Delaware statute were more problematic. Three items—the confidentiality of the proceedings, the method by which the arbitrators were appointed, and the possible infringement on mandatory judicial duties—give rise to particular concerns.

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201. *Id.* (citations omitted).

202. Although arbitration often contemplates a limited exchange of documents, the scope of such disclosures is usually much narrower than in litigation. *See* BORN, ICA, *supra* note 3, at 1877–78, 1893–1905. Furthermore, it is rare to see judicial rules on discovery explicitly imported into arbitration. *See id.* at 1887, 1921; LEW ET AL., *supra* note 32, ¶ 21-11; STRONG, GUIDE, *supra* note 32, at 77–78.

203. *See supra* notes 12–13, 121–24 and accompanying text.

204. *Strine*, 894 F. Supp. 2d at 495–96.

205. *Id.* at 496 (noting final awards should "include 'any remedy or relief that the Arbitrator deems just and equitable and within the scope of any applicable agreement of the parties'").

206. *See* 9 U.S.C. §§ 1–16 (2013); *Strine*, 894 F. Supp. 2d at 496.

207. *See* Del. Coal. for Open Gov't v. Strine, 733 F.3d 510, 522 (3d Cir. 2013) (Fuentes, J., concurring) ("Nothing in [the] decision should be construed to prevent sitting Judges of the Court of Chancery from engaging in arbitrations without those confidentiality provisions.").

a. Confidentiality of the Proceedings

According to the Delaware legislature, the new form of statutory arbitration was to be "considered confidential and not of public record until such time, if any, as the proceedings are the subject of an appeal. In the case of an appeal, the record shall be filed by the parties with the Supreme Court in accordance with its rules."[208] This language provided the basis for the underlying legal challenge, which involved a number of journalists claiming that their First Amendment right of access to legal proceedings had been infringed upon as a result of the statute.[209]

Although both the district and circuit courts agreed that the confidential nature of the Delaware proceedings invalidated that aspect of the law,[210] the requirement that procedures be public rather than private does not create any real problems for proponents of individualized procedural contracts. So long as parties agree to have their dispute heard publicly, they can avoid this particular obstacle.[211] However, the debate about confidentiality in *Strine* provides several insights into other issues relating to private procedural contracts.

First, the majority opinion by Judge Sloviter reinforces the notion that litigation and arbitration are very similar in terms of functionality.[212] Although the discussion was meant to iden-

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208. 10 Del. C. § 349(b); *see also Strine*, 733 F.3d at 513. The scope of confidentiality was quite broad and encompassed "all parts of the proceeding, including all filings and all contacts between the arbitrator and any party." *Strine*, 894 F. Supp. 2d at 496 (quoting Del. Ch. Ct. R. 97(a)(4), 98(b)). "Only parties [were] allowed to attend the arbitration hearing unless they agree[d] otherwise," and "[a]ll 'memoranda and work product contained in the case files of an Arbitrator' and '[a]ny communication made in or in connection with the arbitration that relates to the controversy being arbitrated' [were] likewise confidential." *Id.* (citations omitted). Although the statute required the court to enter a judgment in conformity with the arbitrator's final award, the award itself was not to be made public, and details about the parties were not to be included in the judgment. *See id.* at 496–97 (noting the judgments are available on an electronic database under the title "arbitration judgments").

209. *See Strine*, 733 F.3d at 521.

210. *See id.* at 513–21; *Strine*, 894 F. Supp. 2d at 502, 504. Judge Fuentes noted that "[n]othing in [the] decision should be construed to prevent sitting Judges of the Court of Chancery from engaging in arbitrations without those confidentiality provisions." *Strine*, 733 F.3d at 522 (Fuentes, J., concurring).

211. Some proceedings may still be heard "under seal." FED. R. CIV. P. 5.2.

212. *See Strine*, 733 F.3d at 513–21; *see supra* note 160 and accompanying text.

tify any differences between judicial and arbitral actions so as to determine whether the Delaware procedure must be open to the public, the analysis instead demonstrated the numerous ways in which litigation and arbitration overlap in terms of purpose and procedure.[213] This observation is not only important as a structural matter,[214] it is also relevant to the substantive analyses that are conducted below.[215]

Second, several of the judges hearing this case suggested that states may allow parties to adopt procedures that are very different from standard litigation, so long as the requisite consent exists.[216] While a number of the procedural elements in *Strine* were initially devised by the state rather than by the parties themselves, the Delaware arbitration scheme nevertheless required the parties' consent to implement those procedures.[217] Furthermore, the statute appeared to give the parties and the arbitrators a great deal of discretion in adapting the procedure by which the dispute was to be heard.[218] Finally, there is no indication that the parties' consent had to arise post-dispute, which suggests that pre-dispute agreements regarding customized procedures are enforceable.[219] As a result, *Strine* can be read as providing structural support for individualized proce-

213. *See Strine*, 733 F.3d at 513–21.

214. *See supra* note 160 and accompanying text. For example, it could be argued that any procedure that may be made subject to arbitration can also be made subject to a private procedural contract, since the two procedures are functional equivalents. *See* Hoffman, *supra* note 7, at 391 (noting that "some distinguished scholars now argue that parties' greater ability to contract out of federal and state procedural rules [through arbitration agreements] entails the lesser power to modify them"); *see also* Michaels, *supra* note 160, at 342, 357 (discussing equivalence functionalism). While a full exploration of this subject is beyond the scope of the current Article, the issue is nevertheless intriguing.

215. *See infra* note 317 and accompanying text (suggesting the limits between litigation and arbitration are semi-permeable).

216. This principle is most clearly enunciated by Judge Fuentes in his concurrence and by the district court. *See Strine*, 733 F.3d at 522 (Fuentes, J., concurring); Del. Coal. for Open Gov't v. Strine, 894 F. Supp. 2d 493, 495 (D. Del. 2012), *aff'd*, 733 F.3d 510 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014).

217. *Strine*, 733 F.3d at 512.

218. *See Strine*, 894 F. Supp. 2d at 495.

219. *See supra* notes 186–190, 390–394 and accompanying text.

dural contracts, so long as the procedure is public[220] and consensual.[221]

b. Appointment of Arbitrators

The second area of concern involves the means by which arbitrators are appointed under the Delaware statute. Although neither the district court nor the circuit court discussed this feature at length, the Delaware legislature indicated that proceedings were to be presided over by "a member of the Court of Chancery, or such other person as may be authorized under rules of the Court."[222]

If the proceedings are to be considered as some form of arbitration, then this provision is highly problematic, since "virtually all authorities . . . accept that arbitration is a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties."[223] Furthermore, the district court noted that while "[t]he Alternative Dispute Resolution Act, which creates court-annexed arbitration in the federal courts, seems to allow magistrate judges to serve as arbitrators[,] . . . neither the parties nor [the] Court could find evidence of that practice."[224] Of course, the appointment of a judge to hear the dispute is not at all problematic if the proceedings constitute a form of customized litigation, which is how the Delaware courts eventually framed the procedure.[225]

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220. *See Strine*, 733 F.3d at 513–21.

221. *Id.* at 512.

222. *Strine*, 894 F. Supp. 2d at 494 (quoting 10 Del. C. §349(a)); *see also Strine*, 733 F.3d at 512.

223. BORN, ICA, *supra* note 3, at 217.

224. *Strine*, 894 F. Supp. 2d at 502 (citing 28 U.S.C. §653(b) (2013)); *see also* DDI Seamless Cylinder Int'l, Inc. v. Gen. Fire Extinguisher Corp., 14 F.3d 1163, 1165–66 (7th Cir. 1994); Brandt v. MIT Development Corp., 552 F. Supp. 2d 304, 315 (D. Conn. 2008); Hameli v. Nazario, 930 F. Supp. 171, 182 (D. Del. 1996); Ovadiah v. New York Ass'n for New Americans, Nos. 95 Civ. 10523 (SS), 96 Civ. 330 (SS), 1997 WL 342411, at *3–4 (S.D.N.Y. June 23, 1997); Heenan v. Sobati, 96 Cal. App. 4th 995, 1000–03 (2002); Elliott & Ten Eyck P'ship v. City of Long Beach, 57 Cal. App. 4th 495, 503–04 (1997); Charles H. Smith, *When Is an "Arbitration" Not an Arbitration? When a Sitting Judge Serves as a Private Arbitrator*, 60 DISP. RESOL. J. 29, 33 n.23 (2005); Stipanowich, *supra* note 194, at 359; *infra* notes 241–45 and accompanying text.

225. While some questions might arise as to whether the procedures permitted under the Delaware statute infringed upon the judge's core adjudica-

The Delaware statute also indicated that the arbitrator-judge was to be appointed by the Chancellor of the Court rather than by the parties.[226] This element could appear to create difficulties at first glance because parties in arbitration are usually entitled to choose their decision-maker themselves.[227] However, it is possible for parties to delegate selection of the arbitrator to an arbitral institution or court, so this mechanism passes muster.[228]

c. Mandatory Judicial Duties

The third and perhaps most intriguing aspect of *Strine* involves the district court's distinction between adjudicators who are judges and adjudicators who are private citizens (i.e., arbitrators).[229] According to the court, "[a] judge bears a special responsibility to serve the public interest. That obligation, and the public role of that job, is undermined when a judge acts as an arbitrator bound only by the parties' agreement."[230] Furthermore, "the judge's obligation in his public role as a judicial officer" cannot be altered, even with the parties' consent.[231]

This aspect of *Strine* is extremely useful, since it reinforces theoretical notions regarding the sanctity of judges' core adjudicative duties.[232] Unfortunately, the court does not go on to explain precisely what is encompassed within a judge's "public role as a judicial officer," as opposed to the responsibilities of "an arbitrator bound only by the parties' agreement."[233] Com-

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tive or public duties, those issues are less problematic if the procedure is approved by the legislature, since the state is generally considered competent to define proper litigation procedures as a structural matter.

226. *See Strine*, 733 F.3d at 512.

227. *See* BORN, ICA, *supra* note 3, at 217.

228. *See id.*; LEW ET AL., *supra* note 32, ¶¶ 16-11 to 16-29.

229. *See Strine*, 733 F.3d at 500. This issue has been addressed by commentators as well. *See* BORN, ICA, *supra* note 3, at 217; RENÉ DAVID, ARBITRATION IN INTERNATIONAL TRADE 5 (1985); EMMANUEL GAILLARD & JOHN SAVAGE, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 7 (1999).

230. Del. Coal. for Open Gov't v. Strine, 894 F. Supp. 2d 493, 502 (D. Del. 2012), *aff'd*, 733 F.3d 510 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014).

231. *Id.* at 503.

232. For example, this aspect of *Strine* is reminiscent of discussion relating to the core values of public adjudication and the distinction between matters of public and private concern. *See supra* notes 149–64 and accompanying text.

233. *Strine*, 894 F. Supp. 2d. at 502–03.

mentary provides scant assistance on this point, since there is little scholarship comparing the nature of arbitration and litigation[234] outside of some limited inquiries involving the differences between judges' and arbitrators' duties of independence and impartiality[235] and the ways in which judges and arbitrators can or should apply public policy.[236]

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234. *See* LARRY E. EDMONSON, DOMKE ON COMMERCIAL ARBITRATION § 1:1, at 1–3 (2010) (noting arbitration coexists with litigation as "part of the American system of administering justice"); *id.* § 1:3, at 1-8 to 1-9 (indicating that early precedent distinguished between commercial arbitration as a substitute for litigation and labor arbitration as a substitute for avoiding industrial strife, but suggesting that these distinctions may no longer apply); Cindy G. Buys, *The Arbitrators' Duty to Respect the Parties' Choice of Law in Commercial Arbitration*, 79 ST. JOHN'S L. REV. 59, 93–94 (2005) (noting differences between arbitration and litigation); Pierre Mayer, *Comparative Analysis of Power of Arbitrators to Determine Procedures in Civil and Common Law Systems*, *in* PLANNING EFFICIENT ARBITRATION PROCEEDINGS: THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION, XII ICCA CONG. SER. (1994 Vienna) 24, 25–26 (Albert Jan van den Berg ed., 1996) (noting arbitration is sometimes considered "a substitute for State justice, albeit of a private nature, but nevertheless pursuing the same ends"); Jeffrey W. Stempel, *Keeping Arbitrations From Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 260 (2007) (noting "arbitration is a substitute for adjudication by litigation"); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1673 (2005) (concluding arbitration is not the same as litigation); S.I. Strong, *Does Class Arbitration "Change the Nature" of Arbitration?* Stolt-Nielsen, AT&T *and a Return to First Principles*, 17 HARV. NEGOT. L. REV. 201, 241–45 (2012) [hereinafter Strong, *First Principles*] (discussing the nature of arbitration); *see also* Elliott & Ten Eyck P'ship v. City of Long Beach, 57 Cal. App. 4th 495, 503 (1997).

235. Although arbitrators are expected to behave in an independent, impartial, and (in the international context) neutral manner, arbitrators are not always held to precisely the same standard as judges, since arbitrators are expected to be part of the business world. *Compare* Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 148–49 (1968), *with* AT&T Corp. v. Saudi Cable Co., [2000] 2 Lloyd's Rep. 127 (appeal taken from Eng.) (Ct. App.).

236. Some commentators believe that arbitrators are either more willing or more able than judges to take the public policies of foreign states into account. *See* Stefan Michael Kröll, *The "Arbitrability" of Disputes Arising from Commercial Representation*, *in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 317, ¶¶ 16-57 to 16-65 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009). However, problems can arise if an arbitrator is too reliant on public policy, since arbitral tribunals are not empowered to act like common law courts. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 673–74 (2010); Strong, *First Principles*, *supra* note 234, at 240. This principle can be taken too far, however, since some courts

Although *Strine* does not discuss the nature of judicial adjudication directly, careful reading of the two opinions nevertheless yields some useful information.[237] For example, both the district and circuit courts appeared to suggest that the procedural innovations proposed by the Delaware legislature did not infringe on the judge's public duties in any way, once the confidentiality provisions were struck.[238] Thus, expedited timelines and customized methods of taking and presenting evidence do not appear to violate the judge's "public role as a judicial officer."[239]

This reading of *Strine* is consistent with a Seventh Circuit decision concerning a purported attempt to have a federal magistrate preside over a private arbitration.[240] In an opinion written by Judge Richard Posner, the Court concluded that "arbitration is not in the job description of a federal judge, including . . . a magistrate judge. . . . Federal statutes authorizing arbitration . . . do not appear to authorize or envisage the appointment of judges or magistrate judges as arbitrators."[241] As a result, the magistrate judge would have been acting beyond his judicial capacity if his actions were construed as arbitration.[242]

However, the Seventh Circuit did not stop there. Instead, Judge Posner wrote that

> [a]n alternative characterization to *ultra vires* of what the magistrate judge did is possible. It is that the parties stipulated to an abbreviated, informal procedure for his deciding

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have suggested that arbitrators not only have the ability but in some cases the duty to consider the application of public policy and mandatory law. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985); *see also* United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 42–44 (1987) (indicating that public policy that can be ascertained by reference to the relevant law can and should be considered in arbitral context, lest the award be rendered unenforceable); BORN, ICA, *supra* note 3, at 2181; Strong, *First Principles*, *supra* note 234, at 240.

237. *See* Del. Coal. for Open Gov't v. Strine, 733 F.3d 510, 512 (3d Cir. 2013); *Strine*, 894 F. Supp. 2d. at 502–03.

238. *See Strine*, 733 F. 3d at 521–23 (Fuentes, J., concurring).

239. *Strine*, 894 F. Supp. 2d. at 503; *see also id.* at 495.

240. *See* DDI Seamless Cylinder Int'l, Inc. v. Gen. Fire Extinguisher Corp., 14 F.3d 1163 (7th Cir. 1994); Stipanowich, *supra* note 194, at 366.

241. *DDI Seamless Cylinder*, 14 F.3d at 1165.

242. *Id.* Framing a matter as "arbitration" carries several benefits, including a strictly limited form of judicial review rather than appeal on the merits. *See id.* at 1166; *see also* Strong, *First Principles*, *supra* note 234, at 218.

> the case in his judicial capacity. Parties are free within broad limits to agree on simplified procedures for the decision of their case. They can agree for example to waive the right to present oral testimony and instead to treat the summary judgment proceeding as the trial on the merits. They can agree that the hearing on a preliminary injunction shall be deemed the trial on the merits as well. They can agree to a trial on stipulated facts. They can, of course, agree to binding arbitration, albeit before an arbitrator rather than a judge. They can agree to waive appeal: that is possible even in criminal cases, by a plea agreement. One way to describe what the parties and the judge did in this case is that they agreed that the judge would make a decision on a record consisting of the auditor's report plus the parties' objections, after oral argument by the parties conducted (as is increasingly common in federal district courts) over the telephone, and that they would not appeal the decision. So viewed, the procedure was not improper. Of course the parties should have avoided reference to "arbitration," a mode of dispute settlement distinct from adjudication. They should simply have said that this was the procedure they had agreed upon.[243]

Both the Third and the Seventh Circuits therefore appear to agree that parties may contractually agree to amend standard rules of procedure relating to a variety of issues, including discovery.[244] This view is consistent with that taken by commentators who consider discovery to be one of the easiest practices to regulate by private procedural contract.[245]

Not everyone agrees that matters relating to the taking and presentation of evidence can be made subject to private procedural contracts. Indeed, some scholars have argued that limiting discovery can negatively affect certain core judicial duties.[246] This claim appears to be based on the common law notion that judges need "to understand the *whole* case" before making a decision, in contrast to civil law judges, who only need to know "[w]hat evidence is required to reach a justifiable decision."[247] However, it is not clear that broad, U.S.-style discovery and long, drawn-out trials can or should be considered a

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243. *DDI Seamless Cylinder*, 14 F.3d at 1166 (citations omitted).

244. *See id.*; *Strine*, 894 F. Supp. 2d at 503.

245. *See* Bone, *supra* note 30, at 1331; Dodge, *supra* note 30, at 745; Noyes, *supra* note 27, at 609–10.

246. *See* Paulson, *supra* note 25, at 476, 511–15.

247. El Ahdab & Bouchenaki, *supra* note 15, at 72.

necessary part of the adjudicative process. Indeed, there are several reasons why that presumption does not appear to be true as a matter of fact or theory.

First, the United States is exceptional, even within the common law world, in its approach to pre-trial discovery. Even those jurisdictions that adopt a common law, "whole case" view of judicial decision-making take a much narrower view of the necessary scope of pre-trial disclosures.[248] Furthermore, criminal procedure does not contemplate anywhere near the same amount of discovery that is seen in the civil context, and no one has ever claimed that criminal trials do not involve judges working in a judicial capacity.[249] Therefore, broad, U.S.-style discovery does not appear necessary for a judge to carry out his or her core adjudicative duties, even in the United States.

Second, U.S. practice strongly reflects the notion that the taking of evidence is a quintessentially private activity.[250] Not only do federal and state rules of civil procedure place the responsibility for gathering evidence firmly within the hands of the parties or their attorneys,[251] but U.S. judges seldom ask for particular evidence or witnesses to be introduced at trial, even if the court is entitled to do so.[252] Although U.S. practice differs

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248. *See* LEW ET AL., *supra* note 32, ¶ 22-49; El Ahdab & Bouchenaki, *supra* note 15, at 73; Strong, *Discovery*, *supra* note 74, at 510–11; S.I. Strong & James J. Dries, *Witness Statements Under the IBA Rules of Evidence: What to Do About Hearsay?*, 21 ARB. INT'L 301, 313 (2005).

249. *See* David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 714–15 (2006).

250. *See* Strong, *Consensual*, *supra* note 30, at 160.

251. *See* FED. R. CIV. P. 26; Noyes, *supra* note 27, at 611; Paulson, *supra* note 25, at 514 (discussing Rule 29 of the Federal Rules of Civil Procedure). Notably, the fact that the Federal Rules of Civil Procedure place certain restrictions on the ability of the parties to shape their own procedure does not preclude the possibility that autonomy exists in other regards. *See id.* (discussing Rule 29 of the Federal Rules of Civil Procedure). Thus, for example, the limitation on party autonomy in Rule 29 regarding the timing of certain discovery-related activities does not necessarily bar other types of procedural agreements relating to the taking of evidence. *See* FED. R. CIV. P. 29(b) ("[A] stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial."). Instead, that provision simply reinforces the notion that party autonomy cannot be exercised in a way that affects the relationship between the parties and the court.

252. *See* FED. R. EVID. 614, 706. The right to call fact witnesses is exercised more often in the criminal context than in the civil context. *See* FED. R. EVID.

from that of most civil law nations, where the taking of evidence is considered a public task,[253] the U.S. approach is consistent with that of other common law countries.[254]

Third, judges in the United States do not second-guess the parties' tactical decisions regarding the presentation of evidence during trial.[255] Although courts occasionally exercise their inherent powers in matters relating to the presentation of evidence, most acts of judicial intervention appear to focus on curtailing abusive litigation practices rather than promoting the court's own views about what evidence should be presented and how.[256]

Similar analyses can be conducted with respect to other types of procedural agreements, such as those involving a "trial on stipulated facts or on summary judgment rather than oral testimony"[257] or those eliminating the opportunity for an appeal on the merits.[258] However, both the Seventh and Third Circuits specifically stated that parties could enter into contracts concerning these procedures, which suggests that parties can agree to limit or eliminate certain procedural practices (such as oral testimony and cross-examination) that are typically conceived of as central to the common law legal tradition.[259] In-

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614 advisory committee's note to subdivision (a). Courts seldom appoint their own expert witnesses. *See* FED. R. EVID. 706 advisory committee's note; Strong, *Consensual*, *supra* note 30, at 160.

253. *See* Hazard, *Secrets*, *supra* note 15, at 1682.

254. *See* Andrews, *supra* note 182 (discussing English practice). Indeed, English courts have allowed parties to obtain evidence by means not otherwise known at English law. *See* ADRIAN BRIGGS, THE CONFLICT OF LAWS 38 (2d ed. 2008).

255. *See* Strong, *Consensual*, *supra* note 30, at 160.

256. *See* FED. R. EVID. 614, 706 (noting the right of the court to question fact and expert witnesses); Joseph J. Anclien, *Broader Is Better: The Inherent Powers of Federal Courts*, 64 N.Y.U. ANN. SURV. AM. L. 37, 46 (2008).

257. Del. Coal. for Open Gov't v. Strine, 894 F. Supp. 2d 493, 503 (D. Del. 2012), *aff'd*, 733 F.3d 510 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014); *see also* DDI Seamless Cylinder Int'l, Inc. v. Gen. Fire Extinguisher Corp., 14 F.3d 1163, 1165–66 (7th Cir. 1994).

258. *See DDI Seamless Cylinder*, 14 F.3d at 1165; *Strine*, 894 F. Supp. 2d at 503.

259. *See* BORN, ICA, *supra* note 3, at 1786. Using "tradition" as a touchstone for legal analysis is highly problematic. *See* Ronald J. Krotoszynski, *Dumbo's Feather: An Examination and Critique of the Supreme Court's Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48 WM. & MARY L. REV. 923, 928–30 (2006).

deed, U.S. courts appear to have long been capable of altering common law rules, even those that are of a longstanding nature.[260] Therefore, when considering what constitutes a core adjudicative duty, courts and commentators must be careful not to assume that a particular practice is central to the adjudicative function simply because it has traditionally been available in U.S. litigation.[261]

C. Interim Conclusions

The preceding analysis suggests that although states may have a legitimate interest in protecting the fundamental principles of institutional design inherent in their legal systems, not every judicial procedure affects public, structural concerns. Instead, some procedures arise solely between the parties and therefore are entirely private as a matter of both theory and of practice.

At this point, courts and commentators agree that parties should not be able to alter matters touching on the administration and operation of the courts. However, there do not appear to be any reasons to justify a prohibition on procedural contracts concerning matters that arise solely between the parties. Furthermore, these types of procedural agreements can even reflect certain positive virtues, including an increase in predictability in international commerce and a possible reduction of certain public costs.

Although the preceding discussion paints a largely positive view of procedural contracts in international litigation, some courts may nevertheless resist party autonomy in procedural matters, either because of concerns about perceived encroachments on judicial prerogatives or because of worries about what constitutes a "proper" or adequate procedure. The first of these

260. *See* Funk v. United States, 290 U.S. 371, 382 (1933) ("That this court and the other federal courts, in this situation and by right of their own powers, may decline to enforce the ancient rule of the common law under conditions as they now exist, we think is not fairly open to doubt."); *DDI Seamless Cylinder*, 14 F.3d at 1166; *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 533–34 (2004) (allowing courts to tailor proceedings that did not fall within the mandatory core of constitutional due process); Chevron Corp. v. Donziger, No. 11 Civ. 0691 (LAK), 2013 WL 5548913, *1–3 (S.D.N.Y. Oct. 7, 2013) (requiring parties to provide written witness statements instead of affirmative oral testimony in appropriate cases).

261. *See* Bone, *supra* note 30, at 1386–88.

two matters should be dispensed with relatively easily, since the United States Supreme Court has shown little patience for judicial hostility to party autonomy, particularly in situations involving international commerce. However, the second issue could be problematic, since courts are duty-bound to protect the parties' fundamental procedural rights. These sorts of substantive concerns are taken up in the next section.

III. SUBSTANTIVE CONCERNS ABOUT PROCEDURAL AUTONOMY IN INTERNATIONAL COMMERCIAL LITIGATION

The previous section suggested that courts and commentators must look past surface considerations to determine whether and to what extent a particular procedural practice affects core structural concerns. This same kind of in-depth approach is necessary when analyzing substantive concerns about private procedural contracts in international commercial litigation. However, rather than focusing on matters of institutional design, substantive analyses focus on questions relating to individual rights and the principles of due process and procedural fairness.

Although it is critically important for courts and commentators to consider substantive concerns relating to procedural autonomy in international commercial litigation, the process can involve some methodological difficulties. For example, it can be challenging to even identify what the relevant substantive norms are because due process and procedural fairness are typically considered as a matter of domestic rather than international or transnational law.[262]

Though daunting, the problem is not insurmountable, since there may be another body of law that can help identify the due process norms that apply in international commercial litigation. For example, international commercial arbitration is extremely well-developed in terms of its procedural norms and has already been shown to have a structural connection with

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262. The development of an international norm of due process is somewhat more advanced in the criminal law context. *See* LARRY MAY, GLOBAL JUSTICE AND DUE PROCESS 1–17 (2011) (suggesting domestic due process standards should be extended to international law and recognized as jus cogens); Richard Volger, *Due Process*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 929, 939, 945 (Michel Rosenfeld & Andras Sajo eds., 2012).

international commercial litigation.[263] Therefore, it may be that there is a substantive link between the two processes as well. That issue is considered in the following sections.

A. International Commercial Arbitration as a Framework for Analysis

There are several reasons why international commercial arbitration might be able to provide an appropriate standard for evaluating substantive concerns relating to procedural contracts in transnational litigation. First, as the discussion on structural concerns demonstrated, numerous commentators have identified a jurisprudential connection between procedural contracts in litigation and procedural contracts in arbitration.[264] While the precise nature of that relationship has not yet been defined,[265] the fact that there is a structural connection suggests the possible presence of a substantive affiliation as well.[266]

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263. *See* KURKELA & TURUNEN, *supra* note 6; GEORGIOS PETROCHILOS, PROCEDURAL LAW IN INTERNATIONAL ARBITRATION ¶¶ 4.85–.94 (2004); S.I. STRONG, RESEARCH AND PRACTICE IN INTERNATIONAL COMMERCIAL ARBITRATION: SOURCES AND STRATEGIES 71–137 (2009) [hereinafter STRONG, RESEARCH] (providing bibliographic information).

264. *See* ALI & UNIDROIT, *supra* note 10, at 17; Bone, *supra* note 30, at 1333; Dodge, *supra* note 30, at 781; Drahozal & Rutledge, *supra* note 30, at 1106–07; Hoffman, *supra* note 7, at 428; Resnik, *supra* note 11, at 599.

265. Some commentators have suggested that "the analytical problems involved in opting out of litigation [and into arbitration] are quite distinct from those arising inside the courtroom" while other scholars have taken the view that "parties' greater ability to contract out of federal and state procedural rules entails the lesser power to modify it." Hoffman, *supra* note 7, at 391, 395 (citations omitted).

266. One commentator has identified a number of procedural requirements that apply in both litigation and arbitration. For example,

> [j]udicial and arbitral decision-makers are required to render a judgment or award, following representations from the parties. Six fundamental principles are associated with this relationship between the adjudicator and the parties: (i) the adjudicator's impartiality and (ii) independence; (iii), the adjudicator's duty to treat the parties equally, (iv) to listen to both sides and to respect each party's right to controvert evidence or legal submission, and (v) the duty to reach a reasoned decision within (vi) a reasonable time.
>
> More generally, the numerous fundamental and important principles of civil justice can be arranged under these five headings, which are the five constellations of procedural principles: (1) advice and access:

Some commentators would object to this methodology due to a belief that arbitrators use different analytical techniques than judges.[267] For example, these commentators suggest that arbitrators routinely disregard precedent and draft awards that are bereft of any sort of legal reasoning.[268] Setting aside the question of whether those practices still arise in domestic U.S. arbitration, it is clear that these allegations do not apply in international matters.[269]

Instead, international commercial arbitration is universally agreed to be a highly legalistic procedure involving extremely detailed written and oral submissions outlining what are often highly sophisticated legal arguments.[270] Arbitral tribunals typically issue fully reasoned awards that explain the arbitrators' substantive and procedural decisions in great detail.[271] Many of

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> empowering the parties; (2) conditions for sound decision-making; (3) an efficient process; (4) a fair process; and (5) upholding judgment. Of these numerous principles, none can be regarded as detached from the judicial process.

Andrews, *supra* note 182.

267. *See* Bone, *supra* note 30, at 1386–88; Hoffman, *supra* note 7, at 391, 395; *see also supra* notes 160–64 and accompanying text.

268. *See* Bone, *supra* note 30, at 1386–88. Bone also describes a somewhat outmoded domestic U.S. practice (the non-neutral arbitrator) that does not exist in the international realm, where independence, impartiality and neutrality are required. *See* BORN, ICA, *supra* note 3, at 1494–1507; Bone, *supra* note 30, at 1387.

269. *See* STRONG, GUIDE, *supra* note 32, at 4–5.

270. *See id.*; Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69, 69, 73 (2003); Eric Bergsten, *The Americanization of International Arbitration*, 18 PACE INT'L L. REV. 289, 294, 301 (2006); Born, *Adjudication*, *supra* note 10, at 877; Lucy Reed & Jonathan Sutcliffe, *The "Americanization" of International Arbitration?*, 16 MEALEY'S INT'L ARB. REP. 36 (2001); Steven Seidenberg, *International Arbitration Loses Its Grip: Are U.S. Lawyers to Blame?*, 96 A.B.A. J. 50, 54 (2010).

271. *See* BORN, ICA, *supra* note 3, at 1871–72; Bone, *supra* note 30, at 1387–88. Indeed, some parties complain that arbitral awards are too long. *See* Pierre Lalive, *On the Reasoning of International Arbitral Awards*, 1 J. INT'L DISP. SETTLEMENT 55, 55 (2010). Although the style of the award may vary depending on whether the decision-maker comes from a common law or civil law background, arbitral tribunals are nevertheless acting in a judicial manner. *See* S.I. Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources*, 20 AM. REV. INT'L ARB. 119, 143 (2009) [hereinafter Strong, *Sources*]; *see also supra* note 247 and accompanying text (describing the different analytical approaches of civil law and common law lawyers).

these awards are subsequently published in denatured (anonymized) form,[272] which allows scholars to determine whether and to what extent arbitrators comply with the law. Detailed examination of these awards demonstrates a tradition of rigorous attention to legal argument and authority, similar to the approach adopted by judges.[273]

Notably, the debate about due process in international commercial arbitration is not limited to principles enunciated in arbitral awards and scholarly commentary. Instead, national judges from around the world often consider questions of procedural fairness as a result of various types of ancillary litigation.[274] As described further in the discussion below, the unique nature of international commercial arbitration requires national courts and arbitral tribunals to adopt a highly consistent set of due process standards that applies in both arbitral and judicial contexts and in different countries. Furthermore, the concept of procedural fairness in international commercial arbitration is developed through a highly iterative process that involves both public and private adjudicators, although judges necessarily have the final say about such issues. As a result, discussions about the proper bounds of procedural autonomy in international commercial arbitration appear highly relevant to similar debates concerning international commercial litigation.

Support for the analytical methodology adopted in this Article can also be found in judicial decisions such as *Delaware Coalition for Open Government v. Strine*.[275] Although that case focused primarily on confidentiality concerns within the context of U.S. constitutional law, Judge Roth's discussion of international commercial arbitration (rather than one of the various forms of domestic arbitration) supports this Article's use of international commercial arbitration as a guide to international norms of procedural fairness.[276]

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272. *See* STRONG, RESEARCH, *supra* note 263, at 45, 83–85.

273. *See* BORN, DRAFTING, *supra* note 2, at 9; LEW ET AL., *supra* note 32, ¶ 24-55; Bone, *supra* note 30, at 1388; Christoph A. Hafner, *Professional Reasoning, Legal Cultures, and Arbitral Awards*, 30 WORLD ENGLISHES 117, 117–28 (2011) (describing differences between civil law and common law reasoning).

274. *See* STRONG, GUIDE, *supra* note 32, at 37–87 (discussing various ways in which judges become involved in arbitration).

275. *See* Del. Coal. for Open Gov't v. Strine, 733 F.3d 510 (3d Cir. 2013).

276. *See Strine*, 733 F.3d at 525 (Roth, J., dissenting).

Another compelling reason to rely on international commercial arbitration involves the high degree of esteem with which it is held in the business and legal worlds. Despite recent concerns about increasing formalism and costs,[277] international commercial arbitration is generally considered to be one of the great success stories of the procedural realm.[278] Not only are the various conventions associated with international commercial arbitration among the most widely accepted treaties in the world (indeed, the most successful of these, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards [more commonly known as the New York Convention] has been signed or ratified by 149 state parties),[279] but private parties typically prefer arbitration as a means of resolving their cross-border business disputes.[280] Furthermore, the widespread approval and perceived legitimacy of the procedures used in international commercial arbitration have led numerous countries to adopt a treaty-based form of arbitration (investor-state arbitration) that draws heavily on the procedural rules developed in the private commercial context.[281]

The amount of public and private support for international commercial arbitration is impressive. However, what may be even more important for purposes of this Article is the way in which the norms associated with international commercial arbitration have become embedded in domestic law, either direct-

277. These concerns focus more on issues of cost than issues of procedural irregularity. *See supra* notes 33–34 and accompanying text.

278. *See supra* note 32.

279. *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 217, 330 U.N.T.S. 3 [hereinafter New York Convention]; *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, U.N. COMM'N ON INT'L TRADE LAW (UNCITRAL), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Jan. 3, 2012) [hereinafter New York Convention Status]; William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 HASTINGS L.J. 251, 257 (2008). Other treaties in this field are also well-recognized, although those agreements are primarily regional in nature. *See* BORN, ICA, *supra* note 3, at 91–109.

280. *See* BORN, ICA, *supra* note 3, at 68–71.

281. *See* LUCY REED ET AL., *Preface to the Second Edition* of GUIDE TO ICSID ARBITRATION, at xi (2nd ed. 2010); Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L. REV. 1269, 1272 (2009).

ly[282] or indirectly through the adoption of national legislation based on the UNCITRAL Model Law on International Commercial Arbitration ("Model Arbitration Law").[283] Although commentators suggest that it is often difficult for international legal norms to become incorporated into national law,[284] the process appears to have been very successful in the area of international commercial arbitration.[285]

Both the various conventions on international commercial arbitration and the Model Arbitration Law reflect a high degree of respect for the parties' procedural autonomy.[286] However, parties cannot act with unfettered discretion. Instead, "procedural autonomy [in international commercial arbitration] is qualified . . . by the mandatory requirements of applicable na-

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282. This process is easier in monist states but also occurs in dualist regimes. *See* James A.R. Nafziger, *Book Review: Dinah Shelton, ed., International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion*, 61 AM. J. COMP. L. 901, 902 (2013); S.I. Strong, *Monism and Dualism in International Commercial Arbitration: Overcoming Barriers to Consistent Application of Principles of Public International Law*, *in* BASIC CONCEPTS OF PUBLIC INTERNATIONAL LAW: MONISM AND DUALISM 547, 555–57, 563–68 (Marko Novaković ed., 2013).

283. *See* UNCITRAL Model Law on International Commercial Arbitration, U.N. Comm'n on Int'l Trade Law, 18th Sess., Annex I, U.N. Doc. A/40/17 (June 21, 1985), revised by Rep. of the U.N. Comm'n on Int'l Trade Law, 39th Sess., June 17–July 7, 2006, Annex I, art. 34, U.N. Doc. A/61/17, U.N. GAOR, 61st Sess., Supp. No. 17 (2006) [hereinafter Model Arbitration Law]. The Model Arbitration Law was designed to be consistent with the terms of the New York Convention and thus with public international law relating to international commercial arbitration. *See* New York Convention, *supra* note 279; Model Arbitration Law, *supra*, Explanatory Note to 1985 version, paras. 47, 49; BORN, ICA, *supra* note 3, at 115–21; William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L L. 1241, 1243 (2003).

284. *See* René Provost, *Judging in Splendid Isolation*, 56 AM. J. COMP. L. 125, 153 (2008).

285. *See* Frédéric Bachand, *Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism*, 2012 J. DISP. RESOL. 83, 83; Zekoll, *supra* note 43, at 1348–51 (discussing "state-sanctioned party autonomy" in international commercial arbitration); *see also* EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION 26 (2010) (suggesting international commercial arbitration is consistent with a theory of "strict State positivism").

286. *See* New York Convention, *supra* note 279; Model Arbitration Law, *supra* note 283; BORN, ICA, *supra* note 3, at 82–83, 91.

tional law (subject to applicable international limits)."[287] These requirements are reflected in certain well-established norms that are created and respected by both courts and arbitral tribunals.[288]

The jurisprudential connection between litigation and arbitration suggests that arbitration law may be able to provide certain insights into the boundaries of procedural autonomy in litigation. This is particularly true in the cross-border business context, since the law relating to international commercial arbitration is far more developed than the law relating to international commercial litigation.[289] Therefore, this Article analyzes the substantive concerns relating to procedural contracts by using examples drawn from international commercial arbitration.

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287. BORN, ICA, *supra* note 3, at 1749. One of the more salient discussions regarding the difference between domestic and international principles of public policy, including procedural public policy, is found in a series of reports by the International Law Association concerning public policy as a bar to enforcement of international awards. *See* Int'l Law Assn. Comm. on Int'l Commercial Arb., *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards* (2000), *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/19; Int'l Law Assn. Comm. On Int'l Commercial Arb., *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards* (2002), *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/19; Strong, *Due Process*, *supra* note 98, at 67–70.

288. Arbitrators' respect for international procedural norms exists not only as a matter of informal acculturation but also as a result of what is often seen as a duty to produce an enforceable award. *See* Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 792–93; Günther J. Horvath, *The Duty of the Tribunal to Render an Enforceable Award*, 18 J. INT'L ARB. 135, 135 (2001); *see also* GAILLARD, *supra* note 285, at 53 (discussing the comparative and iterative elements of the transnational rules method). Arbitrators know that if they exceed the limits of procedural fairness, their awards will be unenforceable, which is not the parties' contracted-for outcome. *See* Horvath, *supra*, at 137–38. Hence, there is an implicit duty on the part of the arbitral tribunal to conform with judicial norms of due process and procedural fairness. *See id.* at 145–48.

289. *See infra* notes 294–98 and accompanying text.

B. Limits of Procedural Autonomy in International Commercial Arbitration

1. Sources of Authority Describing Procedural Fairness in International Commercial Arbitration

When considering the limits of procedural autonomy in international commercial arbitration, it is useful to begin by identifying the relevant legal authorities.[290] Professor Matti Kurkela and Santtu Turunen have suggested that a "prima facie order of sources . . . for identifying *lex proceduralia* or transnational due process requirements in arbitration" includes

1) The New York Convention
2) Human rights conventions
3) International soft law concerning arbitration
4) Principles of law formulated from various national procedural laws.[291]

The first item on the list—the New York Convention—has been characterized as "constitutional" in nature, an interpretation that has arisen at least in part because the New York Convention plays a role comparable to that of a national constitution "in mediating between private autonomy (or liberty) and governmental regulatory interests."[292] Although the New York

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290. *See* KURKELA & TURUNEN, *supra* note 6, at 10–11.

291. *Id.* at 11; *see also* New York Convention, *supra* note 279. "*Lex proceduralia*" can be described as a set of procedural norms that are analogous to the substantive law known as *lex mercatoria. See* KURKELA & TURUNEN, *supra* note 6, at 7–8. Extensive commentary exists regarding the content and historical development of the *lex mercatoria*, and it may be that some of these principles would be equally applicable to the development of the *lex proceduralia*. *See* BERGER, *supra* note 6; Mary B. Ayad, *Harmonization of Custom, General Principles of Law and Islamic Law in Oil Concessions*, 29 J. INT'L ARB. 477, 488–90 (2012) (suggesting *lex mercatoria* fulfills the requirements of Article 31(3)(c) of the Vienna Convention on the Law of Treaties); Emmanuel Gaillard, *Transnational Law: A Legal System or a Method of Decision Making?*, 17 ARB. INT'L 59, 59–72 (2001); Maniruzzaman, *supra* note 6, at 665; *see also supra* note 6.

292. Gary B. Born, *Arbitration and the Freedom to Associate*, 38 GA. J. INT'L & COMP. L. 7, 22 (2009) [hereinafter Born, *Associate*]; *see also* New York Convention, *supra* note 279; Peter B. Rutledge, *The Constitutional Law of International Commercial Arbitration,* 38 GA. J. INT'L & COMP. L. 1, 2 (2009). This constitutional function is also reflected in national laws of arbitration, which

Convention does not discuss procedural autonomy directly, a number of key principles can be derived from Article V, which describes the grounds upon which an objection to recognition and enforcement of a foreign arbitral award can be based.[293]

Article V is relatively general in nature (another characteristic that the New York Convention shares with many national constitutions),[294] but the principles are further interpreted and applied in judicial decisions and arbitral awards that are reproduced in detail in various yearbooks and databases.[295] Similar information has been gathered on judicial decisions construing the Model Arbitration Law, which was designed to be consistent with the terms of the New York Convention and which has been adopted in whole or in part in nearly 100 jurisdictions, including a number of U.S. states.[296]

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would include statutes based on the Model Arbitration Law. *See generally* Model Arbitration Law, *supra* note 283; Born, *Associate*, *supra*, at 22.

293. *See* New York Convention, *supra* note 279, art. V; KURKELA & TURUNEN, *supra* note 6, at 10.

294. *See* New York Convention, *supra* note 279, art. V; Born, *Associate*, *supra* note 292, at 21. The content of the various due process provisions are discussed in more detail below. *See infra* notes 330–53 and accompanying text.

295. *See* UNCITRAL, *Dissemination of Decisions Concerning UNCITRAL Legal Texts and Uniform Interpretation of Such Texts: Note by Secretariat*, ¶¶ 8, 16, U.N. Doc. A/CN.9/267 (Feb. 21, 1985); STRONG, RESEARCH, *supra* note 263, at 72–88; ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 2–3 (1981); Pieter Sanders, *Foreword* to INT'L COUNCIL FOR COMMERCIAL ARBITRATION, ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION v, vi (2011); Barbara Steindl, *The Arbitration Procedure—The Development of Due Process Under the New York Convention*, AUSTRIAN ARB. Y.B. 255, 255–82 (2008). For example, UNCITRAL has compiled a database known as CLOUT (Case Law on UNCITRAL Texts), which contains judicial decisions from all over the world construing the Model Arbitration Law and the New York Convention. *See Case Law on UNCITRAL Texts (CLOUT)*, UNCITRAL, http://www.uncitral.org/uncitral/en/case_law.html (last visited Apr. 13, 2014); *see also* New York Convention, *supra* note 279; Model Arbitration Law, *supra* note 283; STRONG, RESEARCH, *supra* note 263, at 85–87 (discussing CLOUT). Other databases also exist. *See* 1958 NEW YORK CONVENTION GUIDE, http://newyorkconvention1958.org (last visited Apr. 8, 2014).

296. *See* New York Convention, *supra* note 279; Model Arbitration Law, *supra* note 283, Explanatory Note to 1985 version, paras. 47, 49; UNCITRAL, *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arb

Compilations of national court decisions concerning international commercial arbitration have been collected for over fifty years and provide an important insight into how judges interpret and apply mandatory principles of procedural law in the cross-border commercial context.[297] No similar collection exists with respect to the limits of procedural autonomy in civil litigation.[298]

Kurkela and Turunen suggest that information regarding the limits of procedural autonomy in international commercial arbitration can also be gleaned from "different kinds of soft law, institutional rules, other international conventions, model laws, human rights laws, and general procedural principles."[299] Indeed, some commentators believe that human rights instruments are more important than the New York Convention to the question of procedural rights, since the synallagmatic character of the New York Convention gives it a lesser stature than documents discussing universal human rights norms.[300]

Several international human rights instruments, including the United Nations Universal Declaration on Human Rights ("Universal Declaration"), the International Covenant on Civil and Political Rights ("ICCPR"), and the European Convention on Human Rights and Fundamental Freedoms ("European Convention"), apply to arbitration (albeit indirectly) and therefore could shed some light on questions relating to procedural

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itration_status.html (last visited Apr. 7, 2014) (including adherents to both versions of the Model Arbitration Law); BORN, ICA, *supra* note 3, at 115–21; STRONG, RESEARCH, *supra* note 263, at 85–87 (discussing CLOUT); Park, *supra* note 283, at 1243.

297. *See* New York Convention, *supra* note 279; Model Arbitration Law, *supra* note 283; STRONG, RESEARCH, *supra* note 263, at 85–87; VAN DEN BERG, *supra* note 295, 2–6; Sanders, *supra* note 295, at vi; Steindl, *supra* note 295, at 255–82.

298. Some comparative studies exist relating to procedural rights in criminal matters, and some commentators have suggested that useful comparisons can be made across the civil law-criminal law divide. *See* M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 253–92 (1993); Sklansky & Yeazell, *supra* note 249, at 684–85. However, no studies have actually applied this theory in the international commercial context.

299. KURKELA & TURUNEN, *supra* note 6, at 10; *see also* RUTLEDGE, *supra* note 85, at 145–59.

300. *See* New York Convention, *supra* note 279; ALEKSANDAR JAKSIC, ARBITRATION AND HUMAN RIGHTS 88, 221–25 (2002).

autonomy.[301] However, these instruments are somewhat different from the New York Convention in that they primarily address litigation rather than arbitration,[302] thereby giving rise to the question of whether it would not be preferable to establish the limits of procedural autonomy in litigation by looking directly at these particular norms rather than proceeding indirectly through arbitration.

A direct approach would have some benefits, including the ability to offset the argument that the New York Convention's limits on procedural autonomy only apply to proceedings meant to recognize and enforce arbitral awards.[303] However, primary reliance on human rights instruments gives rise to a number of

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301. *See* European Convention on Human Rights, as amended by Protocols Nos. 11 and 14, art. 6, *opened for signature* Nov 4, 1950, E.T.S. No. 5 [hereinafter European Convention]; International Covenant on Civil and Political Rights art. 14, Dec. 19, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR]; Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 10, U.N. Doc. A/810 (Dec. 10, 1948), [hereinafter Universal Declaration]; JAKSIC, *supra* note 300, at 23–28, 85–88; Schultz, *supra* note 133, at 8 ("[A]rbitration can only be permitted . . . if some mechanism exists that ensures that the national arbitration framework is in conformity with the ECHR. Through such a mechanism, through its constraints on the national arbitration framework, the ECHR applies *indirectly* to, or more generally has a bearing on, arbitration."). Some commentators dispute that conclusion. *See* Adam Samuel, *Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights: An Anglo-Centric View*, 21 J. INT'L ARB. 413, 416–19, 426–27 (2004) (arguing that parties consenting to arbitration waive their rights under Article 6(1) of the ECHR); Schultz, *supra* note 133, at 7–8. A considerable amount of discussion has focused on the applicability of Article 6 of the European Convention to arbitration. *See* European Convention, *supra*, art. 6; KURKELA & TURUNEN, *supra* note 6, at 10; LEW ET AL., *supra* note 32, ¶¶ 5-57 to 5-67; Vasil Marmazov & P.V. Pushkar, *Is There a Right to Fair Settlement of a Case by Means of Arbitration, as Guaranteed by the European Convention on Human Rights?*, 2 L. UKR. 52, 52–64 (2001), *available at* http://eurolaw.org.ua/publications/ukrainian-journal-of-european-studies/5-2011/42-is-there-a-right-to-fair-settlement-of-a-case-by-means-of-arbitration-as-guaranteed-by-the-european-convention-on-human-rights.

302. *See* European Convention, *supra* note 301, art. 6; ICCPR, *supra* note 301, art. 14; Universal Declaration, *supra* note 301, art. 10; JAKSIC, *supra* note 300, at 23–28.

303. *See* JAKSIC, *supra* note 300, at 77, 176, 88. Of course, this argument can also be answered by the recognition that the due process norms applicable in international commercial arbitration reflect certain mandatory procedural principles that are consistent across national borders. *See infra* notes 338–42 and accompanying text.

practical problems. First, a number of these instruments are not directly applicable in domestic litigation[304] or are only applicable in a limited number of legal systems.[305] As a result, these instruments provide little assistance in determining whether and to what extent the various procedural principles are broadly recognized or reflected in domestic law.[306]

Second, most treaty language is relatively general in nature.[307] Although this is a problem shared by the New York Convention, there are very few judicial decisions construing human rights instruments' procedural protections in the civil litigation context. Those decisions that do exist are typically rendered by international tribunals of limited jurisdiction rather than by national courts.[308] Nowhere is there a global data-

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304. *See* JAKSIC, *supra* note 300, at 108–09, 112; David Sloss, *Legislating Human Rights: The Case for Federal Legislation to Facilitate Domestic Judicial Application of International Human Rights Treaties*, 35 FORDHAM INT'L L.J. 445, 446, 449–51 (2012).

305. For example, the European Convention is not applicable outside Europe. *See Convention for the Protection of Human Rights and Fundamental Freedoms, Status*, COUNCIL OF EUROPE, http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG (last visited Apr. 13, 2014).

306. Some limited analyses exist in the context of criminal procedure. *See* Bassiouni, *supra* note 298, at 292.

307. *See* European Convention, *supra* note 301, art. 6; ICCPR, *supra* note 301, art. 14; Universal Declaration, *supra* note 301, art. 10.

308. *See* New York Convention, *supra* note 279. Most litigation focuses on the meaning of Article 6(1) of the European Convention, which has been cited 19,650 times by the European Court of Human Rights. *See* European Convention, *supra* note 301, art. 6(1); CASE LAW DATABASE, EUROPEAN COURT OF HUMAN RIGHTS, http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (searching under "Article 6-1") (last visited Nov. 6, 2013). However, the United States is not a state party to the European Convention, so the jurisprudence arising out of the European Court of Human Rights is not applicable in the United States. *See* European Convention, *supra* note 301, art. 19; Council of Europe, *supra* note 305. Furthermore, although many of the due process provisions of the European Convention are the same or similar to other international instruments that have been signed by the United States (such as the Universal Declaration and the ICCPR), it is unlikely that U.S. courts would find the case law of the European Court of Human Rights persuasive. *See* European Convention, *supra* note 301; ICCPR, *supra* note 301; Universal Declaration, *supra* note 301; Oona A. Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 CORNELL L. REV. 239, 260, 319–20 (2013) (discussing U.S. adherence to, including conditions attached to, the Universal Declaration and the ICCPR); *see also* Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 86 (2005) (decrying use of foreign and inter-

base or collection of cases relating to how these principles are interpreted and applied by national courts in international commercial disputes. Therefore, human rights instruments provide useful insights into discussions relating to the limits of procedural autonomy, but cannot compete with the depth or breadth of analyses arising out of international commercial arbitration.

2. An International Customary Law of Procedure

Some commentators have described the extensive amount of information relating to due process and procedural fairness in international commercial arbitration as constituting a type of *lex specialis*.[309] While a *lex specialis* may be controlling in its own field, those norms typically have little or no applicability in other areas of law.[310] However, experience in other contexts suggests that it is possible for a *lex specialis* to grow beyond its original scope of application and take on the attributes of customary international law or to "interpret the terms of another, more general norm."[311] Furthermore, strict segregation of the relevant legal principles may be inappropriate or impracticable in cases where there is a particularly strong connection between two areas of law, as is the case between mandatory procedural norms in international commercial arbitration and international commercial litigation.[312] Therefore, it appears possible to use judicial and arbitral authorities describing procedural limits in international commercial arbitration as a means

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national law); Antonin Scalia, Commentary, *International Judicial Tribunals and the Courts of the Americas: A Comment with Emphasis on Human Rights Laws*, 40 ST. LOUIS U. L.J. 1119, 1122 (1996) (same).

309. *See* New York Convention, *supra* note 279; Model Arbitration Law, *supra* note 283; JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW 387–89, 410–11 (2003); Bachand, *supra* note 285, at 84.

310. *See* PAUWELYN, *supra* note 309, at 387–89, 410–11.

311. *Id.* at 410–11; *see also* Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 611 (2007); Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123, 129 (2003) ("[T]he BIT movement has moved beyond lex specialis (or better, *leges speciales*) to the level of customary law effective even for non-signatories."); Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 114–15 (2005).

312. *See supra* notes 264–74 and accompanying text.

of identifying a customary international law that also describes the limits of procedural autonomy in international commercial litigation.

The concept of a customary international law of procedure appears to have been first proposed by Professor Thomas Wälde when he suggested that various decisions of the European Court of Human Rights could be said to constitute a "customary international law of procedure."[313] In Wälde's view, principles relating to Article 6 of the European Convention on Human Rights should be considered to apply in investment arbitration by virtue of Article 52(1)(d) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention),[314] which discusses annulment of an investment award on the basis of a serious departure from a fundamental rule of procedure.[315] Notably,

313. Thomas W. Wälde, *Procedural Challenges in Investment Arbitration Under the Shadow of the Dual Role of the State; Asymmetries and Tribunals' Duty to Ensure, Pro-actively, the Equality of Arms*, 26 ARB. INT'L 3, 11 (2010); *see also* European Convention, *supra* note 301, art. 6. Wälde's point also raises the question of whether certain procedural practices should be considered to constitute a form of *jus cogens* that is applicable in both arbitration and litigation. *See* Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679; JAKSIC, *supra* note 300, at 35–43; MARTTI KOSKENNIEMI, INT'L LAW COMM'N STUDY GRP. ON FRAGMENTATION, FRAGMENTATION OF INTERNATIONAL LAW § 2.5.3, http://legal.un.org/ilc/sessions/55/fragmentation_outline.pdf; Anja Lindroos, *Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, 74 NORDIC J. INT'L L. 27, 28–29 (2005); Wälde, *supra*, at 10–11. At this point, the principle of *jus cogens* is still under development, and there are those who would claim that *jus cogens* refers only to substantive rights. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 510–12 (7th ed. 2008). However, other commentators have argued that certain procedural norms can and should be included within the concept of *jus cogens* because they arise as a matter of necessity to give effect to various substantive norms. *See* Sévrine Knuchel, *State Immunity and the Promise of Jus Cogens*, 9 NW. J. INT'L HUM. RTS. 149, 29–30 (2011). Thus, the notion of a type of "procedural *jus cogens*" is not outside the realm of possibility, although a discussion of that point is beyond the scope of the current Article.

314. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 52(1)(d), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]; Wälde, *supra* note 313, at 10–11.

315. *See* ICSID Convention, *supra* note 314, art. 52(1)(d); LEW ET AL., *supra* note 32, ¶ 28-104 (noting that the fundamental rules of procedure include "rules of natural justice such as the right to be heard, equal treatment of the parties and impartiality of the arbitrators"); Wälde, *supra* note 313, at 10–11.

the concept of a serious departure from a fundamental or mandatory rule of procedure is also implicitly recognized in Article V of the New York Convention.[316]

Wälde's hypothesis that the boundaries between arbitration and litigation are relatively fluid with respect to procedural fairness is consistent with the perspective advanced in this Article and by other courts and commentators.[317] However, Wälde's proposal began with judicial norms and moved to arbitration. The question is whether it is possible to make a similar leap from arbitration to litigation.

Such a move appears possible pursuant to a three-step analysis. First is the recognition, as enunciated by Professor Ian Brownlie, that "collections of municipal cases" are critical to the "assessment of the customary law."[318] The various compilations of domestic court decisions relating to international commercial arbitration would appear to qualify as "collections of municipal cases" within Brownlie's meaning.[319] This interpretation appears to apply even though the rights in question arise initially as a matter of international law, since the various principles are incorporated into national law and, in some cases, are even interpreted in light of domestic constitutional norms.[320]

Second, to be recognized as customary international law, a particular practice must be of sufficient duration, reflect a degree of uniformity and consistency, be of a general nature, and be accepted as law.[321] Although a detailed analysis of each of these four elements is beyond the scope of the current Article, the fundamental procedural norms recognized in the law relating to international commercial arbitration appear to meet

316. *See* New York Convention, *supra* note 279, art. V; *see also infra* notes 330–53 and accompanying text.

317. *See* ALI & UNIDROIT, *supra* note 10, at 17; Schultz, *supra* note 133, at 7–8 (discussing the 2001 decision of the Swiss Federal Tribunal in *Abel Xavier v. UEFA*).

318. BROWNLIE, *supra* note 313, at 52.

319. *Id.*; *see also* Bachand, *supra* note 285, at 84; Lowenfeld, *supra* note 311, at 129–30; Salacuse & Sullivan, *supra* note 311, at 114–15.

320. *See supra* notes 282–85 and accompanying text (discussing domestic application of international law). Although judges are supposed to interpret the various instruments in light of international legal principles, courts will sometimes consider core procedural protections in light of domestic constitutional norms. *See* Strong, *Due Process*, *supra* note 98, at 59–60.

321. *See* BROWNLIE, *supra* note 313, at 7–8.

each of these requirements.[322] For example, the procedural protections embodied in international commercial arbitration have been recognized since 1959, when the New York Convention came into force.[323] While the international arbitral community is continually striving to improve consistency of interpretation in national courts,[324] the various principles are currently construed in a relatively uniform manner and are recognized as binding.[325] Furthermore, the various norms are of a general nature, as discussed in more detail below.[326]

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322. *See id*. at 6–7 (discussing evidence of international custom); KURKELA & TURUNEN, *supra* note 6, at 10–11.

323. *See* New York Convention Status, *supra* note 279.

324. Although a number of these initiatives come from the private sector, public bodies such as UNCITRAL have also tried to promote consistency in the interpretation and application of various UNCITRAL texts on international commercial arbitration. Not only did UNCITRAL promulgate the Model Arbitration Law in order to increase the consistent application of the principles found in the New York Convention in jurisdictions around the world, it also adopted a formal recommendation concerning the interpretation of the form requirements found in the New York Convention and the application of national law to matters relating to the enforcement of foreign arbitral awards. *See* New York Convention, *supra* note 279, arts. II(2), VII(2); Model Arbitration Law, *supra* note 283; UNCITRAL, *Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. Doc. A/61/17; GAOR, 61st Sess., Supp. No. 17, Annex II (July 7, 2006); Park, *supra* note 283, at 1243; S.I. Strong, *What Constitutes an "Agreement in Writing" in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act*, 48 STAN. J. INT'L L. 47, 51 (2012). Judicial training efforts, including those by the Federal Judicial Center, the International Council for Commercial Arbitration (ICCA), and the Organization of American States (OAS), have also attempted to make international commercial arbitration more consistent. *See* STRONG, GUIDE, *supra* note 32; *New York Convention Roadshow*, ICCA, http://www.arbitration-icca.org/NY_Convention_Roadshow.html (last visited Apr. 7, 2014); *International Commercial Arbitration: Award Enforcement*, OAS, http://www.oas.org/en/sla/dil/international_commercial_arbitration.asp (last visited Apr. 13, 2014).

325. *See* BORN, ICA, *supra* note 3, at 5; S.I. Strong, *Beyond the Self-Execution Analysis: Rationalizing Constitutional, Treaty and Statutory Interpretation in International Commercial Arbitration*, 53 VA. J. INT'L L. 499, 525–27 (2013) [hereinafter Strong, *Beyond*] (discussing UNCITRAL studies on international consistency in international commercial arbitration). Some aspects of the New York Convention are directed specifically to national courts themselves. *See* New York Convention, *supra* note 279, art. II(3); Strong, *Beyond*, *supra*, at 519–20.

326. *See infra* notes 330–53 and accompanying text.

The third and final step requires norms that have been developed and recognized in the arbitral context to be transferred to the judicial realm. This, of course, is the most controversial aspect of this proposition. However, courts and commentators have suggested that litigation and arbitration operate as functional equivalents at a structural level,[327] which would suggest that it would be appropriate to extend those analogies into the substantive arena. Indeed, regardless of whether arbitration is framed as a substitute for or alternative to judicial proceedings,[328] individual parties would appear entitled to the same core procedural protections.

Notably, the emphasis in this discussion is on certain fundamental norms, since it is well-established that parties in arbitration surrender some types of procedural protections that would normally be available as a matter of domestic law.[329] Since the propriety of this final step can be better analyzed in context, the discussion continues with an analysis of the content of procedural fairness norms in international commercial arbitration.

3. Content of Procedural Fairness Norms in International Commercial Arbitration

Describing the content of the various norms of procedural fairness in international commercial arbitration is a relatively straightforward affair and begins with Article V of the New

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327. *See* Michaels, *supra* note 160, at 342, 357 (describing equivalence functionalism); *see also* Schultz, *supra* note 133, at 2 (noting "awards are recognised as equivalents to judgments").

328. *See* EDMONSON, *supra* note 234, § 1:1, at 1-3, § 1:3, at 1-8 to 1-9; Buys, *supra* note 234, at 93–94; Davis & Hershkoff, *supra* note 11, at 535–37; Mayer, *supra* note 234, at 26; Stempel, *supra* note 234, at 260; Sternlight, *supra* note 234, at 1673; S.I. Strong, *Discovery Under 28 U.S.C. §1782: Distinguishing International Commercial Arbitration and International Investment Arbitration*, 1 STAN. J. COMPLEX LITIG. 295, 348–49 (2013) (framing arbitration as a form of concurrent jurisdiction); Strong, *First Principles*, *supra* note 234, at 241–45.

329. *See* Richard C. Reuben, *Process Purity and Innovation: A Response to Professors Stempel, Cole, and Drahozal*, 8 NEV. L.J. 271, 281–82 (2007) [hereinafter Reuben, *Process*] (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991), and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

York Convention.[330] That provision states in relevant regard that

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> . . .
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> . . .
>
> (d) The . . . arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place. . . .
>
> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> . . .
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.[331]

Thus, the New York Convention suggests that the procedure chosen by the parties may not violate fundamental norms in-

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330. *See* New York Convention, *supra* note 279, art. V. Article V also addresses the invalidity of the arbitration agreement or the incapacity of the parties, *see id.* art. V(1)(a); matters not falling within the scope of the arbitration agreement, *see id.* art. V(1)(c); appointment of the arbitral tribunal, *see id.* art. V(1)(d); awards that have not yet become binding or that have been set aside, *see id.* art. V(1)(e); and the non-arbitrability of the subject matter of the dispute, *see id.* art. V(2)(a). However, these matters are not procedural in the same way that the issues described in Articles V(1)(b), V(1)(d), and V(2)(b) are. *See id.* arts. V(1)(b), V(1)(d), and V(2)(b).

331. *Id.* art. V. The concepts reflected in Article V(1) "safeguard the parties against private injustice," whereas those found in Article V(2) "serve[] as an explicit catchall for the enforcement of a country's own vital interests." Park & Yanos, *supra* note 279, at 259. Sometimes matters of procedural fairness are discussed under Article V(1) and sometimes they are elevated to Article V(2)(b), which allows application of the public policy of the forum state, albeit through an international lens. *See* New York Convention, *supra* note 279, art. V; Strong, *Due Process*, *supra* note 98, at 59–60.

volving proper notice, presentation of one's case, or public policy.[332] The Convention also recognizes that states may include certain additional procedural safeguards in their arbitration laws,[333] although the parties may contract out of those provisions.[334]

These provisions have been construed on numerous occasions by courts from around the world, and the decisions have been collected in various databases and yearbooks.[335] Scholars and arbitrators have also played an active role in identifying the boundaries of procedural fairness in arbitration.[336] The depth and breadth of case law, arbitral awards, and commentary in this field prohibit a comprehensive independent analysis of the underlying principles in the current Article.[337] However, the discussion does not need to be very detailed in order to make the necessary points.

Commentators agree that the concept of due process in international arbitration "refers to a number of notions with varying

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332. *See* New York Convention, *supra* note 279, art. V. Other aspects of arbitral law indicate that parties are entitled to a tribunal that is impartial, independent, and neutral, although those principles are not specifically mentioned in the New York Convention. *See id.*; BORN, ICA, *supra* note 3, at 1494–1507; Andrews, *supra* note 182; *see also supra* notes 235, 266 and accompanying text.

333. Arbitration laws are not the same as rules of civil procedure. *See* STRONG, GUIDE, *supra* note 32, at 14. National rules of civil procedure do not apply in arbitration, unless the parties have an explicit agreement to that effect. *See* InterCarbon Berm., Ltd. v. Caltex Trading & Transp. Corp., 146 F.R.D. 64, 72 (S.D.N.Y. 1993).

334. *See* New York Convention, *supra* note 279, art. V(1)(d). For example, parties may contract out of the right to obtain judicial review of the merits of an arbitral award under the English Arbitration Act 1996. *See* Arbitration Act, 1996, c. 23, § 69 (Eng.).

335. *See* New York Convention, *supra* note 279, art. V; *see also supra* note 295 and accompanying text. National courts have also construed similar provisions under the Model Arbitration Law. *See* Model Arbitration Law, *supra* note 283; *see also supra* note 295 and accompanying text.

336. Scholarly commentary holds a particular place of prestige in international commercial arbitration due to civil law influences and the private nature of the arbitral procedure. *See* Strong, *Sources*, *supra* note 271, at 150–51. Arbitral awards are also an excellent source of information about the procedures used in arbitration. *See id.* at 142–43.

337. Entire books have been devoted to the subject of due process in international commercial arbitration. *See* KURKELA & TURUNEN, *supra* note 6; *see also* JAKSIC, *supra* note 300, at 227–44; PETROCHILOS, *supra* note 263, ¶¶ 4.85–4.94; *see also* Steindl, *supra* note 295, at 255–82.

names under different national laws, including natural justice, procedural fairness, the right or opportunity to be heard, the so-called *principle de la contradiction* and equal treatment."[338] This principle "is often understood as a 'hard' rule of law, a kind of a core or foundation of all other procedural rules, the violation or disregard of which will lead to unenforceability of the award or decision given."[339] "In many national laws this core is described as *ordre public* or public policy."[340]

These principles are considered fundamental or mandatory in nature.[341] Thus,

> [t]he parties cannot . . . waive the irreducible core of procedural guarantees, such as the right to an independent and impartial court, the right to a fair trial and the due process of law which are sine qua non for liberty, dignity, justice and primarily for the maintenance of the precedence of the rule of law principle.[342]

The non-waivable nature of these concepts suggests that they are as applicable in litigation as they are in arbitration.

Although the content of these norms is extremely consistent at its core, the arbitral regime tolerates a certain amount of diversity in how these principles are protected.[343] Variations arise as a result of the autonomy exercised by the parties in their arbitration agreements and choice of institutional rules of procedure, as well as through default provisions contained in

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338. Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313, 1321 (2003) (citations omitted).

339. MATTI S. KURKELA & HANNES SNELLMAN, DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION 1 (2005).

340. *Id.* at 4.

341. However, it is not clear whether the rights are always constitutional in nature. *See id.*; KURKELA & TURUNEN, *supra* note 6, at 10; Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1203 (2009) (discussing subconstitutional nature of certain public policies); Stephen M. Schwebel & Susan G. Lahne, *Public Policy and Arbitral Procedure*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION, VIII ICCA CONG. SER. (1986 New York) 205, 209 (Pieter Sanders ed., 1986) (discussing public policy's constituent elements); James Y. Stern, Note, *Choice of Law, the Constitution, and Lochner*, 94 VA. L. REV. 1509, 1524 (2008) (noting public policy exceptions to enforcement of foreign judgments have at times been framed as subconstitutional in nature).

342. JAKSIC, *supra* note 300, at 218.

343. *See* Schultz, *supra* note 133, at 9.

the relevant national arbitration law.[344] Arbitral tribunals also retain a great deal of discretion to adopt procedures that are tailored to the dispute at hand.[345]

Although international commercial arbitration permits a significant amount of procedural diversity, parties seldom operate outside of certain relatively well-established parameters.[346] Much of the procedural standardization in arbitration arises as a result of the widespread use of institutional rules of procedure, which are similar in most regards and which harmonize some of the key differences between common law and civil law legal systems.[347] Thus, international arbitral proceedings typically feature certain common law elements (such as cross-examination of witnesses, limited exchange of documents between the parties, and a single evidentiary hearing) as well as various civil law features (such as the use of adverse inferences and early submission of documentary evidence).[348]

Some commentators have suggested that international commercial arbitration differs from litigation because parties in arbitration can select certain procedures, such as documents-only or fast-track arbitration, that are not generally available in court.[349] However, judicial analogues can be found for most, if not all, of these purportedly unique arbitral mechanisms. For example, some jurisdictions have created "rocket dockets" that simulate fast-track arbitration.[350] Other courts allow litigation to proceed on a documents-only basis if the parties consent to such procedures.[351] As a result, the differences between arbi-

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344. *See* BORN, ICA, *supra* note 3, at 1785–94; LEW ET AL., *supra* note 32, ¶¶ 21-5 to 21-18.

345. *See* LEW ET AL., *supra* note 32, ¶¶ 21-12 to 21-13. Though potentially broad, arbitral discretion is largely circumscribed in practice by party agreement as well as by the norms and principles described in various treatises, rules, and arbitral awards, and therefore is not completely unbounded. *See* STRONG, GUIDE, *supra* note 32, at 19.

346. *See* O'Connor & Drahozal, *supra* note 9.

347. *See* BORN, ICA, *supra* note 3, at 1785–92; LEW ET AL., *supra* note 32, ¶¶ 21-33 to 21-39; O'Connor & Drahozal, *supra* note 9.

348. *See* BORN, ICA, *supra* note 3, at 1785–92.

349. *See id.* at 1232 n.442; *see also* Schultz, *supra* note 133, at 6–7 (discussing expedited arbitration).

350. *See* Carrie E. Johnson, *Rocket Dockets*: *Reducing Delay in Federal Civil Litigation*, 85 CAL. L. REV. 225, 233–37 (1997).

351. *See The Pennsylvania Tax Appeals Process and Suggested Reform*, 8 PITT. TAX REV. 5, 10 (2010); Daniel F. Solomon, *Summary of Administrative Law Judge Responsibilities*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 475, 476,

tration and litigation appear to be diminishing, at least in the cross-border commercial context.

Furthermore, the literature suggests that most forms of procedural autonomy in arbitration do not result in a violation of international due process norms, even when the parties have agreed to limit the use of certain types of procedures typically found in their home jurisdiction and adopt practices more routinely seen in other legal traditions.[352] This phenomenon suggests that procedural fairness can exist even in the midst of procedural diversity, a conclusion that is as relevant in international commercial litigation as in international commercial arbitration.[353]

4. Comparison of Arbitral and Constitutional Standards of Due Process

Some people might resist the notion that due process norms can be transferred from arbitration to litigation because arbitration is considered to constitute a form of "rough justice" that grants only minimal due process protections.[354] However, the idea that arbitration reflects a type of mandatory procedural minimum works to the benefit of the current analysis, since that principle can also be used to describe the outer bounds of procedural autonomy. The relevance of arbitral due process minimums to litigation is even more apparent given that the

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501 (2011) (discussing how parties in administrative disputes can waive their right to a hearing); *see also* Chevron Corp. v. Donziger, No. 11 Civ. 0691 (LAK), 2013 WL 5548913, *1–3 (S.D.N.Y. Oct. 7, 2013) (using witness statements instead of affirmative oral testimony, which is more often seen in international commercial arbitration than in litigation); CPR Economical Litigation Agreement, *supra* note 37, § 7.4 (waiving oral argument in many types of motion practice).

352. *See supra* notes 347–48 and accompanying text.

353. The same conclusions could be drawn from decisions relating to the recognition and enforcement of foreign judgments, which also look to broad principles of procedural fairness rather than similarities of particular procedural practices. *See* Strong, *Judgments*, *supra* note 14. However, analyses of these decisions can be extremely difficult because courts are considering more than procedural fairness. *See id.* (noting the role that reciprocity, public policy, and other issues play in decisions relating to foreign judgments). The relatively limited nature of procedural review in arbitration makes the analysis easier and more transparent. *See* BORN, ICA, *supra* note 3, at 2739.

354. *See* Reuben, *Process*, *supra* note 329, at 281–82 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991), and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

core, non-derogable norms that are considered to form a "'hard' rule of law" in international commercial arbitration bear a striking resemblance to certain basic constitutional principles of procedural fairness.[355]

Domestic standards of constitutional due process[356] have traditionally been considered inapplicable to arbitration because arbitration does not constitute state action *per se*.[357] Nevertheless, Professor Peter Rutledge has suggested that "constitutional principles have seeped into arbitration through other mechanisms," thereby establishing a *de facto* need for arbitration to comply with U.S. law regarding procedural due process.[358] This "seepage" occurs through a variety of means, including public policy provisions in various international treaties and national laws concerning international commercial arbitration.[359]

Professor Richard Reuben has also identified a connection between U.S. constitutional law and arbitration based on a theory of shared state action.[360] Although arbitration is technically a private form of dispute resolution, Reuben sees courts as becoming increasingly involved in overseeing, facilitating, and enforcing arbitration agreements.[361] Reuben believes this pub-

355. KURKELA & SNELLMAN, *supra* note 339, at 1.

356. *See* U.S. CONST. amend. V; Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (stating "'(d)ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances" and noting that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands" (citations omitted)); Fuentes v. Shevin, 407 U.S. 67, 80 (1972); Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 8–9 (2006). The discussion here will focus on U.S. law, although a comparative analysis of different jurisdictions would eventually be useful.

357. *See* RUTLEDGE, *supra* note 85, at 144–45. The one exception to this general proviso is court-annexed arbitration, which clearly constitutes state action. *See id.* at 131; *see also* Amy J. Schmitz, *Nonconsensual + Nonbinding = Nonsensical? Reconsidering Court-Connected Arbitration Programs*, 10 CARDOZO J. CONFLICT RESOL. 587, 603–06 (2009).

358. RUTLEDGE, *supra* note 85, at 145–59.

359. *Id.*

360. *See* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 956–58 (2000).

361. *See id.*

lic element is enough to trigger a duty to apply constitutional standards of procedural fairness in arbitration.[362]

These commentators' views have some notable support from Lord Neuberger, President of the Supreme Court of the United Kingdom, who recently stated that arbitrators have "a duty to act judicially" because they "are participating in the rule of law" when they are deciding cases.[363] Interestingly, this obligation is owed not only "to the parties to the arbitration, but . . . also . . . to the public."[364] While this principle has obvious structural implications,[365] it also carries important substantive ramifications, since it suggests that procedural practices in arbitration cannot drop below the minimum necessary for the rule of law.[366]

Regardless of whether one believes that constitutional principles must, or simply, may be applied in arbitration, it is nevertheless possible to consider whether and to what extent arbitral standards of due process are currently consistent with U.S. constitutional norms. For example, basic procedural norms in arbitration focus primarily on the opportunity to be heard (which includes notice), equality of arms, and use of an impartial adjudicator.[367] Interestingly, Professor Niki Kuckes has argued that

> the essential element of procedural due process [in the United States], as clearly established in civil settings, is that notice and a hearing must ordinarily precede any governmental dep-

362. *See id.*

363. Lord Neuberger, Address to Property Arbitrators at the ARBRIX Annual Conference, London (Nov. 12, 2013), http://www.supremecourt.gov.uk/docs/speech-131112.pdf.

364. *Id.*

365. For example, Lord Neuberger takes the view that arbitrators "are giving effect to the parties' contract in accordance with substantive and procedural legal principles," which contradicts assertions by certain commentators that arbitrators do not interpret and apply legal precedent. *Id.*; *see also* Bone, *supra* note 30, at 1386–88; *supra* notes 360–64 and accompanying text.

366. *See* Andrews, *supra* note 182; Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 7–9 (2008) (discussing procedural aspects of the rule of law); *see also* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997) (discussing four conceptions of the rule of law); *supra* note 266.

367. *See* Kaufmann-Kohler, *supra* note 338, at 1321–22; Strong, *Due Process*, *supra* note 98, at 53–75; Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1770 (2006).

> rivation of a liberty or property interest. . . . [I]t is useful to refer to the notice-and-hearing model as a "civil" model of due process because it is in civil settings that this test is clearly established as the single constitutional approach to procedural due process.[368]

This description not only provides a useful retrospective analysis of how U.S. courts have behaved in the past, it also suggests how courts might act in the future. For example,

> [w]hen a majority of Justices in *Hamdi* agreed on the core requirements of procedural due process, . . . they applied a classic civil formulation—the right to notice and an opportunity to be heard before an impartial adjudicator—as the correct constitutional approach to due process even for the executive detention of enemy combatants, a new and controversial civil setting.[369]

Hamdi therefore suggests that this basic standard of procedural fairness in civil litigation will be adopted in other types of novel circumstances, including, it is assumed, in cases involving individualized procedural contracts.[370] *Hamdi* also demonstrates a certain amount of consistency between judicial and arbitral standards relating to procedural due process, thereby suggesting that the corpus of authority concerning procedural fairness in international commercial arbitration may be relied upon to define procedural fairness in international commercial litigation.[371]

However, *Hamdi* is lacking in one notable regard.[372] Although arbitral standards of procedural fairness require equality of arms between the parties, *Hamdi* makes no mention of that particular principle.[373] This omission may simply be due to

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368. Kuckes, *supra* note 356, at 8–9 (footnotes omitted). Although notice appears to be a core element of due process in both litigation and arbitration, some authorities have suggested that parties may alter the means by which notice is given or even waive notice altogether. *See* Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 316 (1964); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 351 (1996) (discussing cognovit notes).

369. Kuckes, *supra* note 356, at 8–9 (footnotes omitted) (discussing Hamdi v. Rumsfeld, 542 U.S. 507 (2004)).

370. *See Hamdi*, 542 U.S. at 533.

371. *See id.*

372. *See id.*

373. *See id.*

the fact that *Hamdi* was more concerned with constitutional notions of procedural due process rather than equal protection *per se*.[374] However, this lacuna may also be attributed to the fact that the concept of "equality of arms" is better developed in international jurisprudence than in domestic U.S. case law.[375]

The international understanding of "equality of arms" is not precisely synonymous with equal protection under the U.S. Constitution.[376] For example, the notion of "equality of arms" involves "the fundamental principle that a party should be afforded a reasonable opportunity to present its case in conditions that do not place it at a substantial disadvantage vis-à-vis its adversary."[377] While U.S. equal protection analyses incorporate some of these principles, the primary emphasis in U.S. civil litigation is on ensuring access to the courts[378] rather than on addressing the kinds of procedural disadvantages that can arise when parties come from different legal systems.[379] Focusing on access makes sense in a domestic system where a trans-substantive and purportedly uniform code of procedure is assumed to assuage most, if not all, outcome-determinative disparities that could arise between parties.[380] However, cross-

374. *See* U.S. CONST. amend. XIV; *Hamdi*, 542 U.S. at 533; Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From* Brown *to* Miranda*,* Furman *and Beyond*, 54 VAND. L. REV. 359, 384 & n.128 (2001).

375. *See* Martha F. Davis, *Participation, Equality, and the Civil Right to Counsel: Lessons from Domestic and International Law*, 122 YALE L.J. 2260, 2264–65 (2013).

376. *See* U.S. CONST. amend. XIV.

377. Davis, *supra* note 375, at 2264–65.

378. *See* Helen Hershkoff, *Poverty Law and Civil Procedure: Rethinking the First-Year Course*, 34 FORDHAM URB. L.J. 1326, 1332–33 (2007). Many of these actions have been unavailing, even in cases arising under the Equal Protection Clause of the U.S. Constitution. *See* U.S. CONST. amend. XIV; Hershkoff, *supra*, at 1332–33. Equal protection claims also involve group identity, although some commentators have suggested that those injuries have "migrated" to the realm of due process. *See* Joseph Blocher, *Rights To and Not To*, 100 CALIF. L. REV. 761, 806 (2012).

379. For example, a number of procedural advantages can arise as a result of differences relating to the taking of evidence, preparation of witnesses, and evidentiary privileges. *See, e.g.*, Berger, *Privileges*, *supra* note 16, at 517–18 (discussing evidentiary privileges); Strong & Dries, *supra* note 248, at 311–12 (discussing the presentation of evidence); Wälde, *supra* note 313, at 17–36 (discussing cases involving state parties).

380. *See* Marcus, *Past*, *supra* note 76, at 374, 376–80 (discussing purposes of trans-substantivity and disconnect with uniformity).

border litigants experience different sorts of issues, and, as parties in international commercial arbitration have found, a more flexible approach may be necessary to address various substantive and structural imbalances that arise.[381] Indeed, "[a]s transnational litigation continues to become the bread and butter for more and more lawyers, the absolute insistence on the application of the procedural law of the forum seems less and less justified without some form of a more complete choice of law analysis."[382]

Further discussion of the substantive validity of any particular procedural practice is beyond the scope of the current Article, since due process analyses cannot be conducted in the abstract.[383] However, courts appear entirely capable of addressing any concerns that might arise, either through contract-based challenges (such as those based on unconscionability)[384] or via the inherent power of the court.[385] Indeed, the process by which such rulings can be made is even easier in litigation than in

381. *See, e.g.*, Berger, *Privileges*, *supra* note 16, at 517–18; Strong & Dries, *supra* note 248, at 311–12; Wälde, *supra* note 313, at 17–36.

382. Anton, *supra* note 87, at 489; *see also* BORN, DRAFTING, *supra* note 2, at 1 (suggesting procedure can have an effect on the outcome of a dispute).

383. *See* JAKSIC, *supra* note 300, at 227 ("[T]he right to a fair hearing represents an independent procedural guarantee whose contents are open and is to be determined in each particular case."); *see also id.* at 230 ("[I]t is unlikely to expect that one could evaluate in abstracto the compliance of the arbitral process as a whole with the requirements of the right to a fair trial as laid down in Articles 6(1) of the EHRC and 14(1) of the Political Covenant respectively."). Future analyses might consider the concept of procedural fairness from a socio-psychological perspective. *See* Nancy A. Welsh et al., *Why Theory Matters in Investor-State Dispute Resolution Processes*, 42 WA. U. J.L. & POL'Y (forthcoming 2014).

384. This approach has been effective in eliminating procedural unfairness in domestic arbitration. *See* AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 1746 (2011); Rent-A-Center West, Inc. v. Jackson, 130 S.Ct. 2772, 2780–81 (2010). For example, it has been suggested that the concept of equality in litigation might be so fundamental that it cannot be contracted around as a matter of public policy. *See* Am. Airlines, Inc. v. Wolens, 513 U.S. 291, 249–50 (1995) (O'Connor, J., concurring in part and dissenting in part).

385. *See* Matter of Dunleavy, 769 P.2d 1271, 1272 (Nev. 1988) (noting inherent judicial powers include the "power to take actions reasonably necessary to administer justice efficiently, fairly, and economically"); Anclien, *supra* note 256, at 43.

arbitration, since the court has both initial and continuing jurisdiction over the parties.[386]

C. Interim Conclusions

The preceding section has explored the idea that international commercial arbitration can provide an appropriate and useful means of identifying the substantive limits of procedural autonomy in international commercial litigation. This hypothesis is based not only on the functional similarities between arbitration and litigation, but also on the fact that international commercial arbitration has a well-developed body of law describing certain mandatory procedural minimums from which the parties may not derogate. Since parties may not contract around these norms in arbitration, it is logical to conclude that parties in litigation would also be prohibited from altering these procedures.

The transferability of arbitral norms to litigation is also supported by a content-based analysis. Although the standards described herein are relatively general in nature, arbitral standards of due process appear very similar to domestic principles of constitutional due process. While it will eventually be necessary to conduct a more extensive analysis of other nations' fundamental procedural norms, one would expect the research to show a relatively high degree of consistency between the outer bounds of procedural autonomy in international commercial arbitration and the limits of autonomy in national and international litigation, since the standards that have been developed in international commercial arbitration have been generated by long-term comparative analyses of domestic and international law.

IV. LOGISTICAL CONCERNS

Although parties will need to consider carefully whether and to what extent a particular procedural practice is amenable to customization before entering into an agreement involving that issue, this Article takes the view that, generally speaking, procedural contracts are possible in international commercial dis-

386. Concerns about procedural fairness can arise at the beginning or end of an arbitration and can be heard by either a court or an arbitral tribunal, although courts always have the final say on such matters. *See* STRONG, GUIDE, *supra* note 32, at 37–41, 65–66, 73–85.

putes as both a structural and substantive matter. This conclusion should increase the number of procedural contracts that appear in practice, since some of the uncertainty about the enforceability of such contracts has now been eliminated.

However, the fact that procedural contracts appear enforceable as a general matter does not mean that parties should start drafting those sorts of provisions without any further concerns. Instead, parties need to consider a number of logistical issues before entering into an agreement purporting to alter the procedures used in a particular court.

A. Standalone Versus Embedded Agreements

Experience with arbitration agreements and forum selection clauses suggests that procedural agreements can either be incorporated into a larger transactional document or memorialized independently.[387] To some extent, parties' preference for a particular type of contract may be driven by various external factors, such as when the agreement is made.[388]

However, one issue that may arise in cases of embedded provisions is whether the procedural agreement survives allegations that the contract in which the procedural provision is found is invalid, illegal, void, or voidable. Such claims have not proven unduly problematic in situations involving forum selection clauses or arbitration agreements, but this is a matter that may need to be considered with respect to private procedural contracts.[389]

B. Pre-Dispute Versus Post-Dispute Agreements

Experience with arbitration agreements and forum selection clauses suggests that parties may be most likely to enter into a procedural agreement before the dispute arises, since tactical considerations (either real or perceived) may preclude an

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387. *See* COCA, *supra* note 22, art. 3(d); BORN, DRAFTING, *supra* note 2, at 37.

388. *See infra* notes 390–94 and accompanying text.

389. For example, the arbitral principle of separability ensures the continuing validity of an embedded arbitration agreement even if the larger contract is said to be invalid, illegal, or terminated. *See* BORN, DRAFTING, *supra* note 2, at 136. While this principle is likely applied to forum selection provisions as well, there is far less authority on that point. *See id.* However, COCA will resolve some of these issues once that instrument comes into force. *See* COCA, *supra* note 22, art. 3(d); *see also supra* note 22.

agreement on procedural matters once hostilities have begun.[390] However, pre-dispute agreements may not be suitable in all circumstances, either because the parties do not have a pre-existing contractual relationship or because of policy concerns about waiving or amending certain procedural rights prior to the time the dispute arises.[391]

A full analysis of potential policy issues is beyond the scope of the current Article. However, future inquiries might focus on the adequacy of information at the time of contracting and inequalities in bargaining power.[392] A number of these matters have been considered in the arbitral context,[393] and it is likely that courts will consider procedural contracts in a similar light.[394]

C. Customized Clauses Versus Model Agreements

Parties seeking to draft a private procedural agreement must also decide whether to create their own customized clause or rely on model language found elsewhere. Here, previous practice provides no clear guidance. For example, arbitration

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390. *See* Bone, *supra* note 30, at 1349; *see also* BORN, DRAFTING, *supra* note 2, at 37.

391. *See* RUTLEDGE, *supra* note 85, at 184–89; Davis & Hershkoff, *supra* note 11, at 527–29; Dodge, *supra* note 30, at 766; Kapeliuk & Klement, *Ex Ante*, *supra* note 30, at 1493–94 (noting public and private implications of timing decisions); *see supra* notes 186–90 and accompanying text.

392. *See* Davis & Hershkoff, *supra* note 11, at 527–29; Kapeliuk & Klement, *Ex Ante*, *supra* note 30, at 1493–94. Although many scholars focus on whether pre-dispute waivers are appropriate in situations where there is incomplete information, attention must also be paid to the possibility that post-dispute waivers could be deemed invalid as the result of judicial pressure. *See* Heenan v. Sobati, 96 Cal. App. 4th 995, 1003 n.5 (2002).

393. *See* RUTLEDGE, *supra* note 85, at 184–89. For example, some countries do not permit consumers to enter into pre-dispute arbitration agreements because of concerns about imbalances of power. *See* Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29; JONATHAN HILL, CROSS-BORDER CONSUMER CONTRACTS 206–07, 215 (2008); Llewellyn Joseph Gibbons, *Creating a Market for Justice; A Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due Process, and Fair Play in Online Consumer Arbitration*, 23 NW. J. INT'L L. & BUS. 1, 56 (2002).

394. *See* Hoffman, *supra* note 7, at 391, 412–13 (noting arbitration and litigation exhibit analytical similarities as well as dissimilarities). *But see* Kapeliuk & Klement, *Ex Ante*, *supra* note 30, at 1493–94 (discussing public implications).

agreements are typically based on well-known model clauses, since those provisions have been tested over time and are less likely to be found ambiguous or invalid.[395] In contrast, forum selection clauses are more likely to be drafted on an individual, case-by-case basis, although standard language also exists in this context.[396]

To some extent, the decision of whether to use a customized clause versus a model agreement may depend on the complexity of the procedure at issue. While it may seem counterintuitive to use a model agreement in more intricate situations, increased complexity often results in an increased opportunity for error.[397] Therefore, parties may be better served by using a preexisting model if they intend to alter a large number of procedural practices.

The choice between customized and model language may also depend on the amount of institutional support for a particular process. The widespread popularity of international commercial arbitration has led to the proliferation of model arbitration agreements drafted by arbitral organizations.[398] Parties therefore have a number of different models from which to choose.[399] Even though the same amount of institutional support does not yet exist for private procedural contracts, parties seeking guidance in the drafting process can nevertheless consult several different sources for ideas regarding useful language.[400]

1. CPR Model Civil Litigation Prenup

Parties seeking assistance in drafting a private procedural contract might begin by looking at the CPR Economical Litigation Agreement, more commonly referred to as the CPR Model Civil Litigation Prenup.[401] Although this agreement is extremely detailed, the focus is primarily on discovery issues, which has the happy consequence of avoiding many of the concerns relating to the core adjudicative duties of the court or possible interference with the relationship between the court and the

395. *See* BORN, DRAFTING, *supra* note 2, at 37–38; RUTLEDGE, *supra* note 85, at 200.
396. *See* BORN, DRAFTING, *supra* note 2, at 36.
397. *See id.* at 38.
398. *See id.* at 37–38.
399. *See id.*
400. *See* Noyes, *supra* note 27, at 640–45 (listing various alternatives).
401. *See* CPR Economical Litigation Agreement, *supra* note 37.

parties.[402] The agreement is specifically tailored to commercial disputes and includes various provisions that are sensitive to the particular demands of cross-border litigation, even though the agreement appears to contemplate a U.S. forum.[403]

The Model Civil Litigation Prenup has not yet been judicially considered, despite the respect with which CPR is held in the legal world and the relatively limited scope of the agreement suggest that courts may be inclined to uphold the provision.[404] Nevertheless, some commentators have argued that the discovery process includes some public elements, and it is possible that some courts may also adopt that perspective.[405]

CPR suggests that parties adopt the Model Civil Litigation Prenup by inserting certain standard language in their transactional document.[406] The provision may be amended by the parties, although such revisions should be made with caution, since they run the risk of creating an ambiguous or otherwise pathological clause.[407] CPR has attempted to avoid any questions about the separability of the Model Civil Litigation Prenup from the underlying contract by including language specifically indicating that the procedural agreement will survive claims relating to "the breach, termination or validity" of the substantive contract.[408]

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402. *See id.* §§ 9–12; *see supra* note 245 and accompanying text (noting discovery is perhaps the easiest procedure to alter). However, some problems could arise with respect to the timing of certain submissions, since some commentators have suggested that amendment of court dates could impermissibly infringe on the judge's role. *See* CPR Economical Litigation Agreement, *supra* note 37, § 5; Paulson, *supra* note 25, at 476.

403. The agreement's discussion of jury waivers, depositions, and the work product doctrine all suggest a U.S.-centric perspective, since those are all quintessential U.S. concerns. *See* CPR Economical Litigation Agreement, *supra* note 37, §§ 2, 11, 12.2.5. However, references to foreign privacy laws demonstrate a sensitivity to non-U.S. legal principles. *See id.* § 12.2.5 (discussing the European Union's Data Protection Directive).

404. *See* CPR Economical Litigation Agreement, *supra* note 37.

405. *See supra* notes 246–47 and accompanying text.

406. *See* CPR Economical Litigation Agreement, *supra* note 37.

407. *See id.*; BORN, DRAFTING, *supra* note 2, at 38.

408. CPR Economical Litigation Agreement, *supra* note 37; *see also* BORN, ICA, *supra* note 3, at 353–54 (discussing separability in the arbitral context).

2. The ALI/UNIDROIT Principles of Transnational Civil Procedure

As useful as the CPR Model Civil Litigation Prenup may be, it is largely limited to discovery concerns.[409] Parties seeking a more comprehensive procedural agreement may find inspiration in the ALI/UNIDROIT Principles of Transnational Civil Procedure or the affiliated Rules of Transnational Civil Procedure, which were compiled by the Reporters as a means of "providing greater detail and illustrating concrete fulfillment of the Principles."[410] Although no U.S. court appears to have considered either the Principles or the Rules in an actual litigation, the respect with which the ALI and UNDROIT are held worldwide might increase the likelihood that a court will enforce a procedural agreement based on the Principles or Rules.[411]

The ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure were specifically designed for use in international commercial disputes, which may make this framework particularly attractive to parties involved in cross-border transactions.[412] Potential litigants may also be drawn to the ALI and UNIDROIT approach because of its respect for the various substantive concerns discussed in this Article.[413]

As a general matter, the ALI/UNIDROIT Principles of Transnational Civil Procedure do an excellent job in protecting the core elements of procedural fairness discussed in this Article.[414] Thus, the parties' ability to present their case is guaranteed by provisions requiring "notice . . . by means that are reasonably likely to be effective" as well as language protecting "the right to submit relevant contentions of fact and law and to offer supporting evidence" and the ability to "have a fair oppor-

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409. *See* CPR Economical Litigation Agreement, *supra* note 37.

410. ALI & UNIDROIT, *supra* note 10, at 99. The Rules are meant "to be interpreted in accordance with the Principles of Transnational Civil Procedure and applied with consideration of the transnational nature of the dispute," thereby creating an "autonomous mode of interpretation, consistent with the principles and concepts by which they are guided." ALI & UNIDROIT, *supra* note 10, at 100.

411. *See id.* at xiii–xxii (listing reporters, advisers, and members of the various working and consultative groups); Glenn, *supra* note 21, at 490–91.

412. *See* ALI & UNIDROIT, *supra* note 10, at 16.

413. *See supra* notes 246–47 and accompanying text.

414. *See* ALI & UNIDROIT, *supra* note 10, at 20–24, 41.

tunity and reasonably adequate time to respond to contentions of fact and law and to evidence presented by another party, and to orders and suggestions made by the court."[415] Equality of arms is similarly protected by language requiring "equal treatment and reasonable opportunity for litigants to assert or defend their rights" and the "avoidance of any kind of illegitimate discrimination, particularly on the basis of nationality or residence."[416] Proceedings are also open to the public, except for good cause.[417]

However, some problems do exist. For example, the Principles are somewhat general, and it may be difficult for parties and courts to put the various concepts into practice.[418] Although the Rules were meant to provide more detail so as to allow parties to implement the Principles, the Rules were not meant to be comprehensive in nature, and some confusion may arise as to which procedures apply in any given situation.[419]

Other issues may arise at the structural level. For example, some aspects of the Principles and Rules could be interpreted as affecting public rather than purely private concerns.[420] While problematic elements could be excised from the parties' agreement, extensive alterations could very well create ambiguities that could result in an unenforceable agreement.

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415. *Id.* at 22–23.

416. *Id.* at 20–21.

417. *See id.* at 41–42.

418. *See id.*

419. *See id.* at 99–100; GARNETT, *supra* note 20, at 68–69.

420. A considerable amount of debate could arise as to what aspects of litigation relate only to the relationship between the parties. Some of the more promising provisions would likely involve the taking and presentation of evidence. *See* ALI & UNIDROIT, *supra* note 10, at 128–47. Rules relating to the constituent elements of the statement of claim (complaint) and statement of defense could be seen as either public or private in nature. *See id.* at 111–13. Although settlement offers are typically considered to be a private matter in the United States (with the exception of settlements of class actions, which require court approval), the ALI/UNIDROIT rule regarding settlement contains certain public elements. *See id.* at 117–20; *see also* FED. R. CIV. P. 23. Furthermore, provisions requiring a single concentrated hearing could run afoul of traditions developed in civil law systems, although civil law courts could consider those practices waivable. *See* ALI & UNIDROIT, *supra* note 10, at 144–46. Rules regarding the rescission and enforcement of a final judgment could also be seen as affecting issues of institutional design and the state sovereign prerogative. *See id.* at 152–55.

As a result, parties should only adopt the ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure with caution.[421] Courts are more likely to uphold individualized procedural contracts if those agreements do "not do violence to the interests of society and the judiciary,"[422] and it is not yet clear whether and to what extent the Principles and Rules focus only on matters of private concern.[423]

3. Partial Adoption of Another State's Procedural Rules

Another possibility for parties seeking to customize their litigation procedures involves the partial adoption of another state's procedural rules. Wholesale incorporation of a foreign state's procedural code would be impossible, since there is no way a forum court could or would allow foreign law to control structural matters involving judicial administration or the relationship between the court and the parties.[424] Furthermore, precedent from the world of international commercial arbitration suggests that the parties' decision to have a dispute heard in a particular venue should be given some weight, even in the face of language purporting to adopt foreign procedural law.[425] However, a judge may be willing to apply foreign procedural law to govern certain specific aspects of the relationship between the parties themselves.

Even a limited choice of foreign procedural law would be not be without controversy, since conflict of laws analyses currently "limit the scope of party autonomy to the chosen state's substantive law and exclude its procedural law."[426] However, the

421. *See* ALI & UNIDROIT, *supra* note 10; GARNETT, *supra* note 20, at 69.

422. Paulson, *supra* note 25, at 478.

423. *See* ALI & UNIDROIT, *supra* note 10.

424. BORN, DRAFTING, *supra* note 2, at 161.

425. *See* Union of India v. McDonnell Douglas Corp., [1993] 2 Lloyd's Rep. 48 (Q.B.D.) 50–51 (Eng.). The English court resolved the issue by allowing foreign procedural law to apply to "internal" aspects of the arbitral proceeding, while "external" matters (i.e., those involving the relationship between the arbitration and the courts) remained subject to the law of the arbitral seat. *See id.* This distinction between internal and external matters would also make sense in the litigation context, in that internal matters (i.e., those involving the parties *inter se*) could be made subject to a procedural contract while external matters (i.e., those involving judicial administration and the relationship between the parties and the court) could not.

426. SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS *29 (chapter 3.IV.E)

traditional conflict of law rule has caused numerous problems over the years, since "the line between substance and procedure is not drawn in the same way in all systems, nor is the line always clear in each system."[427] Statutes of limitations have been particularly troublesome for both courts and commentators, although other problems also exist.[428]

Interestingly, the Restatement (Second) of Conflict of Laws provides some support for partial adoption of foreign procedural law.[429] For example, the Restatement indicates that "[a] court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case" because "[e]normous 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 and costs."[430] This approach is adopted, at least in part, because "the burdens 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."[431]

Although the initial presumption is in favor of the procedural law of the forum court, the Restatement recognizes that many procedural practices "fall into a gray area between issues relating primarily to judicial administration and those concerned

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(forthcoming 2014); *see also* Regulation (EC) No. 593/208 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), art. 1(3), 2008 O.J. (L 177) 6; ALI & UNIDROIT, *supra* note 10.

427. SYMEONIDES, *supra* note 426, at *29 (chapter 3.IV.E).

428. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 & cmts. a, b (1971); COLLINS ET AL., *supra* note 1, ¶¶ 7-002 to 7-058; SYMEONIDES, *supra* note 426, at *29–30 (chapter 3.IV.E).

429. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971). While opponents to private procedural contracts may claim that the Restatement requires the law of the forum to govern various procedural issues (such as those involving questions of notice, pleading, etc.), those aspects of the Restatement can be interpreted as indicating that a private procedural contract relating to those matters should be upheld to the extent permitted by local law. *See id.* §§ 123–38.

430. *Id.* § 122 & cmt. a.

431. *Id.* However, as noted previously, procedure can sometimes affect the outcome of a dispute. *See supra* notes 86–87 and accompanying text.

primarily with the rights and liabilities of the parties."[432] When determining which law to apply, courts may consider a number of factors, including

> whether the issue is one to which the parties are likely to have given thought in the course of entering into the transaction. If they probably shaped their actions with reference to the local law of a certain state, this is a weighty reason for applying that law rather than the local law of the forum the plaintiff has chanced to select.[433]

Other relevant concerns may include public and private interests in making the dispute resolution process less expensive, less time-consuming, and less unpredictable.[434] As indicated in this Article, private procedural contracts can not only increase predictability in international commercial litigation,[435] they can also save expenditures by the parties and the court.[436] Therefore, private procedural contracts would appear to be consistent with the Restatement, particularly if the parties specifically chose to have certain principles of foreign procedural law apply.[437]

4. Partial Adoption of Arbitral Rules

Finally, some commentators have suggested that parties seeking to create an individualized procedural contract in litigation could simply adopt various rules of arbitration.[438] This is

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432. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 & cmt. a (1971).

433. *Id.*

434. *See supra* notes 48–95 and accompanying text (noting the U.S. Supreme Court's interest in avoiding unpredictability in international commercial transactions).

435. *See supra* notes 48–95 and accompanying text.

436. *See supra* notes 167–85 and accompanying text.

437. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 & cmt. a (1971).

438. *See* Noyes, *supra* note 27, at 642–44. Interestingly, the ALI/UNIDROIT Rules of Transnational Civil Procedure are in some ways both more and less detailed than arbitral rules of procedure. *See* ALI & UNIDROIT, *supra* note 10, at 100–56; *see* BORN, ICA, *supra* note 3, at 1753–55, 1782–85 (discussing general provisions of arbitral rules). The ALI/UNIDROIT Rules are more detailed in that they cover a wider range of issues and in a somewhat more comprehensive manner. For example, provisions regarding the taking and presentation of expert and fact evidence are far more detailed than many arbitral rules discussing the same subject. But the rules also lack the specificity of arbitral rules concerning, for example, the

an intriguing notion, particularly given the thesis advanced here that international commercial arbitration can provide useful insights into the outer boundaries of procedural autonomy in litigation.[439]

In many ways, arbitral rules of procedure would provide a useful starting point for parties, since most rule sets include detailed yet flexible provisions on various practical matters such as deadlines for written submissions, the use of fact and expert witnesses, etc.[440] Not only are these rules tailored to the particular needs of parties in international commercial disputes, they also feature a useful degree of procedural harmonization while complying with mandatory rules of due process and procedural fairness.[441]

However, arbitral rules do not provide a perfect fit for parties seeking to identify model language for procedural contracts. Not only are arbitral rules generally too long to be reproduced in their entirety in a transactional document,[442] they also include various structural provisions that would be inappropriate in a litigation context.[443] While the offending language could be omitted so as not to infringe on matters of public concern, parties would need to be careful not to create any ambiguities as a result.[444] Therefore, it appears as if parties should avoid adopting arbitral rules when attempting to create a procedural contract for use in court.

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various deadlines relating to the parties' submissions. *See* ALI & UNIDROIT, *supra* note 10, at 110–15, 139–47; BORN, ICA, *supra* note 3, at 1783.

439. *See infra* notes 264–89 and accompanying text.

440. *See* BORN, ICA, *supra* note 3, at 1783; LEW ET AL., *supra* note 32, ¶ 21-10.

441. *See* BORN, ICA, *supra* note 3, at 169–70, 1753–55; GAILLARD & SAVAGE, *supra* note 229, ¶ 1272; *see also supra* notes 330–86 and accompanying text.

442. *See* BORN, DRAFTING, *supra* note 2, at 38. Any attempt to incorporate these rules by reference could very well lead to arbitration rather than litigation, since the rules are generally not used to modify court proceedings. *See id.*

443. These provisions address the relationship between the arbitration and the court or between the parties, the tribunal, and/or the arbitral institution. *See* BORN, ICA, *supra* note 3, at 1753–55, 1782–85 (discussing general provisions of arbitral rules); STRONG, GUIDE, *supra* note 32, at 18–19.

444. *See* BORN, DRAFTING, *supra* note 2, at 38.

CONCLUSION

As the preceding discussion has shown, private procedural contracts give rise to a number of structural, substantive, and logistical concerns. However, none of the issues raised in this Article has suggested that parties are or should be considered incapable of altering some of the procedural rules used in court proceedings. To the contrary, it instead appears possible to allow procedural autonomy in some matters while nevertheless preserving important state interests in the administration of justice and the relationship between the courts and the parties.

Much of the analysis conducted herein has been very general in nature. As such, the discussion does not provide specific answers as to whether and to what extent particular procedural practices are amenable to private contract. However, it is hoped that the general methodology adopted herein demonstrates how courts, commentators, and counsel can identify the appropriate limits of procedural autonomy.

This Article has focused primarily on international commercial litigation because those matters typically involve a higher degree of procedural and substantive unpredictability due to the disparate backgrounds of the parties. However, many of the points made here are also applicable to domestic disputes. Indeed, one of the key authorities supporting procedural autonomy in litigation—*Delaware Coalition for Open Government v. Strine*—arose in the domestic context.[445]

There are numerous ways of analyzing private procedural contracts, and all of them—theoretical, practical, contractual, and procedural—have merit. However, this Article has taken the view that the best way to consider these matters is by differentiating between structural concerns, which affect public questions of institutional design, and substantive concerns, which focus on questions of individual liberty and procedural due process. Only by parsing through the underlying public and private interests can these issues truly be understood.

More work is undoubtedly needed in this area of law. For example, it would be useful to consider how structural analyses regarding the public and private aspects of litigation would play out in civil law jurisdictions. Similarly, it would be helpful to know whether the due process norms established in interna-

445. *See* Del. Coal. for Open Gov't v. Strine, 894 F. Supp. 2d 493 (D. Del. 2012), *aff'd*, 733 F.3d 510 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014).

tional commercial arbitration are consistent with minimum procedural protections in jurisdictions other than the United States. Both of these inquiries will help determine how acceptable private procedural contracts would be around the world and whether such contracts could or would ever replace international commercial arbitration as a realistic method of exercising procedural autonomy.

This Article has taken the view that private procedural contracts provide litigants with the means of structuring their business affairs in an orderly manner while simultaneously respecting issues of institutional design and due process. As a result, these sorts of agreements serve both public and private interests. Although courts and commentators still need to flesh out the precise boundaries of party autonomy on a procedure-by-procedure basis, that work should proceed secure in the understanding that the concept of procedural choice of law should be valued and protected as much as the notion of substantive choice of law.

PARTY AUTONOMY IN INTERNATIONAL CONTRACTS AND THE MULTIPLE WAYS OF SLICING THE APPLE

Symeon C. Symeonides[*]

INTRODUCTION

During the last fifty years, the notion that parties to a multistate contract should be allowed, within certain parameters and limitations, to agree in advance on which state's law will govern their contract (*party autonomy*) has acquired the status of a self-evident proposition, a truism. It has been characterized as "perhaps the most widely accepted private international rule of our time,"[1] a "fundamental right,"[2] and an

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Alex L. Parks Distinguished Professor of Law and Dean Emeritus, Willamette University College of Law; LL.B. (Priv. L.), LL.B. (Public L.), LL.M., S.J.D., LL.D.h.c., Ph.D.h.c.

1. Russell J. Weintraub, *Functional Developments in Choice of Law for Contracts*, 187 RECUEIL DES COURS 239, 271 (1984); *see also* Thomas M. de Boer, *Party Autonomy and Its Limitations in the Rome II Regulation*, 9 YBK.

"irresistible" principle[3] that belongs to "the common core of the legal systems."[4] Thus, in proverbial terms, party autonomy is like "motherhood and apple pie": virtually nobody is against it and most commentators enthusiastically endorse it. This Article offers a brief comparative description of the different ways in which legal systems slice the apple from which they make this pie.

Although party autonomy is an ancient principle, it did not receive widespread statutory sanction until the twentieth century.[5] In the early part of that century, the only two holdouts were the Bustamante Code in Latin America[6] and the first Restatement of Conflict of Laws in the United States. Although Joseph Story, the intellectual father of American conflicts law, endorsed party autonomy,[7] as did American transactional and judicial practice,[8] Joseph Beale, the drafter of the first Restatement, chose to ignore it because it did not fit into his territorialist scheme. In his view, giving contracting parties the freedom to agree on the applicable law would be tantamount to

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PRIV. INT'L L. 19, 19 (2008) ("Party autonomy is one of the leading principles of contemporary choice of law.").

2. Erik Jayme, *Identité culturelle et intégration: Le droit international privé postmoderne*, 251 RECUEIL DES COURS 147 (1995) (characterizing party autonomy as a fundamental right).

3. Alfred E. von Overbeck, *L'irrésistible extension de l'autonomie de la volonté en droit international privé*, *in* NOUVEAUX ITINÉRAIRES EN DROIT: HOMMAGE À FRANÇOIS RIGAUX 619 (1993).

4. Ole Lando, *The EEC Convention on the Law Applicable to Contractual Obligations*, 24 COM. MRKT. L. REV. 159, 169 (1987).

5. *See* SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS 112 (Oxford Univ. Press 2014) [hereinafter SYMEONIDES, CODIFYING CHOICE OF LAW].

6. *See* Convention on Private International Law (The Bustamonte Code), Feb. 20, 1928, 86 L.N.T.S. 111. The Bustamante Code was adopted without reservations by Cuba, Guatemala, Honduras, Nicaragua, Panama, and Peru, and with reservations by Bolivia, Brazil, Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Haiti, and Venezuela. For discussion, see JÜRGEN SAMTLEBEN, DERECHO INTERNACIONAL PRIVADO EN AMÉRICA LATINA, TEORÍA Y PRÁCTICA DEL CÓDIGO BUSTAMANTE (1983).

7. *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICTS OF LAWS § 293(b) (2d ed. 1841).

8. *See* Pritchard v. Norton, 106 U.S. 124 (1882); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 48 (1825); *see also* Andrews v. Pond, 38 U.S. (13 Pet.) 65, 78 (1839); Thompson v. Ketcham, 8 Johns. 189, 193 (N.Y. Sup. Ct. 1811).

giving them a license to legislate.[9] Instead, Beale proposed, and the first Restatement adopted, an absolute and unqualified *lex loci contractus* rule mandating the application of the law of the state in which the contract is made to *all* aspects of the contract.[10]

During the discussion of this rule at the 1928 meeting of the American Law Institute ("ALI"),[11] Beale had to admit that party autonomy (which was then known as the doctrine of the parties' intention) had been accepted by "a majority of the cases,"[12] but argued that its restatement would lead to uncertainty because it would often be difficult to ascertain the parties' intent. When asked about situations in which the parties clearly expressed their intent in the contract, he replied with answers that assumed that the parties were attempting to evade a fundamental policy of the *locus contractus*. When asked about situations in which no fundamental policy was involved, he replied that "the man is not yet born who is wise enough" to inventory all gradations of public policy.[13] The discussion was obviously hopeless.[14] Judge Edward R. Finch, an ALI member, presciently warned Beale:

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9. JOSEPH H. BEALE, TREATISE ON THE CONFLICTS OF LAWS 1080 (1935) ("[A]t their will . . . [parties] can free themselves from the power of the law which would otherwise apply to their acts."). In fairness to Beale, other American writers of that period, as well as Judge Learned Hand, took the same position against party autonomy. *See* Gerli & Co. v. Cunard S. S. Co., 48 F.2d 115, 117 (2d Cir. 1931); RALEIGH C. MINOR, CONFLICT OF LAWS OR PRIVATE INTERNATIONAL LAW 401–02 (1901); Ernest Lorenzen, *Validity and Effect of Contracts in the Conflict of Laws*, 30 YALE L.J. 655, 658 (1921). *But see* WALTER W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 389–432 (1942).

10. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 332 (1934).

11. For documentation of these discussions, see Symeon C. Symeonides, *The First Conflicts Restatement Through the Eyes of Old: As Bad as Its Reputation?*, 32 S. ILL. U. L.J. 39, 68–74 (2007) [hereinafter Symeonides, *The First Conflicts Restatement*].

12. Joseph H. Beale, *Discussion of Conflict of Law Tentative Draft No. 4*, 6 A.L.I. PROC. 454, 458 (1927–28).

13. *Id.* at 462 ("[T]he man is not yet born who is wise enough to say as to a foreign law whether the foreign law really is to be obeyed . . ., whether [its] provisions are matters of such interest to the state that passed them that they would be enforced or are not.").

14. For the reasons, see Symeonides, *The First Conflicts Restatement*, *supra* note 11, at 70–74.

> [Y]ou will never be able to hold your courts to that sort of a rule [i.e., the *lex loci contractus*]. You can lay it down, but human nature is not so constituted that you can make a court adopt a general rule which will do injustice in a majority of the cases coming with it.[15]

History proved Judge Finch right and Beale terribly wrong. Even before the American choice-of-law revolution,[16] which demolished Beale's Restatement, most courts chose to ignore his proscription of party autonomy.[17] Recognizing this reality, the Restatement (Second) of Conflict of Laws formally sanctioned party autonomy in the all-important Section 187,[18] which is followed today by the vast majority of American courts, including some courts that otherwise do not follow the Restatement (Second).[19]

Meanwhile, in the rest of the world, one choice-of-law codification after another recognized party autonomy, especially in the last fifty years. As a comprehensive study documents, all but two of the eighty-four codifications enacted during this period have assigned a prominent role to this principle in contract

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15. Beale, *supra* note 12, at 466.

16. For a documentation of this revolution, see SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE (2006).

17. *See* PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS 1086–87 (5th ed. 2012).

18. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). Section 187 provides in part:

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . ., unless either
>
> > (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
> >
> > (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of section 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Id.

19. *See* HAY, BORCHERS & SYMEONIDES, *supra* note 17, at 1088; Symeon C. Symeonides, *Party Autonomy in Rome I and II from a Comparative Perspective*, 28 NED. IPR 191, 192 (2010).

conflicts.[20] Indeed, many codifications and international conventions have also extended this principle beyond its birthplace, the field of contracts, to areas such as succession,[21] trusts,[22] matrimonial property,[23] property,[24] and even family law[25] and torts.[26] The latest instrument to strongly endorse

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20. *See* SYMEONIDES, CODIFYING CHOICE OF LAW, *supra* note 5, at 114–15, 149–51. The two codifications that have not adopted this principle are those of Ecuador and Paraguay, both of which were minor revisions of the Bustamante Code. *See* ECUADOR CIV. CODE arts. 15–17; PARAGUAYAN CIV. CODE arts. 23–24. At the time of this writing (January 2014), the Paraguayan Parliament was considering the adoption of the Hague Principles on Choice of Law for International Contracts of 2012 (see *infra* note 27), which strongly endorse party autonomy.

21. *See, e.g.*, Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons, art. 5, Aug. 1, 1985, 28 I.L.M. 150; Regulation 650/2012, of the European Parliament and of the Council of 4 July 2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession, art. 22, 2012 O.J. (L 201) 107 (EU); Albanian codif. art. 33.3; Azerbaijani codif. art. 29; Armenian codif. art. 1292; Belarusian codif. arts. 1133, 1135; Belgian codif. art. 79; Bulgarian codif. art. 89; Burkinabe codif. art. 1044; Czech codif. art. 77.4; Estonian codif. art. 25; Italian codif. art. 46; Kazakhstani codif. art. 1121; South Korean codif. art. 49; Kyrgyzstani codif. art. 1206; Liechtenstein codif. art. 29.3; Moldovan codif. art. 1624; Dutch codif. art. 145; Polish codif. art. 64.1; Puerto Rican draft codif. art. 48; Quebec codif. arts. 3098–99; Romanian codif. art. 68(1); Serbian draft codif. art. 104; Swiss codif. arts. 90(2), 91(2), 87(2), 95(2)(3); Tajikistani codif. arts. 1231-32; Ukrainian codif. art. 70; Uzbekistani codif. art. 1197.

Detailed citations to all choice-of-law codifications cited in this Article can be found in SYMEONIDES, CODIFYING CHOICE OF LAW, *supra* note 5, at 353–400. Hereinafter, these codifications are referred to with the country of origin and the abbreviation "codif.", regardless of their formal designation, such as an act, statute, decree, ordinance, etc., and regardless of whether they are free standing "codes" or statutes or whether they form part of another code, such as a civil code.

22. *See* Hague Convention on the Law Applicable to Trusts and on Their Recognition, art. 6, July 1, 1985, 23 I.L.M. 1389.

23. *See, e.g.*, Hague Convention on the Law Applicable to Matrimonial Property Regimes, art. 3, Mar. 14, 1978, 16 I.L.M. 14.

24. *See* PARTY AUTONOMY IN INTERNATIONAL PROPERTY LAW (Roel Westrik & Joroen Van Der Weide eds., 2011).

25. *See, e.g.*, Council Regulation 1259/2010, of 20 December 2010 Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation, art. 5, 2010 O.J. (L 343) 10 (EU); Protocol on the Law Applicable to Maintenance Obligations arts. 7-8, Nov. 23, 2007, http://www.hcch.net/upload/conventions/txt39en.pdf; Council Regulation

party autonomy is the Hague Principles on Choice of Law in International Contracts ("Hague Principles"), a soft-law instrument adopted by the Hague Conference on Private International Law in November 2012.[27]

I. PARAMETERS AND SCOPE OF PARTY AUTONOMY

Although virtually all modern legal systems espouse the principle of party autonomy, they often disagree in defining its exact parameters, scope, and limitations. For example, although most systems allow parties to choose the applicable law only in contracts that are international or multistate, some systems require that the state of the chosen law must possess a certain geographic or other relationship with the contract or the parties, while other systems have dispensed with this requirement entirely.[28]

The requirement for a geographic nexus to the chosen state is only one of several tools—indeed the least precise or effective—for "policing" party autonomy. To be sure, the very use of the word "policing" suggests that party autonomy is not unfettered. Indeed, it is not unfettered, and the reasons are the same as those for which legal systems restrict the domestic manifestation of the same principle, usually referred to as "freedom of contract." For example, in contracts involving presumptively weak parties, such as consumers or employees, "an unfettered freedom to choose a law may be a freedom to exploit a dominant position."[29] Consequently, most domestic laws "curtail

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4/2009, of 18 December 2008 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations, art.15, 2009 O.J. (L 7) 1, 9 (EC).

26. *See* Regulation 864/2007, of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), art. 14, 2007 O.J. (L 199) 40, 46 (EC).

27. *See* Draft Hague Principles as approved by the November 2012 Special Commission Meeting on Choice of Law in International Contracts and Recommendations for the Commentary, Nov. 12-16, 2012, *available at* http://www.hcch.net/upload/wop/contracts2012principles_e.pdf [hereinafter Hague Principles]. For an extensive discussion of the Hague Principles, see Symeon C. Symeonides, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments*, 61 AM. J. COMP. L. 873 (2013).

28. *See* SYMEONIDES, CODIFYING CHOICE OF LAW, *supra* note 5, at 116–20.

29. ADRIAN BRIGGS, AGREEMENTS ON JURISDICTION AND CHOICE OF LAW 37 (2008).

th[is] freedom,"[30] and this curtailment extends to the multistate arena. "The frameworks of private international law . . . are not subordinated to the private agreement of parties to litigation."[31]

Predictably, however, the various systems use different techniques for policing party autonomy, beginning with the way in which they delineate its permissible scope. For example, many systems narrow the scope of party autonomy by:

> (1) Excluding from it certain contracts, such as contracts conveying real rights in immovable property, consumer contracts, employment contracts, insurance contracts, and other contracts involving presumptively weak parties.[32]
>
> (2) Excluding certain contractual issues, such as capacity, consent, and form.[33]
>
> (3) Confining party autonomy to contractual, as opposed to non-contractual, issues;[34] or
>
> (4) Otherwise limiting what "law" the parties can choose, *i.e.*:
>
> > (a) Substantive, as opposed to procedural law,
> >
> > (b) Substantive or internal, as opposed to private international law, and
> >
> > (c) State law, as opposed to non-state norms.[35]

These variations in the scope of party autonomy have been discussed in detail elsewhere.[36] Besides these differences in scope, the various systems differ on the public policy limitations to which party autonomy is subject *within* its defined scope. These differences revolve around two analytically distinct but interdependent questions, which are discussed in the next two sections:

> (1) Which state's standards should be used as the measuring stick for determining the limits of party autonomy in multistate contracts, namely which state's law will perform the role of *lex limitativa*? and

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30. *Id.*
31. *Id.* at 13.
32. *See* SYMEONIDES, CODIFYING CHOICE OF LAW, *supra* note 5, at 125–29.
33. *See id.* at 129–36.
34. *See id.* at 136–37.
35. *See id.* at 137–46.
36. *See id.* at 129–46.

(2) Which threshold should be used in defining those limits?

II. DETERMINING THE *LEX LIMITATIVA*

As noted earlier, party autonomy is simply the external side of a domestic law principle of "freedom of contract," which allows contracting parties to derogate from all of the waivable rules (*jus dispositivum*), as opposed to the nonwaivable or mandatory rules (*jus cogens*) of that law, usually referred to as rules of public policy. In the domestic context, there is only one state whose public policy defines the limits of the parties' freedom of contract—the forum state. But in the multistate context, there are three states that are candidates for this role:

(1) The state whose law the parties have chosen;

(2) The state whose law would have been applicable if the parties had not chosen a law (hereinafter referred to as the "*lex causae*"); and

(3) The state whose courts are called upon to decide the case (i.e., the forum state, the law of which is hereinafter referred to as the "*lex fori*").[37]

Of the three candidates for the role of *lex limitativa*, the chosen state should be eliminated because it would lead to circular or bootstrapping results.[38] This leaves the states of the *lex fori* and the *lex causae*. The *lex fori* is relevant because party autonomy operates only to the extent that the *lex fori* is willing to permit through its choice-of-law rules. The *lex causae* is relevant because, when party autonomy operates, it displaces the *lex causae*.

When the application of the chosen law exceeds the public policy limitations of *both* the *lex fori* and the *lex causae*, the chosen law will not be applied.[39] Difficulties arise when the chosen law: (1) exceeds the limits of the *lex fori* but not the *lex*

37. In some cases, these three states, or any two of them, will coincide, or will impose the same limits on party autonomy. The following discussion focuses on cases in which these states, or their limits, do not coincide.

38. The term "bootstrapping" is a shorthand expression for the American colloquialism that "one cannot pull oneself over an obstacle by one's own bootstraps."

39. Conversely, when the application of the chosen law would not exceed the limitations of either the *lex fori* or the *lex causae*, the chosen law will be applied without problems.

causae, or (2) exceeds the limits of the *lex causae* but not the *lex fori*.

The positions of the various choice-of-law codifications on this issue can be clustered into three groups: (1) those that assign the role of *lex limitativa* to the *lex fori*; (2) those that assign the role of *lex limitativa* to the *lex causae*; and (3) those that follow a combination of the above two positions.

A. Lex Fori *Alone*

The majority of choice-of-law codifications assign the role of *lex limitativa* exclusively to the *lex fori*. This majority consists of: (1) all of the old or "traditional" codifications that recognize party autonomy; (2) nearly half (thirty-four out of seventy-two) of the codifications adopted in the last fifty years; and (3) three international conventions. These codifications do not impose a public policy limitation *specifically* addressing party autonomy in multistate contracts. Instead, they all contain a general public policy ("*ordre public*") reservation or exception not limited to contracts, which authorizes the court to refuse to apply a *foreign* law that is repugnant to the forum's public policy.[40] Some of those codifications[41] and two conventions[42] contain an additional, albeit partly overlapping, exception in favor of the "mandatory rules" of the *lex fori*.

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40. *See, e.g.,* the following codifications and the pertinent articles indicated in parentheses: Afghanistan (art. 35), Angola (art. 22), Algeria (art. 18), Burundi (art. 10), Cape Verde (art. 22), Central African Republic (art. 47), Chad (art. 72), Cuba (art. 21), East Timor (art. 21), Gabon (art. 30), Guatemala (art. 31), Guinea-Bissau (art. 22), Japan (art. 42), Jordan (art. 29), North Korea (arts. 5, 13), Liechtenstein (art. 6), Mexico (art. 12.V), Mongolia (art. 540.1), Mozambique (art. 22), Paraguay (art. 22), Qatar (art. 38), Rwanda (art. 8), Somalia (art. 28), United Arab Emirates (art. 27), Vietnam (art. 759.3), Yemen (art. 36).

41. See the following codifications and the pertinent articles indicated in parentheses: Armenia (arts. 1258, 1259), China (arts. 4, 5), FYROM (arts. 5, 14), South Korea (arts. 7, 10), Macau (arts. 20, 21), Moldova (arts. 1583, 1584), Taiwan (arts. 7, 8), and Venezuela (arts. 8, 10).

42. *See* Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, arts. 17, 18, Dec. 22, 1986, http://www.hcch.net/upload/conventions/txt31en.pdf; Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, arts. 11.1, 11.2, July 5, 2006, http://www.hcch.net/upload/conventions/txt36en.pdf.

B. Lex Causae *Alone*

American law takes the opposite position, reasoning that the only state that has a legitimate interest to allow or disallow the parties' choice is the state whose law would have been applicable in the absence of choice.[43] It is *that* state's law that the parties' choice would displace, and hence it is for that state to determine whether to allow such a displacement and to what extent. Private parties should not be allowed to evade the public policy of that state merely by choosing the law of another state. Consequently, American law assigns the role of *lex limitativa* to the *lex causae* rather than to the *lex fori* as such.[44] The Louisiana and Oregon codifications state this position in express statutory language, the Uniform Commercial Code ("U.C.C.") does so obliquely, and the Restatement (Second) does so in a blackletter section.

Article 3540 of the Louisiana codification provides that the law chosen by the parties applies, "except to the extent that that law contravenes the public policy of the state whose law would otherwise be applicable" in the absence of that choice.[45] The Oregon codification provides that the law chosen by the parties does not apply "to the extent that its application would . . . [c]ontravene an established fundamental policy embodied in the law that would otherwise govern the issue in dispute" in

43. The Peruvian codification may be following a similar position depending on how one interprets Article 2096. This article provides that "[t]he law declared applicable under Article 2095 determines the mandatory rules which are to be applied and the limits on the autonomy of the will of the parties." The quoted provision is ambiguous because Article 2095 provides for both the law chosen by the parties and the objectively applicable law. However, it seems more logical to assume that the phrase "declared applicable" refers to the objectively applicable law rather than the contractually chosen law. In addition, Article 2049 restates the *ordre public* exception, which operates in favor of the *lex fori*.

44. Article 29 of the Puerto Rico draft codification takes the unique position that the chosen law is applied unless it violates restrictions on party autonomy imposed by *both* the *lex fori* and the *lex causae*. For an explanation of the rationale of this provision by its drafter, see Symeon C. Symeonides, *Codifying Choice of Law for Contracts: The Puerto Rico Project*, *in* LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN 419, 422–24 (J. Nafziger & S. Symeonides eds., 2002).

45. LA. CIV. CODE art. 3540 (1992). For a discussion of this provision by its drafter, see Symeon C. Symeonides, *Private International Law Codification in a Mixed Jurisdiction: The Louisiana Experience*, 57 RABELSZ 460, 478, 497-99 (1993).

the absence of a choice-of-law clause.[46] Neither codification assigns an independent role to the *ordre public* of the *lex fori*.

The pertinent section of the U.C.C., Section 1-301, does not contain a public policy limitation, but it does restrict party autonomy through the limits of the *lex causae*. Subsection (c) of Section 1-301 lists several other sections of the U.C.C. and provides that, if any of those sections designates the state of the applicable law for the particular transaction, that law governs and "a contrary agreement is effective only to the extent permitted by the law so specified."[47] Thus, the "law so specified" as applicable to the particular transaction in the absence of party choice (i.e., the *lex causae*, rather than the *lex fori*) delineates the limits of party autonomy under the U.C.C. regime.

Finally, Section 187(2)(b) of the Restatement (Second), which is followed in most states of the United States, also provides that the state whose public policy may defeat the parties' choice of law is not the forum state *qua* forum, but rather the state whose law would, under Section 188, govern the particular issue if the parties had not made an effective choice (i.e., the *lex causae*).[48]

Unlike the Louisiana and Oregon codifications, the Restatement (Second) also assigns a residual, but highly exceptional, role to the public policy of the forum. Section 90 of the Restatement (Second), which is not limited to contracts, preserves the traditional *ordre public* exception of the *lex fori* as the last

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46. OR. REV. STAT. § 15.355 (2011). The same section also provides that the chosen law does not apply to the extent its application would "[r]equire a party to perform an act prohibited by the law of the state where the act is to be performed under the contract" or "[p]rohibit a party from performing an act required by the law of the state where it is to be performed under the contract." *Id.* For a discussion of these provisions, see Symeon C. Symeonides, *Oregon's Choice-of-Law Codification for Contract Conflicts: An Exegesis*, 44 WILLAMETTE L. REV. 205 (2007).

47. U.C.C. § 1-301(c) (2012). The listed sections are §§ 2-402 (sales of goods); 2A-105 and 2A-106 (leases); 4-102 (bank deposits and collections); 4A-507 (fund transfers); 5-116 (letters of credit); 6-103 (bulk transfers); 8-110 (investment securities); and 9-301 through 9-307 (secured transactions).

48. See the pertinent part of RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). In addition, the Restatement provides that the state of the *lex causae* must have "a materially greater interest" than the chosen state in the determination of the particular issue. *Id.* § 187(2)(b). In most cases, a conclusion that a state is the state of the *lex causae* is based, at least in large part, on a conclusion that that state has a "materially greater interest" in applying its law.

shield against entertaining "a foreign cause of action the enforcement of which is contrary to a *strong* public policy of the forum."[49] The accompanying Restatement comments explain that this exception should be employed only "rarely."[50] The comments quote Judge Cardozo's classic standard, according to which, the exception applies only when the foreign law "would violate some fundamental principle of justice, some prevalent conception of morals, some deep-seated tradition of the commonweal."[51] Importantly, the Restatement recognizes the difference between the two public policies, at least as one of degree, by stating that the public policy contemplated by Section 187 "need not be as strong as would be required to justify the forum in refusing to entertain suit upon a foreign cause of action under the rule of § 90."[52]

C. Intermediate Solutions and Combinations

In between the above extremes, one finds several combinations between the standards of the *lex fori* and those of another state, which may be either the state of the *lex causae* or a third state. The Rome Convention enunciated the most widely followed model of such a combination,[53] which the Rome I Regulation preserved with slight modifications. Under Rome I, the chosen law must remain within the limitations imposed by the *ordre public* and the "overriding mandatory provisions" of the *lex fori*.[54] However, in consumer and employment contracts, the chosen law must also remain within the limitations imposed by the "simple" mandatory rules of the *lex causae*.[55] And in all other contracts, the chosen law must remain within the limitations of the mandatory rules of the country in which "all other

49. *Id.* § 90 (emphasis added).

50. *Id.* § 90 cmt. c.

51. *Id.* (quoting Loucks v. Standard & Oil Co. of N.Y., 120 N.E. 198, 202 (N.Y. 1918)).

52. *Id.* § 187 cmt. g.

53. *See* Council Convention 80/934/ECC, on the Law Applicable to Contractual Obligations, arts. 3(3), 5(2), 6(1), 7, 16, 1980 O.J. (L 266) 1, 1–19 [hereinafter Rome Convention].

54. *See* Regulation on the Law Applicable to Contractual Obligations (Rome I) art. 21 (*ordre public)*; *see also id.* art. 9(2) ("overriding mandatory provisions" of the *lex fori*); *see also id.* art. 9(3) (allowing courts to "give effect" to the "overriding mandatory provisions" of the place of performance "in so far as" those provisions "render the performance of the contract unlawful").

55. *See id.* arts. 6(2), 8(1).

elements relevant to the situation" (other than the parties' choice) are located.[56]

Several national choice-of-law codifications outside the EU follow this model, at least to the extent that they protect consumers and employees through the mandatory rules of the *lex causae*.[57]

At least a dozen of the codifications that subject the chosen law to the limits of the *ordre public* and mandatory rules of the *lex fori* provide in addition that the court "may" apply or "take into account" the mandatory rules of a "third country" with which the situation has a "close connection."[58] It is safe to assume that the state of the *lex causae* would always qualify as a state that has a "close connection" because, *ex hypothesi*, it is the state whose law would have been applicable in the absence of a choice-of-law clause. This "close connection" will always render relevant the mandatory rules of the *lex causae*, but will not necessarily guarantee their application because the pertinent articles are phrased in discretionary terms.

The Mexico City Convention and the Hague Principles follow a variation of the above position. Article 18 of the Mexico City Convention reiterates the classic *ordre public* exception, while paragraph 1 of Article 11 preserves the application of the mandatory rules of the *lex fori*. Paragraph 2 of Article 11 provides that "[i]t shall be up to the forum to decide when it applies the

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56. *See id.* art. 3(3); *cf. id.* art. 3(4) (mandatory rules of EU law); *id.* art. 11(5) (mandatory rules of the *lex rei sitae*).

57. *See* the codifications of Albania (art. 52.2 (consumers only)); FYROM (arts. 24–25); Japan (arts. 11–12); South Korea (arts. 27–28); Liechtenstein (arts. 45, 48); Quebec (arts. 3117–18); Russia (art. 1212); Serbia (arts. 141–42); Switzerland (arts. 120–21); Turkey (arts. 26–27); Ukraine (art. 45).

58. *See* the codifications of Argentina (draft arts. 2599–2600); Azerbaijan (arts. 4–5, 24.4); Belarus (arts. 1099, 1100); Georgia (art. 35.3); Kazakhstan (arts. 1090, 1091); Kyrgyzstan (art. 1173, 1174); Quebec (arts. 3079, 3081); Russia (arts. 1192, 1193); Serbia (draft arts. 40.2, 144); Tajikistan (arts.1197–98); Tunisia (arts. 36, 38); Turkey (arts. 5, 6, 31); Ukraine (arts. 12, 14); Uruguay (arts. 5.1, 6.1–2); and Uzbekistan (arts. 1164, 1165); *see also* Hague Convention on the Law Applicable to Agency arts. 16, 17, Mar. 14, 1978, http://www.hcch.net/upload/conventions/txt27en.pdf [hereinafter Hague Agency Convention]. Article 9(3) of Rome I is similar to these articles except that it is limited to the state of performance. It allows courts to "give effect" to the "overriding mandatory provisions" of the place of performance "in so far as" those provisions "render the performance of the contract unlawful."

mandatory provisions of the law of another State with which the contract has close ties."[59]

Similarly, Article 11 of the Hague Principles restates the *ordre public* exception and preserves the application of the mandatory rules of the *lex fori*. The same article also provides that the *lex fori* determines when a court "may or must apply or take into account": (a) the overriding mandatory provisions of another law; or (b) the public policy of the state whose law would be applicable in the absence of a choice of law (*lex causae*).[60]

As the above description indicates, the codifications of the first two groups produce antithetical results in several patterns of cases. These differences have been discussed in detail in another publication, which also offers an assessment of the relative strengths and weaknesses of each of the three groups.[61]

III. THE THRESHOLDS FOR EMPLOYING THE LIMITATIONS TO PARTY AUTONOMY

Another disagreement among various systems is defining the threshold that the parties' choice must exceed before being held unenforceable. If any difference between the *lex limitativa* and the chosen law would defeat the parties' choice, then party autonomy would become a specious gift. As one court noted, "[t]he result would be that parties would have the right to choose the application of another state's law only when that state's law is identical to [the *lex causae*]. Such an approach would be ridiculous."[62]

Accepting the old distinction between *ordre public interne* and *ordre public international*, most systems agree on the need for a higher level or threshold of public policy for multistate contracts than for domestic contracts. This fine conceptual distinction suggests that courts should be more tolerant toward private volition in multistate contracts than in domestic contracts. But there is much less of a consensus in precisely defin-

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59. Inter-American Convention on the Law Applicable to International Contracts art. 11, Mar. 17, 1994, 33 I.L.M. 732 [hereinafter Mexico Convention].

60. Hague Principles, *supra* note 27, art. 11.

61. *See* Symeon C. Symeonides, *Party Autonomy and the* Lex Limitativa, 66 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL (forthcoming 2014).

62. Cherokee Pump & Equip. Inc. v. Aurora Pump, 38 F.3d 246, 252 (5th Cir. 1994).

ing this threshold and especially applying it in practice. Emphatic but actually unquantifiable adjectives such as "fundamental" public policy[63] or "overriding" mandatory rules[64] reflect some of those differences.

A. The Ordre Public *of the* Lex Fori

At least theoretically, the highest threshold is the one posed by the *ordre public* exception of the forum state, when properly applied. The international literature has developed a consensus, which is reflected in many recent codifications, that a proper application of this exception must be based on the following elements:

> (1) *Ordre public* in this context contemplates a strongly held public policy. Some codifications express this notion by referring to "fundamental principles,"[65] "fundamental values,"[66] "basic principles of social organization laid down by the Constitution,"[67] or "those principles of the social and governmental system of the [forum state] and its law, whose observance must be required without exception."[68]
>
> (2) *Ordre public* in this context refers to the "international" or "external" public policy rather than the forum's "internal" public policy. The idea is that multistate contracts are entitled to more tolerant treatment than domestic contracts. The codifications of Peru, Portugal, and Uruguay express this concept by specifically referring to the "international" public policy of the forum state,[69] the Quebec codification refers to *ordre public* "as understood in international relations,"[70] and the Tunisian and Romanian codifications refer to the *ordre public* "in the sense of private international law."[71]

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63. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971).

64. *See* Regulation on the Law Applicable to Contractual Obligations (Rome I), *supra* note 54 art. 9(2)–(3).

65. German codif. art. 6; Belarusian codif. art. 1099; Kyrgyzstani codif. 1173; North Korean codif. art. 13; Mexican codif. art. 15.1.II; Portuguese codif. art. 22; Ukrainian codif. art. 12; Uzbekistani codif. art. 1164.

66. Liechtenstein codif. art. 6; Tunisian codif. art. 36 ("fundamental choices"); Venezuelan codif. art. 8 ("essential principles").

67. Croatian codif. art. 4.

68. Slovak codif. art. 36.

69. Peruvian codif. art. 2079; Portuguese codif. art. 22; Uruguayan draft codif. art. 5.

70. Quebec codif. art. 3081.

71. Tunisian codif. art. 36; Romanian codif. art. 9.

> (3) What is to be compared is the "effect," "result," or "consequences" of the *application* of the chosen law in the particular case (rather than the chosen law in the abstract) with the public policy of the forum state.[72]
>
> (4) The application of the chosen law must produce a result that is clearly or "manifestly incompatible" with the forum's public policy.[73]

Deviating from this consensus, some codifications phrase the *ordre public* exception in terms that suggest a lower threshold. For example, the Chinese codification provides that if the application of a foreign law will "cause harm to the social and public interests of [China], the law of [China] shall be applied."[74] The codifications of Yemen and the United Arab Emir-

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72. Virtually all codifications contain words to this effect. *See, e.g.*, Polish codif. art. 7 ("A foreign law shall not be applied, if its application would lead to consequences that are incompatible with the public policy of the Republic of Poland."). See the following codifications and the pertinent articles indicated in parentheses for additional examples: Angola (art. 22), Armenia (art. 1258), Austria (art. 6), Belarus (art. 1099), Belgium (art. 21), Bulgaria (art. 45), Cape Verde (art. 22), Croatia (art. 4), East Timor (art. 21), Estonia (art. 7), FYROM (art. 5), Germany (art. 6), Guinea-Bissau (art. 22); Hungary (art. 7), Italy (art. 16), Japan (art. 42), Kazakhstan (art. 1090), South Korea (art. 10), Kyrgyzstan (art. 1173), Liechtenstein (art. 6), Lithuania (art. 1.11), Macau (art. 20), Mexico (art. 15.I.II), Moldova (art. 1583), Mozambique (art. 22), Netherlands (art. 6), Peru (art. 2049), Portugal (art. 22), Quebec (art. 3081), Serbia (art. draft. art. 39), Russia (art. 1193), Slovakia (art. 36), Slovenia (art. 5), Switzerland (art. 17), Taiwan (art. 8), Tajikistan (art. 1197.1); Ukraine (art. 12), Uruguay (art. 5), Uzbekistan (art. 1164), and Venezuela (art. 8). The Russian codification and the codifications bearing Russian influence state specifically that the refusal to apply the foreign law may not be based merely on the difference between the legal, political, or economic system of the two countries. *See* Russian codif. art. 1193; Armenian codif. art. 1258(2); Kazakhstani codif. art. 1090(2); Kyrgyzstani codif. art. 1173(2); Tajikistani codif. art. 1197.2; Ukrainian codif. art. 12(2); Uzbekistani codif. 1164.

73. The majority of codifications and conventions contain words to this effect. *See, e.g.*, Belgian codif. art. 21; Bulgarian codif. art. 21; Dutch codif. art. 6; South Korean codif. art. 10; Peruvian codif. art. 2079; Rome I, *supra* note 54, art. 21; Swiss codif. art. 17; Ukrainian codif. art. 12; Venezuelan art. 8; Mexico City Convention art. 18; Hague Agency Convention, *supra* note 58, art. 17; Hague Sales Convention, *supra* note 40, art. 18.

74. Chinese codif. art. 6. For a discussion of the Chinese codification, see Jieying Liang, *Statutory Restrictions on Party Autonomy in China's Private International Law of Contract: How Far Does the 2010 Codification Go?*, 8 J. PRIV. INT'L L. 77 (2012); Yongping Xiao & Weidi Long, *Contractual Party Autonomy in Chinese Private International Law*, 11 Y.B. PRIV. INT'L L. 193, 204-05 (2009).

ates provide that foreign law will not be applied if it is contrary to "Islamic law, public policy or good morals,"[75] while the Iranian codification provides that "private agreements concluded among parties are valid, if they are not against mandatory laws."[76]

B. The "Overriding" Mandatory Rules of the Lex Fori

Rome I distinguishes between "overriding" and "simple" mandatory rules. It defines the latter as rules that "cannot be derogated from by agreement,"[77] and the former as rules that the enacting state regards as "crucial . . . for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable."[78] Obviously, the two definitions contemplate a much higher threshold for applying the "overriding" than the "simple" mandatory rules.[79] Rome I ensures that the chosen law may not violate the overriding mandatory rules of the *lex fori* by providing that "[n]othing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum."[80]

Twenty-four codifications outside the EU and four conventions expressly authorize the application of the overriding mandatory rules of the forum state. Although these codifications do not use the word "overriding," they use phraseology that contemplates an equally high threshold as that of Rome I. They provide that these mandatory rules apply "directly"[81] and

75. Yemeni codif. art. 36; Emirati codif. art. 27.

76. Iranian codif. art. 10.

77. Rome I, *supra* note 54, arts. 3(3–4), 6(2), 8(1).

78. *Id.* art. 9(1). The "overriding" mandatory rules are also known as "internationally mandatory" or "super mandatory" rules, while the "simple" mandatory rules are sometimes referred to as "domestic" or "internal" mandatory rules.

79. *See id.* pmbl., para. 37 ("The concept of 'overriding mandatory provisions' should be distinguished from the expression 'provisions which cannot be derogated from by agreement' and should be construed more restrictively.").

80. *Id.* art. 9(2).

81. Chinese codif. art. 5.

"irrespective of,"[82] "regardless of,"[83] or "notwithstanding"[84] the law designated by the codification's choice-of-law rules, including the rules that allow a contractual choice of law.

Eighteen codifications outside the EU also authorize the application of the overriding mandatory rules of a "third" state that has a "close" (but not necessarily a closer or the closest) connection with the case.[85] In this context, the "third" state is a state other than the forum state or the chosen state. More likely, it will be the state of the *lex causae*, but it can also be another state, i.e., a fourth state. Although the overriding mandatory rules of that state must embody at least the same high level of public policy as those of the forum state, their application is not assured. While the forum's mandatory rules apply automatically, the application of foreign mandatory rules is always discretionary: the court "may" apply or "take into account" the mandatory rules of the third state after considering the "nature" and "purpose" of those rules and the "consequences of their application or non-application."[86]

C. The Public Policy of the Lex Causae

The few codifications that use the public policy of the *lex causae* as the gauge for policing party autonomy also contemplate a high-level policy. The Louisiana codification conveys this notion by referring to "strongly held" policies[87] of the *lex causae*, the Restatement (Second) uses the qualifier "funda-

82. Rome I, *supra* note 54, art. 9(1); Rome II, *supra* note 26, art. 16; Belgian codif. art. 20; Dutch codif. art. 7; FYROM codif. art. 14; Italian codif. art. 17, South Korean codif. art. 7; Swiss codif. art. 18.

83. Belarusian codif. art. 1100(1); Kyrgyzstani codif. art. 1174(1); Lithuanian codif. art. 1.11(2).

84. Bulgarian codif. art. 46(1); Venezuelan codif. art. 10; Mexico City Convention, art. 11.

85. *Cf.* Rome I, *supra* note 54, art. 9(3), which allows courts to "give effect" to the "overriding mandatory provisions" of the place of performance "in so far as" those provisions "render the performance of the contract unlawful."

86. Dutch codif. art. 7(3). Identical or similar language exists in all provisions under discussion here. Of course, consideration of the nature, purpose, and consequences of a rule is also necessary for determining whether a rule of the *lex fori* qualifies as a mandatory rule.

87. *See* LA. CIV. CODE art. 3540 cmt. f (1992) ("[O]nly strongly held beliefs of a particular state qualify for the characterization of 'public policy.'").

mental,"[88] and the Oregon codification speaks of an "established fundamental" policy.[89]

However, although the word "fundamental" suggests a fairly high threshold, the examples the Restatement provides about rules that embody a fundamental policy—statutes that make certain contracts illegal, and statutes intended to protect one party from "the oppressive use of superior bargaining power,"[90]—suggest a much lower threshold than that of the classic *ordre public*. The same is true of the Oregon codification, which defines a fundamental policy as a policy that "reflects objectives or gives effect to essential public or societal institutions beyond the allocation of rights and obligations of parties to a contract at issue."[91] Moreover, as noted earlier, the Restatement states that this public policy "need not be as strong" as that contemplated by the traditional *ordre public* exception.[92] Indeed, under the classic American test articulated by Judge Cardozo, the *ordre public* exception should be employed only in exceptional cases in which the applicable foreign law is "shocking" to the forum's sense of justice and fairness.[93]

D. The "Simple" Mandatory Rules

Finally, the lowest threshold for defeating party autonomy is that posed by the "simple" mandatory rules, namely rules that, in the words of Rome I, "cannot be derogated from by agreement." As noted earlier, Rome I employs this threshold in two categories of contracts:

> (a) Contracts in which "all other elements" other than the parties' choice are "located in a country other than the country whose law has been chosen."[94] In these contracts, the par-

88. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971).

89. OR. REV. STAT. § 15.355(1)(c) (2013).

90. RESTATEMENT (SECOND) § 187 cmt. g.

91. OR. REV. STAT. § 15.355(2) (2013)

92. RESTATEMENT (SECOND) § 187 cmt. g.

93. *See* Loucks v. Standard Oil Co. of N.Y., 120 N.E. 198, 201–02 (N.Y. 1918) (The foreign law must "offend our sense of justice or menace the public welfare," or "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal," or "shock our sense of justice.").

94. Rome I, *supra* note 54, art. 3(3); *see also id.* art. 3(4); Rome Convention, *supra* note 53, art. 3(3).

ties' choice "shall not prejudice" the simple mandatory rules of that other country.[95]

(b) Consumer or employment contracts in which the parties chose the law of a state other than the state of the *lex causae*. In these contracts, the parties' choice of another law may not deprive the consumer or the employee of the protection of the simple mandatory rules of the *lex causae*.[96]

Outside the EU, similar rules for consumer contracts are found in the codifications of about a dozen states.[97]

IV. MAKING THE PIE

This brief Article simply catalogues and describes the different ways in which various choice-of-law systems slice the party autonomy pie. As the Article documents, these systems answer differently the following key questions:

(a) Which contracts, if any, to exempt from the scope of party autonomy?

(b) Which contractual issues, if any, to exempt from the scope of party autonomy?

(c) Which state's standards to use for determining the limits of party autonomy (*lex limitativa*)? and

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95. Outside the EU, similar rules are found in the codifications of Albania (art. 45.4), South Korea (art.25.4), Quebec (art. 3111), and Serbia (draft art. 136.6).

96. *See* Rome I, *supra* note 54, arts. 6(2), 8(1). Article 11 of Rome I seems to contemplate an intermediate category between the simple mandatory rules of Articles 6 and 8 and the "overriding" mandatory rules of Article 9. Article 11 provides that in contracts, the subject matter of which is an in rem right in immovable property or a tenancy of immovable property, the parties' choice of non-situs law may not derogate from those rules of the situs state that mandate compliance with a particular form if those rules "are imposed . . . irrespective of the law governing the contract." *Id.*, art. 11.

97. See the codifications of Albania (art. 52.2), Russia (art. 1212), and Ukraine (art. 45), and for both consumer and employment contracts in the codifications of FYROM (arts. 24–25), Japan (arts. 11–12), South Korea (arts. 27–28), Liechtenstein (arts. 45, 48), Puerto Rico (arts. 5–36), Quebec (arts. 3117–18), Serbia (arts. 141–42), and Turkey (arts. 256–27). However, unlike Rome I, the Japanese codification provides that the consumer or employee is entitled to the protection of the mandatory rules of the *lex causae* only if he/she "expresses his/her will to [the other party] to the effect that such mandatory rules should apply." Japanese codif. arts. 11–12.

(d) How high should the threshold be for employing those limits?

The answers to the above questions form the basic ingredients with which various systems make the party autonomy pie. Obviously, the quality of the pie depends not only on these ingredients (e.g., in what dosages and combinations they are used), but also on other variable factors that have to do with the actual implementation. For example, a high public policy threshold usually implies a liberal regime. Nevertheless, a high threshold that is employed too frequently *in practice* will produce a restrictive regime. Conversely, although a low threshold normally suggests a restrictive regime, a low threshold that courts employ only rarely will produce a liberal regime.

Similarly, a system such as Rome I, and the codifications emulating the Rome Convention, that exempts consumer and employment contracts from the scope of party autonomy can afford to be, and is, more liberal in other contracts. Conversely, a system such as the Restatement (Second) that does not exempt any contracts from the scope of party autonomy appears to be too liberal toward party autonomy.[98] But, the Restatement mitigates that liberality by using a public policy threshold that is both lower and more readily deployable than the threshold for Rome I.

This Article does not purport to compare and assess the quality of the various party autonomy pies produced around the world; not because the author has no opinion[99] or because this is a matter of individual taste, but rather because a fair comparison is a complex undertaking that requires more time and space than is allotted to this Article.[100] One hopes, however, that by showing the many different ways of slicing the pie, this Article can contribute to a more nuanced assessment of the various party autonomy pies.

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98. Likewise, systems such as the Louisiana, Oregon, and Puerto Rico codifications, which exempt issues of capacity, consent, and formation from the scope of party autonomy, can be less circumspect about the parties' choice for other issues.

99. The author's positions are reflected in the codifications he has drafted. *See supra* notes 44–46.

100. For such a comparison and assessment, see SYMEONIDES, CODIFYING CHOICE OF LAW, *supra* note 5, 161–70.

ALL BARK AND NO BITE: HOW ATTORNEY FEE SHIFTING CAN SOLVE CHINA'S POOR ENFORCEMENT OF EMPLOYMENT REGULATIONS

INTRODUCTION

Starting in the late 1970s, China began a dramatic transformation of its labor system from one of guaranteed employment to one based on contract labor.[1] In response to this ongoing process of systematic change and the emergence of an enormous population of new laborers,[2] China has found itself in the challenging position of structuring an employment system that spurs economic growth without sacrificing employee rights and benefits. To address this issue, China has implemented a wave of employment regulations aimed at guaranteeing certain basic rights for workers. Starting with the Labor Law of 1995,[3] the Labor Contract Law of 2008[4] ("LCL"), the 2013 Amendments to the Labor Contract Law,[5] and the proposed Draft Labor Dispatch Regulations,[6] China has created a substantial

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1. Susan Leung, *China's Labor Contract System from Planned to Market Economy*, 3 J. L. ETHICS & INTELL. PROP. 1, 1-2 (2012).

2. LOREN BRANDT & THOMAS G. RAWSKI, CHINA'S GREAT ECONOMIC TRANSFORMATION 1 (2008).

3. Zhonghua Renmin Gongheguo Laodong Fa (中华人民共和国劳动法) [Labor Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995), *translation available at* http://www.acftu.org.cn/template/10002/file.jsp?cid=56&aid=31.

4. Laodong Hetong Fa (劳动合同法) [Labor Contract Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008), *translation available at* http://www.lehmanlaw.com/resource-centre/laws-and-regulations/labor/labor-contract-law-of-the-peoples-republic-of-china.html [hereinafter Labor Contract Law].

5. *See* Jeanette Yu, *Newly Amended PRC Labor Contract Law Imposing Stricter Control Over the Use of Seconded Employees*, LEXOLOGY (Jan. 14, 2013), http://www.lexology.com/library/detail.aspx?g=eec02e59-c329-4c77-aafb-4b4c19324c95.

6. *See* Jeffrey Wilson, *Comments on Draft Labor Dispatch Regulations Due by September 7*, INT'L LAB. & EMP'T L. COMM. NEWSL., Aug. 2013, *available at* http://www.americanbar.org/content/newsletter/groups/labor_law/int_newsletter/2013/aug2013/china.html.

foundation of mandated employment rights for Chinese workers.[7]

However, while the numerous adjustments to the labor contract system have dramatically increased employee rights, they have failed at enforcing such rights and ensuring these workers access to legal remedy. Due to both a lack of knowledge[8] and insufficient funds to spend on legal counsel, Chinese workers are often unaware or unable to access their statutory rights.[9] Therefore, a more prudent approach to the problems of Chinese workers would be to create programs to publicize employee rights and pass legislation that incentivizes Chinese attorneys to take LCL violation cases at little or no cost to the workers. To achieve these goals and provide adequate legal remedy to the Chinese workforce, China should implement both a modified attorney fee-shifting program that emphasizes merit-based awards as well as a poster notification system to increase knowledge of employment rights. The combination of these minor adjustments to China's labor contract system will increase employee knowledge of their statutory rights and create a powerful financial motivation for Chinese lawyers to represent employee plaintiffs.

This Note will address the development of the labor contract system in China as it transformed from a plan-based system to one built around labor contracts and will advocate for legislative changes to better ensure workers' access to their statutory rights. Part I will address the history of the labor contract system as well as the current problems faced by many Chinese laborers. Part II will provide background on the concept of attorney fee shifting, its use in American Civil Rights cases, and some of the problems the system has created for municipalities. Finally, Part III will suggest a modified version of attorney fee shifting and a poster notification system for use in China,

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7. *See* Vikas Bajaj, *Chinese Workers' Rights*, N.Y. TIMES TAKING NOTE (Feb. 8, 2013, 2:19 PM), http://takingnote.blogs.nytimes.com/2013/02/08/chinese-workers-rights.

8. *See* Aaron Halegua, Note, *Getting Paid: Processing the Labor Disputes of China's Migrant Workers*, 26 BERKELEY J. INT'L L. 254, 256 (2008)

9. *See* Xingni Liang, *Attorney Fee-Shifting and Labor Rights in China*, LABOR IS NOT A COMMODITY (Dec. 4, 2009), http://laborrightsblog.typepad.com/international_labor_right/2009/12/attorney-fee-shifting-and-labor-rights-in-china.html.

which will provide laborers with knowledge and access to the employment rights elicited in the Labor Contract Law as well as avoid some of the major burdens attorney fee shifting has created in the United States.

I. BACKGROUND

a. The Iron Rice Bowl: China's Plan-Based Economic Model

In October 1949, the People's Republic of China ("PRC") inherited a nation decimated by years of war and civil strife.[10] The repercussions of the Second Sino-Japanese War,[11] followed by the Chinese Civil War, had left China in a dire economic state and provided the newly established communist government with substantial obstacles.[12] As the PRC came into power, over 4.7 million people in urban areas were unemployed.[13] Furthermore, inflation resulting from the Chinese government's overproduction of currency led to heightened prices and threw many rural families into severe poverty.[14]

In an attempt to maintain social stability and build a successful economic system out of rubble, the PRC followed the footsteps of the Soviet Union and implemented a "plan-based" economic system.[15] Through this system, the PRC combined expansive state ownership of industry with central control over prices and production.[16] The purpose of such a centralized plan

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10. *See* Leung, *supra* note 1, at 2; *see also* BRANDT & RAWSKI, *supra* note 2, at 4.

11. *Sino-Japanese War*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/546188/Sino-Japanese-War (last visited Mar. 31, 2014).

12. *See* BRANDT & RAWSKI, *supra* note 2, at 4.

13. Leung, *supra* note 1, at 2.

14. Richard Ebeling, *The Great Chinese Inflation*, FREEMAN, Dec. 2004, at 2, 3. China experienced severe inflation throughout the 1940s after China "took the country off the silver standard, made its bank notes legal tender, and placed the country on a fiat currency with government in full control of the quantity of money." *Id.*

15. *See* BRANDT & RAWSKI, *supra* note 2, at 4.

16. *See* BRANDT & RAWSKI, *supra* note 2, at 4; *see also* Yiwen Fei, The Institutional Change in China after its Reform in 1979: An Institutional Analysis with a Focus on Mergers and Acquisitions (Nov. 18, 2004) (unpublished Ph.D. thesis, Erasmus University Rotterdam), *available at* http://repub.eur.nl/pub/6854/. China's centrally-planned economy determined prices by "administrative rather than market mechanisms and [allocated

was to "raise domestic saving . . . by extracting resources from the rural sector, and . . . channel[ing] these funds toward industrial growth."[17] However, to achieve such a goal, China needed to increase employment in both urban and rural areas of the country.[18] To this end, the PRC began a program of "government . . . job assignment through labor and education bureaus" in order to fill vacancies in state-owned enterprises and curb the massive unemployment rates throughout the urban sector.[19]

This system of employment soon became known as the "iron rice bowl,"[20] by which the government provided life-long employment and benefits for those assigned state-run positions.[21] Because these state-run positions remained solely in urban areas and were restricted to urban residents,[22] the PRC subsequently limited urban migration from rural areas of China through the Household Registration Regulations of 1958.[23]

The PRC used these laws to divide the population of China into two groups, urban and rural, based on a person's hometown at the time of the law's implementation.[24] Mobility between the two groups was highly uncommon and extremely

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resources] by central planners rather than by forces of supply and demand." *Id.* at 29. Furthermore, China emphasized state industry development and focused on the expansion of heavy industry at the sacrifice of agricultural development. *See id.*

17. BRANDT & RAWSKI, *supra* note 2, at 4.

18. *See* Leung, *supra* note 1, at 2.

19. *See id.*

20. *See* Jia Ching Chen, *From the Iron Rice Bowl to the Steel Cafeteria Tray*, *in* FACTORY TOWNS IN SOUTH CHINA 45 (Stefan Al ed., 2012), *available at* http://www.academia.edu/1897603/_From_the_Iron_Rice_Bowl_to_the_Steel_Cafeteria_Tray_in_Factory_Towns_in_South_China_edited_by_S._Al_2012_Hong_Kong_Hong_Kong_University_Press.

21. *See id.*; Fei, *supra* note 16. Fear that private organizations would be unwilling to reinvest profits in future government programs eventually led to the nationalization of private banking and industrial enterprises. With these enormous enterprises under state control and a government policy emphasizing industrial development, the number of "government jobs" expanded greatly. *Id.*

22. *See* Leung, *supra* note 1, at 2.

23. *Id.*; Kam Wing Chan, *Registration System and Migrant Labor in China: Notes on a Debate*, 36 POPULATION & DEV. REV. 357, 357-58 (2010).

24. Leung, *supra* note 1, at 2.

difficult.[25] Because only urban residents were entitled to government job assignment and its life-long employment guarantee,[26] the PRC used the housing registration system to avoid a complete abandonment of the rural sector.[27]

The results of the PRC's plan-based economic system were dramatic in the sectors affected[28] but, overall, failed to utilize the true potential of the Chinese workforce.[29] The PRC's economic model achieved moderate progress in the creation of human capital[30] and the introduction of new industries.[31] Specifically, mortality among both children and new mothers declined, school attendance and academic achievement of students increased, and new vehicle manufacturers and power plant industries began to develop.[32] However, these achievements were overshadowed by the tremendous failure to properly utilize China's massive working class.[33] A prime example of the inefficiency[34] and redundancy that plagued the PRC's system was the man-made famine of 1959, which killed over thirty million Chinese people.[35] Furthermore, the industries devel-

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25. Chan, *supra* note 23, at 358 ("Hukou conversion, referring to change from the rural to the urban category, was tightly controlled and permitted only under very limited conditions, usually when needed for the state's industrialization objectives.").

26. Leung, *supra* note 1, at 2.

27. *See id.*; Chan, *supra* note 23, at 358 (arguing that the registration system was intended to prevent "'undesirable' rural-to-urban migratory flows").

28. *See* BRANDT & RAWSKI, *supra* note 2, at 5.

29. *See* Fei, *supra* note 16, at 33.

30. *See* BRANDT & RAWSKI, *supra* note 2, at 5.

31. *See* Fei, *supra* note 16, at 25.

32. *See* BRANDT & RAWSKI, *supra* note 2, at 5.

33. *See id.* at 5-6.

34. *See* Fei, *supra* note 16, at 38-39. The Planned Economic System suffered primarily from two forms of inefficiency: allocative inefficiency and x-inefficiency. First, "because prices were determined in an administrative way instead of by the forces of supply and demand," consumer preferences had no influence on production. *Id.* at 38. Second, with infinite funds generated by the state, and specific production requirements, State-Owned Enterprises ("SOEs") had no fear of suffering a loss and would receive no reward for making a profit. Therefore, the SOEs held no incentive to maintain an efficient business structure. *Id.*

35. *See* BRANDT & RAWSKI, *supra* note 2, at 5; *see* Vaclav Smil, *China's Great Famine: 40 Years Later*, 319 BRIT. MED. J. 1619 (1999), *available at* http://www.bmj.com/content/319/7225/1619 (identifying one of the key origins of the famine as Mao Zedong's decision to focus state-run business efforts

oped under the system were plagued with overemployment, lack of innovation, and low labor morale.[36] The PRC system's deficiencies were exacerbated by the PRC's almost isolationist approach to the world economy,[37] which removed Chinese firms from the motivation of international competition and left them with the excessive costs of inefficient labor.[38] The PRC's economic plan had faltered and left the Chinese people, once again, in need of change.

b. Introduction of the Labor Contract System: The 1995 Labor Law

After the death of the first Chairman of the PRC, Mao Zedong, in 1976,[39] it became widely accepted that a systematic change of China's economy was necessary.[40] In an attempt to "restore the link between effort and reward" and jumpstart the stagnant and unmotivated Chinese workforce, China began to experiment with a labor contract system for small sectors of state-run enterprises and at the same time increased the nation's presence within the international market.[41] Beginning in 1978, labor contracts "were first tried out on joint ventures in Shenzhen and were given statutory recognition by the Provi-

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heavily in steel production instead of food production). The "Great Leap Forward," Mao Zedong's economic model to quickly establish China as an industrialized and internationally competitive state, mobilized Chinese workers around the primary goal of industrialization leading to severe neglect of Chinese agriculture and the food supply. William Harms, *China's Great Leap Forward*, UNIV. CHI. CHRON. (Mar. 14, 1996), http://chronicle.uchicago.edu/960314/china.shtml. Many Chinese peasants were pressured to build "backyard furnaces for iron and steel" and were often recruited away from their farms to work on government building projects. *Id.* This excessive emphasis on industrialization continued to the point where grain harvests were left in the fields to rot and millions of people began to die of starvation. *Id.*

36. *See* Leung, *supra* note 1, at 2; *see* BRANDT & RAWSKI, *supra* note 2, at 5-6.

37. *See* BRANDT & RAWSKI, *supra* note 2, at 6, 12.

38. *See id.* at 6.

39. *China Celebrates 120 Years Since Mao Zedong's Birth*, DEUTSCHE WELLE (Dec. 26, 2013), http://dw.de/p/1Ah3S.

40. *See* BRANDT & RAWSKI, *supra* note 2, at 8.

41. *Id.* at 9, 11.

sions for Labor Management in Sino-Foreign Joint Ventures of 1980."[42]

The success of these labor contract programs and the expansion into the international economy led to further implementation throughout the coastal regions of China[43] and eventually a national presence in the Labor Law of 1995. The Labor Law of 1995 was used to nationalize the labor contract approach and end the lingering socialist distinction between state-owned enterprises ("SOEs") and foreign-invested enterprises ("FIEs").[44]

The Labor Law of 1995 implemented contract law principles to all SOEs and FIEs demanding that all employers form labor contracts with their employees that explicitly spell out terms and conditions for employment and termination.[45] The Labor Law of 1995 was an innovative attempt to both motivate the Chinese workforce and guarantee certain employee rights.[46] The law emphasized new protections prohibiting discrimination and child labor, and guaranteed equal pay for equal work.[47] Additionally, labor contracts were required to contain descriptions of work duties, duration of employment, and grounds for termination.[48] The Labor Law of 1995 achieved great progress in improving employment mobility, which greatly decreased the redundant and inefficient use of human capital.[49] Furthermore, through defining rights and obligations within the employee-employer relationship, the Labor Law of 1995 succeeded in pinning down these responsibilities and sta-

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42. Leung, *supra* note 1, at 2. Early labor contract requirements can be found in the Equity Joint Venture Law of 1979 and the Cooperative Joint Venture Law of 1988, which held identical requirements that "the employment, dismissal, remuneration, welfare, labor protection and labor insurance of the staff members and workers of an equity joint venture shall be specified in contracts." *Id.* at 3.

43. *See id.* at 2-3.

44. *See id.* at 3. Prior to the Labor Law, SOEs, as distinct from foreign-invested enterprises ("FIEs"), retained much of the socialist ideology concerning lifetime job security, benefits, and assigned job placement. Even as narrower legislation in 1986 attempted to provide greater autonomy to SOE employees, as of 1993, only a quarter of all SOE employees held labor contracts. *Id.*

45. *See id.*

46. *See id.* at 3-4.

47. *Id.* at 6.

48. *See id.* at 3.

49. *Id.* at 2-4.

bilizing a chaotic system where employment conditions were often arbitrary.[50]

Despite the progressive steps the Chinese government took through implementing the Labor Law of 1995, the resulting privatization of many previously state-owned businesses and the abandonment of the job assignment programs led to a high unemployment rate, particularly among migrant workers.[51] By 2006, over 160 million workers had flooded from rural to urban areas in search of work, but without urban residential status, these workers were often treated as second-class citizens and discriminated against by employers.[52] In the same year, studies conducted by the Economic Intelligence Unit found that over 70% of migrant workers were employed unlawfully without contracts.[53] When contracts were signed, employers often utilized the availability of short-term contracts to prioritize enterprise flexibility over the development of their employees.[54] Employers began hiring employees for numerous short-term contracts in order to avoid labor costs associated with long-term employment.[55] Despite the government's intention to bring about stable, long-term contract positions, many employers provided contracts lasting for less than two years.[56] In order to adjust the Labor Law of 1995 to better deal with the modern issues facing Chinese employees, particularly migrant workers and fixed-employment contract employees, China enacted the Labor Contract Law of 2008.[57]

c. The Labor Contract Law of 2008

The Labor Contract Law of 2008 reiterated that all working relationships required written contracts.[58] The LCL heightened employment costs and increased penalties for employers that were caught hiring employees without written contracts.[59]

50. *Id.* at 3-5.
51. *See id.* at 7.
52. *Id.*
53. ANNE-MARIE KONTAKOS, THE EFFECT OF THE LABOR CONTRACT LAW ON HR IN CHINA 33, 35 (2007).
54. *See* Leung, *supra* note 1, at 6.
55. *See id.*
56. *Id.*
57. *See id.* at 8.
58. Labor Contract Law, *supra* note 4, art. 10.
59. *See id.*

Most notably, if an employer delayed writing a new employee's contract for too long, the LCL mandated that this employee would automatically receive an open-ended contract.[60]

Similar to the Labor Law of 1995, the LCL mandated that all employees be classified as either fixed-term or open-ended contract employees, but the LCL went a step further and contained new provisions to curb improper reliance on short-term contracts. Article 14 of the LCL specified the situations in which a fixed or short-term contract employee could automatically obtain an open-ended contract.[61] This substantial extension of the labor contract regulations was meant to limit the use of fixed-term contracts and encourage the use of long-term and open contracts.[62]

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60. *See* KONTAKOS, *supra* note 53, at 37.

61. *Id*. at 34. Article 14 of the LCL automatically transforms an employee's fixed-term contract into an open-ended contract when certain criteria are met. Specifically, a fixed-term contract will become open-ended when an employee wishes to renew or adjust the terms of a contract at the end of its term, the employer fails to request the new contract be of a fixed-term, and any of the following requirements are met.

> (1) The employee has been working for the Employer for ten (10) consecutive years;
> (2) When the Employer first introduces the labor contract system or the state-owned enterprise that employs him re-concludes its labor contracts as of restructuring, the employee has been working for the Employer for ten (10) consecutive years and is less than 10 years away from his legal retirement age; or
> (3) Where a labor contract was concluded as a fixed-term labor contract on two consecutive occasions and the employee, in the absence of any of the circumstances stipulated in Article 39 and items (1) and (2) of Article 40 of this law, renews such contract.
> If an Employer fails to conclude a written labor contract with an employee within one (1) year from the date the employee commences work, they shall be deemed to have entered into an open-ended labor contract.

Labor Contract Law, *supra* note 4, art. 14.

62. *See* Leung, *supra* note 1, at 8; Kungang Li, *Practice and Problems: The Fixed-Term Employment Contract in China*, *in* REGULATION OF FIXED-TERM EMPLOYMENT CONTRACTS: A COMPARATIVE OVERVIEW 127, 136 (Roger Blanpain, Hiroya Nakakubo & Takashi Araki eds., 2010). The expansive use of fixed-term employment in China has led to a number of labor issues for Chinese workers. *See* Leung, *supra* note 1, at 6. First, the scarcity of employment and the abundance of human resources in China have discouraged workers from reporting substantial employment rights violations. Li, *supra*,

Additionally, the LCL clarified parts of the Labor Law of 1995 concerning termination procedures, severance, and the use of dispatch workers.[63] The LCL placed heightened regulations on how employers could terminate fixed-contract employees.[64] As opposed to the unilateral "at-will" approach of the Labor Law of 1995, the LCL limited employee termination to two situations: termination for cause and termination as part of a "mass-layoff."[65]

Furthermore, the LCL attempted to maintain some of the benefits of the "iron rice bowl" system through the use of almost guaranteed severance. The LCL required employers to pay severance to an employee if a fixed contract expired and the employer failed to renew the contract, except where the employer had offered to renew employment under equal or better terms and the employee refused.[66] Further details are elicited in the LCL concerning when severance must be paid, but it is fair to say that in almost all foreseeable termination scenarios, severance would result.[67] The amount of severance to be paid is "set at one month's salary for each year of employment, up to a maximum of twelve years."[68]

To ensure that employers could not circumvent the LCL by hiring workers through a third-party employment agency in order to avoid the use of direct employment contracts, the LCL also included provisions concerning the use of dispatch workers, or employees hired by a dispatch agency but contracted to

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at 129. Fear that their employer would not renew their employment contract coupled with the expense of legal representation has led many workers to simply abide pervasive employee rights abuses. Leung, *supra* note 1, at 6. Second, without a promise of long-term employment, the Chinese workforce has become increasingly mobile. *Id.* at 5. This enhanced mobility and high employee transfer rate has made employers reluctant to invest in and train their workers, limiting their employees' professional growth. *Id.*

63. *See* KONTAKOS, *supra* note 53. Labor dispatch workers are temporary staff that are hired and officially contracted by a dispatch agency. They are then sent to various third-party "host employers" to work. Dexter Roberts, *Why China's Factories Are Turning to Temp Workers*, BLOOBERG BUSINESSWEEK (Mar. 8, 2012), http://www.businessweek.com/articles/2012-03-08/why-chinas-factories-are-turning-to-temp-workers.

64. *See* KONTAKOS, *supra* note 53, at 35.

65. *Id.*

66. *Id.*

67. *See id.* at 39.

68. *Id.*

work for a separate "host" employer.[69] First, to make sure foreign companies did not rely on foreign employment agencies, the LCL required all foreign company representatives to use dispatch agencies in China to hire any PRC nationals.[70] Second, the LCL encouraged employers to hire employees directly by describing dispatch employee positions as supplementary, replacement, or temporary.[71] Third, the LCL required dispatch agencies and dispatch employees to use, at a minimum, two-year employment agreements.[72] Procedures for termination of dispatch employees were also greatly limited,[73] and should an employee be terminated prior to the end of the employee's contract, the dispatch agency was required to pay the employee minimum wage for the remaining term of the contract.[74]

Finally, in an attempt to ease access to legal remedy, Article 30 of the LCL allowed all workers to "sue directly in court for unpaid wages without first going through [the previously required] labor arbitration process."[75] Article 94 of the LCL also clarified that host employers were jointly and severally liable for violations performed by a contracting agency or dispatch employer.[76]

While the Labor Contract Law of 2008 made substantial progress in terms of declaring certain contractual obligations and employee rights, the implementation and enforcement of such rights has not been as profound.[77] Although studies on the use

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69. *See id.* at 37.

70. *Id.*; BRYAN CAVE LLP, CHINA AMENDS LABOR CONTRACT LAW TO ELIMINATE LABOR DISPATCH ABUSE 1 (2013), *available at* www.bryancave.com/bulletins/Detail.aspx?pub=4137.

71. Labor Contract Law, *supra* note 4, art. 66.

72. Labor Contract Law, *supra* note 4, art. 58.

73. *See* KONTAKOS, *supra* note 53, at 35.

74. *See id.* at 37; Labor Contract Law, *supra* note 4, art. 93.

75. Xiaoying Li, *How Does China's New Labor Contract Law Affect Floating Workers?* 7 (Nat'l Bureau of Econ. Research, Working Paper No. 19254, 2011), *available at* http://www.law.harvard.edu/programs/lwp/papers/How%20Does%20China%27s%20New%20Labour%20Contract%20Law%20Affect%20Floating%20Workers%20in%20China%20_Xiaoying%20Li_.pdf.

76. Labor Contract Law, *supra* note 4, art. 94.

77. *See* JEFFREY BECKER & MANFRED ELFSTROM, THE IMPACT OF CHINA'S LABOR CONTRACT LAW ON WORKERS (2010), *available at* http://www.law.harvard.edu/programs/lwp/papers/How%20Does%20China's%

of labor contracts after the implementation of the LCL found an increased number of employees holding some form of a labor contract,[78] these contracts are still not as universal as the law demands and often omit provisions required under the LCL.[79] Furthermore, interviewed migrant employees have reported that employers often utilize hiring tricks to circumvent the requirements of the LCL.[80] Specifically, employers have used "English-language only contracts, blank or covered-over contracts," divided contracts with half pay in each, and six-day week assignments at 6.7 hours per day in an attempt to avoid potential overtime, wage discrepancies, and other violations of worker's rights under the LCL.[81] Dispatch workers have fared even worse as their suggested "supplemental" use has become increasingly popular. The LCL's ambiguous language describing the use of dispatch employees and the dire worldwide economic climate during the LCL's implementation led to excessive reliance on dispatch workers.[82] Employers have cited poor economic conditions as justification for layoffs in violation of the LCL and have fired employees simply to rehire them under less favorable contract provisions.[83] Despite the enhanced regulations of the LCL, years after its implementation the dispatch system has become "abnormally prosperous,"[84] and dispatch

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20New%20Labour%20Contract%20Law%20Affect%20Floating%20Workers%20in%20China%20_Xiaoying%20Li_.pdf.

78. *See id*. at 7; Li, *supra* note 75, at 12-16.

79. BECKER & ELFSTROM, *supra* note 77, at 7. Only 60% of surveyed workers had a contract at the time of their interview, and many interviewees complained that the contracts they did have lacked certain required provisions. *Id.*

80. *See id.* at 10.

81. *Id.* A study conducted by China's Ministry of Public Security reported that in 2005 alone, approximately 87,000 public protests occurred, many of them involving migrant workers, resulting from "unpaid wages, lost land rights and working conditions." KONTAKOS, *supra* note 53, at 34.

82. *Rights of 60 Million Labor Dispatch Workers Hard to Protect*, JINAN DAILY, Feb. 28, 2011, *available at* www.clntranslations.org/file_download/140.

83. *Id.*

84. *Id*. As of 2010, data obtained by the All-China Federation of Trade Unions showed that the number of domestic labor dispatch workers had reached sixty million, approximately 20% of all domestic workers in China. *Id.*

employees have consistently received diminished wages and less-protected health and safety rights.[85]

Host employers often rely on workers not understanding the full breadth of their statutory rights under the LCL and use the dispatch agency as a buffer to excuse illegal actions such as docking wages, benefits, and severance pay.[86] Some employers have even begun to exploit potential employees by charging "security deposits" to begin work or charging fees for incidents of company "insubordination." [87] Additionally, China's new-found presence within the international economy spurred a sudden burst of foreign investment and industrial growth.[88] Tied to this foreign investment in China is the challenge of international competition, making the prospect of skirting heightened labor costs appealing to both state- and foreign-

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85. *See* Yu, *supra* note 5; Jennifer Cheung, *Workers at State-Owned Oil Company Step Up Demand for Equal Pay for Equal Work*, CHINA LABOUR BULL. (Jan. 21, 2013), http://www.clb.org.hk/en/content/workers-state-owned-oil-company-step-demand-equal-pay-equal-work. One study of 600 auxiliary workers at a state-owned oil company in Shaanxi, conducted during a protest, asserted that their monthly pay was only 2000 yuan, compared with the monthly pay of 5000 yuan for the few remaining formal employees. *Id.*

86. *See Rights of 60 Million Labor Dispatch Workers Hard to Protect*, *supra* note 82; BECKER & ELFSTROM, *supra* note 77, at 16. Although Article 94 of the LCL holds host employers jointly liable for the violations of the LCL committed by contracted dispatch agencies, the true appeal for host employers lies simply in remaining one step removed from the rights employees are guaranteed by law. *See* Roberts, *supra* note 63. Host employers are not directly responsible for paying dispatch workers' social security installments, workers compensation, or even severance pay. Erin Wigger & Peter Schnall, *The Role of Dispatched Labor in the Exploitation of Chinese Workers*, UNHEALTHY WORK (Aug. 18, 2012), http://unhealthyworkblog.blogspot.com/2012/08/the-role-of-dispatched-labor-in.html. Rather, to access these benefits, dispatch workers must first reach out to the dispatch agency that hired them, with whom many have had little or no contact with since they began their employment. CHINA LABOR WATCH, BEYOND FOXCONN: DEPLORABLE WORKING CONDITIONS CHARACTERIZE APPLE'S ENTIRE SUPPLY CHAIN 17 (2012). Furthermore, workers are often completely unaware of the option of legal remedy against either the dispatch agency or their host employer and simply accept their losses and once again begin the search for work. *Id.* ("Most workers do not know where their dispatch company is located or even the company's name. With little understanding of the law, most workers will just think they have lost their job and will not go through the trouble of demanding their rights.").

87. *Id.*

88. *See* BRANDT & RAWSKI, *supra* note 2, at 12-13.

owned companies. Too often these companies found one of the primary means of cutting labor costs was the abuse of dispatch workers, an issue China realized was in dire need of resolution.[89]

d. Addressing the "Dispatch" Issue: The Amended Labor Contract Law of 2013

In response to the increasing reliance on and abuse of dispatch workers, the PRC amended four sections of the 2008 LCL with the Amended PRC Labor Contract Law of 2013 ("2013 Amendments").[90] The essence of these amendments was a push by the Chinese government to make direct hiring the primary means of employment in China.[91] The four 2013 Amendments came into effect on July 1, 2013, and address principle concerns with the hope to both curtail the rampant abuse of the dispatch system and clarify when hiring dispatch workers is appropriate.

First, the 2013 Amendments modify Article 57 of the LCL, specifically to require labor dispatch agencies to have an "appropriate fixed place of business" and a "minimum registered capital" of 2,000,000 RMB.[92] The basic thrust of this change makes bringing suit against a dispatch agency easier to accomplish. With a fixed business location and substantial registered capital, dispatch agencies will have more funds for workers to collect should their rights be violated.[93] Second, Article 63's requirement of equal pay for equal work was enhanced to require host companies, in addition to dispatch agencies, to implement the same payment allocation for both dispatch and direct-hire employees.[94] Third, Article 66 was revised to state "labor dispatch employment can 'only' be adopted for temporary, auxilia-

89. *See id.* at 13; *see Rights of 60 Million Labor Dispatch Workers Hard to Protect*, *supra* note 82.

90. *See* Yu, *supra* note 5.

91. *Id.*

92. BRYAN CAVE LLP, *supra* note 70, at 2.

93. Victoria Ding & Ron Cai, *Amendments to the Labor Contract Law on Labor Dispatch Services Take Effect July 1, 2013*, DAVIS WRIGHT TREMAINE LLP (Jan. 31, 2013), http://www.dwt.com/Amendments-to-the-Labor-Contract-Law-on-Labor-Dispatch-Services-Take-Effect-July-1-2013-01-31-2013/.

94. BRYAN CAVE LLP, *supra* note 70, at 2.

ry, or substitute positions."[95] Furthermore, the terms were defined as follows:

> *Temporary*: positions that will exist for no more than six months;
>
> *Auxiliary*: positions that are not the core-business-related positions in the company. Most government labor officials take the view that non-core-business-related positions comprise cafeteria workers, security guards, cleaning staff, receptionists etc.;
>
> *Substitute*: positions that must be temporarily filled when an employee is on full-time study or long-term leave (e.g., maternity).[96]

Article 66 was also revised to implement a "to-be-determined" maximum percentage of dispatch workers in relation to all workers that could be hired by an employer.[97] Finally, Article 92 was amended to require businesses caught engaging in labor dispatch services without a license to not only forfeit illegal gains, but also to face fines of up to five times their illegal gains.[98] Article 92 also increased the fine to 10,000 RMB per worker for labor dispatch agencies and host employers that violate the LCL and do not fix the problem within a predetermined period.[99]

Clearly, if properly enforced, the 2013 Amendments to the LCL would make the use of labor dispatch workers less appealing for host employers.[100] The dramatic change in required registered capital, from 500,000 RMB to 2 million RMB, will drive many of the smaller enterprises out of business and, in turn, drive up costs for host employers still using the dispatch system.[101] Additionally, the restriction to "temporary, auxiliary, or substitute" positions will likely prevent many of the positions

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95. *Id.*

96. WINSTON & STRAWN LLP, AMENDMENT TO PRC LABOR CONTRACT LAW INCLUDES SIGNIFICANT CHANGES REGARDING DISPATCH ARRANGEMENTS (2013), *available at* http://cdn2.winston.com/images/content/1/4/v2/1416.pdf.

97. *See* BRYAN CAVE LLP, *supra* note 70, at 2.

98. *Id.*

99. *Id.*

100. *See* Ding & Cai, *supra* note 93.

101. *See id.*

previously held by dispatch workers from legally qualifying as appropriate for dispatch employment.[102]

Furthermore, in order to clarify any ambiguity surrounding the adjustments made to Article 66, on August 7, 2013, the Ministry of Human Resources and Social Security issued a request for public comments on a draft adjustment of the labor dispatch section of the 2013 Amendments.[103] These Draft Labor Dispatch Regulations ("Draft Regulations"), while not yet enacted as law, would further restrict the use of dispatch workers.[104] Primarily, the Draft Regulations suggest two distinct changes to the LCL as amended by the 2013 Amendments: First, it would require host employers to clearly lay out what positions within their office qualify as auxiliary positions.[105] This list of auxiliary positions would be reviewable by the host employer's labor union or employee representative and publicized to all employees.[106] Additionally, the maximum amount of auxiliary positions would be set at 10% of the combined direct-hire employees and current dispatched auxiliary workers, not including any temporary or substitute positions.[107] Second, the Draft Regulations clarify a host employer's status as equally liable as the dispatch-employer.[108] Similar to Article 94, this draft regulation serves to eliminate the ability of host employers to avoid liability for LCL violations committed by contracted dispatch agencies. Although not yet enacted as law, when viewed as a whole, the Draft Regulations suggest that China is continuing its legislative push to eliminate reliance on dispatch employees by greatly limiting their legitimate use.

e. The Persistent Problem of Enforcement

Although labor rights of Chinese workers have increased dramatically through the use of the Labor Law of 1995, the La-

102. *See id.*

103. Elizabeth Cole, Mark Weeks & Yumiko Ohta, *China Labor Contract Law Amendments on Dispatch Employees Come into Effect—Implementation Details Still Uncertain*, COVENTUS LAW (August 27, 2013), http://www.conventuslaw.com/china-labor-contract-law-amendments-on-dispatch-employees-come-into-effect-implementation-details-still-uncertain/.

104. Wilson, *supra* note 6.

105. *See id.*

106. *Id.*

107. *Id.*

108. *See id.*

bor Contract Law of 2008, the 2013 Amendments to the Labor Contract Law, and potentially the 2013 Draft Regulations, a persistent problem for Chinese laborers is the poor enforcement of the law.[109] As of 2010, three years after the approval of the LCL, one study found that out of employees interviewed, only "sixty percent . . . had a contract at the time of their interview; [and that] 53 percent . . . had contracts before the law went into effect."[110] As addressed above, many of these individuals felt their contracts omitted key provisions that were required by law.[111] Similarly, dispatch workers, who are most affected by the ineffective execution of the LCL, have even begun to protest the lack of enforcement of Article 63's equal-pay-for-equal work requirement.[112] Despite the fact that many of these workers perform the same function as direct-hire employees, dispatch workers receive less than half the compensation.[113] Arguably, the primary impediment to Chinese workers, especially dispatch workers, is lack of access to the rights granted to them under Chinese law. Therefore, simply amending the current labor statutes to include further regulations and expanded "rights" for workers will not solve the problem. Rather, through the use of an attorney fee-shifting program for LCL violations and an enhanced notification system of legal rights and remedies, China can give bite to its labor legislation and provide workers with the rights their nation has promised them.

II. WHAT IS AN ATTORNEY FEE-SHIFTING STATUTE?

The basis of an attorney fee-shifting system is that the loser in a bout of litigation is required to pay for the winning party's attorney fees.[114] The concept is utilized in various fashions across the world and is rooted in two main principles: 1) that defeat in litigation justifies the imposition of legal fees on the losing party, and 2) that the winner in litigation deserves full

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109. Liu Xuetan, counsel to the auxiliary workers, has stated, "Although the law prohibits unequal pay for equal work, when it comes to enforcement, that's a very different story." Cheung, *supra* note 85.

110. BECKER & ELFSTROM, *supra* note 77, at 7.

111. *Id*.

112. *See* Cheung, *supra* note 85.

113. *Id*.

114. *See* Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L. REV. 651 (1982).

compensation, not detracted by attorney fees, to be made fully whole.[115] The policy incentives inherent to the idea of fee shifting concern the extensive financial burden created by litigation. The imposition of attorney fees upon a losing party acts as a great deterrent to frivolous lawsuits,[116] eases the backlog of cases for the courts, and makes headway toward fully compensating the winning litigant.[117]

a. The Development of Attorney Fee Shifting in America

Unlike a majority of states, the United States legal system has relied primarily on a system of up-front payment where each party is responsible for their own litigation costs regardless of the outcome.[118] This American rule seems to have grown not out of policy incentives but rather through a combination of early distrust of the legal profession and legislative refusal to address the issue.[119] Scholars have argued that a great disdain for attorneys, who were seen as an "unnecessary luxury," developed within colonial America and continued into the early United States.[120] This level of distrust and hostility aimed at the legal profession made the concept of court-ordered attorney fees an unpopular subject.[121] Furthermore, after the Revolutionary War, as American courts began to experiment with the concept of attorney fee shifting, the U.S. Supreme Court remained persistently hostile to acceptance of such a system. In both *Arcambel v. Wiseman* and *Day v. Wood-worth*, some of the earliest Supreme Court cases where attorney fee shifting was raised, the Court refused to legitimize the practice.[122] Rather, the Court emphasized the "general practice" of American juris-

115. David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule,"* 15 IND. INT'L & COMP. L. REV. 583, 589 (2005).

116. *See* Rowe, *supra* note 114.

117. *See* Comment, *Court Awarded Attorney Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 637-38 (1974).

118. *See* Root, *supra* note 115, at 585.

119. *See Court Awarded Attorney Fees and Equal Access to the Courts*, *supra* note 117, at 640.

120. *Id.*

121. *Id.*

122. Arcambel v. Wiseman, 3 U.S. 306, 306 (1796); Day v. Wood-worth, 54 U.S. 363 (1851) (identifying the early practice of the United States Supreme Court to refuse requests for attorney fees to even a successful litigant).

prudence to deny requests for attorney fees and passed the burden of such determinations to the legislature.[123]

However, as American jurisprudence evolved, the strict adherence to the American rule waivered, opening up six main categories of exceptions to the ban on attorney fee shifting.[124] Generally, American courts have found exceptions to the ban on attorney fee shifting in cases involving 1) contracts, 2) bad faith, 3) the common fund doctrine, 4) the substantial benefit doctrine, 5) contempt, and 6) fee-shifting statutes.[125]

One specific fee-shifting statute that has become extremely prevalent in the United States is the Civil Rights Attorney Fees Award Act of 1976.[126] Under the Civil Rights Attorney Fees Award Act, otherwise known as 42 U.S.C. § 1988, a "court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."[127] The justification for this divergence from the traditional American system is based on policy concerns prioritizing the assurance of adequate "access to the judicial process for persons with civil rights grievances."[128] In an effort to expand recourse to the law for all citizens who have suffered a violation of their civil rights, this exception to the American rule encourages meritorious lawsuits by eliminating both the expense of legal counsel and the chilling effect of attorney fees among potential plaintiffs.[129]

b. How Attorney Fee Shifting Works under 42 U.S.C. § 1988: The "Prevailing Party"

The first issue to address in determining appropriate attorney fees is who can actually demand such costs. Under 42 U.S.C. § 1988, reasonable attorney fees are awarded to the "prevailing party" of civil rights litigation. This category explic-

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123. *See Arcambel*, 3 U.S. at 306; *see also Court Awarded Attorney Fees and Equal Access to the Courts*, *supra* note 117, at 640.

124. *See Court Awarded Attorney Fees and Equal Access to the Courts*, *supra* note 117, at 640.

125. *See id.*

126. 42 U.S.C.A. § 1988 (West 2000).

127. *Id.*

128. Cobb v. Miller, 818 F.2d 1227, 1233 (5th Cir. 1987).

129. *See* Kaimowitz v. Howard, 547 F. Supp. 1345 (E.D. Mich. 1982); Hutchinson v. Staton, 994 F.2d 1076 (4th Cir. 1993).

itly excludes the United States but allows plaintiffs, and in some cases defendants, to retain reasonable attorney fees when they succeed in litigation. Unless the parties have explicitly agreed to an alternate payment system, in cases where a settlement is reached, courts have ruled that a plaintiff is automatically deemed the prevailing party.[130] However, prevailing defendants in civil rights actions are not always guaranteed attorney fees, even if they prevail in an action brought against them.[131] Unlike plaintiff's attorneys, who are entitled to attorney fees unless the unique circumstances of the case would render such fees unjust,[132] defendants are entitled to attorney fees only where the plaintiff's underlying claim is frivolous, unreasonable, or groundless.[133]

c. Reasonable Attorney Fees

In regards to the calculation of "reasonable" attorney fees, great discretion is granted to the district court in its determination of fees, which is only subject to review for abuse of judicial discretion.[134] Judges may award whatever reasonable fees they deem necessary, but are free to limit compensation or grant it sparingly if they find the fee claims exorbitant or the time allegedly devoted to the litigation unreasonably high.[135] A reasonable fee is described as one "sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case,"[136] but not one that simply acts as a "form of economic relief to improve the financial lot of attorneys."[137]

130. *See* Davis v. Jackson, 776 F. Supp. 2d 1314, 1317 (M.D. Fla. 2011) ("Court[s] [must] resist the . . . temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation.") (citation omitted); Maher v. Gagne, 448 U.S. 122, 129 (1980); 42 U.S.C.A. § 1988 (West 2000).

131. *See* Allen v. City of Los Angeles, 66 F.3d 1052, 1058 (9th Cir. 1995).

132. United States v. Mississippi, 921 F.2d 604, 609 (5th Cir. 1991).

133. *Id.*

134. Northington v. Marin, 102 F.3d 1564, 1570 (10th Cir. 1996); *see* Muscare v. Quinn, 614 F.2d 577, 579-80 (7th Cir. 1980).

135. *Gagne*, 448 U.S. at 129.

136. Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 552 (2010).

137. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986).

Currently, the Supreme Court uses the two-step lodestar [138] method in calculating attorney fees.[139] First, the court will multiply the reported hours an attorney has worked by the court-determined hourly rate to generate the "lodestar amount." Second, the court will adjust the lodestar amount based on any special circumstances of the case at bar.[140] The determination of a reasonable hourly rate is often based on the prevailing market rate for an attorney of similar skill and experience within the relevant legal community, which is generally the forum in which the court sits.[141] However, the Supreme Court has also authorized additional factors to consider in the determination of a reasonable hourly rate.[142] The twelve factors that were developed in *Johnson v. Georgia Highway Express, Inc.* have been approved by both Congress and the Supreme Court and are as follows:

> (1) the time and labor required to litigate the suit; (2) the novelty and difficulty of the questions presented by the lawsuit; (3) the skill required [to] properly . . . perform the legal service; (4) the preclusion of other employment opportunities for the attorney due to the attorney's acceptance of the case; (5) the customary fee for such services; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount in controversy involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the attorney's profes-

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138. *Lodestar Definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/lodestar (last visited Jan. 18, 2014). A lodestar is defined as "something or someone that leads or guides a person or group of people." The two-prong lodestar analysis was first utilized by the U.S. Supreme Court in *Hensley v. Eckerhart*. Hensley v. Eckerhart, 461 U.S. 424, 433–34 (1983).

139. *Perdue*, 559 U.S. at 551.

140. Brooks Magratten, Robert D. Phillips Jr., Thomas Connolly, Renee Feldman & Isaac Mamaysky, *Trial Practice: Calculating Attorney Fee Awards*, GPSOLO, Mar. 2010, *available at* http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/magratten_phillips_connolly_feldman_mamaysky.html.

141. *See id.*; *see* Blum v. Stenson, 465 U.S. 886, 895–96 (1984).

142. *See* Hensley, 461 U.S. at 434.

> sional relationship with the client; and (12) awards in similar cases.[143]

As to the second prong of the lodestar calculation, in 2010, the Supreme Court greatly reduced the possibility for adjustments to the reasonable fee, permitting such post-lodestar changes only in "extraordinary circumstances."[144] In *Perdue v. Kenny*, the Court held that while the lodestar method was "never intended to be conclusive in all circumstances . . . there [remains] a strong presumption that the lodestar figure is reasonable."[145] This presumption is almost universally upheld in actions arguing for a reduction of the lodestar amounts.[146] Similarly, upward adjustments occur rarely and only when payment of fees has been exceptionally delayed or where the attorney's work has been outstanding in the face of expensive and protracted litigation.[147] Therefore, it is the twelve *Johnson* factors that weigh most heavily in the final determination of reasonable attorney fees.[148]

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143. *See* Daly v. Hill, 790 F.2d 1071, 1075 (4th Cir. 1986); Trimper v. City of Norfolk, 58 F.3d 68, 73 (1995); *see also* Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717–20 (5th Cir. 1974). The twelve factors are commonly referred to as the *Johnson* factors due to their development in *Johnson v. Georgia Highway Express, Inc*. Hill, 790 F.2d at 1077. Although in the *Perdue* dictum, the Supreme Court criticized the use of the *Johnson* factors, the Court ruled specifically on the strong presumption of reasonableness developed in determining the initial lodestar reasonable rate and "did not expressly state that a court should not use the *Johnson* factors to determine [this initial] lodestar figure." Hudson v. Pittsylvania County, No. 4:11CV00043, 2013 WL 4520023, at *2–3 (W.D. Va. Aug. 26, 2013). Furthermore, after *Perdue*, federal courts have continued to utilize the *Johnson* factors in developing an initial reasonable fee under the lodestar method. *See, e.g.*, *id.*; Jackson v. Estelle's Place, LLC, 391 F. App'x. 239, 243 (4th Cir. 2010); McClain v. Lufkin Indus., Inc., 649 F.3d 374, 380–81 (5th Cir. 2011); Trustees of Local 531 Pension Fund v. Flexwrap Corp., 818 F. Supp. 2d 585, 590–91 (E.D.N.Y. 2011).

144. Lyle Denniston, *Analysis: The Lodestar as Gold Standard*, SCOTUSBLOG (Apr. 21, 2010, 10:59 AM), http://www.scotusblog.com/2010/04/analysis-the-lodestar-as-gold-standard/.

145. *See* Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 553–54 (2010).

146. *See* Magratten et al., *supra* note 140.

147. *See id*.

148. *See* Denniston, *supra* note 144.

d. Problems with the Current Attorney Fee-Shifting Rule

Although providing legal recourse to the poor and most vulnerable populations is a justifiable pursuit, the Civil Rights Attorney Fees Award Act of 1976 has led to growing problems for municipalities and their taxpayers within the United States.[149] The most basic of these issues is the granting of huge attorney fees in conjunction with modest jury awards to plaintiffs.[150] Litigation is a costly endeavor and can often drag on for years at a time.[151] Attorney fees for civil rights cases vary, but often range from US$200 to US$500 per hour.[152] These high hourly rates, combined with the heavy presumption against post-lodestar adjustments, make the initiation and protraction of litigation more appealing than securing justice for one's client. Dragging litigation on for years with extensive statistical analysis, expert research, broad discovery, and numerous attorneys[153] assigned to a case can lead to vastly disproportionate awards of attorney fees when compared to plaintiff awards.[154] Additionally, plaintiff's attorneys are also often awarded the same "reasonable fees" in cases where the parties reach an agreeable settle-

149. *See* Katherine Macfarlane, *In Shira Scheindlin's Courtroom, Stop-and-Frisk Lawyers Are the Only Winners*, NEW YORK OBSERVER (Nov. 13, 2013, 7:00 AM), http://observer.com/2013/11/stop-and-frisk-lawyers/.

150. *See* City of Riverside v. Rivera, 477 U.S. 561, 574 (1986); *see also* Max McCann, *Police Misconduct Litigation: Keeping an Open Mind*, OVERLAWYERED (Sep. 23, 2013), http://overlawyered.com/police-abuse-litigation-incentives-keeping-open-mind/.

151. *See* Pacific Research Institute, *Study Claims U.S. 'Tort Tax' Tops $9,800 Per Family*, INS. J. (Mar. 3, 2007), http://www.insurancejournal.com/news/national/2007/03/27/78137.htm. The study notes that America's legal system imposes an economic cost of more than US$865 billion every year and leads to extensive defensive costs made to limit potential legal liability. *Id.*

152. *See, e.g.*, Doe v. Bridgeport Police Dept., 468 F. Supp. 2d 333, 339 (D. Conn. 2006); Duckworth v. Whisenant, 97 F.3d 1393, 1398–99 (11th Cir. 1996); Winston v. O'Brien, 951 F. Supp. 2d 1004, 1009 (N.D. Ill. 2013).

153. *See* Tucker v. City of New York, 704 F. Supp. 2d 347, 355 (S.D.N.Y. 2010).

154. *See, e.g.*, Macfarlane, *supra* note 149 (focusing on *Daniels v. City of New York*, where, after a settlement between the parties, plaintiffs' counsels were awarded over US$3.5 million in fees and costs while the ten named plaintiffs received only US$167,000).

ment,[155] which further encourages amassing clientele rather than diligent lawyering. The combination of high hourly rates, less merit-based awards, and a relaxed standard of "prevailing parties" for plaintiffs, has created a genuine market of civil rights litigation.[156] However, although problems with fee shifting must be acknowledged, the practice has ultimately proved a crucial tool in providing indigent claimants access to legal remedy for violations of their civil rights.[157]

III. APPLICATION TO CHINESE LABOR LAW

a. Fee Shifting

Despite the problems that the United States has faced in its use of fee-shifting statutes, it is exactly this type of litigation scheme that Chinese workers desperately need to gain access to their employment rights.[158] The current crisis facing Chinese laborers, specifically dispatch laborers, is not a lack of statutory authority mandating specific employment practices, but rather a complete lack of knowledge and government enforcement of these rights. However, the implementation of an attorney-fee shifting program, similar to the United States' Civil Rights Attorney Fee Act of 1976, can create an appealing market for employment rights cases in China that will incentivize attorneys to actively seek out laborers in need of assistance. Through the use of attorney fees as a supplementary financial incentive, China can modify ordinary market conditions surrounding LCL violation litigation and make it profitable to

155. *See* Prison Legal News v. Schwarzenegger, 608 F.3d 446, 451 (9th Cir. 2010); FED. R. CIV. P. 68; Marek v. Chesny, 473 U.S. 1, 9–11 (1985) (noting that in the context of Section 1983 civil rights actions, settlement offers made pursuant to Federal Rule of Civil Procedure 68 include attorney fees within its definition of costs).

156. "In estimating the significance of any rise in civil suits against police officers, it's worth keeping in mind that this is not just the pursuit of social justice. It's an industry." *See* McCann, *supra* note 150.

157. *See* Md. Access to Justice Comm'n, *Fee-Shifting to Promote the Public Interest in Maryland*, 42 U. BALT. L.F. 38, 47–50 (2011).

158. *See id*. The Maryland Access to Justice Commission argues that the use of attorney fee shifting within the realm of U.S. civil rights cases has generated a beneficial market shaped around enhanced financial incentives for attorneys. *Id.*

connect individuals whose rights have been violated with groups who can adequately fight for their compensation.[159]

China has already successfully tested the use of attorney fee shifting in other legal forums.[160] In 1993, China began allowing prevailing parties under the Law Against Unfair Competition to seek out reasonable expenses associated with the investigation and litigation of their claims.[161] Similarly, in 2002, China's Supreme People's Court specifically acknowledged the use of attorney fee shifting in cases of trademark infringement and other actions of copyright litigation.[162] Additionally, despite a lack of statutory authorization, some Chinese courts have even implemented a fee-shifting approach on an ad hoc basis for successful plaintiffs in consumer and personal injury cases.[163] Fee shifting in these areas can arguably suggest a rising dissatisfaction with the current payment system, in which each party pays their own attorney fees and many successful plaintiffs lose large portions of their awards to attorney commissions. Therefore implementation of this type of fee-shifting system would not be completely unprecedented, and would likely be well received by both laborers and plaintiff counsels.

Currently, Chinese labor attorneys have few incentives to represent poor workers in employment rights cases. Migrant workers and dispatch workers on average earn only 1290 RMB per year, while the average commission for attorneys can range from 500 to 5000 RMB.[164] This enormous investment in legal counsel greatly discourages employees from bringing small claims in the first place, and the small awards for unpaid wages or overtime rarely cover the attorney commissions.[165] For the claims pursued, cultural biases often lead Chinese law firms to avoid representing migrant workers, in particular, because they fear successful claimants will refuse to share any damage

159. *Id.* at 38–39.
160. *See* Donald C. Clarke, *The Private Attorney-General in China: Potential and Pitfalls*, 8 WASH. U. GLOBAL STUD. L. REV. 241, 253 (2009).
161. *See id.*
162. *See id.*
163. *See id.*
164. *See* Liang, *supra* note 9.
165. *See id.*

award granted.[166] Therefore, due to the small payout and possibility of lack of payment, Chinese law firms lack the financial incentive to seek out and diligently assist workers litigate LCL claims.[167]

However, through the use of a modified attorney fee-shifting program, China can incentivize attorneys to find and accept employee rights cases, as well as litigate them to the best of their abilities. By adopting the American system of "reasonable hourly rates," utilizing the twelve *Johnson* factors to determine reasonableness, and adopting the relaxed standard of "prevailing party," the financial incentive to represent employee rights claims would dramatically increase.[168] Similar to the plaintiff's attorneys in civil rights cases throughout the United States, the huge potential payout for attorneys would make litigating even minor employment rights claims extremely appealing.[169] Therefore, employees who previously lacked the funds necessary to obtain legal counsel would have access at no personal cost.

However, the vast benefits of attorney fee shifting should not overshadow the problem of excessive attorney fees in the face of nominal litigant awards. As addressed in Part II(d), the combination of high hourly rates, less merit-based enhancements or reductions, and a relaxed prevailing party standard has led to cases with attorney fees completely disproportionate from the plaintiff's actual award.[170] To remedy this issue, China must maintain the reasonableness requirements embodied in the *Johnson* factors, implement statutorily imposed maximum and minimum hourly rates, and place a heavier emphasis on merit-based enhancements and reductions. The use of the *Johnson*

166. *See* Yin Lily Zheng, Note, *It's Not What Is on Paper, but What Is in Practice: China's New Labor Contract Law and the Enforcement Problem*, 8 WASH. U. GLOBAL STUD. L. REV. 595, 606 (2009).

167. *See id*.

168. *E.g.*, Macfarlane, *supra* note 149. In the context of American civil rights cases, Macfarlane details the significant financial incentive created for attorneys to litigate cases when attorney fee shifting, reasonable hourly rates, the twelve *Johnson* factors, and the relaxed standard of prevailing party have been implemented.

169. *See* McCann, *supra* note 150 (establishing the significant financial incentives for civil rights attorneys to bring "marginal, not just high-value" cases to court).

170. *See* Riverside, 477 U.S. at 561; *see* McCann, *supra* note 150.

factors, when combined with set maximum and minimum reasonable rates, will greatly temper the degree of attorney-fee liability employers may face in employment rights cases, but the emphasis on merit-based enhancements will balance this slight diminished incentive with a powerful motivation to provide high quality legal representation.

Local government organizations are the best entities to set the appropriate range of attorney fees in determining maximum and minimum hourly rates.[171] Local governments can best balance the strong nationwide desire to provide access to legal remedy for employees with their own liability as an employer, along with the liability of private organizations in their locale. This balance of policy incentives will lead to an equitable range of reasonable rates and will avoid the burdensome expenses seen in some civil rights cases in the United States.[172]

Additionally, the dramatic limitations on American post-lodestar adjustments should not be implemented in China's attorney fee-shifting legislation. With the limits on reasonable attorney fees in place, lawyers will still hold a strong financial incentive to accept and litigate employment rights cases, but lack an incentive to provide effective and efficient lawyering.

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171. China is divided into twenty-two provinces, five "autonomous" regions, and four municipalities that are directly controlled by the Chinese central government. The provincial governments, the people's governments of the autonomous regions, and the municipal governments under the Central Government, which exercise authority over these geographic sectors of China, are responsible for the implementation of local laws and regulations. *China's Political System: The Local Administrative System*, CHINA.ORG, http://www.china.org.cn/english/Political/28842.htm (last visited Apr. 20, 2014). It is this level of government that would be best suited to address necessary limitations on judicial discretion in determining appropriate attorney fees.

172. *See, e.g.*, David D. Dudley & Frances Reynolds Colbert, *Determining Reasonable Attorney Fees*, 85 WIS. LAW. 10 (2012), *available at* http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=85&Issue=10&ArticleID=10217. In response to cases involving violations of consumer protection laws in which attorney fees far exceeded the awarded compensatory damages, Wisconsin enacted statute 814.045, which limits reasonable attorney fees to a maximum of three times the amount of compensatory damages awarded. This set limit is overcome only in rare circumstances where the court determines greater amounts are reasonable. *Id.*

Since a majority of cases in all actions result in settlement,[173] any system that refuses to award attorney fees in settled cases will eliminate the incentive for attorneys to work. Therefore, a better approach toward increasing the quality of advocacy provided to Chinese laborers is to give courts greater discretion in determining both reductions and enhancements to the final lodestar award. Rather than adopt the "extraordinary circumstances" requirement of *Perdue,*[174] China should craft local legislation that can incentivize good lawyering without leading to ridiculous discrepancies between plaintiff awards and attorney fees. The appropriate factors to determine post-lodestar adjustments, as well as the limitations on such adjustments, are again best suited for local Chinese governing bodies who can properly balance the need for enforcement in employee rights claims with the resulting economic and municipal liability concerns associated with such reforms. Furthermore, these organizations are best suited to quickly realize if the increased judicial discretion in awarding post-lodestar fee enhancements needs further limitation to achieve its purpose of creating a financial incentive for attorneys, without granting excessive and undeserved fee awards.

b. Enhanced Notification

The modified fee-shifting system proposed above will provide a necessary tool for Chinese laborers to access their employment rights under the Labor Contract Law of 2008 and the subsequent amendments. However, despite the strong financial motivation this new market of LCL claims will provide for attorneys, the system will not succeed without employees actually understanding their labor and employment rights.

A majority of Chinese workers learn of their employment rights through conventional media sources, such as television or the Internet. However, older, poorer, and less educated workers have extremely limited access to these resources.[175] The resulting effect is that the most vulnerable populations of

173. *See* Jonathan D. Glater, *Study Finds Settling Is Better than Going to Trial*, N.Y. TIMES, Aug. 8, 2008, at C1 (addressing the appeal of settlement and estimating that 80–92% of cases never actually reach the trial phase of litigation).

174. *See* Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 556 (2010).

175. BECKER & ELFSTROM, *supra* note 77, at 16.

workers, migrant and dispatch laborers, are the least likely to obtain reliable information concerning their rights as workers.[176] Therefore, to compliment the fee-shifting model and secure knowledge of employment rights, additional regulations mandating notification of LCL rights in the workplace must be implemented. As seen in many federal and state statutes in the United States, poster notifications are used to ensure workers obtain knowledge of some of their most basic rights.[177] For example, under 29 C.F.R. § 1903.2, employers in the United States are required to display posters developed by the Occupational Safety and Health Administration.[178] The posters are required to be placed in "a conspicuous place where workers can see it" and specifically inform workers of their rights under the Occupational Safety and Health Act.[179] Similarly, under New York Labor Law § 661, New York State employers are required to post displays informing workers of the current New York State minimum wage, overtime rates, and other wage requirements in multiple languages.[180]

China should adopt a similar poster-requirement system that notifies workers of basic, fundamental employment rights, such as the requirements of fixed and open-ended contracts, overtime pay, and severance pay. The poster requirement must mandate placement in a conspicuous location where it can easily be seen by workers and should be written in both Simplified and Traditional Chinese characters[181] to ensure that a majority of workers have notice of their employment rights. While em-

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176. *See id.* at 8.

177. *See, e.g.*, *Poster Page: Workplace Poster Requirements for Small Businesses and Other Employers*, U.S. DEP'T OF LABOR, http://www.dol.gov/oasam/boc/osdbu/sbrefa/poster/matrix.htm (last visited Mar. 26, 2014).

178. *OSHA's Workplace Poster: Job Safety and Health: It's the Law*, OCCUPATIONAL SAFETY & HEALTH ADMIN. (2013), https://www.osha.gov/Publications/poster.html.

179. *Id.*

180. N.Y. LAB. LAW § 661 (McKinney 2010).

181. *Simplified Chinese vs Traditional Chinese*, ELANEX, http://www.elanex.com/EN/languages_chinese.aspx (last visited Apr. 20, 2014) (noting that traditional written Chinese holds greater popularity in Taiwan, Hong Kong, and among many Chinese peoples spread throughout the world, while simplified Chinese is more popular throughout Mainland China and Singapore).

ployers may not actively comply with these regulations, as seen with those regulations currently in place, the new market for labor attorneys will have lawyers actively seeking out these easily identifiable and provable violations of the LCL.

CONCLUSION

Despite the implementation of the Labor Law of 1995, the Labor Contract Law of 2008, and the 2013 Amendments to the Labor Contract Law, Chinese workers still lack adequate access to their employment rights. While these regulations seem to reflect a nationwide policy in favor of employee rights, a solution to the enforcement problem will not be found in procuring more restrictive employment regulations. Rather, through the use of a modified attorney fee-shifting system and a poster notification requirement, China can provide workers with the means to access these statutory rights. By using the American fee-shifting system in civil rights cases as a model, including adjustments to limit unreasonable costs, China can incentivize attorneys to seek out employee-rights cases and provide legal representation at no charge. Furthermore, by utilizing a poster notification system of employment rights, China can combat the confusion among workers concerning their statutory rights and fuel the employee rights litigation market. With these minor legislative adjustments, China can complement its already progressive employment regulations with the means for workers to access their legal rights.

Christopher John Yee Coyne[*]

* B.A., B.S., Fordham University (2011); J.D., Brooklyn Law School (expected 2015); Managing Editor of the *Brooklyn Journal of International Law* (2014–2015). I would like to thank the staff and editors of the *Journal* for their invaluable help and insightful edits during the preparation of this Note. Thank you also to my friends, family, and my girlfriend, Tara Lepelletier, for their support and encouragement throughout this process. Finally, I would like to thank my parents, Dan and Mazie Coyne, for their unwavering love and support throughout all my endeavors and for which I am eternally grateful. All errors and omissions are my own.

"TWO HOUSEHOLDS, BOTH ALIKE IN DIGNITY": THE INTERNATIONAL FEUD BETWEEN ADMIRALTY AND BANKRUPTCY

Two households, both alike in dignity,
In fair Verona, where we lay our scene,
From ancient grudge break to new mutiny,
Where civil blood makes civil hands unclean.
From forth the fatal loins of these two foes
A pair of star-cross'd lovers take their life;
Whose misadventured piteous overthrows
Do with their death bury their parents' strife.
The fearful passage of their death-mark'd love,
And the continuance of their parents' rage,
Which, but their children's end, nought could remove,
Is now the two hours' traffic of our stage;
The which if you with patient ears attend,
What here shall miss, our toil shall strive to mend.[1]

INTRODUCTION

In 2012, the Japanese shipping firm Sanko Steamship Co. ("Sanko") unilaterally refused to make lease payments on certain of its commercial shipping vessels.[2] After Sanko stopped making its payments, multiple creditors, including the Liberian navigation firm Evridiki Navigation, Inc. ("Evridiki"), proceeded quasi in rem[3] against the *M/V Sanko Mineral* ("the *Mineral*") and attached the vessel while it was in port at Baltimore, Maryland.[4] Sanko refused to post a bond, which would have released the *Mineral*, out of concern that such action would affect its private resolution process with its chief creditors.[5] The vessel, however, still contained cargo for which Sanko's customers had already paid.[6] Several of these customers, some incorporated abroad and others in the United States,

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1. WILLIAM SHAKESPEARE, ROMEO AND JULIET act 1, prologue.
2. Evridiki Navigation, Inc. v. Sanko S.S. Co., 880 F. Supp. 2d 666, 668 (D. Md. 2012).
3. *See* discussion *infra* Part I.A.
4. *Evridiki*, 880 F. Supp. 2d at 668.
5. In furtherance of its efforts to avoid a formal bankruptcy filing, Sanko had started a private resolution process with its chief creditors. *Id.* at 669.
6. *Id.* at 668.

intervened in the action in an attempt to vacate the attachment of the *Mineral* so that they could receive their goods.[7] The vessel remained attached in Baltimore, and one of the cargo owners, ThyssenKrupp Materials NA, Inc. ("ThyssenKrupp"), eventually proceeded in rem[8] against the *Mineral*.[9] ThyssenKrupp claimed that it was under contract to have cargo on the *Mineral* delivered to a customer within a certain window of time, that the window had closed, and that ThyssenKrupp therefore held a maritime lien on the *Mineral*.[10] Eventually, Sanko filed for Chapter 15 bankruptcy recognition and protection[11] ("Chapter 15") in the United States, and ThyssenKrupp's vessel arrest, along with Evridiki's attachment, was vacated.[12] *Evridiki Navigation, Inc. v. Sanko Steamship Co.* illustrates an evolving conflict—if Chapter 15 bankruptcy can eviscerate a vessel arrest or attachment action so easily, then arrest and attachment cease to be effective tools for the enforcement of maritime liens, which are a vital source of rights in admiralty.[13]

Evridiki is an apt example of cases that follow a similar pattern: bankrupt, foreign companies using U.S. jurisdiction to escape creditor action in maritime claims. When Chapter 15 works to preclude a vessel arrest or attachment, maritime creditors are denied any recovery from the debtor, resulting in the unjust treatment of those creditors during the bankruptcy pro-

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7. *Id.*

8. *See* discussion *infra* Part I.A.

9. *Evridiki*, 880 F. Supp. 2d at 668.

10. *Id.*

11. 11 U.S.C. §§ 1501–1532 (2014) contains the U.S. implementation of the United Nations Commission on International Trade Law's ("UNCITRAL") Model Law on Cross-Border Insolvency. This Note discusses Chapter 15 in some depth in Part II.B, but in pertinent part Chapter 15 allows a foreign company, which has already filed for bankruptcy abroad, to petition a U.S. bankruptcy court for recognition of the foreign bankruptcy proceeding. Upon recognition, Chapter 15 further allows a stay of all creditor actions against the foreign debtor.

12. After the Federal Bankruptcy Court recognized Sanko's foreign bankruptcy, it issued an order to the District of Maryland precluding the decision of any of the myriad issues in the case, except for the determination of Evridiki's attachment of the *Mineral*. *Evridiki*, 880 F. Supp. 2d at 673–76.

13. WILLIAM TETLEY, MARITIME LIENS AND CLAIMS 937 (2d ed. 1998).

ceedings.[14] Not only are the creditors responsible for court costs and filing fees, which can be quite expensive, but they also lose their original investment in the debtor who files for Chapter 15 bankruptcy. As the economies of nations across the globe, developed and developing, become increasingly interdependent, the importance of the shipping industry will only grow.[15] Even with recent advances in air freight and high speed rail, overseas shipping still accounts for "[a]round 80 per cent of global trade by volume and over 70 per cent by value."[16] Moreover, as the U.S. shipping industry continues to contract, shipping companies will increasingly be foreign in their citizenship.[17] This increase in foreign shippers necessarily means that more future maritime bankruptcies will be foreign, which will, in turn, lead to more Chapter 15 petitions in the United States. Such an increase in Chapter 15 filings will result in an increase in the abuse of creditors' rights to enforce their maritime liens and claims, by barring the traditional means of executing those liens and claims—arrest and attachment.

This Note suggests a solution to the imbalance between admiralty and bankruptcy drawn from the history of U.S. maritime law and the response of the Commonwealth of Australia,[18] another large shipping nation that has adopted the United Nations Commission on International Trade Law's ("UNCITRAL") Model Law on Cross-Border Insolvency (the "Model Law"), to

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14. Melissa K. S. Alwang, *Steering the Most Appropriate Course Between Admiralty and Insolvency: Why an International Insolvency Treaty Should Recognize the Primacy of Admiralty Law over Maritime Assets*, 64 FORDHAM L. REV. 2613, 2620 (1996).

15. *See* U.S. Dep't Transp. Mar. Admin., U.S. Waterborne Foreign Trade by Trading Partners, 2003–2012, *available at* http://www.marad.dot.gov/library_landing_page/data_and_statistics/Data_and_Statistics.htm (last visited June 21, 2014) [hereinafter U.S. Waterborne Foreign Trade by Trading Partners]; U.S. Dep't Transp. Mar. Admin., U.S. Waterborne Foreign Container Trade by Trading Partners, 2007–2012, http://www.marad.dot.gov/library_landing_page/data_and_statistics/Data_and_Statistics.htm (last visited Jun 21, 2014) [hereinafter U.S. Waterborne Foreign Container Trade by Trading Partners].

16. U.N. CONFERENCE ON TRADE & DEV., REVIEW OF MARITIME TRANSPORT 2013, at xi, U.N. Doc. UNCTAD/RMT/2013, U.N. Sales No. E. 13.II.D.9 (2013).

17. *See* U.S. Waterborne Foreign Trade by Trading Partners, *supra* note 15; U.S. Waterborne Foreign Container Trade by Trading Partners, *supra* note 15.

18. *See* discussion *infra* Part III.A.2.

alleviate some of the tension for both admiralty and bankruptcy sides of the argument.

Part I of this Note examines the relevant admiralty law, including the complexities of maritime liens as well as vessel arrest and attachment provisions. Part II briefly explains the genesis of Chapter 15 as well as its functions pertinent to this Note's argument. As the title of this Note suggests, the policies that inform the goals of bankruptcy and admiralty are often diametrically opposed, such that the tensions between the two are best addressed concurrently. To that end, Part III analyzes laws that grapple with the policy concerns surrounding the intersection of admiralty and bankruptcy from the United States and the Commonwealth of Australia. Part IV discusses the current imbalance between bankruptcy and admiralty, accompanied by a caveat in the form of the Second Circuit's electronic funds transfer cases ("EFT"),[19] warning against tipping the scales too far in admiralty's favor. Part V examines recent U.S. Supreme Court jurisprudence that supports stronger protections for admiralty rights. Ultimately, the solution is not a simple one. This Note argues that investors can be protected from heavy-handed bankruptcy courts, just as debtors can be protected from ravenous creditors, by implementing certain elements of the Australian scheme in the U.S. system.

I. ADMIRALTY: VESSEL ARREST, ATTACHMENT, AND MARITIME LIENS

The three interdependent aspects of admiralty law that are crucial to understanding the tension between admiralty and bankruptcy are vessel arrest, vessel attachment, and maritime liens. Briefly, maritime liens[20] are a legal construct that serve as a basis for many causes of action in maritime law.[21] Maritime liens are, in turn, enforced by vessel arrest and attachment actions. The interplay of maritime liens, vessel arrest, and vessel attachment is complex, but it must be understood in order to clarify the severity of the problem presented by Chapter 15 bankruptcy protections in admiralty suits.

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19. *See* discussion *infra* Part IV.B.

20. A maritime lien is "[a] lien on a vessel, given to secure the claim of a creditor who provided maritime services to the vessel or who suffered an injury from the vessel's use." BLACK'S LAW DICTIONARY 943 (9th ed. 2009).

21. *See* Alwang, *supra* note 14, at 2629.

A. Arrest and Attachment: The Action in Rem and the Action Quasi in Rem

Vessel arrest and attachment predate the founding of the American republic. Some scholars argue that arrest and attachment have their roots in ancient Greek law, although the earliest extant mention is in the Byzantine emperor Justinian's Corpus Iuris Civilis.[22] More recently, however, the American implementations of vessel arrest and attachment were developed from the British Imperial system after the American Revolution.[23] Vessel arrests and attachments were, and are, a natural response to the frequently transitory nature of parties to admiralty suits.[24]

A maritime attachment action is used when a plaintiff has *any* in personam claim in admiralty against another party.[25] Because maritime attachment, which directly affects a res, be it a vessel or other maritime property, can occur only when the attaching party has an in personam claim, it is considered a quasi in rem action. Furthermore, the maritime attachment—or quasi in rem action—can be used against *any* property that is owned by the defendant.[26]

Alternatively, the maritime vessel arrest—or in rem action—is a suit against a physical vessel itself or other maritime property such as cargo or freight. A maritime vessel arrest is only filed in order to foreclose on a maritime lien.[27] One may bring

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22. TETLEY, *supra* note 13, at 7–11.

23. "After renouncing British suzerainty in 1776, the United States retained the Admiralty attachment, which is similar, but not identical, to the *saisie conservatoire*. Admiralty law in the United States has since advanced, giving American law its own particular cachet, flavor and much more." *Id.* at 37.

24. "Courts of admiralty are established for the settlement of disputes between persons engaged in commerce and navigation, who, on the one hand, may be absent from their homes for long periods of time, and, on the other hand, often have property or credits in other places." *In re* Louisville Underwriters, 134 U.S. 488, 493 (1890).

25. FED. R. CIV. P. SUPP. ADMIRALTY & MAR. CLAIMS B. In Personam Actions: Attachment and Garnishment; *see* Orbis Marine Enterprises, Inc. v. TEC Marine Lines, Ltd., 692 F. Supp. 280, 284–85 (S.D.N.Y. 1988).

26. FED. R. CIV. P. SUPP. B.

27. Additionally, the property named in the in rem action must be the subject of the same maritime lien that the plaintiff is seeking to enforce. *See* FED. R. CIV. P. SUPP. ADMIRALTY & MAR. CLAIMS C. In Rem Actions: Special Provisions; Madruga v. Superior Court, 346 U.S. 556 (1954); Chelentis v. Lucken-

an in rem action by itself, or together with a quasi in rem action, but maritime attachment is not an alternative to the vessel arrest action.[28] U.S. admiralty law is unique in its use of maritime attachment and vessel arrest, as many other common law nations only allow a vessel arrest action.[29] The strength of U.S. arrest and attachment provisions can be traced to the colonial period, when a poor quality road network forced the early American colonists to rely heavily on shipping.[30]

Maritime attachment has two primary ends: "first, to compel appearance; [second], to condemn for satisfaction."[31] That is to say, maritime attachment first gains the libelant[32] jurisdiction and second guarantees recovery in the event of a favorable decision. Maritime attachment has relatively simple procedural steps, of which only one is necessary to expound upon in depth.[33] There is a requirement in the U.S. maritime attachment procedure that "the defendant cannot be found within the district."[34] This step in the maritime attachment test is particularly important to the discussion here because the provision allows foreign libelees to be haled into U.S. courts. Unfortunately, the state of being absent from the district is not defined

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bach S.S. Co., 247 U.S. 372 (1918); The Moses Taylor, 71 U.S. (4 Wall.) 411 (1866).

28. William Tetley, *Arrest, Attachment, and Related Maritime Law Procedures*, 73 TUL. L. REV. 1895, 1934–35 (1999).

29. *Id.* at 1899.

30. FRANK L. MARAIST, THOMAS C. GALLIGAN, JR., & CATHERINE M. MARAIST, CASES AND MATERIALS ON MARITIME LAW 1 (2d ed. 2009).

31. Manro v. Almeida, 23 U.S. 473, 489 (1825); *see* Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684, 693 (1950).

32. In admiralty suits, the plaintiff is referred to as the libelant, while the defendant is referred to as the libelee. *See* BLACK'S LAW DICTIONARY 999 (9th ed. 2009).

33. Tetley, *supra* note 28, at 1936.

> Procedurally, Supplemental Rule B requires the plaintiff to file a detailed complaint, accompanied by an affidavit. The plaintiff must show: (1) that he has an *in personam* claim against the defendant; (2) that the defendant cannot be found within the district where the action is commenced; (3) that property belonging to the defendant is present, or soon will be present, in the district; and (4) there is no statutory or general maritime law proscription to the attachment.

Id.

34. FED. R. CIV. P. SUPP. ADMIRALTY & MAR. CLAIMS B. In Personam Actions: Attachment and Garnishment.

in the statute, a lacuna that has led a specific test to arise from the case law.[35]

The two-pronged subtest that has developed from a want of a statutory definition is "based upon jurisdiction and the service of process."[36] First, the jurisdictional element of the test depends upon the same "minimum contacts" reasoning that the U.S. Supreme Court used in *International Shoe Co.* v. *Washington*.[37] If the libelee is found to have "minimum contacts" "within the district," then maritime attachment is not viable. If the libelee is found not to have "minimum contacts" "within the district," then the action proceeds to the notice, or service of process, prong of the test, which requires that the libelee not have an "office or authorized agent in the district where or through whom legal process may be served upon him."[38] If both of these prongs are found in the affirmative, then the libelee is considered "found within the district" and the maritime attachment of his property is considered inappropriate. If either of the prongs is found in the negative, then the libelee is considered absent from the district and maritime attachment is considered proper, subject to the other statutory requirements in the provision. [39]

Maritime attachment is one of the most envied U.S. admiralty tools in the world, and it is not available in many other

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35. Tetley, *supra* note 28, at 1935.

36. *Id.*

37. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id.

38. TETLEY, *supra* note 13, at 939–40.

39. Oregon v. Tug Go Getter, 398 F.2d 873, 874 (9th Cir. 1968) (libelee considered within the district where he had minimum contacts within that district); W. Bulk Carriers, Pty. v. P.S. Int'l, 762 F. Supp. 1302, 1308 (S.D. Ohio 1991) ("[I]t is clear that defendant could not have been found within this district at the time of the attachment for purposes of service of process."); LaBanca v. Ostermunchner, 664 F.2d 65, 67–68 (5th Cir. 1981) (interpreting "within the district" to mean a state's individual district; where service on libelee was available in the Northern District of Florida but not the Southern District of Florida, maritime attachment was allowed).

common law countries precisely because it is so liberal and powerful when compared with vessel arrest.[40] Indeed, "[t]he United States has . . . led the world in developing and implementing effective constitutional protections of the private property rights of shipowners with respect to . . . [vessel] arrest. In that domain in particular, U.S. maritime law can well serve as a model for other nations."[41] It should come as no great surprise, then, that when bankruptcy courts can nullify an attachment, it throws the U.S. maritime legal system dangerously off course.

B. Maritime Liens: The Complex Source of Admiralty Rights

> "Maritime liens are the product of the evolution of custom, statute, and judicial decisions. To understand them, one must understand the history of maritime law."[42]

The creation and use of maritime liens to advance public policy at sea is of ancient vintage, dating to the lex maritima[43] of ancient Rome and Byzantium.[44] As admiralty law developed around the world, it was necessary to develop a legal construct that could "enforce financial obligations acquired internationally."[45] This construct is the maritime lien, and it is so important to the operation of admiralty law that some exposition about the convoluted and technical nature of these liens is necessary.

> A traditional maritime lien is a secured right peculiar to maritime law (the *lex maritima*). It is a privilege against property (a ship) which attaches and gains priority without any court action or any deed or any registration. It passes with the ship when the ship is sold to another owner, who may not know of the existence of the lien. In this sense the maritime lien is a

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40. *See* Tetley, *supra* note 28, at 1939–40.

41. *Id.* at 1940.

42. TETLEY, *supra* note 13, at 60. For an exhaustive explanation of the history of maritime liens, Professor Tetley's book is an outstanding resource. Unfortunately, there is no space in this Note to give that history anything more than a cursory glance.

43. *Lex maritima* is "[t]he body of customs, usage, and local rules governing seagoing commerce that developed in the maritime countries of medieval Europe." *See* BLACK'S LAW DICTIONARY 931 (9th ed. 2009).

44. *See also* TETLEY, *supra* note 13, at 1–56. (providing an extensive discussion of the history of maritime liens accompanied by explanations of how they relate to the operation of the modern shipping industry).

45. Alwang, *supra* note 14, at 2630.

> secret lien which has no equivalent in the common law; rather it fulfills the concept of a "privilege" under the civil law and the *lex mercatoria*.[46]

Maritime liens are undoubtedly complicated, and the order in which they rank in court can be arcane. The procedure of balancing a general lien on a vessel's freight with a preferred maritime lien or a secured lien, while difficult, can be done.[47] Despite the inherent complexities, over the centuries, admiralty law has developed a system of ranking liens in the order in which they must be fulfilled by a ship's master or the party responsible for the ship's operation.[48] These rankings differ between nations, but only slightly.[49] More important to this analysis, former British territories rank their maritime liens in a similar manner, making a comparison much simpler.[50] Conveniently, however, neither the ranking methods nor the rankings themselves are salient for the purposes of this Note; only the fact that the liens are ranked is important to the argument here.

Maritime liens are vital to the operation of admiralty law because they provide the causes of action for a large number of suits. [51] Admiralty causes of action are based in maritime liens for disputes ranging from collision damage caused by a ship to preferred ship's mortgages, to marine insurance premiums.[52] "In addition to recognizing a larger number of maritime liens than any other nation, U.S. maritime law is uniquely rich in affording admiralty claimants both the attachment and arrest in rem as mechanisms for asserting their claims and obtaining pre-judgment security."[53] In fact, the most common remedy to

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46. TETLEY, *supra* note 13, at 59–60. "For example, a sailor who suffers an injury on ship has a lien which arose and attached to the vessel automatically upon the injury." Alwang, *supra* note 14, at 2630.

47. For a detailed discussion of the prioritization of maritime liens, see George L. Varian, *Rank and Priority of Maritime Liens*, 47 TUL. L. REV. 753 (1973).

48. *See* TETLEY, *supra* note 13, at 855–58.

49. *See generally id*. at 858–912 (extensive discussion of systems used to rank maritime liens in several nations).

50. *See id*.

51. *See* Alwang, *supra* note 14, at 2629–31.

52. *See* TETLEY, *supra* note 13, at xii–xiii.

53. Tetley, *supra* note 28, at 1939.

suits for the enforcement of maritime liens is vessel arrest.[54] In U.S. courts, however, the interaction of maritime liens, and hence vessel arrests, with bankruptcy proceedings are confounded because, despite the fact that "bankruptcy judges have no specific grant of admiralty jurisdiction," bankruptcy judges "may exercise jurisdiction over the validity and priority of maritime liens."[55] This intrusion by bankruptcy courts into admiralty disputes is the crux of the problem that this Note attempts to address.

II. BANKRUPTCY: THE U.N.'S MODEL LAW AND CHAPTER 15

Bankruptcy is a complex legal system, with a pedigree nearly as venerable as admiralty's. International bankruptcy,[56] while a much younger variant of bankruptcy, is relatively easily understood once a basic framework has been established. This section will establish that framework before laying out the problem created by the current international bankruptcy regime's effects on admiralty law. It will also propose a solution to that problem in the United States based on a fortuitous confluence of Australian law.[57]

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54. *See* John S. Rogers, *Enforcement of Maritime Liens and Mortgages*, 47 TUL. L. REV. 767, 767 (1973).

55. 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 520–22 (2d ed. 1994);

> While one heard of complaints from the admiralty bar that judges without tenure and the other perquisites of article III judges could not constitutionally exercise admiralty jurisdiction, the validity of the grant of admiralty jurisdiction to bankruptcy courts seems to have never been authoritatively determined in a published opinion. As previously noted, however, the Supreme Court's 1982 decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., invalidated title 11's grant of comprehensive jurisdiction to the bankruptcy courts.

Frank Kennedy, *Jurisdictional Problems Between Admiralty and Bankruptcy Courts*, 59 TUL. L. REV. 1182, 1198 (1985).

56. "Bankruptcy" is synonymous with "insolvency." Which word is used depends upon the lexicon of the legislature writing a particular statute. *See Cross Border Insolvency Act 2008* (Cth) s 1 (Austl.); U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, at 3–4, U.N. Sales No. E.14.V.2 (2014).

57. *See* discussion *infra* Part III.A.2.

A. The Model Law

As commerce in the late twentieth century became increasingly globalized, it was clear to UNCITRAL[58] and the international legal apparatus that some regularization and uniformity would be helpful both in the business of trade and in the business of law.[59] One of UNCITRAL's efforts to create a blanket international bankruptcy scheme is the Model Law.[60] Although the Model Law has only been accepted by a handful of U.N. states,[61] and despite its relative youth, it has already had significant legal and economic effects in at least two member nations—the United States and Australia.[62]

B. Chapter 15

Chapter 15 of the United States Code replaced the old Section 304 of the Bankruptcy Code and is the United States' implementation of UNCITRAL's Model Law.[63] Chapter 15 has five stated purposes, which are derived from its international origin.[64] First, any interpretation of Chapter 15 "must be coordinated with the interpretation given by other countries that have adopted it as an internal law to promote a uniform and coordinated legal regime for cross-border insolvency cases."[65] The goal of normalization in Chapter 15's first stated purpose is further supported by the other enumerated purposes, which are as follows:

> (2) greater legal certainty for trade and investment; (3) fair and efficient administration of cross-border insolvencies that

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58. *Welcome*, UNCITRAL, http://www.uncitral.org/uncitral/en/index.html (last visited June 21, 2014).

59. *Id.* at *1997*; *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment*.

60. UNCITRAL, *supra* note 56.

61. Nineteen nations, to be exact. *Status*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited Apr. 26, 2014).

62. *See* discussion *supra* text accompanying notes 11–18; *see* discussion *infra* Part III.A.1.

63. 11 U.S.C. § 1501 (2014).

64. *Id.* § 1501(a).

65. Administrative Office of the U.S. Courts, *Chapter 15*, U.S. COURTS (last visited June 21, 2014), http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter15.aspx.

> protects the interests of all creditors, and other interested entities, including the debtor; (4) protection and maximization of the value of the debtor's assets; and (5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.[66]

A Chapter 15 bankruptcy case is typically filed in order to protect a foreign debtor's assets that exist or are contemporaneously located in the United States.[67] The threshold that a party must meet to gain Chapter 15 protections is relatively low.[68] The party seeking bankruptcy protections must petition the court for "recognition of a foreign proceeding."[69] The statute defines a foreign proceeding as follows:

> [A] collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.[70]

This petition process leads to what has come to be known professionally as the "Chapter 15 gap period."[71] This "gap period" occurs between the filing of the petition for recognition and the recognition hearing before the bankruptcy court. Although the debtor is not automatically protected by the Bankruptcy Code after petitioning for recognition, if he fears that a creditor may take action against him before the recognition hearing, then the debtor may move for provisional protections after the filing and before the hearing.[72] These protections are injunctive and terminate after the recognition hearing takes place.[73] Furthermore, this temporary relief differs from the permanent relief offered after the hearing in that only debtor property that is "perishable, susceptible to devaluation, or otherwise in jeop-

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66. 11 U.S.C. § 1501(a).

67. Administrative Office of the U.S. Courts, *supra* note 65.

68. 11 U.S.C. § 1504.

69. *Id.*

70. 11 U.S.C. § 101(23) (2014); *see In re* Betcorp Ltd., 400 B.R. 266 (Bankr. D. Nev. 2009).

71. Bruce Nathan & Eric Horn, *Demystifying Chapter 15 of the Bankruptcy Code*, BUS. CREDIT, June 2009, at 1, 2.

72. 11 U.S.C. § 1519(a)(1) (2014).

73. *Id.* § 1519(b)–(e). The temporary relief terminates unless extended under Section 1521(a)(6), which allows for such an extension.

ardy" is given to the debtor.[74] As the UNCITRAL Legislative Guide on Insolvency Law eloquently states:

> The reason for the availability of collective measures, albeit in a restricted form, is that relief of a collective nature may be urgently needed already before the decision on recognition in order to protect the assets of the debtor and the interests of the creditors. Exclusion of collective relief would frustrate those objectives. On the other hand, recognition has not yet been granted and, therefore, the collective relief is restricted to urgent and provisional measures.[75]

Once a foreign proceeding is recognized by the court, the court must then determine whether that proceeding is "main" or "non-main."[76] A main proceeding is "a foreign proceeding pending in the country where the debtor has the center of its main interests."[77] A non-main proceeding is "a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment."[78] While the statute defines a debtor's establishment as "any place of operations where the debtor carries out a nontransitory economic activity," it does not define a debtor's center of main interests.[79] The Bankruptcy Code, however, does contain a rebuttable presumption that "the debtor's registered office . . . is presumed to be the center of the debtor's main interests."[80] After an order granting recognition of a foreign proceeding, many of the protections granted by the other chapters of the Bankruptcy Code are afforded to the Chapter 15 debtor.[81] These protections de-

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74. *Id.* § 1519(a)(2).

75. U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW, at 341, U.N. Sales No. E.05.V.10 (2005).

76. 11 U.S.C. § 1517(b) (2014).

77. *Id.* § 1502(4).

78. *Id.* § 1502(5).

79. *Id.* § 1502(2).

80. *Id.* § 1516(c). Much ink has been spilled over how to determine a debtor's center of main interests. The case law seems to accept the European rule that the debtor's center of main interests is "the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties." *In re* Tri-Cont'l Exch. Ltd., 349 B.R. 627, 634 (Bankr. E.D. Cal. 2006). *Cf. In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 336 (S.D.N.Y. 2008) (citation omitted) (listing factors that could be taken into consideration in determining a center of main interests).

81. 11 U.S.C. §§ 1520–1521.

pend, naturally, upon whether the foreign proceeding is found to be main or non-main. If the foreign proceeding is found to be non-main, then the protections granted depend upon the bankruptcy judge's discretion and the relief requested by the foreign company's representative.[82] Types of relief include the staying of proceedings against debtor assets, suspension of the right to transfer or dispose of debtor assets, granting administration of debtor assets to the debtor's foreign representative, and extension of the provisional relief granted after filing by Section 1519(a).[83] In the event that a proceeding is recognized as a foreign main proceeding, Section 1520 imparts the protections granted by the more general chapters of the Bankruptcy Code, including automatic stay of proceedings against debtor assets,[84] avoidance of post-petition transactions,[85] and security of after-acquired property,[86] among others.[87]

The only bulwark opposite the many debtor protections provided by Chapter 15 is the paltry Section 1522, which provides for the discretionary protection of creditor interests in the debtor.[88] This section states, in pertinent part, that all of the protections granted by Chapter 15 are at the judge's discretion.[89] That is, if the protections granted by the Bankruptcy Code would unjustly harm the interests of creditors or other parties to the bankruptcy proceedings, it is within the judge's discretion to modify or terminate that relief as he sees fit.[90] With judicial oversight as the only defense for creditors in a

82. *Id.* § 1521(a).
83. *Id.* § 1519(a).
84. *Id.* § 362.
85. *Id.* § 549.
86. *Id.* § 552.
87. *Id.* § 1520.
88. *Id.* § 1522.
89. *Id.*
90. *Id.* For a brief look at when courts have considered the application of Section 1522, see *In re* Tri-Cont'l Exch. Ltd., 349 B.R. 627, 637 (Bankr. E.D. Cal. 2006) (court withheld debtor assets from foreign representative in order to protect U.S. creditors); *In re* Qimonda AG Bankr. Litig., 433 B.R. 547, 571 (E.D. Va. 2010) (court remanded case where "the Bankruptcy Court did not, as required by §1522, adequately balance the parties' respective interests"); *In re* Int'l Banking Corp. B.S.C., 439 B.R. 614, 626–27 (Bankr. S.D.N.Y. 2010); SNP Boat Serv. S.A. v. Hotel Le St. James, 483 B.R. 776 (S.D. Fla. 2012).

vessel arrest action, it should come as no surprise that Chapter 15 has confounded admiralty suits in the United States.

III. "FROM ANCIENT GRUDGE BREAK TO NEW MUTINY": CONFLICTS OF POLICY BETWEEN ADMIRALTY AND BANKRUPTCY

The differing goals of maritime law and bankruptcy cause a great deal of conflict when both regimes coexist in the same case.[91] The two legal regimes are at constant odds with one another because "[a]lthough the scope of admiralty jurisdiction over contracts may be in flux, the freedom and sanctity of the contract is sacred in maritime law. Bankruptcy law turns contracts on their heads as it allows debtors to reject contracts or avoid contractual transactions."[92] Maritime law has been steadily losing the battle with bankruptcy law in the United States because bankruptcy courts are given broad powers to take jurisdiction in cases related to bankruptcy. While practitioners of admiralty law may rankle at the infringement of bankruptcy onto admiralty jurisdiction, there are good policy reasons for the expansive and wide-reaching nature of U.S. bankruptcy law.

The most important reason for bankruptcy protections, arguably, is the defrayment of risk among entrepreneurs, producers, and employers.[93] Innovation and production are foundational principles of capitalist economies, but innovators and producers will not be willing to take the risks necessary to compete in such an economy without some manner of a safety net.[94] Businesses have inherent value, and when they become insolvent, there is often societal interest in helping them continue to function.[95] A prime example of the benefits of bankruptcy protection is obvious from a basic analysis of the Bethlehem Steel bankruptcy.[96] When businesses fail, the goods and

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91. *See* Graydon S. Staring, *Bankruptcy—An Historical View*, 59 TUL. L. REV. 1157, 1166 (1985); Gary F. Seitz, *Interaction Between Admiralty and Bankruptcy Law: Effects of Globalization and Recurrent Tensions*, 83 TUL. L. REV. 1339, 1359 (2009).

92. Seitz, *supra* note 91, at 1352.

93. *Id.* at 1353.

94. *Id.*

95. *Id.*

96. *Id.* at 1353–54.

services that they produce are no longer available for consumption, their workers lose their employment, and their creditors are unable to recover their full investment.[97] Aside from avoiding these societal evils, the purpose of bankruptcy as a legal regime is threefold: to provide the debtor with a "fresh start,"[98] to distribute a debtor's remaining assets to his creditors, and to allow debts to be reorganized in order to allow a debtor to continue operating.[99]

While the protection of debtors and the creation of an economic safety net for business owners are noble and necessary functions of bankruptcy law, they conflict intrinsically with the rights of creditors in admiralty suits.[100] Those rights in admiralty suits have been called "aggressive" primarily because they favor creditors.[101] Maritime law, with its focus on protecting creditors' rights at the expense of the debtor,[102] is in apposition with bankruptcy's orderly procession of creditors that is designed to protect the debtor and nurture him back to health as a functional, profitable company.[103] Admiralty law, however,

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> Bethlehem Steel was at one time one of the largest shipbuilding companies in the world and one of the most powerful symbols of American industrial manufacturing leadership. Bethlehem Steel "failed": they were no longer paying their debts as they became due. Liabilities exceeded assets and the company had a negative net worth. The company listed inexpensive steel imports and numerous high pension payments as causes of its bankruptcy. Would we be better off if Bethlehem Steel disappeared from the face of the earth? Tens of thousands of people would be out of work. The nation would lose a major source of steel, an important component of national industrial production. Finally, recovery by creditors would be limited.

Id.

97. *Id.*

98. Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 566 (2005) (quoting President George W. Bush from his signing ceremony address, "[the bankruptcy laws] give those who cannot pay their debts a fresh start").

99. Seitz, *supra* note 91, at 1354–55.

100. *Id.* at 1357–58.

101. *Id.*

102. "[A] primary purpose of maritime law is to support a strong merchant marine by favoring creditors." Seitz, *supra* note 91, at 1352 (alteration in original) (quoting John A. Edginton, 3B BENEDICT ON ADMIRALTY 1–21 (2008)).

103. Bankruptcy is designed to protect debtors by giving them "a new opportunity in life and clear field for future effort, unhampered by the pressure

was developed over centuries to deal with the complex maritime industry as it matured globally; an industry that must face the difficulties posed by property that is singularly expensive and internationally mobile—seagoing vessels.[104] Maritime liens, as mentioned previously,[105] are the solution to the innate complications involved in securing rights in maritime commerce. Likewise, vessel arrest and attachment actions are the primary, effective means of enforcing the rights created by maritime liens.[106] If the vessel arrest and attachment actions, or the maritime lien they guarantee, are not protected, the already beleaguered U.S. shipping industry will be irrevocably damaged. Additionally, admiralty was the original international law[107] and, as such, lacks many of the underpinnings of state or nationally centered interests that other legal regimes, like bankruptcy, naturally possess.[108] As the U.S. shipping industry continues to contract,[109] large shipping corporations will increasingly be foreign in their citizenship, [110] which will lead to

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and discouragement of preexisting debt." Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

104. Alwang, *supra* note 14, at 2628–29.

105. *See* discussion *supra* Part I.B.

106. *See* discussion *supra* Part I.A.

107. *See generally* William W. Adams, *Constitutional History—Development of Admiralty Jurisdiction in the United States*, 8 W. NEW ENG. L. REV. 157 (1986) (discussing early interpretations of the U.S. Constitution, Article III, Section 2, which grants admiralty jurisdiction to federal courts); William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL HIST. 117 (1993) (providing a historical account of early admiralty jurisprudence); Hertz v. Treasure Chest Casino, LLC, 274 F. Supp. 2d 795 (E.D. La. 2003) (featuring Judge Fallon's excellent analysis of the evolution of admiralty jurisdiction in the United States).

108. Alwang, *supra* note 14, at 2629.

109. *See* U.S. Dep't Transp. Mar. Admin., U.S. Waterborne Foreign Trade by U.S. Custom Districts, 2003–2012, *available at* http://www.marad.dot.gov/library_landing_page/data_and_statistics/Data_and_Statistics.htm (last visited June 21, 2014) [hereinafter U.S. Waterborne Foreign Trade by U.S. Custom Districts].

110. *See* U.S. Dep't Transp. Mar. Admin., Top 25 Flag of Registry (September 27, 2013), *available at* http://www.marad.dot.gov/library_landing_page/data_and_statistics/Data_and_Statistics.htm [hereinafter Top 25 Flag of Registry].

an increase in the use of Chapter 15 bankruptcy by debtors to escape creditors in the United States.[111]

A. The Land Down Under: Australia's Serendipitous Solution to the Problem

While the United States wrestles with the difficulties imposed by the Model Law's interaction with admiralty law, an analysis of another nation's implementation of the Model Law is informative. It should be noted that a meager number of U.N. member states have only recently adopted the Model Law.[112] The combination of a lack of adherents and recent acquiescence translates to a paucity of case law in the few nations that have implemented the Model Law, and a particular want of case law within the realm of admiralty. One may, however, still draw inferences about the way that vessel arrests would interact with the Model Law in these states, based on what little case law exists. This Note chose a state for comparison out of the group of nations that were once British colonies or territories for a number of reasons. The foremost of those reasons is that most former British territories share a common heritage of admiralty law.[113] This common legal heritage[114] means that the law of the comparison nation is similar enough

111. A comparison of the rise in U.S. imports, a decline in U.S. exports, and a steadily shrinking U.S. private fleet reveals contraction within the U.S. merchant marine that will likely continue in the future. As such, many, if not most, future maritime bankruptcies will be foreign in nature, leading to increasing conflicts between U.S. admiralty law and the tenets of U.N. solutions to cross-border insolvency represented by Chapter 15 of the U.S. Code.

112. *Status*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited June 21, 2014) (listing states that have adopted the Model Law together with the dates of their various adoptions).

113. The Siren, 80 U.S. 389, 393 (1871) ("From the close of the Revolution down to this time it has continued to be our law, so far as it is adapted to the altered circumstances and condition of the country, and has not been modified by the proper national authorities."); Thirty Hogsheads of Sugar v. Boyle, 13 U.S. 191, 198 (1815) ("The United States having, at one time, formed a component part of the British empire, *their* prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances.").

114. *See* TETLEY, *supra* note 13, at 1265–1410 (discussing states that have a developed vessel arrest codex).

to make such a comparison both possible and fruitful.[115] The second reason is that due to the British Empire's nature as a maritime power, and as a part of its imperial heritage, many, if not all formerly British nations have developed a virile merchant marine, making the shipping industry of great economic significance to those states.[116] The maritime tradition of these states is important simply because it ensures that the state selected will have enough case law and statutory law, although certainly not a surplus of either, to facilitate an analysis. The third and final reason is a simple one; many formerly British nations share the English language as their mother tongue, making research and analysis much easier.

The Commonwealth of Australia is one of the best examples of a state with a strong maritime heritage[117] that has also adopted the Model Law.[118] While Australia did adopt the Model Law largely without reservation via the Cross Border Insolvency Act of 2008,[119] the Australian Parliament has added some helpful interpretation to guide the implementation of the law.[120] Although Australia has a different legal regime, which informs their deployment of the Model Law in relation to admiralty, it still offers an example that may allow the U.S. legal system to achieve a middle path between the powerful, creditor centric tools of admiralty law and the equally robust debtor protections of bankruptcy law.

1. The Australian Adoption of the Model Law and *Yu v. STX Pan Ocean*

The Australian statute delimits some specific types of bankrupts, insolvent individuals or entities in the Australian statu-

115. *See Status*, *supra* note 112.

116. *See* Top 25 Flag of Registry, *supra* note 110.

117. *See* BUREAU OF INFRASTRUCTURE, TRANSP. & REG'L ECON., STATISTICAL REPORT: AUSTRALIAN SEA FREIGHT 2–3 (2012).

118. *Cross Border Insolvency Act 2008* (Cth) s 1 (Austl.)

119. The Parliament of Australia went so far as to attach the Model Law on Cross-Border Insolvency as a schedule to its own statute and insert it into existing Australian law "with as few changes as are necessary to adapt it to the Australian context." *Id.* sch 1.

120. The Australian Parliament wrote an explanatory memorandum to accompany its adoption of the Model Law and guide the implementation of the Model Law. Explanatory Memorandum, *Cross Border Insolvency Act 2008* (Cth) 6 (Austl).

tory language, who are not protected by certain elements of the Cross Border Insolvency Act 2008 ("Cross-Border Insolvency Act"). This approach essentially creates an exception to the Model Law for particular types of debtors.[121] While this is an attractive option for parties interested in placing some constraints on the implementation of the Model Law, it is not without its faults. The first of those faults is the fact that such a system of exceptions would grant the enacting government power to favor certain industries[122] or institutions that are considered systemic.[123] Such favoritism in a free market economy is unsavory, at best, as it allows the government to choose "winners and losers" on an economic level. A second fault of the exceptions approach is the possibility of a slippery slope. Once a legislature begins to generate exceptions to the protections of the Model Law, it may continue to create exceptions until the law is so diluted as to be useless.

Despite the risks inherent in the creation of exceptions to the Model Law, the Federal Court of Australia has done just that in its recent decision in *Yu v. STX Pan Ocean Co Ltd*.[124] In *Yu*, the court held that vessel arrests made in pursuance of certain maritime liens would be exempt from the exclusive protections offered to the debtor under the Cross-Border Insolvency Act, which imports the Model Law into Australian law.[125] In a somewhat confusing nexus of parliamentary acts, the only arrests protected are those that are made to enforce maritime liens that impart to the lienor the status of a "secured creditor."[126] These liens are protected because of a clause in another

121. "It is proposed to exclude corporate entities that are currently subject to special insolvency regimes at the Commonwealth level (including financial institutions) from the scope of the Model Law. Views of States and Territories will be sought on exclusion of further types of entities under special insolvency frameworks." CORPORATE LAW ECON. REFORM PROGRAM, CROSS-BORDER INSOLVENCY: PROMOTING INTERNATIONAL COOPERATION AND COORDINATION, PROPOSALS FOR REFORM: PAPER NO. 8, at 26 (2002) [hereinafter CLERP].

122. *See The Decline and Fall of General Motors: Detroitosaurus Wrecks*, ECONOMIST, Jun. 6, 2009, at 78.

123. *See AIG: Cheque Mate*, ECONOMIST, Nov. 5, 2008, at 22.

124. *Yu v STX Pan Ocean Co.*, (2013) FCR 680 (Austl.).

125. *Id.* ¶¶ 41–42.

126. Security rights are created in a maritime lien when the lien involves claims for salvage, claims for collision damages caused by a ship, claims for wages of a ship's master or crew, and claims for a master's disbursement. *Admiralty Act 1988* (Cth) s 15 (Austl.).

parliamentary act, the Corporations Act 2001 ("Corporations Act"), which provides in pertinent part that the stay of proceedings allowed by the Australian Model Law shall not affect "a secured creditor's right to realise or otherwise deal with [a] security interest."[127] Thanks to this protection of secured creditors' interests[128] in the Corporations Act and the Model Law's reservation that local laws, such as the Corporations Act, are allowed to survive its implementation,[129] the Honorable Justice J. Buchanan was able to rule that bankruptcy law could not trump admiralty law at every turn, and that in certain cases, admiralty actions must be allowed to proceed.[130] Justice Buchanan succinctly explains the problem between the two legal regimes of admiralty and insolvency in Australia:

> Criticism has been made of the terms of the Model Law by reason of its failure to recognise and take appropriate account of international maritime law and the operation in Australian jurisdictions of the Admiralty Act. I do not propose to take up those matters in the present judgment, but those criticisms draw attention to the fact that, for centuries, international maritime law developed its own security regimes for reasons which remain generally observed around the world, including in Australia.[131]

He goes on to illustrate that maritime liens, by their very nature as an action in rem, are securities as discussed in Section 471C of the Corporations Act.[132] Justice Buchanan also establishes a rule for other judges exercising their discretion in the granting of bankruptcy protections, stating that "[w]hether an arrest would issue would depend on the circumstances, the reason why the arrest was sought and the interest sought to be vindicated by the [arrest]."[133]

The astute analyst will note, however, that the combination of Australian statutes allowed for the Federal Court of Austral-

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127. *Corporations Act 2001* (Cth) s 471C (Austl.).

128. "Nothing in section 471A or 471B affects a secured creditor's right to realise or otherwise deal with the security interest." *Id.*

129. *Yu v STX Pan Ocean Co.*, (2013) FCR 680, ¶ 36 (Austl.) ("Article 20(2) preserves the operation of local insolvency laws."); *see also* UNCITRAL, *supra* note 56, at 20(2).

130. *Yu*, (2013) FCR at ¶¶ 41–42.

131. *Id.* at ¶ 39.

132. *Id.* at ¶ 40.

133. *Id.* at ¶ 41.

ia's decision *by accident*. Although there is some indication[134] in the legislative record that the Australian Parliament intended Corporations Act Section 471C to protect security interests from the implementation of the Model Law, there is no evidence that the parliament thought it would be protecting vessel arrest provisions in admiralty.[135] Interestingly, an examination of the security interests created by maritime liens that are protected from the Australian implementation of the Model Law leads one to the conclusion that these exceptions are quite adventitious. There are only four types of maritime liens that create a security interest that is free from the Model Law in Australian jurisdictions.[136] More importantly, each of the four types of liens covers an area of maritime commerce and an operation of admiralty law that is essential to the success of shipping at sea.[137] The public policies that benefit from the liens are still vital today as a part of the modern shipping industry.

2. The Security Interests Guaranteed by Australian Maritime Liens

The first Australian maritime lien that creates a security interest is the maritime lien arising from a claim of salvage.[138] It is good policy that whenever and wherever one ship finds another in distress, the first ship lends assistance.[139] The assisting ship is said to be the salvor of the distressed ship, and, as the High Court of Admiralty stated in *The Two Friends (M'Dougal, Master)*, "every person assisting in rescue has a lien on the thing saved. He has, as it has been argued, an action *in*

134. *See* CLERP, *supra* note 121, at 35; *Cross Border Insolvency Act 2008* (Cth) s 20 (Austl.).

135. *Corporations Act 2001* (Cth) s 471C (Austl.).

136. "A reference in subsection (1) to a maritime lien includes a reference to a lien for: (a) salvage; (b) damage done by a ship; (c) wages of the master, or of a member of the crew, of a ship; or (d) master's disbursements." *Admiralty Act 1988* (Cth) s 15(2) (Austl.).

137. The ranking of these liens among one another is conveniently irrelevant for the purposes of this Note, because all four types of lien vest security rights in the creditor.

138. As previously mentioned, admiralty law is very much sui generis, and an additional article could be written discussing the intricacies of the right of salvage. For more information on salvage as a doctrine see W.R. KENNEDY, LAW OF SALVAGE (5th ed. 1985).

139. TETLEY, *supra* note 13, at 329–40.

personam also; but his first and his proper remedy is *in rem*."[140] This right of salvage is designed to make it lucrative for ships to aid one another and to prevent "embezzlement" or piracy.[141] If this lien from salvage rights is not defended against bankruptcy stays granted by the Model Law, then the impetus to aid ships in distress begins to erode, which would be contrary to public policy.[142] It is true that the law could simply require ships to assist one another, but that would be inherently difficult to enforce on the open sea.[143] Even though the Australian statutes only accidentally protect maritime liens based on salvage rights, it is a fortuitous coincidence, as the shipping industry would be greatly harmed if the institution of salvage were undermined by the Model Law.[144]

The second of the four security interests created by Australian maritime liens is the security interest arising from collision damage done by a ship.[145] For obvious reasons, a collision or allision can cause extensive damage to the vessel and its surrounding environs.[146] The policy reason for the priority of this lien type over others is based on the size of seagoing vessels

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140. *The Two Friends (M'Dougal, Master)*, (1799) 165 Eng. Rep. 174 (Admlty) 176; 1 C. Robinson 271.

141. *See The Blackwall*, 77 U.S. (10 Wall.) 1, 14 (1869).

142. KENNEDY, *supra* note 138, at 43.

143. *See* Mason v. Blaireau, 6 U.S. (2 Cranch) 240, 266 (1804)

> If the property of an individual on land be exposed to the greatest peril, and be saved by the voluntary exertions of any person whatever; if valuable goods be rescued from a house in flames, at the imminent hazard of life by the salvor, no remuneration in the shape of salvage is allowed. The act is highly meritorious, and the service is as great as if rendered at sea. Yet the claim for salvage could not, perhaps, be supported. It is certainly not made. Let precisely the same service, at precisely the same hazard, be rendered at sea, and a very ample reward will be bestowed in the courts of justice.

Id.

144. Justin S. Stern, *Smart Salvage: Extending Traditional Maritime Law to Include Intellectual Property Rights in Historic Shipwrecks*, 68 FORDHAM L. REV. 2489, 2492 (2000).

145. In the modern context, this category includes damage from collisions with the ship and damage caused directly by the ship's actions, called ship tort liens. TETLEY, *supra* note 13, at 387–91.

146. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 757 (5th ed. 2012).

and their capacity to cause massive amounts of damage.[147] This is an especially salient point given the size of modern bulk carriers, tankers, and container ships.[148] A shipwreck close to a port, even of a relatively small, noncommercial vessel, can have an enormous cost in terms of both economic loss and lives, as demonstrated by the wreck of the *Costa Concordia*.[149] This is to say nothing of other types of maritime disasters, an obvious example being the *Deepwater Horizon* debacle.[150] It is good public policy to hold the masters of vessels responsible for such maritime catastrophes that take place under their command.[151] It is difficult to imagine Carnival Cruise Lines, operator of the *Costa Concordia*, or BP, an operator of the *Deepwater Horizon*, escaping from liability for damages caused by the vessels under their control simply by filing for bankruptcy. Yet, if either corporation had filed for bankruptcy abroad, the validity of maritime claims against them would have been at issue.[152] Once again, the Australian statute, albeit accidentally, protects the security interests in maritime liens created by collision damage and ship torts, which are traditional maritime liens essential to maritime commerce and the safe operation of seagoing vessels.[153]

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147. TETLEY, *supra* note 13, at 387–90.

148. In the trial following the *Exxon-Valdez* oil spill, the jury awarded US$5 billion for punitive damages, which were later reduced to US$507.5 million, in addition to US$507.5 million for actual damages. Exxon Shipping Co. v. Baker, 554 U.S. 471, 476 (2008).

149. The recent *Costa Concordia* disaster is evidence of this and, even though the loss of life takes clear precedence, the long-term economic loss to the pleasure cruise industry should not be forgotten when tabulating damage. Gaia Pianigiani, *Search Is On for Survivors From Cruise Ship That Ran Aground*, N.Y. TIMES, Jan. 15, 2012, at A10.

150. On April 20, 2010, a drillhead blowout on the *Deepwater Horizon* oil rig resulted in a large explosion. The oil rig burned for a day and a half before it sank, but the damage to the oil well resulted in a spill of about 4.9 million barrels of oil into the Gulf of Mexico between April 20 and July 15, 2010. *See* Campbell Robertson, *Search Continues After Oil Rig Blast*, N.Y. TIMES, Apr. 22, 2010, at A13; U.S. COAST GUARD, ON SCENE COORDINATOR REPORT *Deepwater Horizon* OIL SPILL, (2011) *available at* http://www.uscg.mil/foia/docs/DWH/FOSC_DWH_Report.pdf.

151. *See generally* TETLEY, *supra* note 13, at 387–416 (discussing the policy behind and function of collision damage maritime liens).

152. *See* discussion *supra* text accompanying notes 11–18.

153. *See* TETLEY, *supra* note 13, at 387–90.

The third type of maritime lien held in Australia to create a security interest is a lien for the "wages of the master, or of a member of the crew, of a ship."[154] The importance of ensuring the pay of seamen and ships' masters cannot be understated.[155] In an economic analysis, if seamen are not reliably paid for their work, they will leave the shipping industry to seek jobs where they are more regularly reimbursed. Without captains and crews, the shipping industry ceases to function for obvious reasons. All of that is to say nothing of the human rights issues and labor struggles that plagued seamen in the past that have only recently, in the grand scale of admiralty law, been mollified by legislative and judicial action.[156] Another facet of the wage problem is the potential for criminal activity if seamen and masters are not paid.[157] Shipping vessels are mobile, expensive, and often filled with valuable cargo.[158] Piracy is a very real risk on modern shipping lanes, and if seamen and ship masters are not adequately compensated, desperados may not be confined to operating dinghies off the coast of Somalia.[159] As such, the Australian protection of the security interest in a maritime lien for seamen's and ship masters' wages conveniently serves the interests of the public.

The fourth and final type of Australian maritime lien that is protected from a stay granted by the Model Law is a lien for a ship master's disbursements.[160] This is similar to a lien for necessities[161] but applies to purchases made by the ship's master from his own money or on his own credit in the pursuance of his duties to the ship and crew.[162] The logic behind this type of lien is similar to that of the lien for wages mentioned above.

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154. *Admiralty Act 1988* (Cth) s 15(2)(c) (Austl.).

155. Bass v. Phoenix Seadrill/78, Ltd., 749 F.2d 1154, 1160–61 (5th Cir. 1985) ("Seamen, of course, are wards of admiralty whose rights federal courts are duty-bound to jealously protect.").

156. 46 U.S.C. § 50101 (2014).

157. *See* TETLEY, *supra* note 13, at 267–69.

158. *See* U.S. Waterborne Foreign Trade by U.S. Custom Districts, *supra* note 109.

159. Jeannette Catsoulis, *Stolen Seas*, N.Y. TIMES, Jan. 18, 2013, at C10. (discussing a recent documentary on Somali Pirates).

160. *Admiralty Act 1988* (Cth) s 15(2)(d) (Austl.).

161. Necessities are things purchased on credit by a ship underway that the ship requires to continue its voyage: for example, food and water for the crew, medical supplies, fuel oil, and repairs. TETLEY, *supra* note 13, at 551–52.

162. *Id.* at 419.

Without the assurance of reimbursement, a ship's master may, at best, be required to unjustly pay the price of the shipowner's default. At worst, the ship's master may either shirk his duty by not purchasing the necessities required for the safe and successful operation of his vessel, or even turn to crime in order to make up his shortfall.[163] This maritime lien is so zealously enforced that in one case a commercial shipping vessel was sold in a Canadian small claims court to pay a mere CA$251.00 master's disbursement.[164] Once again, the Australian exception protects those most at risk of unjust treatment in a bankruptcy action under the Model Law—secured creditors.

Based upon the Australian case law and the lucky congruity of Australian statutory law, the most important types of maritime liens—those for salvage, collision damage, master's or crew's wages, and master's disbursements—are protected in Australian jurisdictions from the Model Law's ham-fistedness. There is a solution to the battle between vessel arrest and bankruptcy in the United States that can be distilled from the Australian solution to the same conflict.

IV. RESTORING BALANCE TO THE SCALES

Ultimately, bankruptcy and admiralty are "both alike in dignity."[165] Both regimes protect valuable economic interests and both have their place in the legal system. Under Chapter 15, bankruptcy's protection of debtors has expanded significantly, while it simultaneously constricted admiralty's protection of creditors. This imbalance causes a great deal of harm to maritime commerce. One should not forget, however, exactly how powerful the vessel arrest and attachment provisions of U.S. maritime law can be if not kept reasonably in check. An example of maritime attachments getting out of control and subsequently being reigned in is readily available in the EFT line of cases, which will be discussed at the end of this section.[166] Additionally, a discussion of recent Supreme Court jurisprudence

163. *See* Epstein v. Corporacion Peruana de Vapores, 325 F.Supp. 535 (S.D.N.Y. 1971) (ship's master bought 2.2 million cigarettes and forty cases of liquor intending to smuggle them internationally).

164. *Osborn Refrigeration Sales & Services Inc. v. The Atlantean I*, [1979] 2 F.C. 661 (Fed. Ct. of Can.).

165. SHAKESPEARE, *supra* note 1.

166. *See* discussion *infra* Part IV.B.

evinces a trend of U.S. courts increasing the difficulty with which foreign parties can gain access to the U.S. judicial system.[167] Once these final issues have been addressed, this Note will then move on to the proposed solution to the conflict between bankruptcy and admiralty.

A. The Weight: Bankruptcy Has Waxed Full

Proponents of stronger admiralty protections have argued that "any international insolvency treaty should include a provision recognizing the primacy of admiralty law over maritime assets."[168] While the effectiveness of Chapter 15 could be compromised if Congress begins to carve out exceptions, it is clear that the chapter, as it stands now, is dysfunctional if not actively harmful in cases of maritime bankruptcy. Other nations that have adopted the Model Law have no specific provision protecting maritime assets in maritime insolvencies,[169] but many of the larger shipping nations that have implemented the Model Law also lack the robust tools of the U.S. admiralty system.[170] Furthermore, Australia, at least, has recognized that the lack of protection for maritime assets from the Model Law has created significant difficulties in admiralty actions.[171] The nations that possess maritime capabilities similar to those of the United States have started to adjust their implementations of the Model Law in an effort to level the playing field between admiralty and insolvency once again.[172] Furthermore, there is strong precedent in favor of treating admiralty disputes differently from other actions in the United States.[173] Aside from the

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167. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1677 (2013) (holding that the threshold for foreign parties to bring suit in the United States required "the presence of some distinct American interest").

168. Alwang, *supra* note 14, at 2617.

169. *See* CROSS-BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW (Look Chan Ho ed., 2d ed. 2009) (examining the implementation of the Model Law in various countries; nowhere, however, does it mention any reservations or exceptions for admiralty actions).

170. Tetley, *supra* note 28, at 1928. ("Another hallmark of U.S. maritime procedures is that both maritime attachment and arrest in rem are subject to certain constitutional safeguards rooted in the 'due process' clauses of the Fifth and Fourteenth Amendments of the United States Constitution.")

171. *Yu*, (2013) FCR at ¶ 38.

172. *Id.*

173. Admiralty is one of few disciplines specifically protected in the Constitution. U.S. CONST. art. III, § 2, cl. 1.

Constitution's explicit treatment of admiralty jurisdiction,[174] there is a long history of Supreme Court jurisprudence that recognizes admiralty as being separate from the common law.[175] Therefore, bankruptcy courts cannot determine admiralty suits. Even if bankruptcy courts had the proper jurisdiction, bankruptcy, as a discipline, looks at suits through a lens that focuses on land-based, national concerns.[176] Admiralty disputes are inherently focused on the uniquities of maritime commerce and should be adjudicated with that focus in mind.[177]

B. Admiralty Ascendant

Admiralty, however, should not be permitted to run roughshod over debtor rights, as it was in the EFT line of cases. In these cases, the Second Circuit successfully stopped an abuse of maritime attachment procedure.[178] Beginning with *Winter Storm Shipping, Ltd. v. TPI*,[179] the Southern District of New York allowed a creditor to use a maritime attachment to seize a shipper's electronic funds transfer.[180] Over the course of the next seven years, the Second Circuit was inundated with maritime attachment claims on EFTs. Indeed, four years after the *Winter Storm* decision, the Second Circuit questioned the veracity of that decision in *Aqua Stoli Shipping Ltd. v. Gardner*

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174. *Id.*

175. "Admiralty courts proceed according to the principles, rules, and usages which belong to the admiralty as contradistinguished from the courts of common law." United States v. Ames, 99 U.S. 35, 35–36 (1878) (quoting Manro v. Almeida, 23 U.S. 473 (1825)). *See also* Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917); *Chelentis*, *supra* note 27; Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955); Garrett v. Moore-McCormack Co., Inc., 317 U.S. 239 (1942).

176. *See, e.g.*, GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 589 (2d ed. 1975) ("[M]aritime liens and land liens have little in common.").

177. Alwang, *supra* note 14, at 2642–45.

178. Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd., 585 F.3d 58, 68 (2d Cir. 2009) (discussing the difficulties created by its decision to allow EFTs to be attached in maritime claims).

179. Winter Storm Shipping, Ltd. v. TPI, 310 F.3d 263 (2d Cir. 2002).

180. EFTs are electronic monetary transactions that take place during the regular course of business. Due to the high concentration of financial institutions in New York City, it became very common for creditors to attach the EFTs of a debtor involved in contracts that were just barely maritime in nature, as required by the procedural rules. *Jaldhi*, *supra* note 162, at 62.

Smith Pty Ltd.[181] In 2009, the Second Circuit specifically overturned *Winter Storm*, holding that "*Winter Storm's* reasons [are] unpersuasive and its consequences untenable."[182] The EFT cases are a prime example of the problems created when the powerful tools of admiralty are allowed to go unchecked, similar to the way in which Chapter 15 has gone unchecked since its adoption from the Model Law.[183] Just as powerful admiralty provisions had to be brought back under control in the EFT cases, the ability of current bankruptcy law to disrupt vessel arrest and attachment actions must also be brought to heel.

V. *KIOBEL* AND THE SUPREME COURT'S DISINTEREST IN FOREIGN AFFAIRS

Admiralty law, as mentioned above, is international by its very nature.[184] When admiralty combines with international bankruptcy, it is almost inevitable that one party will be foreign to the United States. The Supreme Court, however, recently moved away from U.S. judicial involvement in foreign suits.[185] In its decision in *Kiobel v. Royal Dutch Petroleum Co.*, the Supreme Court raised the bar for access to American courts, and it is likely that the Court would do the same in a maritime bankruptcy if given the opportunity.[186] While it may appear at first glance that strict application of Chapter 15 protections would keep foreign matters out of U.S. courts by relegating the procession of creditors to foreign proceedings, there are several problems with that assumption.[187] First, the Court's decision in *Kiobel* explicitly stated that some "distinct Ameri-

181. Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd., 460 F.3d 434, 447 n.6 (2d Cir. 2006) ("The correctness of our decision in *Winter Storm* seems open to question . . .").

182. *Jaldhi*, *supra* note 178, at 68.

183. *See* discussion *supra* text accompanying notes 11–18.

184. *See* Adams, *supra* note 107, at 165 ("Nowhere does it appear that a grant of admiralty jurisdiction to the federal government was founded on anything other than considerations of international comity.").

185. *Kiobel*, *supra* note 167, at 1669.

186. *Id.*

187. One may arrive at the assumption that Chapter 15 protections will result in fewer foreign suits in U.S. courts because one of the purposes of Chapter 15 is to relegate foreign bankruptcies to foreign courts. § 1501 *supra* note 50.

can interest" had to be implicated in order for foreign parties to gain access to the U.S. legal system via the Alien Tort Statute.[188] In the vessel arrest actions with which this Note concerns itself, the creditors are always American in their citizenship, because if they were not, they would not have access to U.S. maritime remedies. Surely citizenship can satisfy *Kiobel*'s requirement of "American interest" for access to U.S. courts. Additionally, foreign companies have been using the Chapter 15 bankruptcy provisions to protect their assets located in the United States.[189] Indeed, the whole purpose of Chapter 15 is to protect local assets of distant debtors.[190] While such usage may not involve U.S. courts in certain types of bankruptcy litigation, it would take advantage of the U.S. system to serve foreign interests, which seems to be precisely what the Supreme Court seeks to avoid by its holding in *Kiobel*.[191] Hence, based on the stated aims of the Court, the conflict between admiralty and bankruptcy must be solved by stronger protections for the powers of vessel arrests and attachments.

CONCLUSION

> "What here shall miss, our toil shall strive to mend."[192]

The combination of Supreme Court trend, maritime bankruptcy dysfunction, and a preexisting, creditor-centric corpus of admiralty law, demands a resolution in the current feud between Chapter 15 bankruptcy protections and admiralty actions. A curative amendment to Chapter 15 could be based on the Australian model, which protects a very limited but vital set of maritime liens and rights of action. By reserving admiralty arrest and attachment proceedings to courts sitting in admiralty, this solution would go a long way toward ameliorating the destructive effects that the deployment of the Model Law has had on maritime commerce in the United States.[193] Moreover, as U.S. imports from the developing world rise and the number of U.S.-based shipping companies falls, there will be a corresponding increase in foreign companies filing for

188. *Kiobel*, *supra* note 167, at 1677–78.
189. *See Evridiki*, *supra* note 2, at 669; discussion *supra* at 1–2.
190. 11 U.S.C. § 1501(a)(4).
191. *Kiobel*, *supra* note 167, at 1669.
192. SHAKESPEARE, *supra* note 1.
193. *See Evridiki*, *supra* note 2, at 669; discussion *supra* at 1–2.

Chapter 15 recognition of their bankruptcies in an effort to escape creditors in the United States.[194] As these creditors continue to lose money in the shipping business, they will cease to invest in it, leading to a further contraction of the already reeling industry.

The importance of bankruptcy protections, however, cannot be denied. Bankruptcy protections are part of the reason that the modern United States economy, and indeed the international economy, is as vibrant as it is.[195] The ability of bankruptcy to lower the barriers to entry into the economy for entrepreneurs is of extreme importance to overall economic health, and that is to say nothing of bankruptcy's ability to keep large corporations running, their products and services flowing into the marketplace, and their employees working and earning.[196] But, as in all things, moderation is critical. Chapter 15 has administered a crash course, at least in the United States and Australia, on the problems associated with overbroad, one-size-fits-all international laws, especially such laws that govern legal regimes as disparate and diametrically opposed as bankruptcy and admiralty.[197] In the instance of vessel arrest, admiralty law requires either a statutory protection of its jurisdiction, created by the legislature, or a judicial interpretation of Chapter 15 that protects admiralty jurisdiction from bankruptcy courts similar to the interpretation in *Yu*.[198] Australia provides an excellent example of a nation with a robust merchant marine possessing tools on par with U.S. vessel arrest, if not attachment, provisions.[199] Furthermore, Australia has encountered an identical problem in its own implementations of the Model Law in admiralty cases.[200] Australia has responded in an appropriate fashion by recognizing the importance of maritime liens to the operation of maritime commerce and creating protections for vessel arrest and attachment, the only effective tools that creditors have to enforce those liens.[201] Such protec-

194. *See* Top 25 Flag of Registry, *supra* note 110; U.S. Waterborne Foreign Trade by U.S. Custom Districts, *supra* note 109.
195. Staring, *supra* note 91, at 1164.
196. Jensen, *supra* note 98, at 566–67.
197. *See* discussion *supra* Part III.
198. *See Yu*, (2013) FCR at ¶ 41–42.
199. *See Admiralty Act 1988* (Cth) s 15 (Austl.).
200. *Yu*, (2013) FCR 680.
201. *Id.*

tions will be vital to the health of the United States' shipping industry in the future. Congress must take a cue from the Federal Court of Australia and craft a provision into Chapter 15 to counteract the current abuse of the chapter by debtors seeking to sabotage the rights of their creditors.

Alfred Joseph Falzone III[*]

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[*] B.A., The University of North Carolina at Chapel Hill (2009); J.D., Brooklyn Law School (Expected 2015); Editor-in-Chief, *Brooklyn Journal of International Law* (2014–2015). I thank the staff and editors of the *Brooklyn Journal of International Law* for their tireless efforts in the publication of this Note. I owe special thanks to Mr. Christopher R. Nolan, who provided the impetus for this topic, although I answered a question rather different from the one he asked. Finally, I must thank Elizabeth Komar, my wife, for her support and patience during this process. Any errors or omissions are my own.

CIVILIAN SOCIAL MEDIA ACTIVISTS IN THE ARAB SPRING AND BEYOND: CAN THEY EVER LOSE THEIR CIVILIAN PROTECTIONS?

INTRODUCTION

The Arab Spring has brought great change to the Middle East. While a series of protests and violent revolutions supplanted old regimes in Tunisia, Egypt, Yemen, and Libya, Bahrain was rocked by protests and a civil war still rages in Syria.[1] New communications technologies such as Facebook, YouTube, and Twitter, as well as the global proliferation of cell phones, have been perceived as indispensable tools to organize protests,[2] galvanize public support,[3] incite armed rebellion, and seek the support of allies and the international community.[4] Dissidents' use of modern social media technology for these purposes can pose a real threat to an established regime, so much so that the military will try to stop these activities

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1. Interview by Celeste Headlee with Abderrahim Foukara, Washington Bureau Chief, Al Jazeera Int'l, & Maren Turner, Executive Director, Freedom Now, in Washington D.C. (Oct. 2, 2012), *available at* http://www.npr.org/2012/10/02/162154681/syria-bahrain-still-feel-arab-spring-aftershocks.

2. Thomas Sander, *Twitter, Facebook and YouTube's role in Arab Spring (Middle East Uprisings)*, SOCIAL CAPITAL BLOG (May 23, 2012), http://socialcapital.wordpress.com/2011/01/26/twitter-facebook-and-youtubes-role-in-tunisia-uprising/.

3. Though there were several previous self-immolations in Tunisia, Ryan asserts that the use of social media to spread video of the event is what caused the incident to garner attention from the wider Tunisian public and the traditional media. Yasmine Ryan, *How Tunisia's Revolution Began,* AL JAZEERA (Jan. 26, 2011), http://www.aljazeera.com/indepth/features/2011/01/201112612181598548 3.html.

4. *See* Richard A. Lindsey, *What the Arab Spring Tells Us About the Future of Social Media in Revolutionary Movements,* SMALL WARS J. (Jul. 2013), http://smallwarsjournal.com/jrnl/art/what-the-arab-spring-tells-us-about-the-future-of-social-media-in-revolutionary-movement. Fitzpatrick notes that social media can be used to garner support from international partners. *See* Alex Fitzpatrick, *Social Media Becoming Online Battlefield in Syria,* MASHABLE (Aug. 9, 2012), http://mashable.com/2012/08/09/social-media-syria.

through cyberwarfare[5] or direct action against the dissidents using such social media technology.[6]

A dissident's use of social media presents great potential to alter the military balance of an engagement, as it can be used to directly or indirectly recruit fighters and encourage military defections.[7] Dissidents could also use social media to document abusive actions by the regime,[8] express political views or aspirations incompatible with those of the regime, garner sympathy and material support from the international community, or otherwise aid a military or political victory over the regime.[9] These activities, while potentially harmful to the regime's military and civilian government, could be characterized as free expression, an attempt to alter only the political situation,[10] or even journalism.[11] In spite of such protections, a besieged regime may wish to either silence social media activists or target them as though they were enemy military forces.[12]

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5. Fitzpatrick, *supra* note 4.

6. Kristen McTighe, *A Blogger at Arab Spring's Genesis,* N.Y. TIMES, Oct. 12, 2011, *available at* http://www.nytimes.com/2011/10/13/world/africa/a-blogger-at-arab-springs-genesis.html?_r=0.

7. Social media, such as YouTube, could be used for this purpose. However, more traditional radio devices were actually used for this purpose in documented reports. This article documents members of the armed opposition encouraging defection, but this activity could just as easily be undertaken by civilians. *See* Erika Solomon & Douglas Hamilton, *It's a Walkie-Talkie War on Syrian Frequencies*, REUTERS, April 4, 2012, http://www.reuters.com/article/2012/04/04/us-syria-radio-idUSBRE8330E420120404.

8. Jennifer Preston, *Seeking to Disrupt Protestors, Syria Cracks Down on Social Media*, N.Y. TIMES, May 22, 2011, at A10.

9. SEAN ADAY, ET. AL., BLOGS AND BULLETS II: NEW MEDIA CONFLICT AFTER THE ARAB SPRING 20–22 (2012), *available at* http://www.usip.org/publications/blogs-and-bullets-ii-new-media-and-conflict-after-the-arab-spring (detailing how outside political or military pressure may make victory for the opposition more likely).

10. International Covenant on Civil and Political Rights arts. 19, 25, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

11. Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 79, June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978).

12. This can be accomplished by manipulating the content of the post, discrediting it, or blocking it. Fitzpatrick, *supra* note 4; Christopher Williams, *How Egypt Shut Down the Internet*, TELEGRAPH, Jan. 28, 2011, http://www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/8288163/How-Egypt-shut-down-the-internet.html.

Under international law, a regime can only target civilians with military force if the civilian has surrendered his or her protections by "taking direct part in hostilities."[13] Although it seems that many regimes have and will continue to use their military, paramilitary, and other state organs to target civilians regardless of international law,[14] a regime has the right to repel an insurrection and defend itself against combatants or civilians who have truly lost protection by aiding combatants.[15] This was demonstrated in Libya, where Muammar Gaddafi's orders to attack armed civilians were within his regime's right of self-defense, but orders to attack civilian protestors were contrary to international law.[16] In order to balance the rights of the regime to properly defend itself and the rights of a civilian to lawfully express him or herself, it is imperative to define the line between a social media activist who has lost civilian protection and one who has not.[17]

Two competing approaches have developed to determine when a civilian has lost their protection from military targeting by "taking direct part in hostilities."[18] The first is the Protocol I Test, developed by the International Committee of the Red

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13. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 11, art. 51, sec. 3.

14. *See Libya: 10 Protestors Apparently Executed,* ALERTNET: A THOMSON REUTERS FOUND. SERVICE (Aug. 19, 2011, 12:30 AM), http://www.trust.org/alertnet/news/libya-10-protesters-apparently-executed.

15. Sarah Joseph, *Humanitarian Intervention in Libya*, CASTAN CENTER FOR HUM. RTS. L. (Mar. 18, 2011), http://castancentre.com/2011/03/18/humanitarian-intervention-in-libya.

16. *Id.*

17. Keck articulates the idea that international law seeks to strike a balance between military necessity and ensuring humanitarian protections. A state's right to self-defense, which gives rise to military necessity, must be based on permissible goals, however. Trevor Keck, *Not All Civilians are Created Equal: The Principle of Distinction, the Question of Direct Participation in Hostilities, and Evolving Restraints on the use of Force in Warfare*, 211 Mil. L. Rev. 115, 131 (Spring 2012); The International Covenant on Civil and Political Rights contains the right to freedom of expression, though it notes that freedom may be curtailed only to the narrowest extent possible for national security and public order needs. International Covenant on Civil and Political Rights, *supra* note 10, art. 19.

18. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 11, art. 51, sec. 3; Douglas Moore, *Twenty-First Century Embedded Journalists: Lawful Targets?*, ARMY LAW., July 2009, at 18–21.

Cross ("ICRC").[19] This Test requires that the civilian act to cause military harm through an action designed for the purpose of causing such harm.[20] The civilian's actions and the harm must also be linked directly within a single causal step.[21] The second approach, the Functionality Test, evaluates the civilian based on the military importance of the civilian's function to the faction that the civilian is supporting.[22]

This Note will argue that neither the Protocol I Test nor the Functionality Test adequately balance a social media activist's right to free expression with a regime's right to self-defense,[23] in light of the potential military advantages gained by using social media.[24] An ideal balance will allow the social media activist unlimited political expression, even if the regime is existentially threatened by it, while respecting the regime's right to target an activist who specifically endeavors to inflict serious military harm. The social media activist is less likely to be protected under the more expansive Functionality Test, because this test fails to assure adequate protections for the activist's

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19. *See* Nils Melzer, *Interpretive Guidance on the Notions of Direct Participation in Hostilities Under International Humanitarian Law: Adopted by the Assembly of the International Committee of the Red Cross on 26 February,* 2009, 90 INT'L REV. RED CROSS 991 (2009) [hereinafter INTERPRETIVE GUIDANCE].

20. *Id.* at 1025.

21. *Id.* at 996.

22. Dan Stigall, *The Thickest Grey: Assessing the Status of the Civilian Response Corps Under the Law of International Armed Conflict and the U.S. Approach to the Targeting of Civilians*, 25 AM. U. INT'L L. REV. 885, 896 (2010).

23. The United Nations Charter guarantees the right to national self-defense. U.N. Charter art. 51.

24. Zambelis notes the military value of social media by writing that the "FSA [Free Syrian Army] appears keen to compensate for its tactical and operational inadequacies by exploiting social media as a force multiplier." Chris Zambelis, *Information Wars: Assessing the Social Media Battlefield in Syria*, COMBATING TERRORISM CENTER SENTINEL, Jul. 2012, at 19, 20, *available at* http://www.ctc.usma.edu/posts/information-wars-assessing-the-social-media-battlefield-in-syria. The United States military uses information to degrade an adversary military's efficiency and as a standalone "nonlethal capability." These goals would seem to lend themselves to the employment of social media. U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.30, PSYCHOLOGICAL OPERATIONS 1-1 to 1-4 (Apr. 2005); PRENTISS BAKER, PSYCHOLOGICAL OPERATIONS WITHIN THE CYBERSPACE DOMAIN (2012), *available at* http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA519576 (submitted to the faculty of Air War College).

right to freedom of speech and association.[25] The Protocol I Test is much more likely to grant protection to a social media activist, but it almost universally prevents the regime from defending itself against the military harm that social media activists can purposefully cause.[26]

This Note will then argue that the Functionality Test can be adapted to adequately balance the rights of the regime with those of the social media activists.[27] The Functionality Test requires additional safeguards to ensure that regimes only target social media activists in those rare instances where the activists intentionally pose a legitimate military threat.[28] These additional safeguards will require that the activist exhibit an individual, subjective intent to cause military harm to the regime,[29] and that the act not constitute part of the "general war effort" by merely building military capacity.[30]

Part I of this Note will provide a background of civilian participation in conflict and the use of social media, both before and during the Arab Spring, by examining the dissidents' actions and the regimes' reactions. This examination will focus heavily on the situation in Syria, as its civil war is the closest

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25. Stigall notes that the Functionality Test is more likely to allow for the targeting of civilians. Stigall, *supra* note 22, at 896. Free expression and political harm should not result in the loss of civilian protection. INTERPRETIVE GUIDANCE, *supra* note 19, at 1020.

26. Michael Schmitt criticizes the Protocol I Approach as constraining a military's ability to respond to certain legitimate threats posed by civilians. Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697, 725, 729 (2010) [hereinafter *Deconstructing Direct Participation in Hostilities*].

27. International law generally recognizes the right to free expression, association, and political views. International Covenant on Civil and Political Rights, *supra* note 10, art. 19. The right of a regime to protect itself in a legal manner is not affected by the general character of the regime. Joseph, *supra* note 15. However, doctrines like humanitarian intervention may be used to address abuses in the conduct of the war or the government's behavior in general. *See* T. Modibo Ocran, *The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping*, 25 B.C. INT'L & COMP. L. REV. 1, 2 (2002).

28. Stigall notes that the Functionality Test could be interpreted in a manner too expansive to constrain military action against civilians that should be protected from targeting. He also observes that the Functionality Test is more likely to allow targeting of civilians than other interpretations. *See* Stigall, *supra* note 22, at 896–898.

29. Free expression and political harm should not result in the loss of civilian protection. INTERPRETIVE GUIDANCE, *supra* note 19, at 1020.

30. I*d.*

to a traditional intrastate armed conflict, [31] and dissidents using social media in such a conflict are more likely to cause military harm. Part II will address the current provisions and interpretations of international law that result in civilian dissidents who use social media, either losing or maintaining their protection from targeting. Part III will analyze and evaluate the different applications of social media activities that may result in the loss of civilian protection in light of the different interpretations of a civilian's direct participation in hostilities.[32] Part IV will discuss the strengths and weaknesses of each interpretation of direct participation and propose additional criteria for determining when a social media activist has lost his or her civilian protection. These additional criteria will seek to balance a regime's right to defend itself from what could be employed as a new type of military threat against the legitimate rights of a social media activist.[33]

I. BACKGROUND

A. Evolution of Protection for Civilians

The right of the civilian population to be free from military targeting has been evolving over the last 150 years.[34] Following the widespread civilian suffering of World War II,[35] large segments of the international community drafted the final treaty in the modern series of the Geneva Conventions to protect civilians, in addition to the soldiers, sailors, and prisoners of war protected under previous Geneva Conventions, from certain

31. The conflict in Syria most closely resembles a traditional intrastate conflict because the regime forces are engaged with several organized, armed opposition groups and coalitions of such organized groups. *See,* Lina Sinjab, *Syria Crisis: Guide to Armed and Political Opposition,* BBC (Dec. 13, 2013), http://www.bbc.com/news/world-middle-east-24403003.

32. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 11, art. 51, sec. 3.

33. The United Nations Charter guarantees the right to national self-defense. U.N. Charter art. 51; Joseph, *supra* note 15.

34. Protection of civilians was at first customary and began to be codified by instruments such as the Hague Conventions of 1907. *See* Waldemar Solf, *Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I*, 1 AM. U. J. INT'L L. & POL'Y 117, 120–24 (1986).

35. Keck, *supra* note 17, at 120–121.

instances of undue harm during war.[36] Within international conflicts, states were obliged to offer certain protections to opposing armed forces, military objectives, and civilians actively participating in hostilities.[37] These included protections from murder, summary execution, use as a hostage, torture, and other inhumane treatments.[38] The first and second additional protocols to the Geneva Conventions explicitly protected civilians from military targeting, as long as they refrained from participation in hostilities.[39] The first additional protocol extended some of the Geneva Conventions protections to intrastate conflicts for the first time, though only within the context of conflicts against colonial or apartheid regimes.[40] The first additional protocol conditioned civilian protection on direct, ra-

36. The protection of civilians was codified by the fourth treaty in the Geneva Conventions and was similar to the safeguards offered to the groups shielded by the three previous treaties. For this reason, the enumerated protections are referred to as "Common Article 3" for their identical placement in each treaty. Lori Hosni, *The ABCs of the Geneva Conventions and their Applicability to Modern Warfare,* 14 NEW ENG. J. INT'L & COMP. L. 135, 137–138 (2007); Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

37. Hosni, *supra* note 36, at 137–38 (citing Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 36, art. 3).

38. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 37, art. 3; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *supra* note 37, art. 3; Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 37, art. 3; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 36, art. 3.

39. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 11, art. 3; Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609.

40. Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *supra* note 39, art. 1, ¶ 4; Hosni, *supra* note 36, at 143–45.

ther than active participation in the conflict, as had previously been the case.[41] A second additional protocol extended the civilian protections of the first additional protocol to all internal armed conflicts.[42]

B. Increasing Participation of Civilians in Warfare.

Concurrent with the development of greater civilian protections,[43] civilians have become generally more involved in warfare, both as victims and as participants.[44] The recent proliferation of intrastate conflicts[45] has been accompanied by the increased suffering of civilians in such conflicts.[46] The nature of these conflicts seems to create a propensity for greater civilian involvement in the fighting.[47] This increased civilian involvement is likely due to the intermingling of regime forces, opposition forces, and civilians in close quarters and the greater like-

41. The treaty protections for civilians in intrastate conflicts were originally allowed for groups attempting to overthrow a colonial regime, occupation from a foreign power, or an apartheid regime. Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Conflicts (Protocol I), *supra* note 11, art. 1, sec. 4. Later, all internal armed conflicts were covered. Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *supra* note 39, art. 1; Michael Schmitt, *Direct Participation in Hostilities and 21st Century Armed Conflict*, in FESTSCHRIFT FÜR DIETER FLECK 505, 507, (Horst Fischer et al. eds., 2004) [hereinafter *21st Century Armed Conflict*], *available at* http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/schmitt_direct_participation_in_hostilties.pdf.

42. Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *supra* note 39, art. 1.

43. *See* Solf, *supra* note 34, at 117–129.

44. *See generally* Andreas Wegner & Simon J. A. Mason. *The Civilianization of Armed Conflict: Trends and Implications,* 90 INT'L REV. RED CROSS 835 (2008).

45. *See generally* Stephane Dosse, *The Intrastate Wars*, SMALL WARS J., 2 (Aug. 25, 2010), http://smallwarsjournal.com/jrnl/art/the-rise-of-intrastate-wars.

46. The majority of the worst instances of civilian suffering are a result of intrastate conflicts. OXFAM, PROTECTION OF CIVILIANS IN 2010: FACTS, FIGURES, AND THE U.N. SECURITY COUNCIL'S RESPONSE, 2–3 (2011), *available at* http://www.oxfam.org/sites/www.oxfam.org/files/protection-of-civilians-in-2010-09052011-en.pdf.

47. *See* Wegner & Mason, *supra* note 44, at 840–41, 843–46.

lihood that civilians will be invested in the outcome of a more local conflict.[48]

At the same time, warfare in general is being waged with greater civilian involvement under the auspices of military supervision.[49] Contractors and civilians directly employed by the military are performing jobs that were once reserved for uniformed military personnel.[50] Civilians often participate in conflicts through irregular militias[51] or perform technical tasks for an organized military such as Cyber Operations,[52] maintaining complex weapons systems,[53] or preparing food for soldiers.[54]

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48. Many factors may explain this increased civilian involvement in hostilities. Intrastate conflicts may afford the opportunity for civilians to participate in an intrastate conflict as a pretext for other opportunities, such as personal gain or prosecution of a vendetta against a certain group. Furthermore, the parties to the conflict may have uncertain membership, with action undertaken in a "bottom up" manner where civilians will broadly undertake the goals of a party on their own initiative. *Id.* at 843–44.

49. *See generally* Nathan E. Hill, Military Contractors–Too Much Dependence? (Mar. 15, 2008) (Strategy Research Project for U.S. Army War College), *available at* http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA479000.

50. Civilians have become increasingly involved in administering and maintaining high technology military equipment such as command systems, communications, and sophisticated weapons. Wegner & Mason, *supra* note 44, at 839 . Civilian contractors now routinely act as cooks, interpreters, security guards, and equipment maintenance workers. Mark Cancian, *Contractors: the New Element of Military Force Structure*, 38 UNITED STATES ARMY WAR COLLEGE QUARTERLY: PARAMETERS 63–64 (Autumn 2008), *available at* http://strategicstudiesinstitute.army.mil/pubs/parameters/articles/08autumn/cancian.pdf.

51. For an example of this phenomenon, *see* Paul Rodgers, *Syria: the Evolving Problem of Competing Militias,* OXFORD RESEARCH GROUP (Feb. 2013),
http://reliefweb.int/sites/reliefweb.int/files/resources/Syria%20the%20evolving%20problem%20of%20competing%20militias.pdf.

52. Cyber Operations include assuring security of computer networks as well as using such networks to offensively assist military commanders. Cyber Operations capabilities have been suggested as a tool of deterrence, similar to nuclear weapons, and have been used for other national security goals, such as sabotaging Iran's nuclear weapons program. Zachary Fryer-Biggs, *U.S. Cyber Moves Beyond Protection*, DEFENSE NEWS (Mar. 16, 2014 9:54 AM), http://www.defensenews.com/article/20140316/DEFREG02/303170013/US-Cyber-Moves-Beyond-Protection; DEP'T OF DEFENSE, CYBER OPERATIONS PERSONNEL REPORT 10-11, 14-15 (2011), *available at* http://www.hsdl.org/?view&did=488076.

53. Wegner & Mason, *supra* note 44, at 838–39.

54. Rod Nordman, *Risks of Afghan War Shift from Soldiers to Contractors*, N.Y. TIMES, Feb. 12, 2012, at A1.

Militaries are also taking on other activities that were either formerly civilian in nature or did not exist in the recent past,[55] such as Cyber Operations, to safeguard and attack computer networks, and Information Operations, which are designed to impact a party's ability to collect, process, disseminate, and act upon information.[56] These developments have resulted in greater civilian involvement in military operations as well as the incorporation of arguably civilian activities into military operations.[57]

The simultaneous trends of rising civilian involvement in intrastate conflicts and a generally increasing civilianization of military tasks[58] have collided with the growing protections offered to civilians during conflicts[59] to cause even greater friction between legal protections and the reality of warfare.[60] The use of social media can accelerate this friction, as its use may further muddle the difference between military goals, political goals, and free expression.[61]

C. Use of Social Media in the Arab Spring.

Social media has been perceived as instrumental to the political and military effectiveness of the opposition and insurgent forces in the Arab Spring.[62] The genesis of the Arab Spring

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55. Wegner & Mason, *supra* note 44, at 837–38.

56. Information Operations are activities designed to "affect the ability of the target audience . . . to collect, process, or disseminate information before or after decisions are made." Information Operations include Psychological Operations which seek not only to affect other militaries, but also civilian populations and governments, which are necessary to achieve military goals. UNITED STATES DEP'T OF DEFENSE, JOINT PUBLICATION 3-13 INFORMATION OPERATIONS, II-3 to II-4 (2006) [hereinafter JOINT PUBLICATION 3-13]; Wegner & Mason, *supra* note 44, at 837–38; Fryer-Biggs, *supra* note 52.

57. Wegner & Mason, *supra* note 44, at 837–38.

58. *Id.*

59. *See* Nils Melzer, *Keeping the Balance Between Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretative Guidance on the Notions of Direct Participations in Hostilities,* 42 N.Y.U. J. INT'L L. & POL. 831, 887 (2010) [hereinafter *Keeping the Balance Between Necessity and Humanity*].

60. Wegner & Mason, *supra* note 44, at 843–45.

61. Actors in the conflict are either political or military, but employ similar means to use social media in the Syrian conflict. Zambelis, *supra* note 24, at 19.

62. *See* T.J. Waters, *Social Media and the Arab Spring*, SMALL WARS J. (Nov. 14, 2012), http://smallwarsjournal.com/jrnl/art/social-media-and-the-

movement is thought to have occurred in Tunisia when Mohamed Bouazizi immolated himself.[63] He acted out of desperation after he was unsuccessful in securing the return of his fruit and scale impounded by corrupt government officials.[64] This act is often cited as the catalyst that unleashed protests and rebellion across the region as the citizens of Tunisia, Libya, Egypt, Syria, Bahrain, and other Arab countries yearned for "dignity, justice, and opportunity."[65] The ensuing protests and skirmishes with authorities were distributed throughout Tunisia via Facebook, until traditional media picked up the story and further accelerated its distribution.[66] News of the opposition's activities and the regime's repression were disseminated by the various means of social media; that dissemination, in turn, appears to have increased acts of protest against the regime.[67] Although paramilitary and police forces[68] were used

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arab-spring. Some experts believe, however, that the impact of social media in the Arab Spring may have been overstated and that additional study is needed to draw definite conclusions about social media's importance to these movements. *See* ADAY, ET. AL., *supra* note 9, at 3–5.

63. This event is often cited as the spark that ignited the events in Tunisia, which in turn is cited as the immediate catalyst for the Arab Spring. Salman Shaikh, *Mohamed Bouazizi: A Fruit Seller's Legacy to the Arab People*, CNN (Dec. 17, 2011, 9:23 AM), http://www.cnn.com/2011/12/16/world/meast/bouazizi-arab-spring-tunisia/; Ryan, *supra* note 3.

64. Hernando De Soto, *The Real Mohamed Bouazizi,* FOREIGN POLICY (Dec. 16, 2011), http://www.foreignpolicy.com/articles/2011/12/16/the_real_mohamed_bouazizi.

65. Shaikh, *supra* note 63.

66. Social media is given great credit for spreading news of this event, as a similar event that was not widely reported failed to spark widespread civil action in Tunisia. Ryan, *supra* note 3.

67. Facebook, Twitter, and YouTube were used to spread news about the opposition's and regime's activities. These sources even fed information to traditional television news outlets. Ryan, *supra* note 3.

68. Customary practice indicates that police or paramilitary forces can be considered armed forces, thus their members are considered combatants, if they independently meet the criteria to be considered an armed force. It is arguable that this practice is confined to international conflicts, as it is not mentioned in Protocol II, which deals with a broader scope of intrastate conflicts than Protocol I, though examples given by the ICRC of activities, such as the enforcement of a nation's laws, are not analogous to traditional military action. International Committee of the Red Cross, *Rule 4: Definition of Armed Forces*, CUSTOMARY INT'L HUMANITARIAN L. DATABASE, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule4 (last visited Oct. 25, 2012); Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and

against the protestors, the military itself seemed to act against the regime.[69] This suggests the possibility that the use of social media may have served to recruit widespread military support for the revolution. It is entirely possible, however, that this movement was purely political, and the military simply declined to intercede as the president had ordered.[70] The usage of social media was aimed at organizing protests and disseminating information about the regime.[71] These activities generally involved political mobilization against the government and lacked a military component.[72]

During the conflict in Syria, the Free Syrian Army used social media to implore members of the regular Syrian military to defect and join the Free Syrian Army.[73] The defections that fol-

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Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 11, art. 43. Membership in the armed forces, however, is a predicate to being considered a combatant—as distinguished from a civilian—in international conflicts. International Committee of the Red Cross, *Rule 3: Definition of Combatants*, CUSTOMARY INT'L HUMANITARIAN L. DATABASE, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule3 (last visited Sep. 14, 2012); Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 11, art 43; Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *supra* note 39, art. 1.

69. Ellen Knickmeyer, *Just Whose Side are Arab Armies on, Anyway?,* FOREIGN POLICY (Jan. 28, 2011), http://www.foreignpolicy.com/articles/2011/01/28/just_whose_side_are_arab_armies_on_anyway.

70. The motivation for the military's refusal to intercede and obey the President's order to fire on the protestors is not clear. This refusal and the withdrawal of the military, however, have been described as "inexplicable." *See* David Kirkpatrick, *Chief of Tunisian Army Pledges His Support for 'the Revolution',* NY TIMES, Jan. 24, 2011, at A4.

71. The use of social media in Tunisia closely mirrored the use of social media in Egypt. Sahar Kamus & Katherine Vaughn, *Cyberactivism in the Egyptian Revolution: How Civic Engagement and Citizen Journalism Tilted the Balance,* 14 ARAB MEDIA & SOC'Y, SUMMER 2011, *available at* http://www.arabmediasociety.com/index.php?article=769&printarticle.

72. *See* Knickmeyer, *supra* note 69.

73. YouTube and walkie-talkies were used by the opposition to try to induce defection by regime soldiers. Solomon & Hamilton, *supra* note 7; Saad Abedine, *Military Defectors Unite Under Free Syrian Army,* CNN (Mar. 25, 2012), http://www.cnn.com/2012/03/24/world/meast/syria-unrest.

lowed chronologically[74] have allegedly filled the ranks of the Free Syrian Army while sapping the strength of the regular Syrian Army.[75] Furthermore, the Free Syrian Army used the same social media to sow disunity and lower the morale of the Syrian military.[76] This type of action has the effect of building up the military capacity of the Free Syrian Army while inflicting military harm on the forces of the regime.[77]

Social media activists used YouTube, Twitter, Facebook, and a host of other media to broadcast atrocities and other abuses by the regime to the outside world.[78] In Libya, social media users publicized violence by the regime, which was cited as a significant factor in galvanizing support for international military intervention.[79] Posting evidence of such violence can bridge the gap between what happened on the ground during an armed conflict and what the governments and citizens of the world know when traditional international media is unable to document such violence through local reporting.[80] In many instances, such international awareness galvanized the citizens of other countries to encourage their own governments to politically pressure the regime committing the violence.[81] Measures un-

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74. The connection between media inducement and actual defection can be inferred, but not documented. *See generally* Abedine, *supra* note 73; *See* Solomon & Hamilton, *supra* note 7.

75. *Inside the Free Syrian Army*, PBS NEWS HOUR (March 12, 2012), http://www.pbs.org/newshour/bb/world/jan-june12/syria_03-12.html.

76. Zambelis, *supra* note 24, at 20.

77. The composition of the Free Syrian Army itself implies that defection causes harm to regime forces as well as benefit to opposition forces. *See Inside the Free Syrian Army*, *supra* note 75; But, Zambelis characterizes the use of social media to encourage defections from the regime to the opposition as more important to reducing the morale and effectiveness of the regime than the marginal shift in relative personnel strength. *See* Zambelis, *supra* note 24, at 20–21.

78. *Libya: 10 Protestors Apparently Executed, supra* note 14.

79. Aday writes that the use of social media in Libya generated a great deal of discussion of the conflict. He is currently investigating how much, if at all, such discussion can influence a foreign government to intervene. *See* Sean Aday, *Social Media, Diplomacy, and the Responsibility to Protect,* TAKE FIVE (Oct. 17, 2012), http://takefiveblog.org/2012/10/17/social-media-diplomacy-and-the-responsibility-to-protect.

80. ADAY, ET. AL., *supra* note 9.

81. This "boomerang" phenomenon is when a population oppressed by a regime causes citizens of another country to compel their own government to pressure the regime. This political pressure may cause the regime to suspend abuses or make it more difficult to commit them. ADAY, ET. AL., *supra* note 9

dertaken by other governments to compel the regime to halt violence sometimes result in subsequent military intervention.[82]

Dissidents' use of social media during the Arab Spring has shown that some uses of social media are capable of altering the military landscape in addition to causing widespread political consequences.[83] The recent uprisings of the Arab Spring also suggest several plausible scenarios in which social media could be employed in future political and military uprisings, such as organizing protests to distract the regime's military while opposition forces attack.[84] Each of these scenarios has different military and political consequences, and will therefore inform a different legal result as to when the social media activist in question would lose his or her civilian protection.[85]

II. APPROACHES TO CIVILIAN PROTECTION

Under the Geneva Conventions Additional Protocols I and II, protecting civilians in interstate and intrastate conflicts respectively,[86] a civilian loses his or her protections from military

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(citing MARGARET KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS (1998)).

82. *See The Colonel Charges Ahead,* ECONOMIST (May 17, 2011), http://www.economist.com/node/18400592.

83. *See* Zambelis, *supra* note 24

84. *See generally Twitter, Facebook and YouTube's role in Arab Spring (Middle East Uprisings), supra* note 2.

85. Stigall notes that the interpretative framework chosen will lead to different results in situations with the same facts. *See* Stigall, *supra* note 22, at 907–08.

86. Civilian status is asserted simply by finding that the person is not a member of the armed forces or a comparable opposition group in an armed conflict. The most important factor in determining membership in the armed forces is that the person is under the discipline of a responsible command. The Geneva Conventions and its additional protocols are, however, unclear about whether protections afforded to combatants extend to dissident armed forces in an intrastate conflict. The ICRC states that the definition of armed forces may be used to distinguish combatants from civilians for the purposes of determining civilian status in an intrastate conflict. International Committee of the Red Cross*, Rule 3: Definition of Combatants*, *supra* note 68; International Committee of the Red Cross*, Rule 4: Definition of Armed Forces*, *supra* note 68; International Committee of the Red Cross*, Rule 5: Definition of Civilians*, CUSTOMARY INT'L HUMANITARIAN L. DATABASE, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule5 (last visited Sep. 15, 2012). Both additional protocols contain the same protections for civilians not taking direct part in hostilities but apply to different types of conflicts. The

targeting only by taking "direct part in hostilities."[87] There are two primary interpretations of this standard which would allow varying degrees of participation and support to an armed conflict before the civilian would lose his or her status.[88] The Protocol I Test evaluates three formal elements of the civilian's actions in a manner that tends to conservatively preserve civilian protections[89] whereas the more expansive Functionality Test evaluates a civilian based on their military value.[90]

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first protocol applies to international conflicts and a limited set of intrastate conflicts while the second protocol applies generally to intrastate conflicts. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 11, art. 1, sec 4, art. 51, sec. 3; Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *supra* note 39, art. 1, sec. 2, art. 13.

87. Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *supra* note 39, art. 13, sec. 3. A temporal element must also be considered in order to understand the requirement of direct participation in hostilities. Many scholars believe that protection is lost only for the duration of such participation as opposed to the idea that habitual participation will result in a long term, total loss of protection. Kenneth Watkin, *Opportunity Lost, Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance,* 42 N.Y.U. J. INT'L L. & POL. 641, 660–62 (2010).

88. Moore, *supra* note 18, at 20–21. The Geographic, Functional, and Temporal Test is a third alternative test to determine direct participation in hostilities. This test considers "(1) geographic proximity of service provided to units in contact with the enemy, (2) proximity of relationship between services provided and harm resulting to enemy, and (3) temporal relation of support to enemy contact or harm resulting to enemy." Albert S. Janin, *Engaging Civilian-Belligerents Leads to Self-Defense/Protocol I Marriage*, ARMY LAW., July 2007, at 89 (quoting INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY, INT'L & OPERATIONAL LAW VOL. II, at I-10 (2006)). Stigall finds the Geographic, Functional, and Temporal Test less expansive than the Functionality Test. Stigall, *supra* note 22, at 896. It should be noted that some believe the Functionality Test to also consider the geographic and temporal proximity of military harm. Moore, *supra* note 18, at 21 n. 215.

89. The International Committee of the Red Cross developed this interpretation because prior national guidance and adjudications on the subject did not establish an applicable rule, but rather lists of behaviors, beyond physically fighting an enemy, that were classified as either direct or indirect participation. *See* INTERPRETIVE GUIDANCE, *supra* note 19, at 991–93; *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 705–08, 725, 729.

90. Moore, *supra* note 18, at 19–22; Stigall, *supra* note 22, at 896.

A. Protocol I Test

The Protocol I Test was developed by the ICRC to clarify the ambiguity of the "direct participation" requirement articulated in the Geneva Conventions and its additional protocols.[91] The Protocol I Test requires three elements to find direct participation in hostilities under the Geneva Conventions.[92]

First, a "threshold of harm" must be reached wherein an act is "likely to adversely affect the military operations or military capacity of a party to an armed conflict" or an act that kills or causes physical harm to a person or object protected from attack.[93] This includes any harm, or potential harm, that may have a negative effect on the military situation.[94] Such harm is broadly defined and only needs to deprive the regime of some military advantage or diminish its military capabilities.[95] The threshold of harm does not account for actual severity of harm, so long as some harm occurs or is likely to occur.[96]

Second, there must be a direct causal relationship between the act and the harm suffered.[97] The ICRC recommends considering several factors to parse direct causation from indirect causation.[98] First, in order to constitute direct causation, the act must not be a part of the general war effort.[99] This distinguishes those acts that indirectly support hostilities through the general war effort, to include "war sustaining activities like

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91. INTERPRETIVE GUIDANCE, *supra* note 19, at 991–94; Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *supra* note 39, art. 13, sec. 3.

92. *Keeping the Balance Between Necessity and Humanity*, *supra* note 59, at 856–57.

93. The harm does not have to actually come to fruition but must only be a likely result. INTERPRETIVE GUIDANCE, *supra* note 19, at 1016.

94. *Deconstructing Direct Participation in Hostilities*, *supra* note 26, 714-15.

95. The breadth of activity meeting this element is intentionally wide. It was thought that the remaining elements would properly exclude indirect participation. Still, "political, economic, and other advantages, such as impacting civilian morale" are not military harm though they may be indispensable to a war effort. *Id.* at 715–20.

96. INTERPRETIVE GUIDANCE, *supra* note 19, at 1017.

97. I*d.* at 1020.

98. Michael Schmitt, *Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5, 26–27 (2010) [hereinafter *A Critical Analysis*].

99. Stigall, *supra* note 22, at 894.

manufacturing ammunition," from those that actually apply military force, like assaulting an enemy position.[100] Activities within the general war effort are those that build the general military capacity and contribute to military victory by supporting and enabling the general capability to apply military force.[101] These include military production, maintenance of transportation infrastructure, finance, and activities building political support for the conflict.[102] The causation element is, however, broader than simply separating participation in the general war effort from actions with more specific military consequences.[103] This element also requires that no more than a single "causal step" exist between the action constituting direct participation and the harm inflicted.[104] For instance, building

100. This idea tries to parse military logistics, industrial research, and other support into that which is part of a traditional war economy from support tied to specific military operations which, while similar, shares a closer causal connection to the specific military harm in question. The ICRC actually defines the general war effort as activities "objectively contributing to the defeat of the adversary . . . beyond the actual conduct of hostilities." This, along with the argument that the line delineating direct participation should fall somewhere between an individual engaged in combat and any person with an indirect impact on the war effort, strongly implies that the dividing line between the general war effort and the conduct of hostilities is the addition to or support of military capacity versus some application of force or harm to the enemy. *See* INTERPRETIVE GUIDANCE, *supra* note 19, at 1020 n.113. Keck gives several other examples of this fine line. For instance, he posits that transporting ammunition on a truck meets causation if it is destined directly for a unit at the front line, but transporting it to a port for further shipment would not meet the required level of causation. Keck, *supra* note 17, at 142.

101. INTERPRETIVE GUIDANCE, *supra* note 19, at 1020

102. The ICRC notes a difference between the general war effort and war sustaining activities. The general war effort includes activities directly supporting the general military effort, such as production, design, and transport. War sustaining activities are further removed and include activities associated with a nation at war such as political propaganda, finance, and maintenance of an economy geared to support the war effort. *Id*.

103. This test, however, stipulates that participation in the general war effort will always be considered indirect participation in hostilities. *Id.* at 1019–20.

104. This act does not need to be indispensable to the harm, as direct participation could occur when a person provides extra help that is not strictly needed to accomplish the goal. Schmitt further notes that the single step could not have been literal, as gathering intelligence is several steps removed from an attack, but still certainly direct participation. *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 725, 727–28.

and storing an Improvised Explosive Device would be at least a single causal step removed from the military harm incurred when that weapon is employed by placing and detonating it.[105] The direct causation element contains an exception for coordinated operations where the operation itself meets the causation element.[106] This exception will find direct causation if the individual act is both an integral part of the operation and undertaken specifically for that operation.[107]

The third requirement of the Protocol I Test is a belligerent nexus.[108] A belligerent nexus exists when the act in question was "specifically designed [to cause the required threshold of military harm] to support a belligerent party to the detriment of another" party.[109] A belligerent nexus differs from traditional subjective intent, in that a belligerent nexus requires only an evaluation of the purpose of the act itself, whereas a subjective evaluation would focus on what the individual actually intended to accomplish through the act.[110] Belligerent nexus is evaluated by inferring the purpose of the act from available objective facts in each circumstance, and therefore imputes intent to all participants in such an act regardless of their individual intent.[111] For instance, a civilian that attacks a soldier to prevent

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105. There is great disagreement about whether a civilian should be targetable when engaging in such an activity. Many military commanders believe that, although it would fail the Protocol I Test, the act is inherently hostile and is likely the only practical time to interdict the Improvised Explosive Device. *See id.* at 725, 729.

106. INTERPRETIVE GUIDANCE, *supra* note 19, at 1022.

107. Actions like general military training, though integral to a certain operation, are not specific enough to a certain operation to amount to direct participation. *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 729–30. Moreover, the examples given by the ICRC and its specific language, such as indicating the location of forces, imply that collective military operations are limited to those achieving a specific and limited objective, instead of broader strategic operations. *See* INTERPRETIVE GUIDANCE, *supra* note 19, at 1023.

108. Watkin, *supra* note 87, at 657–58.

109. *Keeping the Balance Between Necessity and Humanity*, *supra* note 59, at 857, 873.

110. A finding of belligerent nexus requires the intent to cause the threshold of harm referenced in the first element of Protocol I Test. INTERPRETIVE GUIDANCE, *supra* note 19, at 1026–27.

111. Similar acts may have different motivations, such as inflicting military harm on an enemy, enjoying criminal gain, or simply defending one's self. *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 735–36.

a rape would lack a belligerent nexus because the act would not be designed to cause military harm, even though military harm was caused through a purposeful act, regardless of the true intentions of the civilian.[112] Conversely, a civilian would have a belligerent nexus if he or she spontaneously joined a military attack with the sole intention of looting the other side for profit.[113] An individual would be excused from an act with a belligerent nexus only if he was unaware of his participation in the act, such as a person unaware that they were transporting a bomb.[114]

C. Functionality Test

The Functionality Test was predominantly developed by the United States to interpret the idea of direct participation in hostilities in a manner that acknowledged the military value of civilians on the battlefield.[115] The Functionality Test evaluates the importance and level of support of a civilian's military function to the achievement of a party's military goals.[116] This test does not focus on the actual or potential harm caused to the other side, but instead focuses on the value provided to the armed forces by the civilian's activities.[117] Under the Functionality Test, the more essential a civilian is to victory on the bat-

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112. INTERPRETIVE GUIDANCE, *supra* note 19, at 1027–28.

113. *Id.*

114. Keck, *supra* note 17, at 143.

115. The Parks Memorandum is a United States Army Judge Advocate General memorandum that is credited with introducing the ideas of the Functionality Test. The Parks Memorandum originally detailed the Functionality Test's criteria to determine a civilian's protection status when attached to an army. This document is geared towards evaluating the classification of civilians that accompany United States forces in overseas, interstate conflicts, and, therefore, must be adapted to an intrastate conflict which may feature less organized belligerent parties. *See* Moore, *supra* note 18, at 21 (citing Memorandum of Law, W. Hays Parks, Office of The Judge Advocate General, U.S. Army, Law of War Status of Civilians Accompanying Military Forces in the Field (May 6, 1999) (on file with The Brooklyn Journal of International Law) [hereinafter Law of War Memo].

116. *Id.*; *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 725–28. Adopting and expecting reciprocal treatment from the enemy can be said to underlie the International Law of War. As such, this test should apply to irregular militaries, including those in armed opposition during an intrastate conflict. Sean Watts, *Reciprocity and the Law of War*, 50 HARV. INT'L L.J. 365, 368 (2009).

117. Moore, *supra* note 18, at 21.

tlefield, the more likely they are to have crossed the threshold for direct participation.[118] Furthermore, under this test, direct participation can be dependent on the particular strategy a side chooses because the strategy determines the importance of specific functions to military success.[119] The Functionality Test, therefore, is dependent on the circumstances of the individual civilian, as well as his or her role in the overall war strategy.[120] This test is attractive because it accounts for the fact that civilians can augment and perform functions that are not just indispensable, but constitute the heart of military operations, even in modern armies.[121]

The Functionality Test also requires that the hostile activity be in "direct support of combat operations."[122] Direct support is determined by examining the alignment of goals and the integration of civilian and military activity.[123] The definition of direct support is amorphous, but it seeks to include civilian activities that support soldiers in battle or a civilian's action "in the midst of an ongoing engagement."[124]

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118. *See* Stigall, *supra* note 22, at 906–07.

119. Stigall notes that, during the United States campaign in Afghanistan, the strategy selected will affect how vital a civilian is considered under the Functionality Test. The use of American civilians to build and repair infrastructure in Afghanistan may constitute direct participation under the Functionality Test, since such activity is viewed by the U.S. military as integral to the overall military strategy. If the reconstruction, however, was undertaken for purely humanitarian reasons concurrent with the war, American civilians participating in such an effort would not directly participate in hostile acts under the Functionality Test due to their unimportance to the military strategy. *Id.*

120. Keck, *supra* note 17, at 145.

121. Moore, *supra* note 18, at 21; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/NSAID-00-115, DEFENSE LOGISTICS: AIR FORCE REPORT ON CONTRACTOR SUPPORT IS NARROWLY FOCUSED 1-9, 13, 16 (2000), *available at* www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA377822.

122. This standard is intended to provide some protection from civilians engaged in what is traditionally understood as the general war effort. It seems to place a heavy focus on the geographical disposition of the civilian, whereas the Protocol I Test seems to acknowledge that these categories are driven more by the function of the civilian. *See* Moore, *supra* note 18, at 21.

123. Moore, *supra* note 18, at 24.

124. *Id.* At 21 n. 224 (quoting ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 484 n.14 (A.R. Thomas & James C. Duncan eds., Supp. 1999). Moore implies that the idea of direct support is related to the idea of activities in the general war effort through examples, though he notes that guidance is not clear. *See id.* at 21 n.224.

The Functionality Test also requires that the perception of the enemy must be considered in order to determine how critical they believe the civilian is to the opposing side.[125] The same criteria used in the main Functionality Test should be evaluated from the point of view of the opposing party.[126] This consideration provides some balance to the subjective and arbitrary nature of the Functionality Test by considering the view of both sides to a conflict.[127]

III. APPLICATION OF THE PROTOCOL I AND FUNCTIONALITY TESTS TO THE ARAB SPRING

The different uses of social media during the Arab Spring would result in different protections for civilians depending on which test is used.[128] The choice of applying either the Protocol I Test or the Functionality Test can be dispositive in determining whether international law is able to best balance protec-

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Moore also writes that the Functionality Test does "not condone targeting civilians for general participation in the war effort, similar to Protocol I" but allows targeting of those rendering direct support. This seems to adopt direct support as an element of the test, and explain its relation to the general war effort. *See id.* at 21. The definitions of direct support that Moore cites are not entirely congruent with the general war effort as understood by the ICRC in the Protocol I Test. *Compare id.* at 21 n.224, *with* INTERPRETIVE GUIDANCE, *supra* note 19, at 1020.

125. Moore, *supra* note 18, at 21.

126. This element should inject predictability into the test, as putting one's self in the shoes of the enemy should lead to more uniformity between what each party believes is protected. *See* Law of War Memo, *supra* note 115, §3.

127. *See id.* §3.

128. Stigall notes that the choice of framework, when coupled with the facts of the situation, will be dispositive in determining if direct participation in the hostilities occurred. Stigall, *supra* note 22, at 898. It is unlikely, but possible, that social media activists would be considered combatants in an intrastate conflict if they could be found to be under a responsible command of a recognized party to the conflict and under that party's system of discipline. This would only be found when the social media activist was integrated into a quasi-military command structure and subject to its directions. *See* Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 11, art 43; *Committee of the Red Cross, Rule 4: Definition of Armed Forces*, *supra* 68; JOINT PUBLICATION 3-13, at II-1. It is important to note, however, that the increase in focus on Information Operations and Psychological Operations among established militaries reinforces the idea that dissemination of information can be a military activity, especially when used as a supporting effort in a military operation. U.S. DEP'T OF ARMY, *supra* note 24, at 1–7.

tions of legitimate social media activity with a regime's right to self-defense in an internal conflict.[129]

A. Use of Social Media to Organize Protests that Threaten the Regime.

In a situation where social media is used to organize and incite protests against a regime, as it was in Tunisia,[130] neither test would likely result in a finding of direct participation in hostilities.[131] Under the Protocol I Test, no threshold of harm would be found, as the harm would not be of a "specifically military nature,"[132] because any harm would be political.[133] Causation likewise would not be found, as such a finding is directly contingent upon a finding that the threshold of harm had been met.[134] Even if it were stipulated that the threshold of harm had been met, causation would also fail, as providing the information to incite a protest would be several steps removed from any specific military harm inflicted by the actual protestors.[135] A belligerent nexus would also be lacking in this situation because a political protest is difficult to characterize as exhibiting an objective intent to cause the threshold of harm required by the first element of the test.[136] In examining the actions of a social media activist organizing a protest, it would be difficult to conclude that the activist's actions were designed with the purpose of causing the requisite military harm.[137]

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129. Stigall, *supra* note 22, at 898; *See* International Covenant on Civil and Political Rights, *supra* note 10, art. 19; *See* Joseph, *supra* note 15.

130. *Twitter, Facebook and YouTube's role in Arab Spring (Middle East Uprisings)*, *supra* note 2.

131. *See generally* Kamus & Vaughn, *supra* note 71. The use of social media to incite political protests is analogous to events that took place during the Tunisian revolution. *See* Ryan, *supra* note 3.

132. Threshold of harm is more arguable in Tunisia where protests pressured the regime to give up political power. Although the army was called, but failed, to respond to requests for aid to the Tunisian regime—possibly due to social media pressure—there was still no armed military conflict to be altered in that scenario. *See* INTERPRETIVE GUIDANCE, *supra* note 19, at 1016.

133. Here, the harm was to pressure the regime to cede power in a political sense. *See* Ryan, *supra* note 3.

134. *See Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 719–20; *See* Watkin, *supra* note 87, at 658.

135. INTERPRETIVE GUIDANCE, *supra* note 19, at 1021.

136. *Id.* at 1021.

137. Jamie Williamson, *Challenges of Twenty-First Century Conflict,* 20 DUKE J. COMP. & INT'L L. 457, 466 (2010).

The Functionality Test also would fail to find direct participation in this scenario. Evaluating the status and importance of a social media activist's effect on the military would be moot when his or her activities do not contribute to any military goals.[138] Though the Functionality Test is more liberal than the Protocol I Test, it is still based on a civilian's importance to the achievement of military goals.[139]

B. Use of Social Media to Incite Protests that Aid Military Action.

Protests, informed and organized by social media, could be used to distract or hamper regime forces in order to allow an opposition attack.[140] A protest could be deliberately organized, or opportunistically exploited, by an insurgency to distract or misdirect military forces during an armed attack.[141]

Under any of these circumstances, the Protocol I Test could be used to find the threshold of harm because the protests divert military resources away from fighting in the concurrent armed conflict.[142] The military harm caused by distracting soldiers is not diminished by the possibility that protected political or other nonmilitary harm may result from the protest.[143] Military harm under this test must be specific, but not exclusive, as implied by the ICRC's finding that interrupting the

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138. Moore examines a journalist who only begins to be considered under the Functionality Test when the goals of the journalist and military align. *See* Moore, *supra* note 18, at 21.

139. *Id.* at 24–26.

140. Although not an attack on a regime by an insurgency, the Benghazi attack on the U.S. Consulate illustrates the plausible tactic of using a protest as a distraction for a military assault. The genesis of the Benghazi Protests that accompanied the simultaneous attack on the U. S. Consulate is not entirely clear. It is likely the protest was planned in response to an offensive video, without knowledge of the impending attack; however, it is possible that the protest was a planned distraction. *See* Scott Shane, *Clearing the Record on Benghazi,* N.Y. TIMES, Oct. 18, 2012, at A16; More recent reports have shown that the relationship between the protest and attack may be even less clear upon further investigation. David Kirkpatrick, *A Deadly Mix in Benghazi,* N.Y. TIMES (Dec. 28, 2013), http://www.nytimes.com/projects/2013/benghazi/#/?chapt=0.

141. *See* Shane, *supra* note 140.

142. INTERPRETIVE GUIDANCE, *supra* note 19, at 1018–19.

143. Again, it is not clear what the motivation of the Benghazi protestors was. Their goals may have been expressive or possibly even military. Scott Shane, *supra* note 140; David Kirkpatrick, *supra* note 140.

food supply could meet the threshold of harm, even though it may disproportionately affect the civilian population.[144]

Even if the broad military threshold of harm element is met, causation is extremely difficult to show. Here the military harm is distracting the soldiers, which is directly caused by the participants in the protest.[145] Therefore, the social media activist's action of inciting the protest would be at least one causal step removed from the protestors' distraction.[146] Furthermore, the ICRC guidance states that political propaganda is necessarily indirect participation, as it is part of the general war effort.[147]

Inciting, or even organizing, a protest to support an attack could be considered an integral part of a collective military operation, and thus fall within the coordinated operations exception to the causation requirement.[148] Such an argument would misconstrue the purpose of the collective operations exception, which is to ensure that causation is not excused simply because some participants in a military operation do not independently cause harm, but still help a collective unit inflict the required threshold of harm.[149] It would be an abuse of the causation ex-

144. Examples like interrupting food supply are stated not to meet the threshold of harm unless they impair military operations or capacity. This suggests that "specific" military harm does not equate with "exclusive" military harm, as the residual harm of that action could be to hurt government or civilian operations. *See* INTERPRETIVE GUIDANCE, *supra* note 19, at 1019.

145. *See* Keck, *supra* note 17, at 142.

146. Unlike Schmitt's example of gathering intelligence, which could possibly be characterized as a single causal act with multiple steps, acts to incite a protest are inherently indirect as they rely on the independent actions of discreet individuals instead of integrated collective actions to complete the hostile act. *See Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 725, 727–28.

147. It may be possible to distinguish this situation from what the ICRC thought of as political propaganda if it was done with the purpose of causing specific military consequences, like diverting military forces. *See* INTERPRETIVE GUIDANCE, *supra* note 19, at 1020.

148. *Id.* at 1022–23.

149. This exception seeks to acknowledge that a modern military operation includes many people who do not directly cause harm to the enemy. For instance a Forward Air Controller may not drop a bomb but may be necessary to properly target the bomb. Andrew Walton, The History of the Airborne Forward Air Controller in Vietnam, 2–3 (2004) (unpublished thesis for Masters of Military Art and Science, U.S. Army Command and General Staff College), *available at* http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA429021; INTERPRETIVE GUIDANCE, *supra* note 19, at 1022–23.

ception to consider an operation to be collective, when participants may not be aware that they are even participants in a collective action. Thus, a social media activist who incites or even organizes a protest is not part of a collective action with the protestors and the collective operations exception is not applicable.[150]

A belligerent nexus could only be found, upon objective inspection of the facts, if the protest was designed specifically with the intent to divert military resources away from an armed conflict.[151] In a situation where a protest was organized in order to cause military harm, but the participants attended to express political discontent, the Functionality Test does not provide clear guidance.[152] The ICRC states that civilians obstructing military activity while fleeing violence lack a belligerent nexus, while those blocking a road in order to obstruct military operations exhibit a belligerent nexus.[153] It is likely that, in an unclear situation, the objective facts would be construed cautiously in order to ascribe the intent of the majority of participants to the act as a whole.[154] The outcome, however, is far from clear.

It is important to note that a finding of belligerent nexus is a description of the objective purpose of the act, not of any individual, and that such a finding would impute a belligerent nexus onto the organizers and all participants in the protest.[155] The Protocol I Test declines to find a belligerent nexus in extreme situations where a civilian is unaware of his or her part

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150. This seems most analogous to the example of the training of military recruits being considered indirect causation because the training was removed from the specific hostile action by intervening decisions, similar to the way that protests are dependent on the individual decisions of the protestors. *See Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 725, 729–39.

151. *See* Watkin, *supra* note 87, at 659.

152. The requirement is that the act be "specifically designed to cause the required threshold of harm." This does not mention that intent needs to be exclusive. It is likely that "specific" has the same meaning as it does for the threshold of harm. The report, however, does not explore examples of an act being designed for two purposes. Experts compiling this report note that, if specific intent is ambiguous, it cannot justify "split second targeting." INTERPRETIVE GUIDANCE, *supra* note 19, at 1022–27.

153. INTERPRETIVE GUIDANCE, *supra* note 19, at 1027–28.

154. *Keeping the Balance Between Necessity and Humanity*, *supra* note 59, at 874–77.

155. *A Critical Analysis, supra* note 98, at 34.

in hostilities, such as when a civilian drives a truck unaware that he or she is transporting munitions.[156] A civilian taking part in a protest, without knowing that the protest is a pretext for a military assault, could be analogized to a civilian being unaware of his or her role in hostilities. That exception, however, is limited and seems inapplicable to situations where the civilian is aware of their actions, but not aware of the greater purpose of their actions.[157] In such a case, the determination of belligerent nexus is likely moot because the organizing activist will retain civilian protection due to a lack of causation, as the organization of a protest is several causal steps removed from any military harm caused.[158]

Subjecting this scenario to the Functionality Test will render a different outcome. Under the Functionality Test, the incitement or facilitation of a protest which diverts or misdirects a regime's military resources could be found sufficiently supportive of a military action to overthrow that regime to warrant the loss of the instigators' civilian protections.[159] This would require a finding that the protest had a serious impact on military objectives, and that the social media activist was an important, high level catalyst in direct support of the protest.[160] The regime's agents might also claim that they subjectively perceived the activist as a threat in order to reinforce the importance of the action, if the activist is involved in a large demonstration.[161] In such a scenario, because the activist assisted in mobilizing a large amount of demonstrators, the importance of his function would be quite high.[162] Although this test is highly dependent on facts, it is also highly subjective and open to a great deal of interpretation,[163] subject only to the

156. INTERPRETIVE GUIDANCE, *supra* note 19, at 1027.

157. *See id.* at 1027.

158. *See* Watkin, *supra* note 87, at 659.

159. Stigall suggests that military goals can also include winning the allegiance of the local population, which, while certainly a political goal, may also be considered a military goal. This is analogous to the use of civilians to reconstruct Afghan infrastructure, which possibly meets the Functionality Test due to that mission being critical to overall military goals. *See* Stigall, *supra* note 22, at 907.

160. *See id.* at 896–97.

161. For an in depth explanation of the subjective criteria used to apply the Functionality Test, see Moore, *supra* note 18, at 21.

162. *See* Keck, *supra* note 17, at 144–45.

163. *Id.* at 145.

civilian's functional level of support and his or her importance to military goals.[164] The Functionality Test does not limit itself to the military significance of actions, as the Protocol I Test does, but examines the civilian's military role.[165] The protestors would likely retain protection because they would not, individually, be important enough, or contribute enough functional support, to become military targets.[166]

C. Use of Social Media to Incite Military Defections from the Regime.

Civilian social media activists may also attempt to cause defections from the regime's military forces with the secondary goal of augmenting the ranks of armed opposition groups, as was the case in Syria.[167] Under the Protocol I Test, defection would meet the threshold of harm as the regime's military capacity would be directly diminished by the removal of its soldiers from battle.[168] Mere recruitment of fighters for the opposition, on the other hand, would fail to meet the threshold of harm.[169] This is due to the fact that the threshold of harm is not met when the opposition increases its own military capacity without independently causing military harm to the regime.[170]

Causation is difficult to demonstrate, as enticing or convincing a soldier to defect is, at least, a causal step removed from the hostile act, especially because the defecting soldier's action is a choice independent from the enticement of the activist.[171] Even if defection could be characterized as a collective action,

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164. Moore, *supra* note 18, at 21.

165. *See id.*

166. Law of War Memo, *supra* note 115, §3.

167. In this story, it should be noted that documented attempts to encourage defection where undertaken by combatants of the armed opposition, not by sympathetic civilian efforts. Solomon & Hamilton, *supra* note 7. The Syrian opposition has also attempted to encourage defections through YouTube, though by a member of the Free Syrian Army and not an unaffiliated civilian. *See* Saad, *supra* note73.

168. *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 714–15. The threat of defection alone can have significant military consequences, such as grounding the air force for fear of losing planes to the opposing force. *See* Rod Nordland, *Latest Syrian Defectors are from Higher Ranks,* N.Y. TIMES, June 25, 2012, at A9.

169. *See* INTERPRETIVE GUIDANCE, *supra* note 19, at 1018–19.

170. *A Critical Analysis, supra* note 98, at 27–28.

171. *See* INTERPRETIVE GUIDANCE, *supra* note 19, at 1020.

enticement would not form an integral part of that action,[172] as defection is possible without such enticement. The normal causation element, as well as the collective operations exception, could possibly be met if the social media activist and opposition materially facilitated defection by providing safe passage or some similar aid.

Belligerent nexus is entirely dependent on the existence of facts indicating that the defection campaign was objectively designed to harm the regime's military, rather than build the combat power of the armed opposition.[173] This is because a belligerent nexus refers to the objective design of an act to achieve a valid threshold of harm.[174] A social media activist inciting defections would likely fail the Protocol I Test due to negative findings of causation and belligerent nexus because the harmful action was causally remote and not conclusively designed with the purpose to harm the regime's military.

The Functionality Test would find the inducement of defections to be direct participation in a conflict, especially if the defectors joined the ranks of the opposition.[175] The function of causing defection and recruiting soldiers would seem to be of the highest order in an internal conflict.[176] This point is even more pronounced as the Functionality Test does not require that causation be limited to a single causal step like the Protocol I Test.[177] Under the Functionality Test, the requisite level of importance of a social media activist needs to be determined based upon a factual examination of how instrumental the ac-

172. *See A Critical Analysis, supra* note 98, at 29–31.

173. *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 736.

174. The elements of this test are cumulative; therefore, the succeeding elements must refer to a valid preceding fact. If both a valid and an invalid threshold of harm are found, but belligerent nexus is met for only the invalid threshold of harm, direct participation will not be found. *A Critical Analysis, supra* note 98, at 27.

175. Moore, *supra* note 18, at 21.

176. Recruiting fighters and drawing them from the enemy seems to be a more vital function than civilian reconstruction was in the Afghanistan conflict discussed by Stigall. *See* Stigall, *supra* note 22, at 906–07.

177. The Protocol I Test requires causation within a single step while the Functionality Test only requires the act be in direct support of operations. *Compare* INTERPRETIVE GUIDANCE, *supra* note 19, at 1020, *with* Moore, *supra* note 18, at 21.

tivist was in facilitating defections.[178] A finding on the military importance must also consider the opposing regime's evaluation of a social media activist's importance.[179] A regime's evaluation would likely attach equal or greater importance than the opposition's evaluation, to regime soldiers defecting and joining the ranks of the opposition. It is also important to note that a social media activist would lose protection under this test by either exclusively encouraging defections or exclusively recruiting fighters, as both activities are important elements of the opposition's military mission.[180] Notably lacking is a requirement that the social media activist intend to affect the military balance of power by causing defections and aiding recruitment.[181]

D. Use of Social Media to Acquire Foreign Aid for the Opposition.

Social media can also be used as a tool to document the abuses of the regime and the virtues of the opposition in the hope of obtaining outside aid for the struggle against the regime.[182]

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178. The importance of social media as a tool of Psychological Operations to aid a military effort can be analogized to the importance of journalism as a Psychological Operations tool. Moore explores if a journalist embedded with a military unit would be considered to be taking a direct part in hostilities. He notes that when the military exerts sufficient control over the journalist and the goals of the military and journalist align, then the journalists could possibly be targeted under the Functionality Test. *See* Moore, *supra* note 18, at 24–26.

179. Law of War Memo, *supra* note 115, §3.

180. *See* Stigall, *supra* note 22, at 896.

181. Moore requires that independent journalists be brought under military control before they can pass the Functionality Test. This seems to be a special case, however, as the activity in which such journalists play a role is a military controlled Information Operations campaign. Because this is described as a plan integrating many types of information and disseminating it according to a mission specific plan, the goal could not logically be advanced without some instruction, coordination, or facilitation by the military. Other activities could possibly constitute direct participation under the Functionality Test without such close integration with military goals. For examples see Moore, *supra* note 18, at 21.

182. This website shows that the documentation of regime abuses may result in pressure for foreign governments to intervene or otherwise provide aid. Geoffrey Mock, *Desperate Reprisals, Documenting the Syrian Regime's Abuses,* AMNESTY INT'L (June 20, 2012), http://blog.amnestyusa.org/middle-east/desperate-reprisals-documenting-the-syrian-regimes-abuses.

This aid may take the form of punitive action against the regime,[183] efforts to deny the regime military advantage,[184] direct aid to the opposition,[185] or even foreign military intervention against the regime.[186] Regardless of the aid secured by the pressure created by social media activists, securing international aid could never be considered direct participation under the Protocol I Test, although some elements of the test may be satisfied. The threshold of harm would be met by some of these forms of aid if they either adversely affect the regime's military capacity by denying them weapons and support or if they result in the infliction of military damage by, for example, encouraging a foreign government to attack the regime.[187] A social media activist who attracts international aid that results in the arming or training of the opposition would fail to cause military damage consistent with the threshold of harm, due to the fact that building the opposition's military capacity fails to inflict sufficient military harm on the regime.[188] There is, however, a possibility that coercive economic sanctions could cause sufficient military harm to meet the threshold of harm, if military capacity is sufficiently damaged.[189]

Causation will not be found when a social media activist garners international support to aid the opposition or harm the

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183. *E.U. Expands Sanctions, Moves Toward Oil Embargo,* REUTERS (Aug. 19, 2011), http://www.reuters.com/article/2011/08/19/syria-eu-sanctions-idUSB5E7IL02720110819.

184. Foreign supplies of weapons were intercepted en route to the Syrian regime. Richard Spencer et. al., *Britain Stops Russian Ship Carrying Attack Helicopters for Syria,* TELEGRAPH, June 19, 2012.

185. Weapons can be used to arm the opposition as they were in Libya. Rod Nordland, *Libyan Rebels Say They're Being Sent Weapons,* N.Y. TIMES, Apr. 16, 2011, at A10.

186. The North Atlantic Treaty Organization provided international air support to the Libyan opposition. Richard Spencer, *Libya: Coalition Forces Prepare Two-Pronged Blitz to Finish off Gaddafi*, TELEGRAPH (May 28, 2011, 5:37 PM), http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8543882/Libya-Coalition-forces-prepare-two-pronged-blitz-to-finish-off-Gaddafi.html.

187. *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 715–20.

188. *A Critical Analysis, supra* note 98, at 27.

189. It seems possible to interpret the Protocol I Test to find military harm through economic sanctions that diminish military forces. *See* INTERPRETIVE GUIDANCE, *supra* note 19, at 995–96.

regime because such action is part of the general war effort and more than a single causal step removed from the harm. First, because the aid is supplied by another power with independent volition, the provision of aid will necessarily be more than a single causal step removed from any action by the social media activist that may have caused it. The social media activist must raise international awareness, the populace of the nation rendering aid must then exert pressure, the government of that nation must decide to render such aid, and then the aid must be delivered. Second, the social media activist's attempt to acquire such international aid will be considered a part of the general war effort because it is a high level, civilian government, wartime operation, similar to diplomacy or the purchase of necessary military supplies.[190] Furthermore, such aid is not geared toward a specific operation, but to generally degrading the regime's military capacity or increasing the opposition's military capacity.[191]

Even if causation were found, a belligerent nexus is unlikely to be found, as the social media activist's campaign was likely intended to induce the international community to inflict political, rather than military, harm.[192] Belligerent nexus is especially problematic for economic sanctions, as it is probable, again, that the enacting state pursued them in order to force the regime to make political concessions rather than inflict military harm.[193] It is difficult to ascribe a specific purpose to a social media activist's campaign to bring international attention to a conflict. It is more logical to assume that the activists are attempting to secure whatever type of aid they can, not specific aid for a single military operation.

In contrast, the Functionality Test is more amenable to finding direct participation for instances of social activism which

190. For examples of the application of the causation element of the Protocol I Test see *id*. at 1020.

191. Only in cases where an allied attack is coordinated with the opposition could causation be direct, otherwise the opposition is simply helping to create a broad political action through the participation of the ally. It is unlikely, however, that the social media activist's pressure would exhibit enough direct connection to have caused such a specific attack. *See id.* at 1021–23.

192. *See* Keck, *supra* note 17, at 143.

193. Here some sanctions were targeted at specific members of the regime, presumably to influence their decision making. *E.U. Expands Sanctions, Moves Toward Oil Embargo, supra* note 183.

result in international aid for the opposition.[194] Securing the aid of a major international power could prove decisive in altering the military balance in a conflict.[195] The Functionality Test, however, does require that an action be taken in "direct support" of combat operations.[196] Because seeking international aid is not directly aligned and integrated with the opposition's military goals, but instead aimed at broader political goals, the Functionality Test would also fail to find direct participation in hostilities due to a lack of direct support.[197]

IV. EVALUATION OF CURRENT INTERPRETIVE APPROACHES AND SUGGESTED IMPROVEMENTS.

The use of either the Protocol I Test or the Functionality Test to determine when a civilian has lost protection through participation in hostilities does not adequately address the balance between the social media activist's right to free expression[198] and a regime's right to defend itself against a legitimate, internal military threat.[199] Both tests function satisfactorily at the extremes—prohibiting the military targeting of a political protest organizer or a social media activist who can help secure

194. Stigall notes that the Functionality Test is more expansive than the Protocol I Test. *See* Stigall, *supra* note 22, at 896–97.

195. Securing the aid of a powerful ally, like the North Atlantic Treaty Organization, seems to have been decisive to the outcome of the conflict in Libya. Interview by Bettina Klein of Deutschlandfunk radio with Egon Ramms, Retired General, Federal Republic of Germany (Aug. 26, 2011), *available at* http://www.dw.de/nato-has-played-a-decisive-role-in-libya/a-15346089. Such aid, however, pales in comparison even to a civilian who maintains a vital weapons system. *See* Moore, *supra* note 18, at 21. Furthermore, it has been suggested that influencing a civilian population can meet the Functionality Test as being a critical function for victory, like influencing the Afghan population with reconstruction projects. Securing international aid seems no further removed from battlefield functions than influencing a domestic population to facilitate traditional military operations. *See* Stigall, *supra* note 22, at 906–07.

196. Moore, *supra* note 18, at 21.

197. For an example of the consideration of direct support in the case of embedded journalists under the Functionality Test, see *id.* at 24–26.

198. International law protects rights of expression. International Covenant on Civil and Political Rights, *supra* note 10, art. 19.

199. Joseph, *supra* note 15.

general foreign aid.[200] The Protocol I Test may fail to allow a regime to defend itself when a social media activist is instrumental in encouraging defections or when that activist organizes a protest specifically for military advantage. The Protocol I Test is generally too restrictive to accommodate targeting of civilians that in some circumstances are performing important and indispensable military functions that are too diffuse to form a particular instance of specific military harm but which may still be distinguished from the general war effort.[201] On the other hand, the Functionality Test has been criticized as too malleable and arbitrary, conditioning direct participation upon the subjective importance of a civilian's role in a strategy that may not be widely known.[202] The Functionality Test also fails to give adequate weight to the civilian's individual intent, which could lead to loss of protection for a social media activist that unwittingly causes important military harm, such as organizing a protest that distracts regime soldiers, leading to an opposition attack.[203] The Functionality Test has further been criticized for failing to provide a predictable, bright line where direct participation ends and where indirect participation, like financing, which is too far removed from hostilities under the Functionality Test, begins.[204]

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200. Social media could be one of the means used to create public pressure on foreign governments to intervene in an intrastate conflict, implicating military consequences. *See the Colonel Charges Ahead, supra* note 82.

201. *See* Keck, *supra* note 17, at 145 (citing *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 737–38). The social media activist's potential analogue, depending on exact activity, in an organized military is that of an Information Operations or Psychological Operations specialist. It is likely that such activities could be traced to a specific military harm, as their effects may be diffuse and cumulative. They are, however, employed on the "tactical" level, meaning that they are targeted more specifically than just being a part of the general war effort. U.S. DEP'T OF ARMY, *supra* note 24, at 2–3; The U.S. Army defines tactical as the "level of war at which battles and engagements are planned and executed to achieve military objectives." The tactical level is differentiated from the Operational and Strategic level where broad objectives and campaigns are achieved by a connected series of tactical engagements. U.S. DEP'T OF ARMY, ARMY DOCTRINE PUBLICATION NO. 3-90, OFFENSE AND DEFENSE 1 (2012).

202. Keck, *supra* note 17, at 145.

203. *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 735–36.

204. Stigall notes that Afghan drug traffickers that financed the insurgency may have been targeted. Stigall, *supra* note 22, at 897 (citing CHRISTOPHER M.

A. Evaluation of the Protocol I Test

The Protocol I Test does not allow for the loss of protection when a civilian traceably, but not directly, causes a specific instance of military harm under the "no more than one causal step" standard.[205] This is a helpful distinction in separating true participation in hostilities from the general war effort.[206] The distinction does not, however, allow for the fact that some actions may not be direct, but still cause specific and traceable harm, with the intent to cause diffuse military harm, in support of broad, rather than specific, military goals. For instance, Psychological Operations are employed by modern armies to degrade an enemy force's morale and will to fight, not just those defending specific objectives,[207] whereas participation in the general war effort involves activities like the production of ammunition for general use.[208] While ammunition could traceably be used to achieve a specific objective, it is inherently building a general military capacity to be employed as needed in later operations.[209] Organizing civilian perceptions through social media could be considered part of a general war effort, like producing ammunition to build general military capacity, or it could be considered an actual application of military capacity against the regime, albeit in a general, rather than specific, manner.[210] Actions that could be analogized to a tactical military application should, however, be considered direct participation as they are no longer a part of the "general war ef-

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BLANCHARD, AFGHANISTAN: NARCOTICS AND U.S. POLICY 16 (2009), *available at* http://www.fas.org/sgp/crs/row/RL32686.pdf).

205. *See* Watkin, *supra* note 87, at 658.

206. INTERPRETIVE GUIDANCE, *supra* note 19, at 1020.

207. The United States Army publishes extensive doctrine on how to use Psychological Operations against civilian and military audiences to achieve military goals or support traditional forces in achieving their military objectives. U.S. DEP'T OF ARMY, *supra* note 24, at 1–2 to 1–4.

208. INTERPRETIVE GUIDANCE, *supra* note 19, at 1020.

209. Schmitt explains that employing capacity and, in some cases like constructing an Improvised Explosive Device, building capacity, should meet the direct causation standard to allow a military to defend itself from such activities. *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 727.

210. The ICRC does use production of propaganda as an example of an activity within the general war effort. The ICRC also notes, however, that propagandists can lose their protection if they directly participate in hostilities. *See* INTERPRETIVE GUIDANCE, *supra* note 19, at 1019–22.

fort,"[211] whether a social media activist's efforts caused diffuse military harm or harm to a specific target. Shaping public opinion to support a general, albeit tactical, military end is an accepted application of Psychological Operations or Information Operations.[212] Giving blanket protection to civilians who take part in such activities creates a double standard, as a regime that retains similar Information Operations and Psychological Operations capabilities in its military would remain subject to targeting by the opposition while a civilian engaging in such activities could intentionally cause military harm without being targeted.[213] The Protocol I Test would, however, extend civilian protection to Information Operations and Psychological Operations activities by social media activists since they are at least one step removed and arguably part of the general war effort.[214]

The Protocol I Test's strict direct causation requirement has also been criticized more broadly because it fails to include civilians that make deadly and effective contributions to a conflict.[215] Michael Schmitt criticizes the Protocol I Test because

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211. Although not targeting a specific military objective, the use of social media to cause a direct harm is more analogous to a tactical operation than undertaking an activity to build capacity for a war effort through financing, which is a traditional example of an activity within the general war effort. Edward Linneweber, *To Target or Not to Target? Why 'Tis Nobler to Thwart the Afghan Narcotics Trade Through Nonlethal Means*, 207 MIL. L. REV. 155, 171 (Spring 2011).

212. Here goals such as shaping the public perception of the enemy and the civilian population are seen as indispensable support to a military operation. They can be geared generally toward promoting battlefield victory and are much wider than supporting narrow military goals like capturing a specific objective. *See* Moore, *supra* note 18, at 12; U.S. DEP'T OF ARMY, *supra* note 24, at 1-1 to 1-4.

213. If the Protocol I Test is applied and found to exclude civilian Information Operations from direct participation in hostilities, members of the regime's armed forces would be targetable based solely on membership in the armed forces. International Committee of the Red Cross, *Rule 4: Definition of Armed Forces*, *supra* note 68; *See* INTERPRETIVE GUIDANCE, *supra* note 19, at 1020.

214. Keck references the conservative approach that grants greater immunity to those more closely associated with the general war effort and in general seeks to minimize findings of direct participation in hostilities. Keck, *supra* note 17, at 131.

215. Schmitt writes that constructing an improvised explosive device or a bomb vest for a suicide bomber would be examples excluded under the Protocol I Test's approach to causation, but are still integral to causing the requi-

activities, like building an Improvised Explosive Device, are excluded because they are more than one causal step removed from harm, while military commanders implicitly feel that such bomb makers must be targeted, as targeting them is the most effective way to interdict such weapons.[216] Similarly, a social media activist can only cause indirect harm, that is, harm more than one causal step removed, because they merely enable, or indirectly cause, such harm through the physical actions of others, such as protestors or defectors.[217]

Furthermore, the Protocol I Test characterizes the activity in question based on the objective purpose of its design, and can impute a belligerent nexus to all participants without considering individual intent.[218] This ascribes a belligerent nexus to all participants in either spreading the message of the activist or participating in a subsequent protest, provided that a belligerent nexus is found for the overall purpose of the activity and the other elements of the test are met.[219] Individual participants are excused from a collective finding of belligerent nexus only when they "are totally unaware of the role they are playing in the conduct of hostilities" or the participants are deprived of freedom of action.[220] This exception, however, is intended to be extremely limited.[221] To fall into this exception the protestor would have to be unaware that they were distracting soldiers at all; ignorance that the protestors were distracting soldiers to enable a military strike by the opposition would not be sufficient for this exception.[222] This is consistent with the ICRC example, where the transportation of an explosive is only

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site military threshold of harm. Schmitt criticizes limiting the consideration of integral acts, more than one step removed from causing the threshold of harm in all cases, not only in collective actions. *See Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 725, 729–30.

216. *Id*. at 725, 729.

217. INTERPRETIVE GUIDANCE, *supra* note 19, at 1019–21.

218. *Id*. at 1025–29.

219. Schmitt distinguishes belligerent nexus from subjective intent by noting that children fighting for a belligerent party would lack subjective intent, but still have a belligerent nexus due to the overall design of the act in question. This can be extrapolated to show that an individual lacking subjective intent for any reason could foreseeably exhibit a belligerent nexus. *See Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 735.

220. INTERPRETIVE GUIDANCE, *supra* note 19, at 1027.

221. *See id*. at 1027.

222. *See id*. at 1027.

excused if the driver does not know it is an explosive, but the same transportation presumably would not be excused if the driver were aware of the explosive, and only unaware of the purpose of the explosive.[223] Based on this analysis, the Protocol I Test is not suitable to situations involving social media activists because damage to the regime is discounted as indirect and the belligerent nexus is imputed to all knowing participants no matter their individual subjective motivations.[224]

B. Evaluation of the Functionality Test.

The Functionality Test is generally better suited towards considering the rights of the regime, though at the expense of the important rights of civilians. The Functionality Test recognizes that military damage which cannot be directly found within a single causal step to cause a specific instance of military harm can still be traceably attributable to the civilian's action.[225] This connection is important because a social media activist could prove to be vital to military operations, and support those operations in a functionally significant way, if he were to incite a protest that tied up a large military force or if he were to cause military defections.[226] Therefore the Functionality Test's replacement of the Protocol I Test's requirements for threshold of harm and causation with an evaluation of the value and gravity of the activity[227] allows the regime greater flexibility to take action against new military capabilities with broad battlefield effects, such as the Information Operations of a social media activist, without tying such action to a single military objective.[228] This would allow targeting of social media activists that cause significant military harm by encouraging defections. It would also address Michael Schmitt's criticism of the Protocol I Test's threshold of harm; the Protocol I Test fails to acknowledge that positively increasing the opposition's mili-

223. *See id.* at 1027.

224. *See Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 735.

225. *See id.* at 729–33. This test does not focus on the geographic proximity of causation to actual military harm. *See* Moore, *supra* note 18, at 21.

226. *See* Keck, *supra* note 17, at 145.

227. Moore, *supra* note 18, at 21.

228. Watkin criticizes the Protocol I Test for limiting direct participation to military harm caused at the tactical level. *See* Watkin, *supra* note 87, at 659.

tary capacity necessarily harms the regime by activities like securing fighters or arms through aid.[229]

The Functionality Test still suffers from inherent arbitrariness, as a social media activist can be targeted based on the subjective importance of his or her activity.[230] This concern is partially addressed by the requirement that functionality and importance be assessed through the eyes of the regime as well as the perspective of the opposition.[231] Adopting a standard that is too strict, however, to respond to the necessities of modern warfare will prove unworkable and ultimately be ignored as irrelevant.[232]

The Functionality Test has some glaring shortcomings when applied to social media activism. First, the Functionality Test does not examine intent because it was originally developed to evaluate a civilian with a connection to an organized military. The test assumes that the civilian in question is providing a function with an obvious military goal, like repairing a valuable weapon,[233] or is providing a service under the control and direction of a military force towards a military goal, like a civilian conducting an interrogation to gather military intelligence.[234] A civilian social media activist will not telegraph his or her intent so readily, based solely on an examination of the activity in question. Many participants in a protest organized through social media will act based on motivations that differ from the organizer's original intent.[235] These participants may even be ignorant of the "designed" purpose of the larger act.[236] Second, this test is too subjective to be predictable. A civilian may not know how militarily important the regime thinks the

229. *A Critical Analysis, supra* note 98, at 28.

230. Keck, *supra* note 17, at 145.

231. *See* Moore, *supra* note 18, at 24.

232. *See Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 699.

233. *See* Moore, *supra* note 18, at 24.

234. *See* Hill, *supra* note 49, at 13–14. The U.S. military's use of this test has been most developed in evaluating its own civilians. It is important to note that the intent of these civilians is not really at issue as they voluntarily associated themselves with the military. The example of an embedded journalist losing protection is controversial, but is, according to Moore, predicated on the amount of military control and integration to which they are subject. *See* Moore, *supra* note 18, at 21, 24–26.

235. *See* INTERPRETIVE GUIDANCE, *supra* note 19, at 1025–29.

236. *See id.*

civilian's act is, and therefore will not have notice of whether he or she can be targeted based on his or her activities.[237]

C. Suggested Improvements to the Functionality Test in the Social Media Context.

Because the Functionality Test better addresses the complexities of social media activism in the context of the Arab Spring, its shortcomings must be addressed with additional safeguards. The Functionality Test should be augmented with a requirement that the activist not only demonstrate subjective intent to cause military harm, but also that his or her action not be a part of the general war effort, in that the action does more than merely build military capacity.[238]

A measure of intent should be required to safeguard against the potential overreach of the Functionality Test.[239] As the Protocol I Test's idea of belligerent nexus fails to distinguish individual motivations for action, [240] subjective intent to cause military harm should be used in conjunction with the Functionality Test to ensure that each targeted civilian intends to cause military harm in excess of protected political expression. This would ensure that a civilian will not lose protection just because his or her social media activities—or activities incited by social media—are incidentally and functionally important to a military operation.[241] This will also allow each individual involved in the act to be evaluated independently, in order to ensure that those not intending to cause military harm do not lose their civilian protections.[242]

This standard may be difficult to administer during the chaos of civil unrest, but would not be any more prone to error or abuse than objectively divining the purpose of entire activities

237. Keck notes that the Functionality Test hinges on the importance of the civilian's activity. *See* Keck, *supra* note 17, at 145.

238. *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 727.

239. Stigall holds the view that this test "is too broad to serve as a legitimate standard to safeguard civilians and far too malleable to legitimately uphold the principle of distinction." Stigall, *supra* note 22, at 912–13.

240. *See* INTERPRETIVE GUIDANCE, *supra* note 19, at 1025–29.

241. See *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 735–36, for examples comparing subjective intent and belligerent nexus.

242. *See* INTERPRETIVE GUIDANCE, *supra* note 19, at 1025–29.

under the belligerent nexus requirement.[243] The ICRC recognizes that a complex test to determine direct participation will be difficult to administer, and thus recommends the use of caution and a presumption of protection if a civilian's status is uncertain.[244] Further in the context of social media activism, a regime will likely have more time to carefully consider targeting a civilian. This is because a social media activist will likely be removed in space and time from the military harm because they are acting remotely to influence the actions of others.[245]

The subjective intent element should also consider whether any military harm caused by a social media activist at the expense of the regime is in support of another party.[246] The consideration of intent to support another party at the expense of the regime makes clear that the hostile act should be intended to support a group militarily opposing the regime. Inclusion of such a consideration of intent will help to ensure that civilians are not targeted for an act that only incidentally supports the opposition, while allowing civilians who truly wish to aid the opposition in their military struggle to be targeted.

There is a need for further safeguards to confine the loss of civilian protections to cases where civilian actions are truly acting in support of a military objective. These safeguards can protect a social media activist who is not providing true military aid by ensuring his or her undertaking is not within the general war effort.[247] The Functionality Test does require that an action be in direct support of military operations, however, that is not a standard suited to a diffuse intrastate conflict where a social media activist's efforts may not be integrated with the opposition forces' activities as required by this element.[248]

Although the Protocol I Test's requirement for direct causation within a single causal step may be too confining for mod-

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243. *See id.* at 1027.

244. *Keeping the Balance Between Necessity and Humanity*, *supra* note 59, at, 875–77; INTERPRETIVE GUIDANCE, *supra* note 19, at 1037–38.

245. *See* Solomon & Hamilton, *supra* note 7.

246. Melzer posits that belligerent nexus requires that the action be intended to harm one party while supporting another. *Keeping the Balance Between Necessity and Humanity*, *supra* note 59, at 871–73.

247. *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 708.

248. *See* Moore, *supra* note 18, at 24, 21.

ern warfare, its exclusion of activities supporting the general war effort is useful in preserving the notion that some civilians can generally support a country or faction at war without broad swaths of a state's civilian population losing their protections from military targeting.[249] Certain efforts mentioned by the ICRC, like designing weapons, producing weapons, or maintaining transportation infrastructure, fit the traditional definition of the general war effort.[250] The general war effort restriction should be slightly refined to encompass the building of general military capacity, but exclude employing that capacity in either a general or specific sense.[251] Activities truly contributing to the general war effort deserve protection, but other activities, though not necessarily specific military actions, may result in specific military consequences, and therefore, should result in lost protection even if causation is removed by several steps, as in the case of an activist who generally causes military defections.[252] This standard should adopt the Protocol I Test's exclusion of activities within the general war effort, instead of the Functionality Test's wider definition of direct support. Adoption of the refined restriction on activities within the general war effort would help ameliorate the dangers of overreach inherent to the Functionality Test.[253] Moreover, this standard would help to further distinguish the use of social media to build general public support for a revolt from a more particular use of social media to militarily affect the regime or to achieve a particular military objective.

CONCLUSION

The widespread use of social media during the Arab Spring represents the confluence of several developments in conflict.

249. Here, the general war effort should be understood as disregarding geographic proximity under the ICRC guidance. INTERPRETIVE GUIDANCE, *supra* note 19, at 1023.

250. *Id.* at 1021–22.

251. An example of building specific capacity would be to train or recruit personnel for a specific military act, like to attack a specific building or position. It would also include a civilian that built an IED for a specific attack or emplacement. A civilian that worked at a traditional munitions factory, which built ammunition to support general military uses to be determined later in the conflict would, however, build general military capacity. *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 718–19.

252. *See* Solomon & Hamilton, *supra* note 7.

253. Stigall, *supra* note 22, at 911–13.

Primarily, the Arab Spring illustrates an increase in intrastate conflicts, [254] a proliferation of the use of social media in military and political conflicts, [255] and an amplified importance of Information Operations in military conflict[256] against the global trend of increasing civilianization of warfare.[257] These trends create an environment where the traditional laws of war, and their requisite protection of civilians, are increasingly outmoded.[258] The use of social media in such internal conflicts strains the current understanding of civilian protection and has the potential to be used much like other weapons on the battlefield.[259] Yet, because social media can also be used for protected activities like political expression, careful evaluation is required before civilian protection can be stripped from social media activists.[260]

The protection of civilians from targeting, except civilians who take "direct part in hostilities," is an essential cornerstone of international law.[261] Current interpretations do not, however, strike an acceptable balance between the concerns of a regime that is defending itself and the social media activist who is exercising his recognized political rights.[262] The Protocol I Test adheres to a time when civilians were often considered passive victims of warfare.[263] As such, this test grants great protections to the social media activist without regard to the serious military impact they could have.[264] The overly restrictive concepts of direct causation and belligerent nexus ensure

254. The author notes that conflicts, predominantly within states, have generally increased during the twenty first century, and have continued that trend during the Arab Spring. Malin Nilsson, *The Trends in Armed Conflicts Today,* PEACE MONITOR (Oct. 12, 2011), http://peacemonitor.org/?p=142.

255. *Twitter, Facebook and YouTube's role in Arab Spring (Middle East Uprisings), supra* note 2.

256. JOINT PUBLICATION 3–13, *supra* note 56, at II-1.

257. Wegner & Mason, *supra* note 44, at 836.

258. *See 21st Century Armed Conflict*, *supra* note 40, at 510–12.

259. Zambelis notes that social media is used to inflict harm on the enemy and act as a "force multiplier." *See* Zambelis, *supra* note 24, at 19, 20.

260. *See* INTERPRETIVE GUIDANCE, *supra* note 19, at 1026.

261. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 11, art. 51, sec. 3.

262. *Id.* at art. 51, sec. 3; *See* Joseph, *supra* note 15.

263. *21st Century Armed Conflict*, *supra* note 41, at 510–12.

264. Again, Zambelis notes how social media can be used to inflict harm on a military organization. *See* Zambelis, *supra* note 24, at 19, 20.

that it is almost impossible for a social media activist to lose civilian protection.[265] The Functionality Test recognizes that civilians could become a legitimate target due to their importance on the battlefield and their indispensable military functions.[266] This test, however, lacks the necessary safeguards to provide predictability and adequate protections to civilians that do not intend to create a military advantage through their actions.[267] The Functionality Test acknowledges the value of information activities in warfare and should be fortified with safeguards, to ensure that social media activists are only targeted in the rare instances when they exhibit a subjective intent to cause military harm that is separate from the general war effort.[268]

*David Heitner**

265. *See* INTERPRETIVE GUIDANCE, *supra* note 19, at 1016–22.

266. Moore, *supra* note 18, at 21.

267. Articulations of the Functionality Test do not explicitly adopt consideration of intent, subjective or otherwise. The Protocol I Test, however, explicitly adopts belligerent nexus, which can be described as collective subjective intent. *See* Keck, *supra* note 17, at 143–45

268. *See* INTERPRETIVE GUIDANCE, *supra* note 19, at 1020.

* B.A. American University, School of International Service (2004); J.D. Brooklyn Law School (2014). I would like to thank my wife Alexandra for her love and support during the development of this Note. I would also like to thank the entire staff of the *Brooklyn Journal of International Law* for their great effort, patience, and guidance throughout the drafting of this Note. All errors and omissions are my own.

E-WASTE & THE REGULATORY COMMONS: A PROPOSAL FOR THE DECENTRALIZATION OF INTERNATIONAL ENVIRONMENTAL REGULATION

INTRODUCTION

In an isolated junkyard at the edges of Lagos, Nigeria, hundreds of laborers, including young children, pick apart remnants of discarded electronics to recover valuable minerals such as gold and copper. Unaware of the dangerous carcinogens and harmful chemicals that abound in the electronic waste ("e-waste"),[1] these workers often burn the e-waste in open air and further expose themselves to extremely toxic materials.[2] Today, increasing demand for the latest technologies drives the fastest growing, and potentially most dangerous, waste stream worldwide.[3] Developing countries are the most common destinations

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1. Electronic components contain small quantities of precious metals such as gold and copper. JIM PUCKETT ET AL., EXPORTING HARM: THE HIGH-TECH TRASHING OF ASIA 8 (Jim Puckett & Ted Smith eds., 2002), *available at* http://www.ban.org/E-waste/technotrashfinalcomp.pdf.

2. Studies indicate that the bodies of those who live near these e-waste dumps have the highest amount of cancer-causing dioxins in the world. *See* Janet K.Y. Chan et al., *Body Loadings and Health Risk Assessment of Polychlorinated Dibenzo-p-dioxins and Dibenzofurans at an Intensive Electronic Waste Recycling Site in China*, 41 ENVTL. SCI. & TECH. 7668, 7672 (2007) (noting that breast milk of women who worked in electronic waste recycling centers had more than two times the concentration of dioxins than do women working in a control site and that their placentas had nearly three times the concentration of dioxin than do women at the control site).

3. Christian Purefoy, *Serious Contamination Threat from Africa's Mounting E-Waste*, CNN NEWS (Apr. 9, 2009), http://www.cnn.com/2009/WORLD/africa/04/08/africa.recycling.computers.ewaste/index.html. More recent projections by the United Nations' Solving the E-Waste Problem Initiative ("StEP") estimate global e-waste volumes to grow by 33% in the next four years, making e-waste the world's fastest growing waste stream. John Vidal, *Toxic "E-Waste" Dumped in Poor Nations, says United Nations,* THE GUARDIAN (Dec. 14, 2013), http://www.theguardian.com/global-development/2013/dec/14/toxic-ewaste-illegal-dumping-developing-countries.

for these wastes.[4] For instance, the United Nations Environment Programme ("UNEP")[5] reports that African countries are quickly becoming the final destination for the world's e-waste.[6] Usually this waste is broken apart and burned by young boys in countries like China.[7] A 2007 study found that blood lead levels of children in Guiyu, China were 50% higher than the maximum safe exposure set by the Centers for Disease Control and Prevention in the United States.[8]

Electronics represent the world's largest and fastest growing manufacturing industry,[9] and the exponentially growing pace of consumer demand for new gadgets fuels the growth in e-waste. This waste includes electronic devices such as computers, mobile phones, television sets, entertainment devices, and refrigerators.[10] Additionally, any components of these products,

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4. Vidal, *supra* note 3.

5. The UNEP was created in 1972 at the United Nations Stockholm Conference on the Human Environment to serve as the "focal point for environmental action and coordination" among United Nations members. Institutional and Financial Arrangements for International Environmental Cooperation, G.A. Res. 2997, pt. II, para. 1, U.N. GAOR, 27th Sess., Supp. No. 30, U.N. Doc. A/8730, at 43 (Dec. 15, 1972). "The UNEP promote[s] international cooperation in the field of the environment." United Nations Conference on Environment and Development: Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849, Agenda 21 – Chapter 38, part 22, 388.

6. James Simpson, *Toxics Alert: Africa Emerging as E-Waste Dumping Ground*, TOXICS ALERT (Dec. 2006), http://enews.toxicslink.org/news-view.php?id=3 ("According to a study by the Basel Action Network ("BAN"), a minimum of 100,000 used and obsolete computers a month are entering the Nigerian port of Lagos alone.").

7. Bryan Walsh, *E-Waste Not*, TIME (Jan. 08, 2009), http://content.time.com/time/magazine/article/0,9171,1870485,00.html.

8. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-1044, ELECTRONIC WASTE: EPA NEEDS TO BETTER CONTROL HARMFUL U.S. EXPORTS THROUGH STRONGER ENFORCEMENT AND MORE COMPREHENSIVE REGULATION (Aug. 2008), *available at* http://www.gao.gov/assets/280/279792.pdf.

9. *See* JIM PUCKETT ET AL., THE DIGITAL DUMP: EXPORTING RE-USE AND ABUSE TO AFRICA 7 (Jim Puckett ed., 2005), *available at* http://www.ban.org/library/TheDigitalDump.pdf [hereinafter THE DIGITAL DUMP]. BAN produced this film and report to document, and increase awareness of, the harmful effects of e-waste dumping in Africa.

10. *Pakistan: Environment: The Dark Side of Digital Waste,* THE FRIDAY TIMES (Pak.), May 16, 2010, [hereinafter THE FRIDAY TIMES]; *See also What is E-Waste?,* CAL. DEP'T OF RESOURCES RECYCLING AND RECOVERY, http://www.calrecycle.ca.gov/Electronics/WhatisEwaste/ (last updated Oct. 26, 2012) (stating that the definition of e-waste comprises mobile phones, computers, televisions, batteries, light bulbs, printers, and consumer electronics.

including cathode ray tubes ("CRTs"),[11] circuit boards, and ink cartridges, which are "sold, obsolete, broken or discarded by their original owners," are also considered e-waste.[12] As a result of the rapid pace of innovation and the related issue of product obsolescence, e-waste is one of the fastest growing types of waste in the industrialized world.[13] In fact, the United Nations projects global e-waste volumes will grow from 48.9 million metric tons in 2012 to 65.4 million metric tons in 2017, or "the weight equivalent of 200 Empire State Buildings or 11 Great Pyramids of Giza."[14] Yet consumers who choose to refurbish or recycle their unwanted electronics often must spend large sums of money or make long trips to designated recycling centers,[15] and often have few affordable and accessible disposal options for electronic waste.[16]

As this Note will discuss, in addition to the Basel Convention on the Transboundary Movement of Hazardous Wastes and

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There is, however, no legal definition for e-waste. For example, California has not been able to determine if certain items, like microwave ovens and similar appliances like toaster ovens or blenders, should be considered e-waste).

11. CRTs refer to the video display components of older non-flat screen televisions and computer monitors. They contain glass tubes made with harmful levels of lead and barium. *See*, *Fact Sheet: Easier Recycling of Cathode Ray Tubes*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/osw/hazard/recycling/electron/crt-fs06.htm (last updated Nov. 15, 2012); *see also* Jennifer Kutz, *You've Got Waste: The Exponentially Escalating Problem of Hazardous E-Waste*, 17 VILL. ENVTL. L.J. 307, 308 (2006).

12. *See* CAL. DEP'T OF RESOURCES RECYCLING AND RECOVERY, *supra* note 10.

13. Betsy M. Billinghurst, *E-Waste: A Comparative Analysis of Current and Contemplated Management Efforts by the European Union and the United States*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 399, 400 (2005).

14. Allie Bidwell, *U.N. Seeks to Solve Growing Global E-Waste Problem*, U.S. NEWS & WORLD REPORT (Dec. 16, 2013), http://www.usnews.com/news/articles/2013/12/16/un-seeks-to-solve-growing-global-e-waste-problem. A report by the Electronics Takeback Coalition states that the 2009 digital conversion of analog televisions in the United States will continue to contribute to e-waste production, because analog televisions are no longer desirable for consumers' reuse. In the United States alone, consumers dispose of more than 550,000 computers and mobile devices per day, based on the EPA's 2010 findings. *Facts and Figures on E-Waste and Recycling*, ELECTRONICS TAKEBACK COALITION 6 (Sept. 25, 2013), http://www.electronicstakeback.com/wpcontent/uploads/Facts_and_Figures_on_EWaste_and_Recycling.pdf.

15. *See* Billinghurst, *supra* note 13, at 400.

16. *Id*.

their Disposal of 1989 ("Basel Convention")[17] and the proposed Basel Ban Amendment,[18] the promulgation of various regulations to manage e-waste—such as the European Union's Waste Electrical and Electronic Equipment ("WEEE") Directive[19] and the Directive on the Restriction of the Use of Hazardous Substances ("RoHS"),[20] as well as the United States' Resource Conservation and Recovery Act ("RCRA") [21]—has done little to address the growing e-waste problem or the loopholes associated with the Basel Convention.[22] The Basel Convention also conflicts with international trade law as enforced by the World Trade Organization ("WTO").[23] Despite various efforts to regulate e-waste disposal, the proliferation of legislation has yielded unsatisfactory outcomes and has even created adverse effects.[24] Examined together, the inefficiencies of e-waste regulation exemplify the findings of the "regulatory commons" as described by Professor William Buzbee. [25] These inefficiencies can be overcome by shifting the burden of regulation from weak international entities to more authoritative private actors through

17. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 57 [hereinafter Basel Convention].

18. *The Basel Convention Ban Amendment*, BASEL CONVENTION, http://www.basel.int/pub/baselban.html (last visited Jan. 10, 2014) [hereinafter Basel Ban Amendment].

19. *See generally* U.S. DEP'T OF COM.'S INT'L TRADE ADMIN., *WEEE: Waste Electrical and Electronic Equipment*, EXPORT.GOV, http://export.gov/europeanunion/weeerohs/weeeinformation/index.asp (last updated May 16, 2013).

20. *See* Directive 2002/95/EC of the European Parliament and of the Council of 27 January on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment, 2003 O.J. (L 37), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0095:en:HTML [hereinafter Directive 2002/95/EC].

21. 42 U.S.C.A. §§ 6901-6992k (1976).

22. *See generally* Christine Terada, *Recycling Electronic Wastes in Nigeria: Putting Environmental and Human Rights at Risk*, 10 NW. U. J. INT'L HUM. RTS. 154 (2012).

23. *See generally* Tanya Karina A. Lat, *Testing the Limits of GATT Art. XX(b): Toxic Waste Trade, Japan's Economic Partnership Agreements, and the WTO*, 21 GEO. INT'L ENVTL. L. REV. 367 (2009).

24. Terada, *supra* note 22.

25. William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1 (2003).

democratic experimentation analogous to Japan's Specified Home Appliance Recycling Law ("SHAR").[26]

The regulatory commons is a reinterpretation of the classic paradox of the tragedy of the commons,[27] in which a natural resource is exploited due to lack of regulation and accountability; in the regulatory commons, however, regulation itself is the overexploited resource.[28] Overregulation poses regulatory challenges and, ironically, gives rise to decentralization mechanisms that actually enable more effective regulation.[29] The coexistence of multiple forms of regulation often produces problems, including "jurisdictional mismatch"[30] and "regulatory fragmentation."[31] Furthermore, in contrast to the tragedy of the commons, in the regulatory commons there is rarely a single government regulator.[32] Applying the framework of the

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26. Japan implemented The Home Appliance Recycling Act in 2001 and it is known by the acronym "SHAR" because it was originally named the "Specified Home Appliance Recycling Law." Catherine K. Lin, Linan Yan & Andrew N. Davis, *Globalization, Extended Producer Responsibility and the Problem of Discarded Computers in China: An Exploratory Proposal for Environmental Protection*, 14 GEO. INT'L ENVTL. L. REV. 525, 541-42 (2002).

27. The tragedy of the commons is commonly used to characterize environmental resource management problems, as first put forth in Garrett Hardin's seminal paper. In the classic tragedy of the commons, each private actor, for example, as a fisherman, has an incentive to catch as many fish as possible. The unchecked pursuit of self-interest, however, under circumstances where a given resource (e.g., fish) is finite, leads to overexploitation of the resource. Over time, resource extraction (e.g., fishing) exceeds the reproduction and replacement rates, which in turn leads to the depletion of fish stocks and the ultimate failure of fishing businesses. Hardin proposes that private property rights in a resource help actors avoid such market failure because property rights incentivize the holders of those rights to manage the resource sustainably, leading to optimal, long-term productivity of the resource. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

28. Buzbee, *supra* note 25.

29. *Id.*

30. *See* JAMES E. KRIER & EDMUND URSIN, POLLUTION AND POLICY: A CASE ESSAY ON THE CALIFORNIA AND FEDERAL EXPERIENCE WITH MOTOR VEHICLE AIR POLLUTION, 1940-1975 (1977) (explaining that the lack of a prime or traditional regulator leads to political inattention and duplication of regulation). *See also* Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1538 (1999) (noting that jurisdictional mismatches exist between the breadth of government authorities' reach and the scope of public goods they deliver).

31. *See* Jonathan Baert Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 YALE L.J. 677, 701-04 (1999).

32. Buzbee, *supra* note 25, at 9.

regulatory commons, this Note proposes that in the context of the growing e-waste stream, decentralization, while counterintuitive at first glance, is a better approach to effectively promoting human and environmental health because it capitalizes on solutions inherent in the regulatory commons.

Part I provides an overview of e-waste, its harmful effects on the developing world, the backdrop for e-waste regulation, and the weaknesses of e-waste regulation as embodied in the Basel Convention, the proposed Basel Ban Amendment, the WEEE and RoHS Directives in the European Union, and RCRA in the United States. Part II presents the paradox of the regulatory commons, a twist on the classic model of the tragedy of the commons, by showing that the regulatory opportunity is the overregulated resource. Part II then applies this paradox to existing e-waste regulations, including the Basel Convention, the proposed Basel Ban Amendment, the WEEE and RoHS Directives, and RCRA, as well as potential conflicts with the WTO's trade regulation, and discusses how the proliferation of these regulations manifests problems of the regulatory commons. Finally, Part III proposes ways in which international environmental laws can be decentralized to reconcile the regulatory commons paradox and more effectively regulate e-waste.

I. BACKGROUND OF E-WASTE AND ITS REGULATION

A. Harmful Effects of E-Waste on the Developing World

E-waste poses significant risk to humans and the environment.[33] It consists of recyclable materials, such as plastics and aluminum,[34] as well as many toxic organic pollutants known as polychlorinated biphenyls ("PCBs"). This class of pollutants includes copper, gold, iron, lead, thallium, and zinc, all of which can lead to birth defects.[35] The CRTs in computer and TV mon-

33. THE FRIDAY TIMES, *supra* note 10.

34. JOHN GALLAUGHER, INFORMATION SYSTEMS: A MANAGER'S GUIDE TO HARNESSING TECHNOLOGY § 5.8 (2010), *available at* http://www.flatworldknowledge.com/pub/information-systems-managers-g/2374/73228.

35. THE FRIDAY TIMES, *supra* note 10. *See also* JOSEPH F. C. DIMENTO, THE GLOBAL ENVIRONMENT AND INTERNATIONAL LAW 111 (2003) (citing a notorious anecdote in 1988 involving a shipment from Italy of 18,000 drums of waste, including PCBs and asbestos, to an "unscrupulous businessman" in Koko, Nigeria, which led to so many hospitalizations and premature births that

itors also contain lead, leading to the serious consequence of lead poisoning.[36] Additionally, many electronics contain cadmium, which is a carcinogen,[37] and mercury, which, in large doses, can cause neurological disorders.[38] Furthermore, plastic parts often contain toxic flame retardants.[39] A common method of taking apart e-waste is to burn electronic equipment in an open fire in order to melt away plastics and inexpensive metals.[40] Many disposal methods, including burning, unleash dangerous carcinogens and neurotoxins, pollute water supplies, and lead to allergic reactions, not limited to skin and respiratory tract disorders.[41] The methods used in the disposal of e-waste also release pollutants, such as black soot, carbon dioxide, and carbon monoxide, into the atmosphere.[42] Moreover, e-waste lying undisturbed in landfills can be just as harmful because it contains heavy metals such as copper, lead, and mer-

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Nigeria subsequently banned the importation of hazardous wastes and implemented the death penalty for violations).

36. Approximately 75% of all CRTs disposed of in the United States are exported for refurbishing, but only approximately 30% are actually appropriate for such refurbishing; the remainder of the CRTs are dumped. MADELEINE COBBING, TOXIC TECH: NOT IN OUR BACKYARD, UNCOVERING THE HIDDEN FLOWS OF E-WASTE, 47 (2008), *available at* http://www.greenpeace.org/international/Global/international/planet-2/report/2008/2/not-in-our-backyard-summary.pdf. *See also Childhood Lead Poisoning,* CTR. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/lead (last visited Jan. 17, 2014) (noting that lead poisoning results in serious harm to nearly every bodily system, as well as learning disabilities, behavioral problems, and even seizures, coma, and death).

37. *Cadmium Compounds Hazard Summary*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/ttn/atw/hlthef/cadmium.html (last updated Nov. 6, 2007).

38. OFFICE OF POLLUTION PREVENTION & TOXIC SUBSTANCES, U.S. ENVTL. PROTECTION AGENCY, REPORT TO CONGRESS: POTENTIAL EXPORT OF MERCURY COMPOUNDS FROM THE U.S. FOR CONVERSION TO ELEMENTAL MERCURY, ix (2009), *available at* http://www.epa.gov/mercury/pdfs/mercury-rpt-to-congress.pdf.

39. *See* SILICON VALLEY TOXICS COALITION, *Just Say No to E-Waste: Background Document on Hazards and Waste from Computers*, U. ARK., http://cmase.uark.edu/teacher/Environmental_Ed/2006%20E-Waste%20Info/E-Waste/Just%20Say%20No%20-%20E-Waste%20Backgrounder.pdf (last updated Jun. 9, 2006).

40. THE FRIDAY TIMES, *supra* note 10.

41. *Id*.

42. *Mountains of Toxic E-Waste in Pakistan Are a Goldmine,* GREEN PROPHET, (Oct. 31, 2011), http://www.greenprophet.com/2011/10/pakistan-e-waste-goldmine/ [hereinafter *Mountains of Toxic E-Waste*].

cury, which can leach into the soil and groundwater over time.[43]

Developed countries have strict regulations that seek to curb e-waste's damage within their borders, often dumping them in developing countries, which disproportionately bear the toll that e-waste inflicts on environmental and human health.[44] Although a number of Western countries have banned disposing of old computers in landfill sites and have required that they be recycled, recycling can cost "tens of dollars per computer."[45] For many developed countries, the more cost-effective alternative is to export old electronics to developing countries, where regulations on e-waste are either nonexistent or neglected.[46] In Europe, for example, only one third of e-waste is treated in compliance with the WEEE Directive.[47] Exporters often disguise illegal e-waste as "secondhand goods" and "for charities" to developing countries in Africa.[48] As a result, China, India, and African countries, which can provide cheap labor and adhere to less stringent environmental laws, or lack such environmental laws entirely, are the end destinations for e-waste.[49] Thus, the same countries regulating e-waste are also often the ones illegally exporting e-waste to the developing world.[50] Nevertheless, developing countries have embraced e-waste recy-

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43. THE FRIDAY TIMES, *supra* note 10.

44. *Mountains of Toxic E-Waste*, *supra* note 42.

45. Richard Black, *E-Waste Rules Still Being Flouted*, BBC NEWS, http://news.bbc.co.uk/1/hi/sci/tech/3549763.stm. (last updated Mar. 19, 2004).

46. *Mountains of Toxic E-Waste*, *supra* note 42. *See also* Black, *supra* note 45.

47. Jana Viktoria Nysten, *EU Regulation of Electronic Waste: A Revised Directive Reflects Economic and Environmental Concerns*, AMERICAN BAR ASSOCIATION: TRENDS (Sept. / Oct. 2012), www.americanbar.org/publications/trends/2012_13/september_october/eu_regulation_electronic_waste_revised_directive_reflects_economic_and_environmental_concerns.html.

48. *Where Does E-Waste End Up?,* GREENPEACE (Feb. 24, 2009), www.greenpeace.org/international/en/campaigns/toxics/electronics/the-e-waste-problem/where-does-e-waste-end-up/.

49. *Mountains of Toxic E-Waste*, *supra* note 42.

50. UNITED NATIONS ENV'T PROGRAMME, WHERE ARE WEEE IN AFRICA? FINDINGS FROM THE BASEL CONVENTION E-WASTE AFRICA PROGRAMME, 12 (Dec. 2011), *available at* http://www.basel.int/Implementation/TechnicalAssistance/EWaste/EwasteAfricaProject/Publications/tabid/2553/Default.aspx.

cling for its employment opportunities and the potential to recover economic value from precious metals such as copper, gold, silver, indium, and palladium.[51]

B. Global E-Waste Regulations: An Overview

The Basel Convention presents the foundation for international regulation of the movement of hazardous waste from industrialized to developing countries.[52] The Basel Convention sets forth three primary goals: 1) the minimization of hazardous waste ("waste reduction principle"), 2) the disposal of waste close to its source of origin ("proximity principle"), and 3) the decrease of transboundary movement of waste.[53] In an effort to achieve these goals, the Basel Convention establishes six rules. First, waste is a "bad," as opposed to a usable and tradable good, that harms human and environmental health and thus should not be traded.[54] Second, waste must be minimized at its source and disposed of in the state where it was created.[55] Third, developed countries that originally generated the waste must manage its disposal in a more acceptable fashion and must only export waste to other countries when it is for recycling and upon the prior, informed consent of the importing

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51. *Mountains of Toxic E-Waste*, *supra* note 42.

52. Basel Convention, supra note 17. *See also* Nicola J. Templeton, *The Dark Side of Recycling and Reusing Electronics: Is Washington's E-Cycle Program Adequate*?, 7 SEATTLE J. SOC. JUST. 763, 766-68 (2009).

53. *About the Convention*, BASEL CONVENTION, http://www.basel.int/convention/basics.html (last visited Jan. 17, 2014). The Basel Convention identifies waste either by its place of disposal or by its recovery process. Annexure IV of the Convention lists these various recovery processes. For example, almost all materials recycled or processed in order to recapture a metal, or an organic or inorganic substance for future use, are listed as waste. On the other hand, electronic components that can be used without further processing are not generally defined as waste. The Basel Convention further divides waste into two lists: List A in Annexure VII for "hazardous" waste that "poses serious threats to the environment and human health" and that requires "special handling and disposal processes," and List B in Annexure IX for non-hazardous waste, which is not regulated by the Basel Convention. Most e-waste is categorized under List A and is subject to the Basel Convention.

54. TOXICS LINK, E-WASTE IN INDIA: SYSTEM FAILURE IMMINENT-TAKE ACTION NOW! (2004), *available at* http://www.toxicslink.org/docs/06040_repsumry.pdf.

55. Basel Convention, *supra* note 17, art. 4.

country.[56] Fourth, the Basel Convention acknowledges that countries have a "sovereign right" to ban the import, entry, or disposal of hazardous wastes.[57] Fifth, the Basel Convention bans trade between parties to the convention and nonparties.[58] Sixth, the Basel Convention bans export of hazardous wastes to those member states whose domestic laws prohibit the import of hazardous wastes.[59]

Despite the Basel Convention's noble goals, various parties stand to benefit economically from e-waste trade that violates the Basel Convention.[60] For example, importers, traders, and recyclers have continued to exploit loopholes in the Basel Convention under pretexts of e-waste disposal for recycling or reuse. E-waste recycling is often profitable to importers because electronic equipment contains small quantities of valuable materials such as gold and copper that can be extracted, reclaimed, and then resold.[61] In fact, the Basel Action Network ("BAN"), a nonprofit group named after the Basel Convention and focusing on combating toxic waste, estimates that as much as 99% of the waste that is shipped to developing countries is to be recycled or reused.[62] At the same time, developing countries lack the infrastructure needed to track the e-waste or oversee handling.[63] Furthermore, people are often uninformed of the procedure to report a claim to international authorities such as Interpol and to take action against e-waste that is disposed of

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56. *Id.* arts. 4, 6.

57. *Id.* preamble.

58. *Id.* art. 4.5.

59. *Id.* art. 4.1.(a). The Basel Convention does, however, permit transboundary movement of hazardous waste if the country of origin is unable to safely dispose of it. *Id.* art. 4.9.(a).

60. *See* Jerrold A. Long, *Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements of Hazardous Wastes and Their Disposal*, 1999 COLO. J. INT'L ENVTL. L. & POL'Y 253, 254-55 (1999). For instance, the Basel Convention does not hold exporters liable for damages occurring after the importer received "operational control" of the waste. Consequently, countries lack incentive to ensure that facilities exist in the importing country, so that importing countries disproportionately bear the costs of enforcement.

61. Vinutha V., *The E-Waste Problem,* EXPRESS COMPUTER ONLINE (Nov. 21, 2005), http://computer.financialexpress.com/20051121/management01.shtml.

62. Charles W. Schmidt, *Environmental Crimes: Profiting at the Earth's Expense*, 112 ENVTL. HEALTH PERSP. 96, 101 (2004).

63. *Id.* at 102.

illegally.[64] When authorities are unable or unwilling to oversee the waste and monitor illegal dumping, e-waste is dumped as an afterthought.[65] Therefore, countries like China, India, and Pakistan continue to be the primary dumping grounds for e-waste from industrialized countries.[66]

In 1995 developing countries sought to overcome the Basel Convention's loopholes in connection with recycling and reuse through the Basel Ban Amendment, which seeks to ban the export of all hazardous wastes from the twenty-nine "Annex VII countries" (Basel Convention signatories that also belong to the European Union or to the Organisation for Economic Co-operation and Development ("OECD"))[67] to the non-Annex VII countries (all other signatories to the Basel Convention).[68] If implemented, the Basel Ban Amendment would ensure that developed countries keep e-waste within their own borders, and would effectively shift the burden from developing countries—to turn away imports of hazardous wastes—to industrialized countries—to prevent such exports.[69] Nevertheless, the Basel Ban Amendment has not taken effect because it has not yet met the Basel Convention's requirement for ratification by three-fourths of Basel Convention parties.[70] In fact, when the Basel Ban Amendment was proposed, Greenpeace, a leading non-governmental organization dedicated to environmental protection, labeled several developed countries the "sinister seven" for they were key opponents of the Basel Ban Amendment.[71] Against this backdrop of the failures of the Basel Con-

64. *Id.* at 98.

65. *Id.* at 98.

66. Vinutha, *supra* note 61.

67. The OECD is a coalition of thirty-two countries focused on democracy and the free market. ORG. FOR ECON. CO-OPERATION & DEV., http://www.oecd.org/ (last visited Jan. 10, 2014).

68. Basel Ban Amendment, *supra* note 18.

69. *Id.*

70. The Basel Ban Amendment requires sixty-six country ratifications, representing three-fourths of the eighty-seven parties present at the Third Meeting of the Conference of the Parties, to take effect. Despite the fifty-one ratifications, the issue as to when the Basel Ban Amendment shall enter into force remains controversial. *Ban Ratification Deposit Box,* BASEL ACTION NETWORK, http://www.ban.org/deposit-box/ (last updated Mar. 27, 2013).

71. These countries are: Australia, Canada, Germany, Japan, the Netherlands, the United Kingdom, and the United States. Jim Puckett & Cathy Fogel, *A Victory for Environment and Justice: The Basel Ban and How it Hap-*

vention, global regulations have proliferated and aim to tackle e-waste disposal. These additional regulations, however, actually exacerbate the problem by fostering the exploitation of a resource, namely regulation itself. This exploitation is manifested by the paradox of the regulatory commons.

The EU's enactment of the WEEE Directive in January 2003 represents the first significant producer takeback, or Extended Producer Responsibility ("EPR"), program,[72] along with the recent WEEE Recast Directive in July 2012.[73] Both measures, however, fall short of achieving their intended goals. The WEEE Directive mandates that private sector producers fund and coordinate collection facilities for consumers to properly dispose of or recycle e-waste at no cost to the consumer.[74] On its face, the WEEE Directive is a blanket regulation covering all e-waste, regardless of its source or quantity.[75] Ideally, the WEEE Directive would shift the entire burden of e-waste recycling and disposal to the original producers and compel manufacturers, retailers, consumers, waste operators, and the government to participate in all steps of the waste recovery process.[76] Addi-

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pened, BASEL ACTION NETWORK (1994), http://ban.org/about_basel_ban/a_victory.html.

72. EPR places the onus on producers to provide for the long-term environmental responsibility of their products in a "cradle-to-grave" chain, from production to distribution to recycling, reuse, and sustainable product design. Noah Sachs, *Planning the Funeral at the Birth: Extended Producer Responsibility in the European Union and the United States,* 30 HARV. ENVTL. L. REV. 53, 53, 65-69 (2006). Before 2003, the EU's e-waste management landscape was similar to the present situation in the United States, in that there was no comprehensive e-waste policy, although some EU countries such as Belgium, Denmark, Germany (e.g. Packaging Ordinance legislation enacted in 1991), Italy, the Netherlands, Norway, and Sweden had such manufacturer takeback policies before 2003.

73. *See generally* U.S. DEP'T OF COM.'S INT'L TRADE ADMIN., *WEEE: Waste Electrical and Electronic Equipment*, *supra* note 19.

74. *See* Council Directive 2002/96, art. 5, 2003 O.J. (L 37) 24-25 (EC), *available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32002L0096*; Kutz, *supra* note 11, at 321; Phoenix Pak, *Haste Makes E-Waste: A Comparative Analysis of How the U.S. Should Approach the Growing E-Waste Threat*, 16 CARDOZO J. INT'L & COMP. L. 241, 271 (2008).

75. *See* Sachs, *supra* note 72, at 77 (discussing how the WEEE Directive mandates that manufacturers take back all household appliances and electric tools, among other wastes).

76. *See Promoting and Practicing Environmental Stewardship for Electronic Products*, U.S. ENVTL. PROTECTION AGENCY,

tionally, the WEEE Recast Directive seeks to expand the scope of the original WEEE Directive, strengthen takeback programs, increase EU member states' waste collection rates, and streamline registration and reporting requirements, among other goals.[77] Nevertheless, the effectiveness of the WEEE Directive and the WEEE Recast Directive are undermined by inconsistencies.[78]

The European Union also sought to structure the WEEE Directive to create ways for manufacturers to develop more environmentally friendly electronics and implemented the RoHS Directive in February 2003, in tandem with the WEEE Directive, to ensure that hazardous materials are removed from electronic devices.[79] The RoHS Directive mandated that manufacturers cease using six substances in electronic goods sold within the European Union by 2006: lead, mercury, cadmium, hexavalent chromium, polybrominated bi-phenyls, and polybrominated diphenyl ethers.[80] Similarly to the WEEE Di-

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http://www.epa.gov/wastes/conserve/tools/stewardship/products/electronics.htm (last updated June 28, 2013); Rob Courtney, *Evolving Hazardous Waste Policy for the Digital Era*, 25 STAN. ENVTL. L. J. 199, 216 (2006).

77. In particular, the WEEE Recast Directive provides a transition period, from August 13, 2012 to August 14, 2018, to expand the scope of the WEEE Directive to all electrical and electronic equipment. The WEEE Recast Directive also requires distributors to set up collection stations at retail locations at no charge to end-users, and sets a target for a minimum collection rate of 45% starting in 2016 to 65% in 2019. *New Recast WEEE Directive (2012/19/EU) Published,* INTERTEK, http://www.intertek.com/consumer/news/v110-new-recast-weee-directive/ (last visited April 9, 2014); *See also* U.S. DEP'T OF COM.'S INT'L TRADE ADMIN., supra note 73.

78. *See* Pak, *supra* note 74, at 262.

79. Catherine Day, *Frequently Asked Questions on Directive 2002/95/EC on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment (RoHS) and Directive 2002/96/EC on Waste Electrical and Electronic Equipment (WEEE)*, EUROPEAN COMMISSION DIRECTOR-GENERAL ENV'T, http://ec.europa.eu/environment/waste/weee/pdf/faq_weee.pdf (last updated Aug. 2006); *See* Directive 2002/95/EC, *supra* note 20.

80. The RoHS Directive banned the use of these six substances by both manufacturers within the European Union and manufacturers who imported electronic goods into the EU. The RoHS Directive, however, allows exceptions for the use of the six banned substances when it is "technically or scientifically impracticable" to replace the banned substance with a substitute or when the use of a substitute would result in "negative environmental, health and/or consumer safety impacts" likely to outweigh any benefits derived from the ban. For instance, the RoHS Directive makes exceptions for the use of lead in

rective, the EU recast the RoHS Directive ("RoHS II")[81] and expanded the scope of the original RoHS Directive to all electronic equipment, cables, and spare parts by 2019.[82] In effect, RoHS II seeks to establish "improvements in implementation, enforcement and coherence."[83] Although most electronics manufacturers have been able to modify products to satisfy the RoHS Directive,[84] the RoHS Directive and RoHS II's strict mandate, in combination with the WEEE Directive, manifest the challenges of the regulatory commons. Collectively, the RoHS and WEEE Directives reduce the sense of social need in regulatory actors charged with their enforcement.

In the United States, RCRA was enacted in 1976 to oversee creation and disposal of waste.[85] In pertinent part, RCRA exempts the export of potentially hazardous e-waste from any export controls to other countries by claiming it is intended for recycling.[86] Additionally, RCRA states that equipment with the

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glass components of CRTs because there is no suitable alternative. Council Directive 2011/65, art. 2, 2011 O.J. (L 174) 5 (EU) (delineating the scope of products affected by the RoHS Directive, which does not include devices with medical or military applications). *See also* Directive 2002/95/EC, *supra* note 20, art. 4.

81. U.S. DEP'T OF COM.'S INT'L TRADE ADMIN, *RoHS: Restriction of the use of Certain Hazardous Substances*, EXPORT.GOV, http://export.gov/europeanunion/weeerohs/rohsinformation/index.asp (last updated May 16, 2013).

82. The original RoHS Directive only applied to several categories of electrical and electronic equipment, such as household appliances and consumer equipment. Press Release, EUROPEAN COMMISSION, *Environment: Fewer Risks from Hazardous Substances in Electrical and Electronic Equipment* (July 20, 2011) *available at* http://europa.eu/rapid/press-release_IP-11-912_en.htm.

83. Memorandum from the European Commission, EUROPEAN COMMISSION, *Questions and Answers on the Revised Directive on Restrictions of Certain Dangerous Substances in Electrical and Electronic Equipment (RoHS)* (Dec. 3, 2008) *available at* http://europa.eu/rapid/press-release_MEMO-08-763_en.htm. RoHS II also promotes better compliance with the new REACH legislation (The Registration, Evaluation, Authorisation and Restriction of Chemicals), which was promulgated in 2006 for the marketing of products in the EU. Press Release, EUROPEAN COMMISSION, *supra* note 82.

84. The RoHS Directive has led to more investment by manufacturers into research and development in order to develop new, cleaner designs and manufacturing techniques, and to clean up devices sold worldwide. Kutz, *supra* note 11, at 328. *See also* Sachs, *supra* note 72, at 93-94.

85. 42 U.S.C.A. §§ 6901-6992k (1976), *supra* note 21.

86. Nisha Thakker, *India's Toxic Landfills: A Dumping Ground for the World's Electronic Waste*, 6 SUSTAINABLE DEV. L. & POL'Y 58, 60 (2006).

"potential for reuse" is not waste, so many electronic products at the end of their usable life cycle are not classified as "waste" and are therefore excluded from the RCRA regulation.[87] The reach of RCRA is further limited by the EPA's narrow definition of "hazardous."[88] Additionally, RCRA only covers materials that emit dangerous chemicals during their use, so electronics and harmful e-waste are generally excluded,[89] even though they harm human and environmental health after the end of their life cycle.

Unfortunately, a 2004 gathering convened by the EPA further reinforced the fact that RCRA can no longer control today's overwhelming, and ever increasing, e-waste stream,[90] a fact which could not have been anticipated at the time RCRA was enacted. To date, there is no nationwide e-waste recycling or safe disposal law in the United States.[91] Even if RCRA were fully relevant, it is undermined by conflicting overlap with EPA regulations. For example, RCRA is only enforced against large businesses, not private consumers and small businesses.[92]

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87. Robert Tonetti, EPA Office of Solid Waste, EPA's Regulatory Program for "E-Waste" (Oct. 2007), *available at* http://www.epa.gov/waste/conserve/materials/ecycling/docs/e-wasteregs.pdf.

88. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 8.

89. Even though the EPA now considers CRT computer monitors to be hazardous, for many years CRT computer monitors were not registered on Toxicity Characteristic Leachate Procedure ("TCLP") lead toxicity tests. Courtney, *supra* note 76, at 205-06.

90. OFFICE OF TECH. POL'Y, U.S. DEPT. COMMERCE, RECYCLING TECHNOLOGY PRODUCTS: AN OVERVIEW OF E-WASTE POLICY ISSUES 3-4 (2006), *available at* http://www.bvsde.paho.org/bvsacd/cd57/recycling/intro.pdf. The National Electronics Product Stewardship Initiative ("NESPI") brought stakeholders in waste disposal together, including state and local governments, recyclers, and environmental organizations. NESPI recognized the need for a national law to better manage waste but no consensus has been reached on a financing method for such regulation.

91. Mark Anderson, *Electronics Waste Programs Ineffective in Most U.S. States*, INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS (Sept. 11, 2013), http://spectrum.ieee.org/energy/environment/electronics-waste-programs-ineffective-in-most-us-states. In 2010, the EPA partnered with the United Nations' StEP Initiative and executed a cooperative agreement in November 2010. *Cleaning Up Electronic Waste (E-Waste)*, ENVTL. PROTECTION AGENCY, http://www.epa.gov/oiamount/toxics/ewaste/index-uew.html#national (last updated Dec. 16, 2013).

92. *See* 40 C.F.R §261.4(b)(1) (2010) (exclusion for household waste); 40 C.F.R. §261.5(f)(3) (2010) (conditional exclusion for companies that produce less than 100 kilograms of hazardous waste per month). *See also* Sachs, *supra*

RCRA "has exempted more and more toxic wastes simply because they allegedly destined for recycling operations"[93] or to other economically challenged institutions that take these wastes in the guise of "donations."[94] Organizations that take public donations like Goodwill and the Salvation Army are reluctant to accept discarded computers because of high disposal costs.[95] Taken together, the loopholes present in RCRA enforcement manifest regulatory fragmentation in e-waste control.

Thus, this Note proposes that global regulators may improve the effectiveness of environmental laws by adopting the lessons of the regulatory commons to create economic incentives for e-waste producers, recyclers, and consumers alike, while enabling states, especially in the developing world, to better protect human and environmental safety. In the particular context of the growing e-waste stream, this Note suggests that, while counterintuitive at first glance, decentralization may be a better approach to effectively promoting human and environmental health.

II. THE PARADOX OF THE REGULATORY COMMONS

A. The Classic Tragedy of the Commons: The Regulatory Commons

The regulatory commons is a variation on the classic paradigm of the tragedy of the commons. In the tragedy of the commons, rational, individual actors overuse a resource that no one individual owns or controls, resulting in the destruction of each individual's long-term interest.[96] This overused resource is

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note 72, at 58 (noting that U.S. households produce over 1.6 million tons of hazardous waste annually).

93. Thakker, *supra* note 86, at 60 (citing a 2002 report from BAN).

94. Manasvini Krishna & Pratiksha Kulshrestha, *The Toxic Belt: Perspectives on E-Waste Dumping in Developing Nations*, 15 U.C. DAVIS J. INT'L L. & POL'Y 71, 88 (2008). E-waste is dumped in the guise of "donations" on developing countries that lack the financial resources to oversee proper disposal. The Indian embassy in the United States even encourages donations of old computers to schools run by the Indian government.

95. Heather L. Drayton, *Economics of Electronic Waste Disposal Regulations*, 36 HOFSTRA L. REV. 149, 159 (2007).

96. Buzbee is the first to engage in serious exploration of the existence of the "regulatory commons." *See* Buzbee, *supra* note 25. Other legal scholars have only referenced the concept in passing. *See*, *e.g.*, William A. Fischel, *Vot-*

called a "fugitive resource" and each actor uses that resource in a way that most immediately benefits him or herself.[97] In the long run, the actors in the tragedy of the commons overuse and deplete the particular resource.[98] The traditional solution, in theory, is to privatize property by creating property rights so that individual actors can better manage externalities, share information, and reduce transaction costs.[99]

The regulatory commons centers on regulation itself, also known as the "regulatory opportunity," as the overused resource, in lieu of some natural resource that is vulnerable to depletion.[100] Whereas the tragedy of the commons assumes that the actor is a rational individual motivated by monetary interests, the regulatory commons assumes that the government actor is not only motivated by monetary interests but also by electoral, ideological, and political interests.[101] Such symptoms

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ing, Risk Aversion, and the NIMBY Syndrome: A Comment on Robert Nelson's "Privatizing the Neighborhood," 7 GEO. MASON L. REV. 881, 896-97 (1999) (noting that local governments tend to overregulate and that the Takings Clause of the U.S. Constitution deters "local governments [from] devolv[ing] into a kind of regulatory commons, in which each knows that its behavior may be harmful to the larger area, but none has the incentive to mend its ways on its own"); Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 985 (1997) (noting that any legal government system is akin to "a kind of regulatory commons, where effective action is dependent upon alliances of groups overcoming collective action barriers and pressuring administrators to respond.").

97. *See generally* H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954), *reprinted in* JOHN A. BADEN & DOUGLAS S. NOONAN, MANAGING THE COMMONS 17 (2d ed. 1998); Hardin, *supra* note 27.

98. *See, e.g.*, Carol M. Rose, *Energy and Efficiency in the Realignment of Common-Law Water Rights*, 19 J. LEGAL STUD. 261 (1990).

99. Completely privatized rights in a resource prone to depletion, however, still rely on robust legal frameworks to maintain and enforce those rights through judicial and regulatory regimes. They also introduce new costs of creating and policing the private property regime and the tradeoff with a community property system. James E. Krier, *The Tragedy of the Commons, Part Two,* 15 HARV. J.L. & PUB. POL'Y 325, 332-35 (1992) (citing Harold Demsetz, *Toward a Theory of Property Rights,* 57 AM. ECON. REV. 347 (Papers & Proc. 1967)).

100. Buzbee, *supra* note 25, at 22.

101. *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 21-33 (1991). *See also* Joseph P. Kalt & Mark A. Zupan, *The Apparent Ideological Behavior of Legislators: Testing for Principal-Agent Slack in Political Institutions*, 33 J.L. ECON. 103, 108 (1990) (dis-

are already present in laws aimed to manage such varied resources as aquaculture,[102] urban sprawl,[103] global warming,[104] and bioengineered foods.[105] For instance, aquaculture involves an industry where conflicting regulation over harvesters of ocean and river resources creates a state in which individual fishers are unable to privatize property and consequently are unable to exclude other fishers from taking the resource.[106]

Overuse of the regulatory opportunity in the regulatory commons poses a range of legal and societal problems.[107] Consider, for example, the problem of "jurisdictional mismatch."[108] When no regulator has primacy over other regulators of the regulated activity (such as the lack of a central government exerting power over local governments and administrative agencies), regulators experience mass political inattention and actually neglect the underlying problem.[109] Additionally, "regula-

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cussing how legislators' ideology is "the most potent explanatory variable" used in evaluating legislators' actions).

102. On a domestic level, in the United States, there is no clear primary regulator. Jurisdiction is shared by the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, the Fish and Wildlife Service, and the Food and Drug Administration, as well as state and local fisheries and wildlife agencies. *See* Erin R. Englebrecht, *Can Aquaculture Continue to Circumvent the Regulatory Net of the Magnuson-Stevens Fishery Conservation and Management Act*?, 51 EMORY L.J. 1187, 1199-1207 (2002).

103. Again, on a domestic level in the United States, urban sprawl continues to be a problem but various forms of political action on the state level have not been effective in addressing the issue. *See, e.g.,* William W. Buzbee, *Sprawl's Dynamics: A Comparative Institutional Analysis Critique*, 35 WAKE FOREST L. REV. 509 (2000).

104. The United States remains the only signatory of the Kyoto Protocol that has not yet ratified the convention. Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 3, Dec. 10, 1997, U.N. Doc FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 (1998), *available at* http://unfccc.int/resource/docs/convkp/kpeng.pdf. Despite executive orders such as the Clear Skies and Global Climate Change Initiatives released in 2002, little has been done in the United States to comply with the Kyoto Protocol. *See* NAT'L OCEANIC & ATMOSPHERIC ADMIN., *President Bush Visits NOAA*, NATIONAL CLIMATIC DATA CENTER (Feb. 14, 2002), http://www.ncdc.noaa.gov/oa/trends.html) (last updated Aug. 20, 2008).

105. *See* THOMAS O. MCGARITY AND PATRICIA HANSEN, BREEDING DISTRUST: AN ASSESSMENT AND RECOMMENDATIONS FOR IMPROVING THE REGULATION OF PLANT-DERIVED GENETICALLY MODIFIED FOODS (2001).

106. *See* Englebrecht, *supra* note 102, at 1190-91 (defining aquaculture).

107. Buzbee, *supra* note 25.

108. *See also* Esty, *supra* note 30, at 1538.

109. *See* KRIER & URSIN, *supra* note 30.

tory fragmentation" arises from the lack of centralization and the prevalence of loopholes in the existing but disconnected regulations.[110] Furthermore, existing regulation may "overlap" or create conflicts among jurisdictions both geographically and at different jurisdictional levels of regulation.[111] Consequently, regulators may experience a reduced perception of social urgency and are less able to recognize and respond to ineffective regulations.[112] These challenges are more severe where the government is either smaller or, in some cases, larger than the underlying resource that is being overly regulated because the poor fit exacerbates the mismatch between legal control and the regulatory resource in question.[113] A tendency to maintain the status quo shapes behavior and suppresses change.[114] Moreover, government actors actually compete to attract or keep businesses and offer regulatory ease as a carrot, resulting in a race to the bottom, where each regulatory authority actually provides less protection than it would if it were acting independently.[115]

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110. *See* Wiener, *supra* note 31, at 701-04.

111. James M. Buchanan & Yong J. Yoon, *Symmetric Tragedies: Commons and Anticommons*, 43 J.L. & ECON. 1, 11 (2000) (noting effects of overlapping agencies in environmental laws).

112. Christopher H. Schroeder, *Rational Choice Versus Republican Moment Explanations for Environmental Laws, 1969-73*, 9 DUKE ENVTL. L. & POL'Y F. 29, 30 and 49-52 (1998).

113. Oceans represent an example where the government is smaller than the resource that is threatened. At the same time, a particular resource may be highly localized so that an expansive government may not effectively regulate it. Buzbee, *supra* note 25, at 25.

114. Interest groups often try to maintain the status quo, and act in reliance on misconceptions derived from mental shortcuts (the availability heuristic). *See* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 798-99 (3d ed. 2001). This can be seen in how United States government policy has allocated public goods such as offshore oil reserves (drilling leases), radio and television airwaves (FCC broadcast frequencies), the air (pollution rights), and various oil and natural gas quotas. *See* Elizabeth S. Rolph, *Government Allocation of Property Rights: Who Gets What*?, 3 J. POL'Y ANALYSIS & MGMT. 45, 47-49 (1983).

115. *See* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation,* 67 N.Y.U. L. REV. 1210, 1221-24 (1992); Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "to the Bottom"*?, 48 HASTINGS L.J. 271 (1997).

B. Application of the Regulatory Commons to Existing E-Waste Regulation

The Basel Convention is a perfect example of regulatory fragmentation. As of this writing, 179 nations had adopted the Basel Convention, yet the United States is the only developed country in the world that has not done so.[116] Furthermore, the United States is one of three nations worldwide to have signed but not ratified the Convention.[117] The other two countries are Haiti and Afghanistan, but neither has the gravitas that the United States carries in the global arena.[118] Moreover, the United States is the biggest producer of waste and thus potentially the largest violator of the Basel Convention.[119] In effect, the United States' signing but not ratifying the Basel Convention undermines the authority and effectiveness of the Basel Convention in other countries. In fact, the United States used its leverage as a signatory to weaken the Convention and prevent a complete ban on all exports of hazardous waste to developing nations.[120] At the same time, developing countries lack sufficient institutional and legal frameworks to enforce obligations of multinational treaties or cannot do so effectively in collaboration with developed countries.[121]

As a result of regulatory fragmentation, the Basel Convention faces challenges of poor implementation and enforcement.[122] Many Basel members claim that they have been unable to comply with the Basel Convention because of limited resources, lack of staff, poor training, low public awareness, and

116. *Parties to the Basel Convention*, BASEL CONVENTION (May 5, 1992), http://www.basel.int/ratif/convention.htm.

117. Templeton, *supra* note 52, at 795.

118. *Id.*

119. China is the world's largest emitter of carbon dioxide, though the United States still consumes six times as much energy per capita as does China. Kristi Heim, *Can a Bold New "Eco-City" Clear the Air in China*?, THE SEATTLE TIMES, Nov. 25, 2007, at A18.

120. Templeton, *supra* note 52, at 794-95; THE DIGITAL DUMP, *supra* note 9.

121. Greenpeace claimed that the Basel Convention should be considered criminal activity. BASEL ACTION NETWORK, THE BASEL BAN: A TRIUMPH FOR GLOBAL ENVIRONMENTAL JUSTICE (2012), *available at* http://www.ban.org/wp-content/uploads/2012/09/BP1_Sept2012Final_A4.pdf (noting that several African nations refused to sign the weakened Convention and instead preferred to create their own treaty banning the import of hazardous waste to Africa).

122. Schmidt, *supra* note 62, at 98.

porous border controls.[123] Unsurprisingly, with the exception of the United States, countries with the most violations—namely of the restrictions on export of hazardous wastes—are poorer and have fewer resources. Thus, they are more vulnerable to illegal e-waste dumping and to toxic waste that is imported under the false pretext of recycling.[124] At least one-third of the Basel Convention's members cannot enforce their treaty obligations due to a complete inability to prevent illegal waste imports.[125] Therefore, in 1995 the global community worked to boost the Basel Convention's effectiveness by seeking to adopt the Basel Ban Amendment, which would place a complete ban on the export of hazardous wastes from wealthy OECD countries to poor non-OECD countries.[126]

Nevertheless, as in the case of the Basel Convention, the Basel Ban Amendment represents another example of regulatory fragmentation. The Basel Ban Amendment's status has been severely eroded by the United States, which has not only failed to ratify the Basel Ban Amendment, but also worked to reverse it.[127] Admittedly, to date, many Basel Convention members have adopted the Basel Ban Amendment, including EU countries that have joined together under independent EU initiatives meant to address hazardous waste exports and e-waste issues, such as the WEEE Directive.[128] Nevertheless, at the same time, the Basel Ban Amendment may hurt developing countries that currently trade in e-waste by reducing these countries' access to affordable electronics, deepening the digital

123. *Id.* at 101.

124. *Id.*

125. *Id.* (noting that countries claim, as causes for noncompliance, "a lack of resources, training, staff, expertise, and public awareness, … [and] lax border controls.").

126. *See Basel Convention Ban Amendment*, *supra* note 18.

127. BASEL ACTION NETWORK, THE BASEL BAN AMENDMENT: ENTRY INTO FORCE = NOW! (2007), *available at* http://ban.org/library/BP4_09_07.pdf (explaining that many countries need to ratify the Basel Ban Amendment for it to take effect, how e-waste policies of the United States and Canada are inadequate and led to social injustice against developing nations, and that the United States and Canada actively oppose the Basel Ban Amendment).

128. Templeton, *supra* note 52, at 795 (noting that France, Germany, and the United Kingdom have adopted the Basel Ban Amendment).

divide between developing and developed countries.[129] Furthermore, the Basel Ban Amendment only prohibits the export of hazardous waste to non-OECD countries and does not prevent the export of clean electronics.[130] Therefore, the effectiveness of the Basel Convention and the Basel Ban Amendment are undermined by the very regulatory fragmentation that they created.

Other examples of the challenges of the regulatory commons—regulatory fragmentation and overlap—can be seen in the EU's legislation regarding e-waste disposal. Inconsistencies among various member states' regulations embody the concept of regulatory fragmentation while also creating new transaction costs.[131] For instance, a key weakness of the WEEE Directive is the resulting costs incurred by their manufacturers in recycling individual devices and tracking quantities of returned goods.[132] Similarly, the RoHS Directive actually causes electronics manufacturers to make products of an inferior quality by substituting less effective component parts so as to abide by the ban on restricted substances.[133] The RoHS Directive also hurts the public by forcing manufacturers to rely on underdeveloped or untested technologies and materials, which may be unreliable or even more harmful to the environment and public health than the banned substances.[134] These effects exacerbate the e-waste problem by encouraging manufacturers to opt for collective recycling instead of actively managing the e-waste that they produce.[135] Faced with such a complex regulatory

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129. *Id.* at 796 (noting that if the United States were to ratify the Basel Convention, such action would influence countries such as Canada and Australia to follow suit).

130. *Id.*

131. *See* Pak, *supra* note 74, at 261.

132. *Id.*

133. *Id.* at 264-65 (noting that manufacturers originally chose to use the banned substances because they were best suited for their particular purposes, and that substitute materials would not have provided the same results).

134. *See* Commission Decision 2005/618, 2005 O.J. (L 214) 65, para. (1), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005D0618:EN:NOT (amending Directive 2002/95/EC to allow for "certain concentration values" of banned substances). *See also* Pak, *supra* note 74, at 264-66 (noting that restrictions on lead caused the formation of "tin whiskers," which can cause failures in electrical circuits and indirectly led to the shutdown of a nuclear power plant in Connecticut in 2005).

135. *Id.* at 262.

framework, EU manufacturers are forced to export their e-waste overseas in order to avoid compliance with EU regulations.[136]

Also at play in relation to the WEEE Directive are the "race to the bottom" effects of the regulatory commons.[137] For instance, China is a popular importing nation for WEEE countries because of its cheap labor and low environmental standards.[138] Taken a step further, the race to the bottom effects of the regulatory commons actually endow China with a competitive economic advantage at the cost of environmental and health risks. The WEEE Directive also allows member states to place "collective" responsibility on industries rather than "individual" responsibility on each manufacturer, so that manufacturers do not actually manage the recycling and disposal costs of their own products.[139] Additionally, the WEEE Directive allows manufacturers to pay a flat fee to recycle, so manufacturers have little incentive to design electronics in ways that minimize use of harmful materials, that have a longer usable life, or that allow them to be disposed of or recycled more easily.[140] Furthermore, the WEEE Directive only sets minimum re-

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136. Article 6 of the WEEE Directive permits manufacturers to export e-waste outside of the European Union as long they can demonstrate that the receiving importer will process e-waste in compliance with the WEEE's standards. Council Directive 2002/96, *supra* note 74, art. 6.

137. *See* Revesz, *supra* note 115; Engel, *supra* note 115. A "race to the bottom" results when competition leads each regulatory authority to provide less protection than it would if each acted independently.

138. A study demonstrates that the cost of recycling a computer is "approximately US$0.38 per pound in the United States, but only US$0.15 to US$0.30 per pound overseas," including all transportation and handling costs. Catherine K. Lin, Linan Yan & Andrew N. Davis, *Globalization, Extended Producer Responsibility and the Problem of Discarded Computers in China: An Exploratory Proposal for Environmental Protection*, 14 GEO. INT'L ENVTL. L. REV. 525, 533 (2002).

139. "Individual" responsibility refers to a situation in which manufacturers manage products they actually produce, whereas "collective" responsibility refers to a situation in which all manufacturers within an industry must collectively manage all e-waste, regardless of whether it arises from a product that a particular manufacturer produced. Council Directive 2002/96, *supra* note 74, art. 8.

140. Article 8 of the WEEE Directive allows manufacturers to use collective e-waste management systems and establish common funds that pay a third-party to manage the disposal and recycling of used electronics returned by the public. *Id*.

quirements and allows all twenty-eight member states[141] individual autonomy in establishing additional mandates.[142] Although the WEEE Recast Directive seeks to harmonize registration, it fails to prescribe labeling requirements and allows EU Member States great leeway in establishing what information must be provided for the proper disposal of their products.[143] Thus, in the regulatory commons, competing governments implement policies in a defensive manner rather than with well-reasoned planning.[144]

Similarly, the regulatory commons' jurisdictional mismatch also cripples current U.S. law on both a domestic and international level. On the federal level, the EPA has been unable to carry out aggressive regulatory controls to implement RCRA.[145] A report by the EPA further underscores that, to date, the United States has not adopted federal regulations to specifically handle domestic management or export of e-waste.[146] At the same time, on the state level, the presence of various forms of legislation results in overlap and creates conflicting waste regulation schemes.[147] These regulations can best be characterized as a "patchwork" of inconsistent and often counterproductive policies.[148] In fact, nearly all types of e-waste are freely exported from the United States; the EPA only maintains narrow

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141. *WEEE Member State Contacts*, EUROPEAN COMMISSION, http://ec.europa.eu/environment/waste/weee/contacts_en.htm (last updated Oct. 2012).

142. *See* Consolidated Version of the Treaty Establishing the European Community art. 176, Dec. 24, 2002, 2002 O.J. (C 325) 33, *available at* http://www.frontex.europa.eu/assets/Legal_basis/12002E_EN.pdf.

143. *See* U.S. DEP'T OF COM.'S INT'L TRADE ADMIN, *supra* note 73.

144. Esty, *supra* note 30, at 1560.

145. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 8, at 2.

146. *See Regulations/Standards*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/waste/conserve/materials/ecycling/rules.htm (last updated Nov. 7, 2013); Existing environmental regulations are intended to limit the pollution created by manufacturing and neglect externalities incurred past the products' end-of-life cycle. *See* Sachs, *supra* note 72, at 57-58 (stating that U.S. regulations are focused on the release of Volatile Organic Compounds ("VOCs") during manufacturing, but not of finished products that release VOCs during use or upon disposal).

147. *See generally Brief Comparison of State Laws on Electronics Recycling,* ELECTRONICS TAKE BACK COALITION, http://www.electronicstakeback.com/wp-content/uploads/Compare_state_laws_chart.pdf (last updated Sept. 19, 2013).

148. Drayton, *supra* note 95, at 166.

control over CRTs.[149] The EPA's CRT rule, introduced in 2006, requires exporters to notify the EPA of their expected exports of CRTs and to acquire consent of importing countries if CRTs are to be recycled overseas.[150] Nevertheless, exporters can easily get around the law by intentionally mislabeling shipments of CRTs to avoid regulation.[151]

Moreover, existing environmental legislation also embodies jurisdictional mismatch by creating conflicts with WTO legislation because both attempt to regulate e-waste. [152] For instance, there are conflicts between the WTO and the Basel Convention where two countries are both members of the WTO, but only one is a Basel Convention Party.[153] Such conflicts may revolve around whether waste regulated by the Basel Convention is a "product" as defined by the WTO, if complying with the Basel Convention would violate the WTO's Most Favored Nation Treatment, or if a trade restriction under the Basel Convention could be justified as an exception to the WTO's laws.[154] A key source of contention is Article I of the General Agreement on Trade and Tariffs ("GATT"); it states that all rules, advantages, or privileges granted by any WTO member for the import and export of any product originating in or destined for any other

149. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 8, at 6-7.

150. 40 C.F.R § 261.39(a)(5) (2007) (Conditional Exclusion for Used, Broken Cathode Ray Tubes ("CRTs") and Processed CRT Glass Undergoing Recycling). *See also Regulation of Cathode Ray Tubes*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/osw/hazard/recycling/electron/index.htm (last updated May 17, 2013); *Export Requirements for Cathode Ray Tubes*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/osw/hazard/international/crts/index.htm (last updated Dec. 21, 2012).

151. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 8, at 6-7, 23-31. The GAO found in its August 2008 evaluation that violations of the CRT rule continued to be "widespread" after the EPA adopted the CRT rule. Forty-three U.S.-based electronic recyclers did not comply with the CRT rule when transacting with undercover GAO representatives acting as fictitious Asian buyers.

152. PAUL P. APPASAMY, INTERNATIONAL CONVENTIONS ON HAZARDOUS CHEMICALS 182 (2006), *available at* http://www.mse.ac.in/Trade/pdf/Compendium%20Part%20B/5.%20PPA-chem-conven(2.4.07).pdf.

153. WTO regulation applies to "products" and could likely apply to wastes covered by the Basel Convention because they are "'moveable items placed in international commerce," e.g., for recycling. *Id.*

154. *Id*. at 183-84.

country must be given "immediately and unconditionally" to a like product originating in or destined for the territory of all other WTO members.[155] This represents potential trade conflict and can give rise to challenges at the WTO if a country that is both a party to the Basel Convention and a member of the WTO bans the import and export of hazardous e-waste to and from a country that is a WTO member but is not a party to the Basel Convention.[156] Under the Most Favored Nation Clause in Article I of the GATT, a country that is not a party to the Basel Convention could bring a dispute in WTO courts that the Basel Convention unfairly favors another country that is trading e-waste, based on the claim that the nonparty country trades products that are "like product" vis-à-vis e-waste.[157] Given such conflicts, harmful e-waste continues to escape control of both the Basel Convention and the GATT regulatory systems and continues to harm the developing countries to which it is exported.

III. RECONCILING THE REGULATORY COMMONS OF E-WASTE REGULATION

Global e-waste regulations manifest the challenges present in the regulatory commons, i.e., jurisdictional mismatch, regulatory fragmentation, overlap, and regulators' reduced perception of social need. These regulations would benefit from implementing effective solutions to reconcile the regulatory commons paradox and more effectively manage e-waste. Analyzing e-waste regulation through the lens of the regulatory commons, one can see that government actors are both the cause and the solution to the problem.[158] On the one hand, government actors cannot claim ownership credit over regulations in the way that a private actor could patent a particular regulation as innova-

155. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

156. *Id.*

157. APPASAMY, *supra* note 152, at 184.

158. Information, its availability, and various beliefs affect how people attribute and perceive causes of underlying problems. MILES HEWSTONE, FRANK D. FINCHAM, AND JONATHAN FOSTER, PSYCHOLOGY 368-74 (2005). *See also* ESKRIDGE, *supra* note 114

tive and gain an early-mover advantage in the market.[159] On the other hand, government actors can help resolve the paradox of the regulatory commons by unleashing market-based forces. [160]

First, a possible solution to the problem of the regulatory commons requires a particular government actor to rise as a prominent regulatory leader.[161] By decreasing the number of potential regulators or increasing the significance of an existing regulator, the system creates a hierarchy of regulatory bodies.[162] Such a hierarchy would better allocate responsibility so that regulatory bodies can share responsibility, incentivize regulatory action, and avoid regulatory fragmentation and overlap.[163]

Second, implementing an Open Method of Coordination ("OMC") system could help overcome the challenge of regulatory fragmentation that is present in the regulatory commons.[164] The OMC is a legal framework created at the Lisbon European Council in 2000 to improve competitiveness for employment opportunities and social cohesion among the EU member states.[165] The OMC provides for a feedback and adjustment process that emphasizes "mutual correction, not uniformity."[166] Experts across a broad spectrum of fields, drawn from member states, come together in a panel to evaluate and disseminate

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159. *See generally* MORRIS FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (2d ed. 1989) (noting that regulators' ability to claim credit is diluted). James Madison also made a similar finding that reputation and credit are "diminished in proportion to the number which is to share in the praise or blame." Randall Strahan, *Personal Motives, Constitutional Forms, and the Public Good: Madison on Political Leadership, in* JAMES MADISON: THE THEORY AND PRACTICE OF GOVERNMENT 69 (Samuel Kernell ed., 2003).

160. Buzbee, *supra* note 25, at 6.

161. *Id.* at 49-51.

162. *See* Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297 (1999).

163. *Id.* (arguing that creating hierarchies helps overcome regulatory inaction and regulatory fragmentation).

164. Buzbee, *supra* note 25, at 61.

165. Maria Joao Rodrigues, *The Open Method of Coordination: A New Governance Tool*, 2-3 EUROPA/EUROPE 96 (2001).

166. Joshua Cohen & Charles F. Sabel, *Sovereignty and Solidarity: EU and US*, *in* PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION, 694 (Karl-Heinz Ladeur ed., 2004).

information about each member state's regulatory strategies.[167] As such, the initiative encourages planning, comparison, and coordination of policies[168] and helps to improve social cohesion across the European nation-states.[169] The OMC has been expanded to other areas of regulation[170] and may be a good solution to resolving problems in e-waste regulation.

Third, the problems of the regulatory commons can also be resolved by a shift in power from government actors to private business actors that lead entrepreneurial, decentralized units and can act with a concentrated interest in regulating e-waste.[171] The promotion of a decentralization approach toward experimentation and information dissemination is commonly known as "democratic experimentalism."[172] Here, decentralized actors can be just as prominent as central government actors and can reinforce information sharing.[173] Unlike regulatory bodies, which have a poor sense of the pressing depletion of the regulatory opportunity, decentralized business actors are more flexible in their behaviors.[174] Furthermore, private sector businesses are empowered with managerial autonomy and liaison arrangements, placing them in a better position to counteract overregulation. By their very nature, private sector businesses are focused on sharing profits and are not subject to the same sense of transparency and accountability to an electorate or constituency, as regulators often are.[175] Thus, democratic experimentalism fosters information sharing and reinforces de-

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167. *Id.*

168. Jos Berghman & Kieke G.H. Okma, *The Method of Open Coordination: Open Procedures or Closed Circuit? Social Policy Making Between Science and Politics*, 4 EUR. J. SOC. SEC. 331 (2002) (highlighting the advantages of the open method of coordination).

169. Cohen & Sabel, *supra* note 166, at 694-95.

170. Fritz W. Scharpf, *The European Social Model: Coping With the Challenges of Diversity*, 4 J. COMMON MKT. STUD. 645, 652-56 (2002).

171. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism,* 98 COLUM. L. REV. 267 (1998) (noting how design of legal institutions can be modeled after that of business institutions to benefit from decentralized units). *See, e.g.,* HANS WISSEMA, UNIT MANAGEMENT: ENTREPRENEURSHIP AND COORDINATION IN THE DECENTRALISED FIRM 11-12 (1992) (stating that fast changing markets need "an increase in 'entrepreneurial density'" within firms).

172. *See* Dorf & Sabel, *supra* note 171.

173. *Id.* at 354-56.

174. *See generally id.* at 368-69.

175. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

centralized autonomy in order to overcome the challenges posed by the regulatory commons.[176]

Collectively, these solutions will help achieve the goals intended by the current overabundance of e-waste regulations.[177] By providing for a clear delineation of authoritative hierarchy and responsibilities, the creation of an OMC system, and the promotion of democratic experimentalism, regulators can overcome regulatory fragmentation, reconcile conflicts from overlapping regulations and jurisdictional mismatch, and prevent political inattention. In this way, regulators, who created the problem of the regulatory commons in the first place, can foster regulatory frameworks that overcome collective action problems in the regulatory commons.[178]

CONCLUSION

To effectively overcome the challenges of the regulatory commons, international regulation of e-waste should shift the burden from weak international entities to more authoritative individuals and better engage actors to increase awareness via democratic experimentalism. Japan's SHAR system provides a model that stands out for its simplicity and effectiveness. Implemented in 2001, the SHAR system distributes e-waste recycling responsibilities among four stakeholders: producers, consumers, retailers, and the government.[179] SHAR mandates that consumers must dispose of bulky electrical and electronic products such as televisions, refrigerators, washing machines, and air conditioners at designated collection locations maintained by large appliance retailers and local government agencies.[180] Manufacturers are divided into two groups.[181] Within each group, manufacturers collaborate to establish and operate

176. *See* Dorf & Sabel, *supra* note 171, cited in Buzbee, *supra* note 25, at 59.
177. *Id*. at 24.
178. *Id*.
179. Lin et al., *supra* note 26, 541-42 (2002).
180. *Id*.
181. Group A includes Matsushita Electric Industrial Co., Ltd., Toshiba Corp., to name a few prominent manufacturers. Group B includes Hitachi, Ltd., Sanyo Electric Co, Ltd, Sharp Corp, Sony Corp, Fujitsu General Ltd., Mitsubishi Electric Corp. Kiyoshi Ueno, *Current Status of Home Appliance Recycling in Japan*, EPC NEWSLETTER, No. 18, *available at* http://www.rezagos.com/descargas/Current%20Status%20of%20Home%20Appliance%20Recycling%20in%20Japan.pdf.

recycling plants and a network of collection centers.[182] Then, other manufacturers and importers can contract with either group to participate in the manufacturers' takeback and recycling networks.[183] Under SHAR, manufacturers manage the end-of-life processing of electronics after collection and develop facilities and logistics chains necessary to transport and recycle discarded electronics in an environmentally friendly way.[184] Meanwhile, consumers help finance SHAR's collection and recycling mechanisms by paying disposal fees when dropping off used electronic goods at the collection centers.[185] While the WEEE Directive places complete end-of-life management responsibilities on manufacturers, Japan's SHAR system is more effective because it employs democratic experimentalism to solve the problems of the regulatory commons.

Unlike most other developed nations, Japan's SHAR system effectively promotes public education regarding the e-waste issue and recruits consumers as responsible actors in delivering e-waste and paying for its disposal.[186] Because disposal fees differ based on the cost of recycling individual brands and waste items, SHAR encourages consumers to change purchasing habits, buy less, and, when they do buy, to buy environmentally friendly products.[187] SHAR uses existing networks of retailers and local governments to operate collection centers and more

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182. Lin et al., *supra* note 26, at 542.

183. *Id*.

184. SHAR holds the largest electronics manufacturers responsible for building the infrastructure and facilities necessary to process e-waste, while smaller manufacturers must negotiate agreements to access these networks. *See* INFORM, INC., *Electric Appliance Recycling in Japan*, 1 (2003), *available at* http://informinc.org/japanepr.pdf. Inform, Inc. is a U.S.-based nonprofit that produces short films to educate the public about the effects of human activity on the environment and human health. This publication explains how Japan enacted responsibility mandates for the disposal of electronic appliances.

185. Manufacturers set recycling fees for their own products and such fees usually range from 2,400 to 4,600 yen, or US$23.50 to US$45. Pak, *supra* note 74, at 275-78. Under SHAR, consumers pay two types of fees upon disposal of e-waste at collection centers: a collection fee to cover the cost of collection and a recycling fee to cover the cost of recycling a particular item. *Id*.

186. *See id*. Additionally, the EPA has found that most computer users are unaware of the problems e-waste presents. TACHI KIUCHI ET AL., GLOBAL FUTURES FOUNDATION, COMPUTERS, E-WASTE, AND PRODUCT STEWARDSHIP: IS CALIFORNIA READY FOR THE CHALLENGE? (2001), *available at* http://infohouse.p2ric.org/ref/41/40164.htm.

187. Pak, *supra* note 74, at 275-78.

proportionately allocates cost to consumers.[188] Furthermore, unlike the WEEE Directive, SHAR also serves as a paradigm for individual, producer-led takeback programs by requiring manufacturers to manage the disposal and recycling of their waste and enabling them to determine disposal costs for these products.[189]

It could be argued that by mandating that consumers both physically dispose of used electronics at specified collection centers and pay end-of-life fees, Japan's e-waste policies may incentivize some individuals to illegally dump unwanted electronics rather than obey the regulations.[190] For example, one month after SHAR became effective, the rate of illegal e-waste dumping in Japan increased by 25%.[191] Coordinating such collection systems and determining individual producers' costs can also be expensive.[192] Nevertheless, Japan's overall success demonstrates that the assignment of individual costs in e-waste regulation can be done effectively. Even if the collective system proves too arduous for certain manufacturers, these manufacturers still have the option to implement their own individual takeback programs, for instance, as Panasonic has done in its home country, Japan, and in many countries outside Japan.[193] Consumers can also fund transactional expenses as-

188. INFORM, INC., *supra* note 184 (explaining how Japan's postal service provides ubiquitous and easily accessible collection infrastructure). Additionally, manufacturers are also incentivized to create more environmentally sound electronics with longer product lives. *See* Pak, *supra* note 74, at 272-73.

189. Pak, *supra* note 74, at 272-73.

190. Lin et al., *supra* note 26, at 542.

191. *Id*.

192. Hannah G. Elisha, *Addressing the E-Waste Crisis: The Need for Comprehensive Federal E-Waste Regulation Within the U.S.*, 14 CHAP. L. REV. 195, 231 (2010) (stating the opinion of SHAR's critics).

193. Panasonic has set up producer takeback programs under the Electronic Manufacturers Recycling Management Company in collaboration with Toshiba and Sharp in the United States, and similar programs in Germany and Australia. *Environment: Recovery of Resources (Used Product Recycling),* PANASONIC,
http://www.panasonic.net/sustainability/en/eco/resources_recycling/recovery/ (last visited Mar. 30, 2014).

sociated with determining and assigning individual product costs by adapting their purchasing behavior. Thus, international environmental regulation can be decentralized in order to provide economic incentives for e-waste producers, recyclers, and consumers alike, while enabling states to better promote human health and environmental safety.

As a next step, rather than signing onto another multilateral treaty, government authorities and private actors should aim to implement a decentralized model analogous to that of Japan's SHAR system. Using reduction of e-waste and illegal exports as a measure of experimental success, public and private parties will benefit if they can replicate and adopt such a model on a global scale.

Jing Jin[*]

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