

# PERFORMING PARTY AUTONOMY

FLEUR JOHNS\*

[T]he legal infrastructure of deals provides . . . a window through which [one] can view, or imagine, the soul of the company.<sup>1</sup>

Supposing that ‘the *soul*’ was an attractive and mysterious idea which philosophers, rightly, gave up only with reluctance—perhaps what they’re now learning to exchange for it is even more attractive . . . life and corporeality, through which, over which, beyond which a tremendous, inaudible river seems to flow . . . .<sup>2</sup>

## I

### INTRODUCTION

The “private” in private international law implies that the primary stimuli to this law’s development are the spontaneous, personal activities and preferences of nongovernmental legal or natural persons. On its face, private international law is concerned with people or entities holidaying on cruise ships, adopting children abroad, buying foreign goods, and entering into commercial contracts with transboundary dimensions. The sense that private international law is properly referable to the “private” (read: civil, familial, and commercial) desires of individual persons (natural or legal) is encapsulated, in particular, by the notion of party autonomy in contractual choice of law and choice of forum.<sup>3</sup> In contracts with indicia of internationalism, an actual or inferred choice on questions of applicable law and forum is supposed to bring clarity and certainty to the confusion posed by multijurisdictional overlap, allowing at least some regulatory rubber to meet the parties’ chosen road.

Legal devolution to party choice in these areas has nonetheless long provoked concerns about regulatory evasion, the subversion of sovereign

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\* Senior Lecturer, Faculty of Law, University of Sydney, Australia. I am deeply indebted to the editors of this symposium for their encouragement and assistance in the development of this article and to Dan Danielsen, Peter Fitzpatrick, Stewart Motha, and Annelise Riles for comments on prior versions. Related work appeared in Fleur Johns, *Performing Power: The Deal, Corporate Rule, and the Constitution of Global Legal Order*, 34 J. L. & SOC’Y 116 (2007).

1. Victor Fleischer, *Brand New Deal: The Branding Effect of Corporate Deal Structures*, 104 MICH. L. REV. 1581, 1585 (2006).

2. FRIEDRICH NIETZSCHE, WRITINGS FROM THE LATE NOTEBOOKS 27 (Kate Sturge trans., Cambridge Univ. Press 2003) (1885).

3. See, e.g., Michael Whincop & Mary Keyes, *Putting the ‘Private’ Back into Private International Law: Default Rules and the Proper Law of the Contract*, 21 MELB. U. L. REV. 515, 542 (1997) (“We consciously endorse . . . an approach [that is] most consistent with the normative principle of party autonomy, and most supportive of private ordering and exchange facilitation. As our title suggests, it is a way to put the ‘private’ back into private international law.”).

authority, and disregard for the legitimate interests of governments.<sup>4</sup> Accordingly, the delineation of the proper ambit of party autonomy, and the extent to which it should be subordinated to mandatory law or public-policy principles, preoccupies much private-international-law scholarship.<sup>5</sup> In recent decades, scholarly attention to the scope of party autonomy in contractual matters has been particularly intense regarding contract-making by transnational corporations,<sup>6</sup> the scenario on which this article focuses.

The influence borne by party autonomy in private international law is discernible not only in scholarly argument that explicitly favors or frets about the prioritization of private choices of law and forum. It is evident too in how private parties' contractual choices feature in private-international-law scholarship. In both scholarship celebratory of party autonomy and scholarship anxious about its impact in private international law, the negotiated enactment of contractual choice is envisaged as a preregulatory or postregulatory moment. Parties are presumed more or less capable of standing back from the laws and jurisdictions with which they are potentially engaged, assessing the likely outcomes of those engagements, and contracting around the impacts they wish to avoid.<sup>7</sup> For the purposes of choosing law and forum, each contracting party is gathered more or less into a single consciousness, vested with coherence and directive vision. The scenario whereby two or more contracting parties so vested decide "autonomously" on law and forum is cast as either the appropriate testing ground for private international law's efficiency, or a potentially dangerous arrogation of lawmaking power properly vested in democratic institutions of government. From either slant, scholarly analysis tends to proceed from the moment of a choice having been made, or toward the possibility of its making. Even those who rail against the rise and abuse of private power seem to take the seamless interiority of each "autonomous" party

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4. See, e.g., *E. Gerli & Co. v. Cunard S.S. Co.*, 48 F.2d 115, 117 (2d Cir. 1931) ("People cannot by agreement substitute the law of another place; they may of course incorporate any provisions they wish into their agreements—a statute like anything else—and when they do, courts will try to make sense out of the whole, so far as they can. But . . . [s]ome law must impose the obligation, and the parties have nothing whatever to do with that." See also 2 ERNST RABEL, *THE CONFLICT OF LAWS, A COMPARATIVE STUDY*, 359–431 (2d ed. 1960).

5. See, e.g., Ama S. Bekow, *The Illusory Choice: Examining the Illusion of "Choice" in Choice of Law Provisions—A Country Study Exploring One Aspect of Foreign Investment in the Caribbean*, 42 HOW. L.J. 505, 511 (1999) ("[T]he success of any choice of law system[ ] can and should be measured by the degree of autonomy that contracting parties have to determine which law would govern their cross border contracts."). See generally Andreas F. Lowenfeld, *International Litigation and the Quest for Reasonableness*, 245 RECUEIL DES COURS 9, 255–91 (1994). Lowenfeld is among those skeptical of "viewing private controversies as if they involved deep-seated national interests." *Id.* at 291.

6. See, e.g., Tai-Heng Cheng, *Power, Authority and International Investment Law*, 20 AM. U. INT'L L. REV. 465, 505 (2005); Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT'L L. 209, 219–20 (2002).

7. As Annelise Riles points out, this capacity for disengaged choice is also assumed by much legal-realist scholarship on private international law in its "technoscientific" mode. Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 BUFF. L. REV. 973, 1007–08 (2005).

more or less for granted. Likewise, as a matter of private-international-law doctrine, provided that a written choice of law or forum is deemed the true choice of a given party (free from duress, *mala fides*, or fraud), the actual *making* of a contractual choice of law or forum becomes virtually unreadable.<sup>8</sup>

Scholarly and doctrinal projections of choices of law and forum as deliberate, measured, and coherent decisions, upon which normative constraints become operative only in anticipation of or after the fact, sit rather uneasily with this writer's experience of legal practice. This unease is particularly acute in relation to the *corporate* enactment of "autonomous" choice. The limits of the traditional conception of contracting as a meeting of minds have long been highlighted in studies of the standard form.<sup>9</sup> Yet my sense is that, in relation to corporate decisionmaking, similar concerns might be raised outside the context of standard-form, or boilerplate,<sup>10</sup> contracting.<sup>11</sup> Even when projections of corporate integrity and autonomy are framed as necessary fictions (as they are by leading commentators on private international law),<sup>12</sup> they are problematic by virtue of the types of inquiry and points of negotiation they foreclose. Accordingly, it is this interior—the terrain of autonomous choice-making—on which this article focuses. To do so is to work in a viral mode *within* the pragmatic sensibility that is the default posture of private international law today.<sup>13</sup>

Admittedly (and as discussed further in part II), the literature on transaction costs and third-party externalities has, on occasion, pointed toward the moment

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8. See generally PETER NYGH, AUTONOMY IN INTERNATIONAL CONTRACTS 66–71, 92–97, 104–21 (1999). Nygh rationalizes private international law's tunnel vision in this respect as follows: "The reason for the . . . exclusion of evidence of pre- and post-contractual behavior is certainty, a policy which is understandable where the agreement between the parties has been reduced to writing." *Id.* at 112.

9. See, e.g., Stephen J. Choi & G. Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129 (2006); Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

10. The contemporary sense of the term boilerplate is derived from the nineteenth-century practice of stamping or casting units of text onto large, flat metal plates (of the kind otherwise used in making steam boilers), then distributing these prepared plates to newspapers throughout the United States as "filler" for their respective editions. Carol Bast, *A Short History of Boilerplate*, 5 SCRIBES J. OF LEG. WRITING 155, 155–56 (1994).

11. Annelise Riles observes that inequities and power imbalances (of a sort that contract law is often ill-equipped to see) are observable as much in *negotiated* parts of the contracts that govern international derivatives transactions as they are in their standardized portions. Annelise Riles, *Collateral Damage: Global Private Governance, Legal Knowledge, and the Legitimacy of the State* 34 (Sept. 2007) (unpublished manuscript, on file with author).

12. See, e.g., *id.*; MICHAEL J. WHINCOP & MARY KEYES, POLICY AND PRAGMATISM IN THE CONFLICT OF LAWS 167 (2001) (observing that "corporations are accorded legal personality [recognized as a reification] for pragmatic reasons, not ontological ones").

13. For discussion of pragmatic tendencies in private-international-law scholarship, see Riles, *supra* note 11, at 3–7, 24–31; Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731 (1990); Symeon C. Symeonides, *The American Choice of Law Revolution in the Courts: Today and Tomorrow*, 298 RECUEIL DES COURS 9, 413–15 (2002). On "viral" critique, see Duncan Kennedy, *The Paradox of American Critical Legalism*, 3 EUR. L.J. 359, 359, 372, 376–77 (1997).

and mode of parties' choice.<sup>14</sup> Public-choice literature has sought to redescribe legal decisionmaking in terms attentive to "rent-seeking," framing parties' autonomous preferences within networks of influence and interest.<sup>15</sup> Behavioral law and economics has inserted insights about actual human behavior into the modeling of choice.<sup>16</sup> Sociologically informed studies of contract law have replaced "elegant models" of contract practice with complex, empirical pictures.<sup>17</sup> However, to the extent that these approaches have been deployed in relation to private international law, the concern of their proponents has generally been to invest that law with greater accuracy, predictability, or efficiency.<sup>18</sup> Literature of this kind seeks, in other words, to consolidate the "facticity" and integrity with which acts of choice—and the so-called autonomous parties that make them—are already invested, albeit in a more sophisticated fashion.

In contrast, the concern of this article is the *politics* of a prevailing tendency to frame the power of transnational corporate agents as resolved and decisive in relation to contractual choices of law and forum, and to regard law as the direct expression of that power, or its necessary antithesis. This configuration merits question because it anticipates—and, as it were, guarantees—the necessity of that with which it sometimes purports to contend: private (corporate) rule. The effect is at least partially akin to that described by Judith Butler in relation to gender: "[W]hat we take to be an 'internal' feature of ourselves [or, in this case, of the global legal order] is one that we anticipate and produce through certain . . . acts . . . ."<sup>19</sup>

By way of launching an investigation into private international law's production of corporate choice, part II of this article explains the significance of party autonomy in private-international-law scholarship and doctrine. As part

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14. See, e.g., Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713 (1997); Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757 (1995).

15. See, e.g., Bruce L. Hay, *Conflicts of Law and State Competition in the Product Liability System*, 80 GEO. L.J. 617, 639–42 (1992) (exploring the "structural incentive[s]" that states face to circumscribe parties' choice of law); Erin A. O'Hara, *Opting Out of Regulation: A Public Choice Analysis of Contractual Choice of Law*, 53 VAND. L. REV. 1551, 1572–86 (2000).

16. See, e.g., Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998). Reza Dibadj argues for the extension of these insights into an "organizational behavioral economics" of the corporate firm. Reza Dibadj, *Reconceiving the Firm*, 26 CARDOZO L. REV. 1459, 1459 (2005).

17. See, e.g., Stewart Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 LAW & SOC'Y REV. 507, 508–12 (1977) (contrasting a "classical model" of contracting that "starts with the assumption that entrepreneurs need to plan and deal with risk" and that "[t]hey do so by carefully drafting contracts, which they understand and agree to" with an empirical picture that "shows that business people in all societies compromise differences rather than invoke contract norms").

18. See, e.g., Choi & Gulati, *supra* note 9, at 1172 ("[T]o recognize the reality of how these documents evolve and how certain terms can get forgotten but nevertheless [be] retained in the contracts will help courts reach a more accurate understanding of the reality of what the contract is intended to mean."); Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151 (2000).

19. JUDITH BUTLER, *GENDER TROUBLE* xv–xvi (2006).

of that scene-setting, part II recalls the contributions of legal realists to private international law, the work of Walter Wheeler Cook in particular. In so doing, this article presents a somewhat heterodox account of Cook's contributions to the discipline. Far from his being read as one more advocate of doctrinal deference to autonomous choice,<sup>20</sup> Cook's interest in parties' choices of law and forum is read here as related to his interest in exploring the effect and limits of private "legislation."<sup>21</sup> It is in that light that this article casts Cook's work as helpful in grappling with the enactment of private-international-law "choice" in corporate settings.

Claiming that the performance of choice comprises an underinterrogated backdrop to private-international-law scholarship, part III of this article replaces this seamless backdrop with another scene: it redescribes corporate parties' choices of law and forum in terms of a quasi-ethnographic rendering of their making.<sup>22</sup> In that redescription, the following arguments are made: First, the exercise of "autonomous choice" in selecting a contract's applicable law and dispute-resolution forum in an international corporate transaction is normatively overdetermined.<sup>23</sup> That is, the factors shaping the enactment of choice in a complex corporate transaction remain normatively irreducible to the apparently determined choices attributed to those entities that are parties to

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20. For such a reading, see CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS 155 (Roger C. Cramton, David P. Currie & Herma H. Kay eds., 3d ed. 1981) ("The rule permitting parties to select the law to govern the validity of a contract has many adherents, including Cook"); Symeonides, *supra* note 13, at 37 ("Cook thought of the choice-of-law problem as one of choosing between competing rules").

21. See WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASIS OF THE CONFLICT OF LAWS 393-98 (1942) [hereinafter COOK 1942] (challenging the argument attributed to Professors Ernest Lorenzen, Joseph Beale, and Herbert Goodrich that "this kind of 'legislation'—if one calls it that—is never permitted under our legal system . . ."). Insofar as Cook did endorse giving effect to parties' "intention" with respect to choices of law and forum (and Cook always couched the word "intention" in scare quotes as if to alert readers to its constructed nature), he contended that choice should be limited to the law of some state with which the transaction in question has some substantial connection, and warned that the public-policy test to which this "intention" must further be subject must be "kept constantly in mind." *Id.* at 412, 418. Note also that Cook's endorsement of a rule deferring to the expressed intention of the parties was always expressed as relative to the more problematic (as he saw it) "place of contracting" theory. Cook conditioned this endorsement further by suggesting that it would be meaningful only "[i]f such a brief set of rules is thought desirable." *Id.* at 419. As Annelise Riles notes, Cook himself had little interest in producing or validating a brief set of rules. Riles, *supra* note 7, at 1030.

22. I am indebted to Annelise Riles for encouraging me to see this account in such a light. For this sort of ethnographic work, see, for example, ANNELISE RILES, THE NETWORK INSIDE OUT (2000); Bruno Latour, Scientific Objects and Legal Objectivity, in LAW, ANTHROPOLOGY, AND THE CONSTITUTION OF THE SOCIAL: MAKING PERSONS AND THINGS 73 (Alain Pottage & Martha Mundy eds., 2004).

23. On "overdetermination," from which the foregoing and later usages in this article are extrapolated, see Louis Althusser, *Contradiction and Overdetermination*, in FOR MARX 87 (Ben Brewster trans., 2005); Sigmund Freud, *The Aetiology of Hysteria*, in THE FREUD READER 96, 108 (Peter Gay ed., 1995); Sigmund Freud, *Fragment of an Analysis of a Case of Hysteria ("Dora")*, in THE FREUD READER, *supra*, at 203. On the implications of "overdetermination" in Althusser's work, and the export (and transformation) of the term, see William S. Lewis, *The Under-Theorization of Overdetermination in Hegemony and Socialist Strategy*, 4 BORDERLANDS E-JOURNAL, Oct. 2005, [http://www.borderlands.net.au/vol4no2\\_2005/lewis\\_overdetermination.htm](http://www.borderlands.net.au/vol4no2_2005/lewis_overdetermination.htm) (last visited May 28, 2008).

each contract in question and the principles of private international law that purport to uphold or constrain those choices. Second, corporate parties' enactments of autonomous preference tend to be structured in particular, patterned ways. These recurrent structures or patterns—and the allocations of power and resources they effect—merit as much questioning as is leveled at the private-international-law principles by which parties' choices are circumscribed in advance or after the fact. Legal realists such as Robert Hale long ago observed that “decisions made [by corporations, for instance] are a function of the decision-making structure, [such that] that structure becomes the critical, if not always conspicuous, policy issue.”<sup>24</sup> In the first half of the twentieth century, Walter Wheeler Cook brought that insight to bear on private international law.<sup>25</sup> Drawing inspiration from the work of Hale and Cook, this article depicts a decisionmaking structure in which party autonomy gets performed (as contractual choices of law and forum), seeking to bring the policy issues embedded in that structure into contention.

The name given in part III to the performative emplacement of party autonomy is “the deal.” In the parlance of practitioners and industry rags concerned with cross-border commercial investment, the deal is a summary term for a set of private-law contracts, public-law permits and concessions, equity investments, loans, bonds, security interests, insurance policies, rating agency grades, debt pricing and terms, national economic and political agendas, construction plans, environmental impacts, professional identities, and industry “firsts” (or revisited precedents).<sup>26</sup> One might also think of the deal as an abode, a workplace, or a polity divided in and against itself. The making of parties' contractual choices, for a given state or nonstate law and a state- or nonstate-dispute-resolution forum, is re-cast here as one enacted in, by, and for the deal. The story told here is of the performance of choices of law and forum from the perspective of corporate lawyers working “in” and “on” a cross-border deal.

Having painted a new backdrop for reflection on party autonomy in private international law, this article focuses, in part IV, upon recent debate concerning the capacity of corporate parties to elect by contract to subject themselves to nonstate norms (particularly merchant law or usage, or *lex mercatoria*), in preference to norms prescribed by state institutions (courts and legislatures). If the autonomous choice of corporate parties is read as the product of a deal and the deal is read as a hypernormative site, then questions arise *before* the

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24. Warren J. Samuels, *The Economy as a System of Power and its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIAMI L. REV. 261, 351 (1973).

25. See generally COOK 1942, *supra* note 21; Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924) [hereinafter Cook 1924].

26. See, e.g., *Latin American Oil & Gas Deal of the Year 2007*, PROJECT FIN. MAG., Feb. 2008, at 1. Cf. Doreen McBarnet, *Transnational Transactions: Legal Work, Cross-Border Commerce and Global Regulation*, in TRANSNATIONAL LEGAL PROCESSES: GLOBALISATION AND POWER DISPARITIES 98, 99 (Michael Likosky ed., 2002). McBarnet “turns the spotlight on the legal construction of global deals . . . from the pragmatic perspective of practising lawyers working for specific clients.” See also Victor Fleischer, *Deals: Bringing Corporate Transactions into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475 (2002).

question when or whether to subject those parties to nonstate norms or state law. Additional, pertinent questions for this debate include the following: How, and with what effects, does deal-constraint get effaced by deal-freedom in scholarly representations of an “autonomous” contractual choice of law? What “choices,” norms, or blind-spots are enacted in this freedom-heavy configuration of the choice of law in international commercial transactions? What are the implications of an overdetermination of the arena of choice for the presumed link between party autonomy and political and economic liberalism? What gets ruled in and ruled out when one locates choice-of-law-related questions *after* the deal? These are the sorts of questions that this article considers or introduces for subsequent consideration.

## II

### PARTY AUTONOMY IN PRIVATE INTERNATIONAL LAW: THE DISCRETE CHARM OF THE CONTRACTING PARTY

In private international law, “party autonomy” in relation to contract is generally taken to refer to the entitlement of parties to select the law under which their contractual terms will be interpreted and the jurisdiction in which those terms will, in the event of a dispute, be enforced.<sup>27</sup> Numerous stories have been told of the nineteenth-century enthronement of private parties as primary “legislators” for their contractual relations.<sup>28</sup> Peter Nygh has observed, for instance, that “[w]hereas originally [a contract] was seen as an obligation imposed on the parties by the general law arising out of their transaction, it came to be seen as an obligation created by the parties themselves.”<sup>29</sup> Nygh regarded it as one consequence of this shift that private international law in most Anglo-Commonwealth, North American, and Western European jurisdictions came to authorize parties to “exit” the realm of an otherwise applicable legal regime, and the purview of an otherwise competent court, as a matter of contractual choice. Thus, in 1999, Nygh wrote: “Today the freedom of the parties to an international contract to choose the applicable law and its corollary, to choose the forum, judicial or arbitral, for the settlement of their disputes arising out of such contract is almost universally acknowledged.”<sup>30</sup>

Equally well-documented is the late-nineteenth- and early-twentieth-century assault, by legal-realist scholars, on the idea of liberty upon which the foregoing configuration of contractual autonomy relies.<sup>31</sup> Robert Hale, among others, argued that freely negotiated, voluntary, contractual exchanges amounted to complex networks of mutual coercion. Parties’ contractual choices,

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27. NYGH, *supra* note 8, at 1, 13.

28. See, e.g., P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979).

29. NYGH, *supra* note 8, at 7 (footnote omitted).

30. *Id.* at 13.

31. See generally AMERICAN LEGAL REALISM 76–120 (William W. Fisher III et al. eds., 1993); BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 29–70 (1998).

Hale showed, were conditioned by the unavailability of alternative choices.<sup>32</sup> The availability or unavailability of such alternatives was a consequence, in part, of the law of contract's (among other laws') unevenly disbursing entitlements.<sup>33</sup> Accordingly, the free-market system of contractual freedom was, according to Hale, "not a system of liberty at all, but a complicated network of restraints, imposed in part by individuals, but very largely by the government itself at the behest of some individuals on the freedom of others, and at the behest of others on the freedom of the 'some.'"<sup>34</sup> "[I]n a sense," Hale argued, "each party to [a] contract, by the threat to call on the government to enforce his power over the liberty of the other, *imposes* the terms of the contract on the other."<sup>35</sup> That parties' contractual choices were not generally experienced by the parties themselves as products of coercion was, Hale contended, solely a matter of social convention.<sup>36</sup> Of this "system," Hale concluded,

What in fact distinguishes this counterfeit system of '*laissez-faire*' from paternalism is not the absence of restraint, but the absence of any conscious purpose on the part of the officials who administer the restraint, and of any responsibility or unanimity on the part of the numerous [property] owners [or holders of other tangible or intangible entitlements] at whose discretion the restraint is administered.<sup>37</sup>

All that could be extrapolated from the principle of party autonomy in contractual matters, according to Hale's reading, was a conscious or unconscious normative commitment on the part of lawmakers (public and private) to maintain, as far as possible, the existing distribution of background constraints and entitlements. Given the ubiquity of unacknowledged coercion, the extant regime of legal rights and prohibitions could not be deduced from any plausible notion of party autonomy in the abstract.

Legal-realist critiques of deductive legal reasoning in general, and contractual freedom in particular, were extended into the private-international-law field by Walter Wheeler Cook. Like Hale, Cook set out to demonstrate the inadequacy of generic explanations for decisions upon which courts arrived in particular instances. Focusing on decisions made by courts, rather than on the reasons given for those decisions, Cook argued that U.S. case law on private-

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32. Robert L. Hale, *Value and Vested Rights*, 27 COLUM. L. REV. 523, 524-25 (1927) ("The law places on the staff no legal duty to work for this employer . . . but it does impose various other restrictions on their liberty which have an indirect effect of making them seek jobs. . . . The legal restraints on their conduct . . . constitute the indirect sanction which drives them into the employ of the particular factory owner.").

33. Robert L. Hale, *Labor Legislation as an Enlargement of Individual Liberty*, 15 AM. LAB. LEGIS. REV. 155, 156-57 (1925). Hale attacks "[t]he idea . . . that at common law we all have equal rights, whether of personal liberty or of property" with the observation that "[t]he common law interferes with liberty by imposing legal duties and these duties are not the same for all. . . . [T]he institution of ownership constitutes for everyone both a curtailment of some sort of liberty and an enlargement of some other sort of liberty."

34. Fried, *supra* note 31, at 50 (quoting Robert Hale, *Economic Nationalism Versus Representative Government* (unpublished manuscript)).

35. Robert L. Hale, *Law Making by Unofficial Minorities*, 20 COLUM. L. REV. 451, 452 (1920).

36. Robert L. Hale, *Our Equivocal Constitutional Guaranties*, 39 COLUM. L. REV. 563, 577 (1939).

37. Fried, *supra* note 31, at 50.

international-law issues could not be reconciled with a theory of law's essentially territorial character nor with any other general principle delineating the scope of sovereign jurisdiction.<sup>38</sup> According to Cook, notions of "right" and other hypostatizations of legal relations ("party autonomy" included) had no more effect in law than as predictions of the probable behavior of certain officials in a particular case.<sup>39</sup> Cook maintained that judicial behavior in any one case was better understood as "a practical result based upon . . . reasons of policy."<sup>40</sup>

By Cook's reading, when, at the behest of a contractual choice of law clause, a forum court purported to apply foreign law, that court was disavowing the law-creating dimension of its finding that foreign law applied. "The most practical and simple statement" of what courts do in such instances, Cook contended, "appears to be that the forum always 'enforces rights' created by its own 'law' and never 'foreign law' or 'foreign rights.'"<sup>41</sup> Similarly, when a forum court determined to uphold an express choice of another jurisdiction set forth in a contract, Cook argued, it was not abstaining from lawmaking or permitting an evasion of forum law. Rather, the court was making a determination that, having regard to public policy in the forum and the reasonableness of the parties' choice in the circumstances, the law of the forum was, for purposes of the transaction in question, identical to the rules of the jurisdiction chosen by the parties, as the forum court understood them.<sup>42</sup> Accordingly, Cook described courts' refusal to give effect to parties' choice of law, in certain cases, as "purely practical," a decision taken in recognition of risks and inconveniences posed by parties litigating in jurisdictions to which their dispute bore little or no connection.<sup>43</sup> In Cook's view, "[n]o attempt should be made to state a single, comprehensive rule or brief set of rules, to be applied more or less mechanically to all types of contracts," such as a rule or rules requiring deference to parties' expressed or presumed intention in contractual choice of law, subject to certain conditions.<sup>44</sup> Instead, Cook concluded, "The 'conflict-of-laws' problems in the field of 'contracts' need[ed] to be broken down so that different types of social, economic, and business problems may receive separate consideration."<sup>45</sup>

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38. COOK 1942, *supra* note 21, at 3–68.

39. *Id.* at 30–31. Hence Cook's observations that "th[e] arbitrariness of [parties'] choice is usually concealed by confusing the occurrence of the factual events with the attachment of legal obligation" and that "an unconscious preference [on the part of the forum court] for the domestic rule of the forum may lead to a 'presumption' that that 'law' is the one the parties 'intended' to govern." *Id.* at 414, 416.

40. Cook 1924, *supra* note 25, at 480.

41. *Id.* at 478.

42. Walter Wheeler Cook, "Contracts" and the Conflict of Laws: "Intention" of the Parties, 32 ILL. L. REV. 899 (1937–1938) [hereinafter Cook, *Contracts I*]. See also Walter Wheeler Cook, "Contracts" and the Conflict of Laws: "Intention" of the Parties: Some Further Remarks, 34 ILL. L. REV. 423 (1939–1940) [hereinafter Cook, *Contracts II*].

43. Cook, *Contracts I*, *supra* note 42, at 920.

44. *Id.*

45. *Id.* That the generic characterization of "social," "economic," or "business" problems could itself be subjected to Cook's critique was not a point taken up in his work.

For all the rigor and force of the legal-realist critique, the idea that contractual choices of law and forum properly arise from the unfettered will of contracting parties (at least in the first instance), and the idea that a principled commitment to uphold “party autonomy” yields predictable outcomes across private-international-law cases, each retain considerable purchase in private international law.<sup>46</sup> These ideas prevail, moreover, both as a matter of legal doctrine and scholarly analysis. In 2005, for example, the Commission of the European Community proposed a regulation to the European Parliament and the Council of Europe to clarify and “modernise” the Rome Convention of 1980 on the Law Applicable to Contractual Relations, while transforming it into an instrument of the European Community. Article 3.1 of the Rome Convention already provided that “[a] contract shall be governed by the law chosen by the parties.”<sup>47</sup> The 2005 proposal sought to “further boost the impact of the parties’ will” in relation to choice of law and choice of forum, permitting, for example, parties’ selection of codified bodies of nonstate law to govern their contractual relations.<sup>48</sup> At the same time, scholars in many jurisdictions continue to champion the cause of party autonomy. Invoking economic-efficiency arguments and political-rights criteria, commentators have rallied periodically to contest the perceived winding-back of contractual freedom under mandatory rules of private international law or by recourse to governmental-interest analysis.<sup>49</sup>

There are, of course, a wide variety of ways in which courts across the common-law world can and do avoid application of the law and devolution to the forum expressly chosen by contracting parties. Courts may find that the contract at issue was so formed as to exclude a clause setting forth that choice, that the choice was not bona fide, not legally permissible, or was contrary to forum public policy, or that the choice of a law or forum unconnected with the

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46. For a study of the status and effects of party autonomy in contractual choice of law in U.S. private international law, see Louis C. James, *Effects of the Autonomy of the Parties on Conflict of Laws Contracts*, 36 CHI.-KENT L. REV. 34 (1959).

47. Convention of the Law Applicable to Contractual Obligations (Rome Convention), Euro. Comm., art. 3.1, June 19, 1980, 19 I.L.M. 1492.

48. EUR. COMM. DOC. No. 2005/0261 at 5, COM (2005) 650 (15 Dec. 2005). As of August 19, 2007, final decisions on the proposal from both the European Parliament and the Council of Europe were pending. The Hague Choice of Court Convention seeks to effect a similar change: see Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 AM. J. COMP. L. 543 (2005).

49. See, e.g., WHINCOP & KEYES, *supra* note 12, at 67 (“Contractual freedom has been substantially wound back by mandatory rules.”); *id.* at 22 (“Efficiency generally requires that parties should be able to agree to the law that should apply to their [contractual] relation, subject to the usual, uncontroversial limits on contractual freedom, such as incapacity and duress.”); Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1275, 1297–98 (1989) (arguing that the application of law and the extension of jurisdiction under private-international-law principles must be defensible as a matter of political theory and that a subject’s consent to be subjected to a particular rule of law is a paradigmatic indicator of the legitimacy of its application); O’Hara & Ribstein, *supra* note 18, at 1277 (“To the extent practicable, parties should be able to choose their governing law, subject to possible procedural protections designed to ensure that the choice is real. In the absence of an explicit agreement, courts should apply rules that facilitate party choice or that select the law the parties likely would have contracted for—that is, the law of the state with the comparative regulatory advantage.”).

contract was otherwise indefensible.<sup>50</sup> As noted above, the concern of this article is not so much with the question whether arguments framed in terms of party autonomy hold sway in private-international-law disputes as a doctrinal matter. Rather, its objective is to highlight the background-structuring effects of the notion of party autonomy. In other words, regardless of whether parties' explicit choices of law and forum always prevail in litigation or arbitration, that a contracting party presumed to be vested with or assertive of autonomy serves as a touchstone for scholarly debate and norm development in private international law is *itself* politically significant. It is in light of the persistence of this touchstone in recent literature that one may observe that the autonomous party has weathered the legal–realist squall remarkably well.

In public-international-law literature, the sometime conceptual counterpart to the contracting party, the autonomous sovereign state, has been subject to successive rounds of disaggregation.<sup>51</sup> The corporation contracting internationally has confronted similar indignities, most notably in the decomposition of the enterprise into a “nexus of contracts” in law-and-economics literature.<sup>52</sup> Legal scholarship has also, from time to time, adopted a thicker, transaction-specific frame for the analysis of corporate contracting, dispensing with contract law's customary preoccupation with written indicia of intent.<sup>53</sup> The contributions of this work have been enormous.<sup>54</sup> Nonetheless, “law-in-action” scholarship on corporate contracting (international and domestic) has tended to relocate the search for a stable, impartial principle

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50. See generally NYGH, *supra* note 8, at 66–71 (discussing, inter alia, *Carnival Cruise Lines Inc. v. Shute*, 499 U.S. 585 (1991); *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Oceanic Sun Line Special Shipping Co., Inc. v. Fay* (1988) 165 C.L.R. 197 (Austl.); *Messageries Maritimes v. Wilson* (1954) 94 C.L.R. 577 (Austl.); *Vita Foods, Inc. v. Unus Shipping Co.* (1939) A.C. 277 (Austl.); *Golden Acres, Ltd. v. Queensland Estates Pty., Ltd* (1969) Q.R. 378 (Austl.)).

51. See, e.g., David W. Kennedy, *A New World Order: Yesterday, Today, and Tomorrow*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 329 (1994).

52. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 292–93 (2d ed. 1977). See also Steven N.S. Cheung, *The Contractual Nature of the Firm*, 26 J. L. & ECON. 1 (1983); Melvin A. Eisenberg, *The Conception That the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819 (1999). For an overview and critique of this literature, see generally Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403 (1985). For further efforts to “crack open . . . the black box of the corporation” in relation to contracting behavior, see the work of Michael Klausner and Marcel Kahan, *supra* note 14, at 716.

53. Victor Fleischer's recent contributions are both exemplary of this inclination and indicative of the impact of socio-legal critiques of the myopia of “doctrinal” contract-law scholarship. See Fleischer, *supra* note 1; Fleisher, *supra* note 26. Sociologists have also weighed in on the “debate” between “doctrinal” approaches to contract law and more “context-attentive” versions of the discipline. See, e.g., Mark C. Suchman, *The Contract as Social Artifact*, 37 LAW & SOC'Y REV. 91, 96 (2003) (“The key finding here is that ‘Contract Law,’ as the doctrinalists study it, exerts remarkably little influence on a remarkably wide range of transactions.”); see also Jeffrey M. Lipshaw, *Contingency and Contracts: A Philosophy of Complex Business Transactions*, 54 DEPAUL L. REV. 1077, 1077–78 (2005) (“The behavior of lawyers and business people in the course of complex commercial transactions and relationships suggest *homo economicus* is not the only model of human behavior, even in economic relationships.”).

54. For a discussion of some of the implications of socio-legal scholarship for public and private international law, see generally Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485 (2005).

governing legal decision to the domain of context, guiding philosophy, or institutional identity. By tracing or attributing corporate legal action to a “nexus of contracts,”<sup>55</sup> “a bureaucratic hierarchical organization,”<sup>56</sup> a tightly woven network of “thick personal relationships,”<sup>57</sup> or the “culture” of a firm or an industry,<sup>58</sup> “post-doctrinal” contract, corporate- and private-international-law scholarship tends to reproduce, at a different scale and with richer embroidery, more or less the very meeting-of-minds-between-autonomous-parties structure that it was ostensibly concerned to surpass.<sup>59</sup> Instead of offer and acceptance between discrete agents, we are presented with a confluence of “corporate systems” and the like, each system, organization, community, or culture attributed with more or less the coherence and interiority that private international law has traditionally attributed to contracting parties (and to states).<sup>60</sup> As Judith Butler has reminded us, recourse to context in lieu of subjectivity often amounts to recourse to yet another “posited unit[y].”<sup>61</sup>

The next part of this article works against the tendency to take the “interiors” of corporate contracting for granted in assessing decisions concerning contractual choice of law and forum. Those decisions by which corporations are presumed, by many, to arrive at the most cost-effective or transaction-suited choices of law and forum are decisions that emanate from an unwieldy normative thicket. The normative dimensions of this thicket are, moreover, neither well captured nor best rendered critically negotiable by recourse to the “convenience” of party autonomy (whether to celebrate or attack it). Envisaging one or more personified corporations to be acting

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55. Eisenberg, *supra* note 52, at 836.

56. *Id.* at 829 (emphasis omitted).

57. Volkmar Gessner, Richard P. Appelbaum & William L.F. Felstiner, *Introduction: The Legal Culture of Global Business Transactions*, in RULES AND NETWORKS: THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS 1, 2 (Richard P. Appelbaum, William L.F. Felstiner & Volkmar Gessner eds., 2001).

58. Harry Arthurs, *The Role of Global Law Firms in Constructing or Obstructing a Traditional Regime of Labour Law*, in RULES AND NETWORKS: THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS, *supra* note 57, at 273, 273–74.

59. For illustrative incarnations of the subjectivity of corporate contracting parties in these various modes, see Gessner, Appelbaum & Felstiner, *supra* note 57, at 2; Eisenberg, *supra* note 52; M.C. Jensen & W.H. Meckling, *The Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305, 310–11 (1976). As Victor Brudney observes, “the vision that informs the ‘nexus of contracts’ concept approaches the classical mode [of contracting, premised on the presumption of autonomy] more closely than it does . . . [an] approach that is sensitive to information asymmetries, duress, incapacity, and lack of ‘good faith’ in performance, and that encourages judicial intervention to protect those thus disadvantaged.” Brudney, *supra* note 52, at 1405.

60. See, e.g., Eisenberg, *supra* note 52, at 836. *Contra* Ralf Michaels, *The Re-statement of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 WAYNE L. REV. 1209, 1247 (2005) (“Once the state no longer serves as the formal criterion distinguishing law from non-law, no other criterion seems to do the job . . . . [W]e cannot stop arbitrarily at the thin criterion of ‘community’ . . .”).

61. BUTLER, *supra* note 19, at xxii. Butler here makes a point that has been much more fully elaborated elsewhere, including in anthropological writing on the search for an ethnographic “real” and the making of scientific fact. See, e.g., JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE* 117–51 (1988); BRUNO LATOUR & STEVE WOOLGAR, *LABORATORY LIFE: THE SOCIAL CONSTRUCTION OF SCIENTIFIC FACTS* (1979).

autonomously in choices of law and forum, whether in a straightforward transactional mode or in a more complex “nexus of contracts” or similar arrangement, tends to mischaracterize the stakes and participants operating in this field and the forces at work therein. Accordingly, critical attention should be given to some of the decisionmaking dynamics that might otherwise be written out of view by that approach.

### III

#### DEAL SURREAL: THE OVERDETERMINATION OF AUTONOMOUS CHOICE

The critique of party autonomy developed here proceeds from a stylized account of how corporate lawyers arrive at contractual choices of law and forum in transnational corporate deals. This account mobilizes, obliquely, identities ranging from the transnational corporation and the corporate lawyer to those of “global capital” and “new” *lex mercatoria* (or transnational merchant law).<sup>62</sup> In recent literature in private international law, each term has been invested with an interiority from which directive force is said to emanate; together, these interiors underwrite the insistent autonomy of the private. Yet, contrary to the impression generated by standard scholarly renderings of transnational corporate agency,<sup>63</sup> experiences of corporate transactional work yield no sullied corporate “soul” amenable to liberation or circumscription on a disciplinary, organizational, or individual level. Whereas Michael Hardt and Antonio Negri have insisted in their widely read book *Empire* that there is “no more outside” to the reign of global capital,<sup>64</sup> this article proceeds in the opposite direction, toward a claim that there may be no *inside* to transnational corporate deal-making that regulates every performance of “autonomous” choice, however unassailable certain systemic or subjective “properties” may appear. The following sketch of corporate dealing suggests that there may be more irresolution to, and a denser array of legal influences upon, private decisionmaking than much recent critical scholarship would have us believe.<sup>65</sup> Experiences of transnational corporate dealing register a sense of those legal decisions that private international law invests with autonomy as decisions “overflowing with the performative.”<sup>66</sup>

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62. On the conception of the latter as a “body” of law, and its status in private international law, see Michaels, *supra* note 60, at 1218–20.

63. See, e.g., Fleischer, *supra* note 1, at 1585.

64. MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* 186 (2001).

65. See, e.g., A. CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY 238 (2003). The transnational corporations and the “global mercatocracy” of which they are a part feature in Cutler’s account as “united,” directive, and largely autonomous protagonists of contemporary processes of global restructuring. *Id.* at 180–82, 237–38.

66. Jacques Derrida, *Force of Law “The Mystical Foundation of Authority,”* in *ACTS OF RELIGION* 228, 256 (Gil Anidjar ed., 2002). Cf. Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 518–19 (1986) (attempting to “describe the process of legal reasoning as [Kennedy] imagine[s] [he] might do it if [he] were a judge” and thereby “looking at law as a person who will have to apply it, interpret it, change it, defy it, or whatever” such that “the

This article seeks to evoke an experience of this performative overflow, with a view to recapturing a sense of some of the myriad legal and policy issues in contention within the architecture of “party autonomy” and the range of people who contribute to working out those issues. It is, however, a starting point for the account that follows that the redescription of transnational corporate power does not render that power up for regulatory grabs, any more than the legal preferences expressed by transnational corporations will always prevail. The deal is not, in this account, entirely precodified in either direction, even as it is patently not a domain of pure freedom. Rather, this article is intended to evoke an experience of corporate decisionmaking on contractual choices of law and forum in which both the predictability *and* the pliability of those decisions may be experienced anew.

Importantly, the redescription that follows is not metaphoric. Here, the deal is not intended as a stand-in for anything but that which it presents: haphazardly recorded notes from days spent as a corporate lawyer. Moreover, this record does not purport to erase autonomous personhood in favor of some “improved” explanatory points of reference for private international law: a now-routine gesture that often serves to enshrine a revised version of the very subjectivity it claims to disaggregate or surpass. The discussion that follows here is concerned with “how” rather than “what” questions: in particular, how does the *necessity* of transnational corporations prevailing across the global legal order get produced through “freely” negotiated transactions? The ensuing account implies that the idea of a corporate actor as a coherent, will-bearing subject is one medium for that necessity’s production. However, this account will suggest that self-consciously contingent identities work rather well in that capacity, too.<sup>67</sup>

In short, it is not contended here that, in the rabbit warren of a deal, one might (or should seek to) outrun coercion and recapture a more “authentic” autonomy. Rather, this brief sketch of choice-making in a cross-border deal is undertaken towards continued excavation (and, potentially, critical mobilization) of the innumerable background “rules” by which legal choosers and choices are shaped, circumscribed, and empowered. As indicated earlier, the work of legal–realist scholars such as Robert Hale and Walter Wheeler Cook taught us much about how the apparent inevitabilities of corporate domination are produced, day by day, decision by decision, deal by deal.<sup>68</sup> It is in debt to Hale’s and Cook’s studies of the regulatory power borne by “unofficial minorities,” the ubiquity of coercion, and the endowments of

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experience of legality may well be different according to the character of the ‘I want’ that opposes ‘the law’”).

67. *Contra* Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959 (1992).

68. Annelise Riles argues (persuasively) that “[t]he innovation of Cook and his cohort . . . lay in elevating the instrument, the relationship of means to ends, as an object of explicit contemplation, of ethnographic analysis.” Annelise Riles, *The Technocratic State: Means and Ends* 26 (Sept. 2007) (unpublished manuscript, on file with author).

intangible privilege as well as tangible property, that the daily life of a deal is sketched here.

#### A. Doing Deals: The Vocabulary of the Market

When corporate lawyers engaged in the “American mode of production of law”<sup>69</sup> talk to each other about international transactional work in which they are engaged, they use the nomenclature of the deal. “We just won a mining deal in Chile.” “I know [X] from that deal we did last year.” “I can’t do [Y] until this deal closes.” Among legal elites dedicated to transactional work in the international financial sector, these are the terms in which lives are punctuated. Whereas scholarship concerning transnational corporate contracting has tended to prefer the vocabulary of agreements, regulations, firms, and institutions (with important exceptions),<sup>70</sup> industry rags announce “deals of the year.” Under the banner of a deal, industry publications summarize an assemblage of legal and nonlegal arrangements among participants public and private.<sup>71</sup>

Documenting all of the arrangements among the parties involved in a deal, and their authority to enter into those arrangements, is the responsibility of lawyers. For the lawyers concerned, “getting the deal done” will mean, at a minimum, getting those documents prepared, negotiated, and signed, so that money (debt and equity) may start to move. Included in that task will be the satisfaction of a litany of legal and nonlegal conditions precedent to financing. The issues to be negotiated to that end are numerous and often fraught. In the project-finance context, for example, they typically revolve around the entitlement of foreign lenders to oversee a project’s day-to-day financial and technical management and, should problems arise, to step in and take over. This is the sort of scene being evoked here: a complex transaction, presenting an array of multijurisdictional, multidisciplinary issues for negotiation, in which sizeable amounts of money and the provision of basic services (via energy infrastructure, for example) are at issue.

#### B. Performing (Corporate) Power: Pace, Place, and Projected Returns

Each occasion of a deal’s performance is, in some sense, an abyss. Nevertheless, some stylistic markers recur, among them what might be thought of as mechanistic or menial elements of a deal: questions of scheduling and venue often left to junior or nonprofessional staff. To locate at this level arrangements coloring the making of “substantive” legal decisions, including choices of law and forum, is to stress that power is ubiquitous across the deal’s

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69. David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407, 413 n.5, 419–26 (1994).

70. See, e.g., Thomas W. Waelde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31 TEX. INT’L L.J. 215 (1996); Jeswald W. Salacuse, *Renegotiating International Business Transactions: The Continuing Struggle of Life Against Form*, 35 INT’L LAW. 1507 (2001). But see Lipshaw, *supra* note 53, at 1077–78; Suchman, *supra* note 53, at 96.

71. See, e.g., *Latin American Power Deal of the Year 2007*, PROJECT FIN. MAG., Feb. 2008, at 1.

formulation as such (a point made, in relation to economic relations generally, by Robert Hale).<sup>72</sup>

Typically, the first step in embarking upon a complex cross-border deal is for the sponsors' (or equity investors') legal or financial advisors to convene an "all hands" meeting. So begin the successive rounds of meetings and conference calls that comprise the daily life of the deal. These are oriented around a draft document, pending-issue list, or logistical concerns. They are interspersed with periods of feverish document preparation on the part of lawyers and occasional lulls in activity. The tempo of the deal tends toward this faltering rhythm. Time drags in the long, air-conditioned hours of a multi-party meeting. Then, periodically, it gets compressed and caffeinated—pushed against the railing of a deadline. Each time that a lawyer gets called upon to make a decision, however significant, its making will be inflected in some way by this discontinuous temporality.<sup>73</sup> Engineering the reduction of transaction costs is supposedly the lawyers' broader mandate, a mandate discharged, in part, by identifying a choice of law and jurisdiction considered "optimal" for the parties, in terms of the economic and other advantages that may flow therefrom.<sup>74</sup> This is how, it has been claimed, lawyers "create value."<sup>75</sup> Yet neither identification of the "costs" of each available choice, nor the "value-creating" processes of their comparison and elimination, is independent of the cadence of their performance.<sup>76</sup>

Another action typically taken early in corporate deal-making is the gathering of precedents.<sup>77</sup> Having reviewed publicly available documents and firm files (containing documents from prior deals in which they participated), each of the major law firms involved in a deal will assemble disclosure documents, contracts, and legal opinions pertaining to comparable deals. These may be selected for their industry relationship to the current deal, geographic proximity, or structural similarities. Any prior agreements to which current deal participants have been a party in somewhat similar circumstances will also be gathered for the evidence that they provide about terms previously accepted by

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72. Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 626 (1943).

73. This temporality is too erratic and deal-specific to be amenable to modelling in terms of time-inconsistent preferences. *But see* Manuel A. Utset, *A Model of Time-Inconsistent Misconduct: The Case of Lawyer Misconduct*, 74 FORDHAM L. REV. 1319 (2005).

74. *See, e.g.*, Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 246 (1993) ("[Choice-of-law] clauses provide standard terms and are a powerful way of avoiding inefficient mandatory rules . . . [thereby] minimizing transaction costs.").

75. *See* Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984); Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering* (Duke L. Sch. Legal Stud., Paper No. 108, 2006), available at <http://ssrn.com/abstract=901439>.

76. "[T]empo," wrote Nietzsche, "is as significant a power in the development of peoples as in music." FRIEDRICH NIETZSCHE, *THE GAY SCIENCE: WITH A PRELUDE IN GERMAN RHYMES AND AN APPENDIX OF SONGS* 36 (Josefine Nauckhoff trans., 2001).

77. Kahan and Klausner outline, in terms of "learning benefits" and "network benefits," some of the factors influencing lawyers' use of precedents. Kahan & Klausner, *supra* note 14, at 719–29.

those parties, and hence the range of negotiating possibilities potentially available.

In addition, drafting responsibilities will be allocated, at an early stage, among the lawyers involved in the deal. This allocation may be made, in part, on the basis of the deal experience (and, by extension, the depth and range of precedents) that one or another law firm can boast. It will also depend upon the style of lawyering favored by the persons in question. Some lawyers insist, wherever possible, on controlling the document (and hence, to some degree, the negotiating agenda) in their clients' interests.<sup>78</sup> Others prefer to weigh in on the drafting process in a commentator role.

Among the terms commonly subject to standardization in corporate practice (terms conveyed from contract to contract with minimal alteration, often referred to as boilerplate provisions)<sup>79</sup> are the choice-of-law and choice-of-forum provisions. Accordingly, the starting point for the negotiation of applicable law and jurisdiction for a contract will often depend upon which law firm has assumed responsibility for drafting that contract and hence the institutional origin of the guiding precedent for that exercise. Thereafter, the ease with which nondrafting deal participants accept the drafting firm's boilerplate may depend on a range of factors, from the volume of documentation those concerned are called upon to review (and the time afforded to do so), to the confidence that participant-makers have come to place in the lawyers responsible for the drafting task in question. The fact that choice-of-law and forum-selection clauses, along with other boilerplate provisions, typically appear at the back of a contract also ensures that they often receive less critical attention than they otherwise might.<sup>80</sup> Thus, notwithstanding the emphasis often placed, retrospectively, on the positive "truth" of each party's consent to a clause stipulating a choice of law or jurisdiction,<sup>81</sup> the actual enactment of choice in relation to these terms is frequently, to some degree, a matter of compound inertia. Those negotiating a contract may be unwilling to query that which presents as routine (or accepted market practice) in a competent draft. Implicit reliance might also be placed on

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78. On the disproportionate power that may be enjoyed by the "party with the pen," see Lawrence M. Solan, *The Written Contract as Safe Harbor for Dishonest Conduct*, 77 CHI.-KENT L. REV. 87, 92 (2001).

79. For the meaning of "boilerplate" in this context, see *supra* note 10.

80. Tina Stark has observed that "[d]eal lawyers most frequently come into contact with boilerplate provisions at 2:00 A.M., after the business portions of the contract have been hammered out or reviewed—hardly a propitious time to begin extensive, critical analysis." TINA L. STARK, *NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE* § 1.02 (2003).

81. See, e.g., *I.P. Metal Ltd. v. Ruote Oz SpA*, 1994 WL 1060817 (Cal. Civ. Div.), [1994] 2 Lloyd's Rep. 560 (considering, as a question of fact, "whether or not the parties concerned *truly* consented or agreed to a special jurisdiction clause to govern any disputes between them") (emphasis added). *But see* *Lake Avery*, 1996 WL 1093659 (QBD (Adm. Ct.)), [1997] C.L.C. 683, [1997] 1 Lloyd's Rep. 540 (requiring only a "good arguable case" that the parties agreed to a contract governed by U.K. law).

the received “wisdom” of well-credentialed, experienced lawyers—wisdom presumed to be embedded in a given firm’s chosen precedents.<sup>82</sup>

Where contract negotiation meetings occur is also a matter bearing, potentially, on the substance of parties’ contractual choice of applicable law and forum. Typically, “high level” strategic meetings will be convened in the principal financing venue, where the preponderance of a deal’s international personnel are likely based. More mechanical, project-specific matters, such as regulatory filings, due diligence, and the negotiation of operational and technical agreements, will usually be dealt with locally, in the country of investment. These latter meetings will often involve junior lawyers, who are frequently those with the strongest language skills within international firms. Through the navigation and staffing of deal-making locales, the deal is given a significant scalar dimension. Through the type of meetings convened in each locale, the country of investment is typically cast as the particularized ground to or from which deracinated “internationals” seek both a knowing proximity (in the sense of “having one’s ear close to the ground”) and the safety of distance (so as to be able to project a generalized business sense, attuned to the “needs” of the global market).<sup>83</sup>

This scalar dimension, in turn, feeds into the range of legal possibility experienced within the deal, including in relation to choices of law and forum. Consider, for instance, the choice of arbitration venue for disputes arising under a material contract for an emerging-market project financing.<sup>84</sup> International counsel would commonly advise that the market norm is to convene such arbitration in a major international capital home to none of the potential disputants, in which some or all parties are presumed capable of feeling at home, while being insulated from unseemly, parochial influences.<sup>85</sup> In the interests of national pride, or for other practical or strategic reasons, local sponsors and their counsel might argue for arbitration to be seated at a local or regional center for international commercial arbitration.<sup>86</sup> The former argument most frequently prevails, in part because of the interests of all persons concerned in presenting as being fluent in the dispassionate language of global

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82. Kahan and Klausner have observed that “[a]necdotal evidence suggests that [the] copying [of precedent documents] is sometimes based on the drafter’s faith that prior users have eliminated formulation errors, rather than on [an] independent understanding and assessment of [each] standard term.” Kahan & Klausner, *supra* note 14, at 721 n.16.

83. See Annelise Riles, *The View From the International Plane: Perspective and Scale in the Architecture of Colonial International Law*, 6 LAW & CRITIQUE 39 (1995).

84. See Filip De Ly, *The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning*, 12 NW. J. INT’L L. & BUS. 48 (1991).

85. See, e.g., Stefano E. Cirielli, *Arbitration, Financial Markets, and Banking Disputes*, 14 AM. REV. INT’L ARB. 243, 249 (2003).

86. On the establishment of centers for international commercial arbitration in Asia, Africa, and the Islamic world in the late 1970s, see Charles N. Brower & Jeremy K. Sharpe, *International Arbitration and the Islamic World: The Third Phase*, 97 AM. J. INT’L L. 643, 653–54 (2003).

commerce.<sup>87</sup> However, where a local party has been able to secure the attendance of senior “internationals” at meetings in the project’s home country (housed in the protective bubble of a suitably generic corporate office), it might seem more plausible to the lenders to accept, say, International Chamber of Commerce (ICC) arbitration in the project region, in the event of dispute under one of the deal’s key agreements.<sup>88</sup> Aside from the implications of this arrangement for any resulting dispute, such a concession tends to take deal negotiation in a rather different direction. Struggles over schedule and venue function as struggles over authority within and over the deal and, obliquely, over its material outcomes. Of such quotidian, routine stuff are “autonomous choices” made and remade.

At this discontinuous tempo and at these various sites, participant-makers perform “choice,” in part, as an enactment of deal-specific identities. These identities, among lawyers, invariably shift: now one is speaking or writing as representative of another (“my client has instructed me to . . . ”); now as a principal (drafting an opinion of one’s firm, for instance); now as employee or employer (when, for instance, lawyers within a firm speak to one another about the deal, partner-to-associate). Here one speaks as the most senior lawyer in the room; there one is the most junior lawyer; at another time, one talks as a lawyer to a nonlawyer (imparting advice to a nonlawyer client, instructing an administrative staff person, or receiving information from an expert in another field). Learning by observation and imitation, lawyers acquire facility in these various roles. The lawyer role that one is performing at any given moment sets a bearing for the legal decisions at which one arrives.

Other identities are also enacted that may wreak havoc with assigned roles and formal hierarchies. On a certain deal, a particular lawyer might be the quiet one, the belligerent one, the old hand, the young gun, the work-horse, or the “rain-maker” (that is, the one whose particular gift appears to be bringing profitable new deals through the door). A lawyer may also circulate through these roles over the life of the deal. He who performed as sexy and charismatic at the first meeting may present as lumpish and withdrawn at another. She who seemed compliant on one occasion might later become the recalcitrant one. How one does a deal, in a particular instance, will be informed by an implicit loyalty to the role that one assumes within the sociopolitical life of the deal. If I am the young one on this deal, I may defer to my older counterparty on a particular negotiating point, or I may fight it to the death. If I am the funny one, I may be ill-inclined to rock one or another negotiating boat, for fear of losing my likeability. Conventionally, atomism and anomie are supposed to result

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87. Judge Keba Mbaye (then of the International Court of Justice) observed that developing countries are rarely the venue of international arbitration. See Fali S. Nariman, *Courts and Arbitrators: Paradigms of Arbitral Autonomy*, 15 B.U. INT’L L.J. 185, 189–90 (1997).

88. The Arbitration Rules of the ICC provide that the place of arbitration shall be chosen by the parties or, in the absence of parties’ choice, fixed by the Paris-based Court of the ICC. Rules of the Court of Arbitration of the International Chamber of Commerce art. 14 (1998).

from sustained engagement in the work of capital.<sup>89</sup> At close range, however, one finds that it is often through the cultivation and repetitive performance of “personal” idiosyncrasies—and the momentum and loyalties generated thereby—that choices are made and deals shaped.<sup>90</sup>

Particular idiosyncrasies tend to recur, albeit in modes varying significantly among corporate professionals. Ready-made scripts are received and sent on, and these are often framed in terms of economic or strategic goals. Those in the role of investors typically understand themselves to be seeking a return on their respective investments: lenders, through the payment of interest; equity investors, through the sale of goods or services at a profit, after debt repayment. The parties concerned may also have other objectives in engaging in a deal. One investor might be seeking particular tax or accounting treatment for an investment, to improve its balance sheet. Another might be pursuing vertical integration by, for example, extending a portfolio of downstream energy investments upstream. Among lenders, a project might complement an existing investment portfolio (spreading risk in terms of industry or geography), or it may be responsive to client demand for access to certain types of investment opportunity. In relation to choices of law and jurisdiction, as well as other matters, legal counsel will understand themselves to be charged with ensuring that these various goals are met or with reconciling them to the extent of conflict. Yet these roles too have an inherent volatility. One cannot be sure whether one’s goal-oriented performance will arrive at its destination. Yesterday’s visionary is often today’s cowboy.<sup>91</sup> Moreover, the promise of projected returns depends in part upon an embrace of the risk that those returns might not come about.

In pursuing this or that goal, deal participants tend to understand themselves to be assuming a particular posture towards, or maintaining a certain relationship to, risk. This often folds into the performance of a particular corporate identity. Fleischer maintains that “[c]ontract design helps form the identity of the firm.”<sup>92</sup> One firm may be more “aggressive” or “push the envelope” more than another. Whatever the institutional identity they are performing, lawyers engaged in cross-border transactional investment typically envisage themselves engaged in site-specific navigation of a matrix of risks.<sup>93</sup>

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89. The classic account is HERBERT MARCUSE, *ONE-DIMENSIONAL MAN* (1964). This thesis is attributable in more general terms to EMILE DURKHEIM, *SUICIDE: A STUDY IN SOCIOLOGY* (Routledge 2d ed., 2002) (1897).

90. Consider, for example, the vivid portraits coloring the deal memories of a U.S. corporate lawyer, in LAWRENCE LEDERMAN, *TOMBSTONES: A LAWYER’S TALES FROM THE TAKEOVER DECADES* 77, 189 (1992).

91. The contrast between pre-bankruptcy and post-bankruptcy portrayals of Enron’s top management is illustrative. See Craig S. Lerner, *Calling a Truce in the Culture Wars: From Enron to the CIA*, 17 *STAN. L. & POL’Y REV.* 277, 291–92 (2006).

92. Fleischer, *supra* note 1, at 1588.

93. See, e.g., Fleischer, *supra* note 26, at 478; John Flood, *Doing Business: The Management of Uncertainty in Lawyers’ Work*, 25 *LAW & SOC’Y REV.* 41 (1991); Arturo O. Vega, *Risk Allocation in Infrastructure Financing*, 3 *J. PROJECT FIN.* 38 (1997).

“Risk allocation” is engineered in the detail of deal agreements, including in choices of law and forum for deal-related contracts. Commonly, in relation to jurisdictional choice, foreign investors’ lawyers favor selection of their “home” forum and corresponding law, understanding that selection to be a mitigant of the risk that their clients’ contractual rights might prove unenforceable in the event of default. An argument will often be made that the home jurisdiction (or another investor-favored jurisdiction) is more accustomed to handling disputes arising under contracts of the type in question and, by reason of the accumulation of judicial precedent in comparable matters, is more likely to arrive at carefully considered and relatively predictable decisions for the benefit of all parties. Alternatively, foreign investors might wish to secure the support of a host government for a particular deal in order to mitigate the risk of asset nationalization or expropriation. In pursuit of this second risk-mitigation objective, those investors might elect to make a concession on contractual forum selection—acceding to choice of the host government’s preferred forum in relation to certain contracts—as a sign of respect, trust, and positive engagement. In so doing, the lawyers concerned would likely understand their clients to be taking a calculated risk, balancing one risk (unenforceability of foreign investors’ contractual rights in a particular jurisdiction) against another (nationalization or expropriation). Lawyers representing a host state will be expected to make a similar calibration of risk from the other side of this imagined equation.

Yet, for all the labors of risk calibration across a deal, this analysis is continually perceived as incomplete.<sup>94</sup> Risk proliferates. Risk cannot be contained. One discerns, among corporate transactional lawyers, at once an anxiety about risk and a belief in its centrality to legal work.<sup>95</sup> Among these lawyers, contingency is often perceived as a life-giving and bountiful force.<sup>96</sup> With risk comes the promise of return for the client and the invigorating sense that one is acting beyond the realm of precedent.<sup>97</sup>

It is perhaps this sense of proximity to risk that evokes such efforts of choreography among transactional lawyers. It is a dedication to the choreographic endeavor that one discerns, above all, in the daily work of

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94. See, e.g., Robert E. Ebel, *Politics Before Business: A Study in Risk Analysis by a Multinational Corporation*, 11 U. PA. J. INT’L BUS. L. 453, 454 (1989) (“Country risk analysis is strictly subjective, and there is no alternative.”); Michael P. Malloy, *International Project Finance: Risk Analysis and Regulatory Concerns*, 18 TRANSNAT’L LAW. 89, 105 (2004) (“The current regulatory rules for the supervision of risk are not sophisticated enough to reflect the actual degree of risk in a particular transaction accurately . . .”).

95. See Roy Kreitner, *Speculations on Contract, or How Contract Law Stopped Worrying and Learned to Love Risk*, 100 COLUM. L. REV. 1096, 1132–33 (2000); Lipshaw, *supra* note 53, at 1082–1100.

96. Lipshaw observes that “dealmakers live with contingency, but they do not necessarily invoke the law to control it.” Lipshaw, *supra* note 53, at 1092.

97. See, e.g., JAMES C. FREUND, *LAWYERING: A REALISTIC APPROACH TO LEGAL PRACTICE* 3 (1979) (“For want of a better term, I consider myself an activist lawyer—I believe that . . . the practitioner must at all times be alert, reach out and *accomplish*.”).

transactional lawyering: a persistent effort to ensure everyone involved in the deal a designated role and to have them perform it more or less to script. This commitment to orchestration extends well beyond the production of legal documents. Transactional lawyers tend to agonize as much over menus as they do over covenants. Logistical planning, project management, and hospitality may occupy lawyers' time almost as much as technical legal work. Whereas private international law scholarship on contractual choice of law tends to cast transnational corporate power as supreme,<sup>98</sup> those engaged in the doing of a deal often seem scrupulously attentive to its fragility.

This hazard-riddled deal landscape is terraced, in part, in terms of "what the law requires" in the various jurisdictions concerned. Lawyers delineate the range of permissible action under relevant national and international laws and tinker with the deal accordingly. If a state-owned company is involved in the deal, lawyers will focus on the range of choices in which that entity is permitted to engage, under applicable national laws (including private international law) and prior contractual commitments. Having regard to the treaty commitments of the relevant states, and the past practice of their courts in private-international-law disputes, lawyers assess prospects for contract-enforcement and foreign-judgment recognition in this or that jurisdiction. And so on and so forth, the legal analyses continue. The implication of any such analysis is that capital must bend to the "will" of the law or of legal institutions.

The deal is also demarcated, from time to time, in terms of "what the market requires." It may be understood, for example, that the market "requires" that withholding or other tax not attach to debt repayments to foreign lenders or to dividends paid to foreign equity holders. Counsel would then dedicate themselves to devising a funds-flow- and contractual structure to achieve that result, one dimension of which may be an attempt to "relocate" the transaction wholly offshore, excising it from the taxing jurisdiction. In such a scenario, the selection of the law or submission to the jurisdiction of the taxing state may be ruled out at the behest of "the market." Each legal issue open for negotiation within a deal will be discussed (at least in part) in terms of market norms. The implication of any such discussion is that the law must bend to the "will" of capital and its drive to accumulate.

Yet the promise of capital accumulation is, as already noted, one only ever expressed in forecast terms. Likewise, the assurance of lawfulness will become increasingly tentative the more that a deal is seen as breaking new ground (an alluring prospect for participant-makers vested in affirming their own creativity). Among the risks with which participant-makers will understand themselves to be intimate is the risk that their deal-specific approximation of

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98. See, e.g., Ama S. Bekoe, Comment, *The Illusory Choice: Examining the Illusion of "Choice" in Choice of Law Provisions—A Country Study Exploring One Aspect of Foreign Investment in the Caribbean*, 42 HOW. L.J. 505, 511 (1999) ("[I]n the context of foreign investment into developing countries, weaker parties are consistently stripped of the ability to choose the law that will govern their contracts in any meaningful way.").

either “what the law requires” or “what the market requires” might be controverted from somewhere beyond the deal. It might turn out that the lawyers’ reading of pertinent private-international-law authorities does not conform to an appellate court’s subsequent pronouncement on the same. The market’s appetite for the product being produced by the borrower might wane. Thus, the deal hovers between deal-specific projections of two horizons—“what the law requires” and “what the market requires”—each one often as unsettled as the other.

### C. The Model as Mute Master: Deal as Commodity

If the undecidedness of a complex, cross-border deal acquires an objective existence for its participant-makers, it is more or less encapsulated by the financial model that in-house and external financial advisors usually produce in the course of its planning. Literally, the model is a set of interlocking spreadsheets in which economic relationships are established between simulated variables in an attempt to calibrate the economic consequences of particular future scenarios.<sup>99</sup> The model represents an attempt to cultivate a master narrative of uncertainty for the deal: both to entrain risk and to give the deal over to risk. Lawyers rarely engage with the details of the financial model, but nonetheless tend to regard it, if only obliquely, as an expression of the deal’s central animus and purpose. Its very impenetrability (for all but the few financial types who work on it) seems to augment the model’s talismanic force.<sup>100</sup>

The model also expresses another sense in which the deal tends to be experienced by participant-makers: as a work of art or industry operating independently of any would-be authors.<sup>101</sup> In the automated unity of the model, one gains an impression of the deal as the work of many, yet belonging to no one. Transactional lawyers tend, accordingly, to experience the deal as a collaborative, creative work, at one remove from the grubby brawls in which their litigation colleagues engage.<sup>102</sup> This sense of the deal often exerts a pacifying effect on employer–employee relations, as well as on disputes that might otherwise arise over forum selection and choice of law. The law-firm associate handed yet another urgent, late-night assignment tends to understand

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99. The Monte Carlo class of computation algorithms is often used for this purpose, the name of which signals their incorporation of randomness and repetition. See Sawakis Savvides, *Risk Analysis in Investment Appraisal*, 9 PROJECT APPRAISAL J. 3 (1994).

100. Miyazaki and Riles rightly warn against overemphasizing the mystique of this financial artifact, which is more often than not treated with disinterest (beyond certain fundamental features and outputs) except by its designated keepers. Hirokazu Miyazaki & Annelise Riles, *Failure as an Endpoint*, in GLOBAL ASSEMBLAGES: TECHNOLOGY, POLITICS, AND ETHICS AS ANTHROPOLOGICAL PROBLEMS 320, 320–21 (Aihwa Ong & Stephen J. Collier eds., 2005) (presenting an “ethnographic inquiry into market participants’ apprehensions of the failure of economic knowledge . . . as an endpoint” that seeks to give attention to “the mundane quality of the mundane”).

101. Fleischer casts deal structure as a product or advertising medium, the effects of which remain “ethereal.” Fleischer, *supra* note 1, at 1586.

102. See, e.g., Freund, *supra* note 97, at 35.

*the deal* to be doing this to her, not the partner communicating the demand. Similarly, particular choices of law and forum may be framed as dictates of the deal. The choice of a jurisdiction perceived to be particularly “investor friendly” may be experienced as a consequence, not of subjective preference, but rather of the compulsion to render a deal “saleable” as an economic and risk package (of which the model is the highest expression). Through the deal’s circulation as collective work, friction is assuaged, available choices eliminated, and points of possible resistance smoothed away.

After closing, the autonomy with which the deal is invested subsists in the commodified mode of a precedent. A particular deal structure gets invested with a brand value independent of the institutional or jurisdictional sites of its making.<sup>103</sup> As noted above, lawyers embarking on a new deal will often begin by collecting publicly available accounts of past deals bearing some connection to their yet-to-be-created work, from which a new deal is assembled like some Dadaist collage. In so doing, they insert their new deal into a deal-lineage associated with “success”; associative value is purloined, reputation bolstered, and anxiety about uncertainty of outcome further allayed.

Hence, the deal-commodity’s circulation fosters reproduction of the very “stylized repetition of acts” or “knowledge practices” by which deal-specific “choices” were produced.<sup>104</sup> The deal evokes a collective allegiance among participant-makers that sets it apart from relations among them, however fraught. Accordingly, the instability arising from the deal’s “performativity” gets cast outwards (as market uncertainty or as a variable response to generalized systemic demands) rather than inwards (as, say, employer-employee or investor-state conflict). The standard scholarly rejoinder has been to redouble that movement away from the deal’s performative terrain: to plumb the global market’s “interior,” ascribing determinative force to a latent bias or culture within this entity or that. The foregoing account suggests the potential fruitfulness of a different engagement—moving *through* the substance of the market, the law, the corporation, or Empire,<sup>105</sup> and into the melee of performances that are their properties, powers, and choices.

#### IV

##### REVISITING “AUTONOMY” IN THE CHOICE OF NONSTATE NORMS

What questions arise from the foregoing redescription of the exercise of “choice” in international contracting that may be salient for current debates in private international law? In response to that question, this part begins by considering the controversy ongoing in private-international-law scholarship

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103. See generally Fleischer, *supra* note 1, at 1582, 1628; D. Gordon Smith, *The “Branding Effect” of Contracts*, 12 HARV. NEGOT. L. REV. 189 (2007).

104. BUTLER, *supra* note 19, at 191. See also Riles, *supra* note 7, at 1030.

105. See generally HARDT & NEGRI, *supra* note 64.

concerning the selection of nonstate law (contemporary incarnations of the so-called *lex mercatoria*) as the governing law in commercial contracts.<sup>106</sup>

Legal scholars' and practitioners' endorsement of *lex mercatoria* amounts, in one account, to "a new political movement, aimed at replacing the national regulation of foreign trade with a transnational, customary law."<sup>107</sup> "Partisans of [the] 'new' *lex mercatoria*," according to Stephen Sachs, "look forward to a day when arbitrators will be free to decide cases according to the custom of merchants, relaxing a national regulation when it is 'not fit for international trade.'"<sup>108</sup> Supporters of this "movement" justify recourse to *lex mercatoria* by reason of its responsiveness to contemporary socioeconomic demands, particularly the "need" for law to be commercially effective. Thus, Jean-Pierre Dupuy has written,

[Forms of international trade] have created a phenomenon whose principal characteristic is that it is *spontaneous* and has been established by the creation of new rules or by the adaptation of existing legal rules and practice to the requirements of contemporary international economy. Its origin is the *need for effectiveness* pursued by the various economic agents across, or in defiance of, frontiers.<sup>109</sup>

Some commentators also stress that allowing parties' recourse to *lex mercatoria* is consistent with private international law's declared respect for party autonomy and consonant with private international law's pursuit of certainty and predictability.<sup>110</sup> In the surrounding debate, partisans and

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106. For scholarship supportive of affording parties the option of subjecting commercial contracts to *lex mercatoria*, see, for example, Thomas E. Carbonneau, *The Remaking of Arbitration: Design and Destiny*, in *LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT* 23 (Thomas E. Carbonneau ed., rev. ed. 1998) (hereinafter *LEX MERCATORIA AND ARBITRATION*); Andreas Lowenfeld, *Lex Mercatoria: An Arbitrator's View*, in *LEX MERCATORIA AND ARBITRATION*, *supra*, at 71; Friedrich K. Juenger, *American Conflicts Scholarship and the New Law Merchant*, 28 *VAND. J. TRANSNAT'L L.* 487 (1995); Friedrich K. Juenger, *The Lex Mercatoria and Private International Law*, 60 *LA. L. REV.* 1133 (2000). For reservations about this prospect, see, for example, OKEZIE CHUKWUMERIE, *CHOICE OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION* 130 (1994) (observing that national courts' deference to the customary norms of the "new" law merchant would "grant arbitrators the power to dictate which rules of national laws would be applied in the national arena, a rather strange prospect"); William W. Park, *Control Mechanisms in the Development of a Modern Lex Mercatoria*, in *LEX MERCATORIA AND ARBITRATION*, *supra*, at 143 (querying whether *lex mercatoria* might be "a fig leaf to hide an unauthorized substitution of [arbitrators'] private normative preferences in place of the parties' shared expectations under the properly applicable law"); Symeon C. Symeonides, *Contracts Subject to Non-State Norms*, 54 *AM. J. COMP. L.* 209, 224–27 (Supp. 2006) (expressing concern that nonstate norms' selection might authorize the exploitation of relatively unsophisticated or weak parties and worry as to the uncertain, imprecise content of the *lex mercatoria*). See generally Michael Joachim Bonell, *Soft Law and Party Autonomy: The Case of the UNIDROIT Principles*, 51 *LOY. L. REV.* 229 (2005); J.H. Dalhuisen, *Legal Orders and Their Manifestation: The Operation of the International Commercial and Financial Legal Order and Its Lex Mercatoria*, 24 *BERKELEY J. INT'L L.* 129 (2006); Abul F.M. Maniruzzaman, *The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?*, 14 *AM. U. INT'L L. REV.* 657 (1999).

107. Stephen E. Sachs, *From St. Ives to Cyberspace: The Modern Distortion of the Medieval "Law Merchant"*, 21 *AM. U. INT'L L. REV.* 685, 808 (2006) (noting also that use of a supposed medieval notion of the "law merchant" as a model for corporate self-regulation has attracted some criticism).

108. *Id.*

109. Jean-Pierre Dupuy, Legal Opinion to Aminoil para. 26, in *Aminoil Pleadings*, Kuwait v. Aminoil (1982) 21 *I.L.M.* 976, *quoted in* Maniruzzaman, *supra* note 106, at 667.

110. Lowenfeld, *supra* note 106, at 71, 75–76 (quoting, with approval, Professor Ole Lando's observation that "[b]y choosing the *lex mercatoria* the parties oust the technicalities of national legal

recalcitrants alike assume that the trade-off to be made, through the medium of *lex mercatoria*, is one between state power and private lawmaking power, or between traditional “statist” and supposedly more innovative “pluralist” approaches to private international law.<sup>111</sup>

To some extent, the foregoing restaging of the choice of law could be read as raising similar questions to those articulated in the *lex mercatoria* debate. Concern about the collapse of law into raw power, and the abuse of power, is a recurring theme of the latter debate. Stephen Toope maintains, for instance, that “the so-called *lex mercatoria* is largely an effort to legitimize as ‘law’ the economic interests of Western corporations.”<sup>112</sup> Ralf Michaels highlights that this worry is not assuaged by the prospect of states embracing nonstate lawmaking under a “cosmopolitan” private international law: “The apotheosis of legal pluralism collapses back into crude international relations realism in which each community determines what is best for itself.”<sup>113</sup> Further, states’ legal recognition of nonstate law “becomes the opposite of recognition—it becomes a ‘violent appropriation.’”<sup>114</sup> Perhaps sensitivity to the concentration of power in private hands (with or without state “recognition” thereof) should be felt all the more acutely when one takes account of the myriad, barely perceptible ways that power, vested unevenly through and within corporate deal-making, already operates to shape “choice.”

The point of the foregoing discussion, however, has *not* been to defend law against private coercion. Rather, the concern of this narrative has been to suggest the difficulty—even the impossibility—of pitting law against (economic or political) power, or of pitting freely (privately) chosen outcomes against legislatively (publicly) mandated outcomes, in relation to contractual choices of law and forum. That difficulty arises from the mutually constitutive nature or the inseparability of law and power, private choice, and public interest, as played out in the tangled web of a deal. In this sense, the analysis here sideswipes and disrupts, rather than replicates, the structure of the *lex mercatoria* debate (to the extent that it can be attributed with a structure). The line of questioning that part III is intended to provoke can perhaps best be illustrated by reverting to one of the questions posed at the outset of this article: What gets ruled in and ruled out when one locates choice-of-law-related questions *after* the deal?

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systems and they avoid rules which are unfit for international contract”; noting, further, that “the general principles of the law merchant offer at least as much predictability as the (often unexpected) law of a given country, particularly a law not selected by the parties”; and attributing the binding force of *lex mercatoria* to its recognition “as an autonomous norm system by the business community.” (quoting Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT’L & COMP. L.Q. 747 at 748, 752 (1985)).

111. See, e.g., Dalhuisen, *supra* note 106, at 133–34. For a more nuanced account of “statist” and “pluralist” positions and their interaction, see Michaels, *supra* note 60.

112. STEPHEN J. TOOPE, MIXED INTERNATIONAL ARBITRATION: STUDIES IN ARBITRATION BETWEEN STATES AND PRIVATE PERSONS 96 (1990).

113. Michaels, *supra* note 60, at 1255, 1258 (footnote omitted).

114. *Id.*

One possibility apparently ruled out of the *lex mercatoria* debate is the prospect that the stakes at issue in this debate (or at least some incarnations thereof) are rather inconsequential. By focusing attention on the contractual designation of *lex mercatoria* and its (affirmative or negative) public-policy implications, private international lawyers may be buying into the very “statist” fictions many rail so hard against. That is, to worry about whether national laws expressly permit corporations to subject their dealings to *lex mercatoria* is to reaffirm that the private power about which one must be most circumspect is that which explicitly co-opts “public” functions, such as lawmaking. Assumptions that may be embedded in this worry include the following: that public (state) power and private (corporate) power routinely offset (rather than support) each other, that they ordinarily occupy distinct spheres of influence, and that coercive power corresponding to private parties gets ramped up to a noteworthy or question-begging degree only when it visibly enters a domain properly reserved to the state. In their reliance on something approaching these assumptions, both sides of the *lex mercatoria* debate may be read to occupy more or less the same ground, so that this controversy might begin to sound rather like quibbling between compatriots.

The *lex mercatoria* “debate” might thus be foreclosed in favor of a partial understanding of law–power relations before it even gets underway. If, however, one regards these shared understandings as politically or empirically indefensible, then the pragmatic question for private international law becomes not *whether* private lawmaking (as opposed to public lawmaking), but *how* and *with what effects* power gets produced and allocated in and through legal decisionmaking in particular instances, and how and with what effects might it be allocated differently.<sup>115</sup> The latter are by no means new questions, but they are ones that rarely seem to get asked when private-international-law scholars debate the permissibility of contracting under *lex mercatoria*.

A second possibility that may be ruled out of the *lex mercatoria* debate through the insulation of deal dynamics from critical purview is the prospect that critical “conflicts” in conflict-of-laws (as private international law is sometimes called) might be located *elsewhere* than that debate’s most commonly drawn front lines, namely the line between insatiable global capital and an ever-more-emasculated state, that between one nation-state and another (often, a “developed” nation and a “developing” one), and that between the mercatocratic elite and the rest. To reread the vagaries of a transnational corporate deal is to recall that fault lines periodically open within the “autonomous personhood” of a corporate party, just as they frequently do within the “autonomous personhood” of any one member of the mercatocracy. Consider conflicts between, say, an associate and a partner, fellow associates, or a lawyer and an administrative assistant. Consider conflicts within the elite in a

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115. Recall the promise, made earlier in this article, to remain loyal to the pragmatic intuitions of the discipline of private international law.

particular city, and between elites from different professions and geographic settings, vested with different types and degrees of elitism. Consider conflicts within the personhood of the lawyer or those internal to the styles of business or corporate lawyering. These conflicts may be as or more material to the realization or frustration of corporate “choice” than those that private international law customarily navigates. And the tensions at work in these conflicts may operate in defiance of conventional mappings of core and periphery, freedom and constraint, law and politics.<sup>116</sup> To locate questions surrounding party autonomy after the deal is to negate the maneuverability of these conflicts and their materiality in the constitution and consolidation of “autonomous” positions.

Yet, for all the blind spots borne by private international law, perhaps commentators and practitioners might yet amplify—perhaps even make pragmatic use of—its inclination to register and approach conflict. Where a public international lawyer is more inclined to see a “higher” commonality or “mere” politics, the private international lawyer tends to see difference—difference in and to the law that is not always amenable to being managed or massaged away. Might a disinclination to avoid conflict per se get ruled *in* when we approach an issue as a private-international-law matter?<sup>117</sup> If so, this predilection, combined with the richness of the legal-realist legacy, may yet equip private international lawyers to navigate some of the banal and complex “interiors” of party autonomy in a corporate context. Private-international-law scholars, lamenting the demise of their discipline in the face of legislative and treaty harmonization,<sup>118</sup> may yet find in the architecture of autonomous choice a plethora of material conflicts in which lawyers are already active. These may not be of a kind amenable to codification, litigation, or reform in conventional terms. Nevertheless, private international lawyers could still ask, in and of these domains, the sort of pragmatic questions that they readily ask of private international law’s judicial and legislative development: What is the price of

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116. One way of coming to grips with such conflicts in methodological terms is offered by Holmes and Marcus, who seek to track the production of “illicit, marginal social thought” within technocratic milieu in terms of a “para-ethnographic dimension” of domains of expertise. Douglas R. Holmes & George E. Marcus, *Cultures of Expertise and the Management of Globalization: Toward the Re-Functioning of Ethnography*, in GLOBAL ASSEMBLAGES: TECHNOLOGY, POLITICS, AND ETHICS AS ANTHROPOLOGICAL PROBLEMS 235, 236–37 (Aihwa Ong & Stephen J. Collier eds., 2005).

117. Indeed, as Michaels highlights, private-international-law issues can even inspire political passion at times. Ralf Michaels, *EU Law as Private International Law? Reconceptualising the Country-of-Origin Principle as Vested-Rights Theory*, 2 J. PRIVATE INT’L L. 195 (2006) (noting that “people all over Europe took to the streets to protest against a proposed norm of private international law—the ‘country-of-origin’ principle stated in Article 16 of the proposed services directive”).

118. See, e.g., C.G.J. Morse, *Making English Private International Law*, in REFORM AND DEVELOPMENT OF PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOUR OF SIR PETER NORTH 273 (James Fawcett ed., 2002) (on legislative developments); Hans Ulrich Jessurun d’Oliveira, *The EU and a Metamorphosis of Private International Law*, in REFORM AND DEVELOPMENT OF PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOUR OF SIR PETER NORTH, *supra*, at 111 (on the effect of EC treaty-based law).

“autonomy” in contractual choice of law; which costs or interests should matter in the assessment of that price; and who pays that price in each instance?

## V

### CONCLUSION

To enliven the “private” of private international law is to extend legal inquiry to what is at stake in private international law seeking to depict, consolidate, validate, redistribute, augment, co-opt, or circumscribe private power. This article has highlighted that there are significant stakes at issue *before* the question of what private international lawyers should do in the face of question-begging concentrations of private power. In their vital role in the framing and enactment of that power, lawyers advising on private-international-law issues have been and are already engaged in the contentious business of allocating resources and authority. Moreover, the mode of that engagement is mostly far removed from measured weighing and balancing. Accordingly, drawing inspiration from the work of Robert Hale and Walter Wheeler Cook, among others, this article has cautioned against the reading of “autonomous” legal decisions by multinational corporations as instances of congealed power in private international law. In the stylized setting of a cross-border deal, this article has instead depicted the performative enactment of autonomous choice in all its tawdry, collective routinization. In so doing, it has suggested establishing as both politically significant and worthy of legal scholarly attention the very terms in which such “choices” are formulated and articulated, and to recapture some sense of the persistent undecidedness of that articulation.