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Sovereign Debt and the Three and a Half Minute Transaction: What Sticky Boilerplate Reveals about Contract Law and Practice

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SOVEREIGN DEBT AND *THE THREE AND A HALF MINUTE TRANSACTION*: WHAT STICKY BOILERPLATE REVEALS ABOUT CONTRACT LAW AND PRACTICE

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Book review of MITU GULATI & ROBERT E. SCOTT, THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN (2013).

I. INTRODUCTION

Current perceptions are not kind to lawyers, law practice, or law schools. Lawyers are derided as value detracting,[1] law practice dismissed as rote,[2] and legal education scorned as over-priced.[3] Clients

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1. *See generally* BRUCE MACEWAN, GROWTH IS DEAD: NOW WHAT? LAW FIRMS ON THE BRINK (2012) (detailing client dissatisfaction with attorneys and suggesting that lawyers face imminent failure absent reinvention of the industry); RICHARD SUSSKIND, TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE, at xiii (2013) (reasoning that pressures of the marketplace have forced the legal profession to the brink of fundamental change). *See also* MITCHELL KOWALSKI, AVOIDING EXTINCTION: REIMAGINING LEGAL SERVICES FOR THE 21ST CENTURY, at xiii (2012).

2. THE CTR. FOR THE STUDY OF THE LEGAL PROFESSION AT THE GEORGETOWN UNIV. LAW CTR. & THOMSON REUTERS PEER MONITOR, 2013 REPORT ON THE STATE OF THE LEGAL MARKET 12, [hereinafter LEGAL MARKET REPORT] (explaining that "[t]he inexorable drive toward the commoditization of legal services" has driven down demand for all levels and types of lawyers). *See also* RICHARD SUSSKIND, THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES 27 (2008); Stephen J. Choi &

complain that the benefit received from their transactional counsel do not justify the costs, particularly when lawyers revert to the role of mere scrivener and mindlessly rely on contractual boilerplate.[4] Today's transactional law practice, therefore, faces an evolutionary challenge: Lawyers must do more than churn legalese and contracts must strategically manage client risks and accurately reflect party intent.[5] But at the same time, lawyers need to recognize that client time and budgetary pressures will continue to push towards contractual commoditization.[6]

Robert Scott and Mitu Gulati's recent book, *The Three and a Half Minute Transaction: Boilerplate and the Limits of Contract Design*, is a story of "sticky" boilerplate in the sophisticated context of sovereign debt practice.[7] The book reads like a Michael Lewis bestseller,[8] using a

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Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129, 1149 (2006); Stephen J. Choi & G. Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 EMORY L.J. 929, 947 (2004) [hereinafter *Innovation in Boilerplate Contracts*]; Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261, 261 (1985); *See infra* notes 100-02, 111-14 and accompanying text.

3. *See, e.g.*, WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007); BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS (2012); Kyle P. McEntee et al., *The Crisis in Legal Education: Dabbling in Disaster Planning*, 46 U. MICH. J.L. REFORM 225, 225 (2012). Various scamblogs have criticized law schools for falsifying data and not appropriately preparing students for legal practice. *See, e.g.*, Paul Campos, *Goodbye is too good a word*, INSIDE THE LAW SCHOOL SCAM (Feb. 27, 2013, 4:43 AM), http://insidethelawschoolscam.blogspot.com.

4. LEGAL MARKET REPORT, *supra* note 2, at 13 (discussing the balance of power shift to clients away from law firms with respect to staffing demands and pricing); MACEWAN, *supra* note 1 (discussing and presenting data relating to client pricing pressures). *See also* Catherine Dunn, *The In-House World According to Ben Heineman Jr.*, (Apr. 9, 2012); William D. Henderson, *Are We Selling Results or Résumés?: The Underexplored Linkage Between Human Resource Strategies and Firm-Specific Capital*, SOC. SCI. RES. NETWORK (Apr. 16, 2008), http://ssrn.com/abstract=1121238. Clients demand cost-effective lawyering (including form use), but allege that they are being charged for custom-tailored contracts and provided with off-the-rack products. Client dissatisfaction with respect to litigators takes a slightly different form, typically based on perceptions of incompetence, greed and a flawed, costly and cumbersome judicial system.

5. Joseph Kimble, *You Think Anybody Likes Legalese?*, MICH. BAR J. 52 (Aug. 2013).

6. SUSSKIND, *supra* note 1, at 3-5.

7. MITU GULATI & ROBERT E. SCOTT, THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN 2 (2013).

character-driven, intensely researched approach to transform the analysis of a complicated topic into a compelling page-turner. The book begins by explaining the much-derided *Elliott Assocs.* ruling by a Brussels Court of Appeals in 2000,[9] and then draws from Gulati and Scott's extensive research and analysis to explore why the *pari passu* contract provision in sovereign debt instruments persists and proliferates in the face of this adverse judicial interpretation.[10] While the story of modern sovereign credit markets and practices is itself intriguing, Gulati and Scott use this particular instance of sticky boilerplate as a test case for the broader question of general durability of potentially adverse standard language in contracts. This test case is compelling because it shows how boilerplate is inherently sticky, even in contracts produced by the most elite Wall Street firms in seemingly bespoke transactions.[11] Gulati and Scott pose multiple justifications for resistance to form modification – legitimate and otherwise – as well as various origin stories for sovereign debt *pari passu* clauses. The origin stories and sovereign debt contract data create a fascinating archeological-type study of this particular contract form.

After considering all the data and the lore, Gulati and Scott conclude that the value of including a *pari passu* clause in sovereign debt instruments is something akin to an urban myth: widely believed and not actually true.[12] This, the authors reason, is an example of how boilerplate stickiness provides no utility to clients and merely indicates systemic inadequacies.[13] By so concluding, Gulati and Scott offer a solution to the mystery of where the *pari passu* clause in sovereign

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8. *See, e.g.*, MICHAEL LEWIS, LIAR'S POKER (1989), MICHAEL LEWIS, MONEYBALL (2003), MICHAEL LEWIS, THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE (2010).

9. GULATI & SCOTT, *supra* note 7, at 12-13.

10. *Id.* at 10-13. The Latin term *pari passu* means "in equal step." In a debtor bankruptcy context, a *pari passu* clause requires that creditors recover equally with other similarly situated creditors. BLACK'S LAW DICTIONARY 1115 (6th ed. 1990) (*pari passu* means "[b]y an equal progress; equably; ratably; without preference. Used especially of creditors who, in marshaling assets, are entitled to receive out of the same fund without any precedence over each other"). Debts relate to one another in a hierarchy, and a particular debt will be classified as senior, junior or *pari passu*, meaning equal, to another particular debt. *See* GULATI & SCOTT, *supra* note 7, at 6.

11. Sovereign debt legal work is dominated by the most elite New York and London law firms, including Cleary Gottlieb Steen & Hamilton, Allen & Overy, and White & Case.

12. GULATI & SCOTT, *supra* note 7, at 6.

13. *Id.* at 3-4.

bonds came from and why it persists. Their sleuthing only uncovers just the tip of the proverbial iceberg, however, with respect to a broader legal market and agency failure. The answers discerned by Gulati and Scott, in true Socratic fashion, merely whet the reader's appetite to ask more questions, namely what this agency failure portends for the future of contract law and transactional legal practice.

The authors' study and explanation of sovereign lending provides a useful introduction to the concepts underlying this important and fragile segment of global finance. In addition, *The Three and a Half Minute Transaction* gives a rare glimpse into the sausage-making factory of Big Law's contracting practices, and as such is an important book for any legal practitioner (as well as current and future law firm clients). But it also is a morality tale for theorists and legal reformers as they consider flaws in the current market for legal services and what changes must be made.

Part II of this review explains the use of the *pari passu* clause in the context of sovereign lending and Gulati and Scott's detailed research and analysis into its evolution, justification and prevalence. Part III discusses the authors' critical assessment of boilerplate stickiness theories in the *pari passu* clause test case. Part IV builds on these findings in the context of two questions suggested but not addressed in *The Three and a Half Minute Transaction*: What does boilerplate stickiness reveal about the continuing validity of certain contract law doctrines, and what does it suggest for the evolving role of the modern transactional attorney?

II. THE *ELLIOTT* CASE AND ITS AFTERMATH: WHY *PARI PASSU*?

The Three and a Half Minute Transaction grew out of an article that in turn grew out of a workshop during which Scott and Gulati puzzled over the general conundrum of rigidity in contract provisions, in particular with reference to sovereign lending and the commonly used *pari passu* clause.[14] The *pari passu* clause seems misplaced in

14. *Id.* at 54-55. A version of the authors' manuscript was workshopped at Hofstra University Law School and short commentaries on their manuscript and an earlier version of their thesis was published in the Hofstra Law Review. *See* Robert A. Cohen, *"Sometimes a Cigar is Just a Cigar": The Simple Story of* Pari Passu, 40 HOFSTRA L. REV. 11, 11-12 (2011) (the lawyer who represented Elliott defends the rogue interpretation of the *pari passu* clause in sovereign bonds); Mitu Gulati & Robert E. Scott, *The Three and a Half Minute Transaction: Boilerplate and the Limits of*

sovereign debt instruments,[15] and neither Gulati nor Scott nor the hundreds of sophisticated attorneys they interviewed could cogently explain its purpose or meaning in that context.

In non-sovereign commercial lending where the prospect of bankruptcy looms, there is utility to having a borrower promise a creditor equal standing with other creditors during bankruptcy liquidation.[16] But this perfectly reasonable justification for a *pari passu* clause in typical debt instruments underlines the odd character of its placement in sovereign lending: Sovereigns cannot declare bankruptcy.[17] Why, then, have *pari passu* clauses been a consistent feature of sovereign lending for over a hundred years?[18] Although

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Contract Design, 40 HOFSTRA L. REV. 1, 1-2 (2011); Steward Macaulay, *Notes on the Margins of Lawyering, in Three and a Half Minutes*, 40 HOFSTRA L. REV. 25, 25-26 (2011) (heralding the data collection methods of Gulati & Scott as a tremendous contribution to contract law, and opining that lawyers will innovate through the problem of sticky boilerplate); Rodrigo Olivares-Caminal, *The Pari-Passu Interpretation in the Elliott Case: A Brilliant Strategy but an Awful (Mid-Long Term) Outcome*, 40 HOFSTRA L. REV. 39, 39 (2011) (focusing on the unsolved problem of retaining the *pari passu* clause in sovereign debt instruments); Barak Richman, *Contracts Meet Henry Ford*, 40 HOFSTRA L. REV. 77, 77-78 (2011) (mechanization applied to contracting is unsurprising and reflects both the attorney's and client's economic interests); Preston M. Torbert, *The Crisis Exposed by* Pari Passu, 40 HOFSTRA L. REV. 87, 87 (2011) (opining that the story of *pari passu* is a tremendous argument for upgrading attention to contract drafting and advocates that law schools take up this challenge); Phillip R. Wood, *The Bankruptcy Ladder of Priorities and the Inequalities of Life*, 40 HOFSTRA L. REV. 93, 93 (2011) (explaining the use of *pari passu* in regimes where bankruptcy is a viable alternative). *See also* GULATI & SCOTT, *supra* note 7, at 4, 6.

15. *Infra* notes 17-18 and accompanying text.

16. GULATI & SCOTT, *supra* note 7, at 114.

17. The *pari passu* clause speaks to in-step collections in bankruptcy, but sovereigns are not able to declare bankruptcy. *Id.* at 28, 45-52. Although there is no international bankruptcy court for sovereigns, contract collective action clauses to some extent simulate a bankruptcy system in that they provide for joint creditor restructuring of sovereign debt. *Id.* at 28. For a more extensive discussion between special challenges of sovereign borrowing, *see* Lee C. Buchheit & Mitu Gulati, *Responsible Sovereign Lending and Borrowing*, 73 LAW & CONTEMP. PROBS. 63, 72 (2010); Mitu Gulati & George Triantis, *Contracts Without Law: Sovereign Versus Corporate Debt*, 75 U. CINN. L. REV. 977, 984 (2007); Robert E. Ahdieh, *Between Mandate and Market: Contract Transition in the Shadow of the International Order*, 53 EMORY L.J. 691, 692 (2004); Lee C. Buchheit, *The* Pari Passu *Clause* Sub Specie Aeternitis, 10 INT'L FIN. L. REV. 11, 11 (1991).

18. GULATI & SCOTT, *supra* note 7, at 70-71. Several iterations of the *pari passu* clause appear in sovereign lending documents, and the authors opine that the version used in the *Elliott* case presents the most risk. *Id.* at 13.

some practitioners articulate the theory that the *pari passu* clause addresses lender risk of a sovereign debtor using assets which already secure existing bond obligations as collateral for subsequent lenders[19] that risk is already directly prohibited by another ubiquitous boilerplate provision: the negative pledge clause.[20] Indeed, Gulati and Scott's research only led them to conclude that the *pari passu* clause (a) is repeatedly used in sovereign debt documents, and (b) prior to the *Elliott Assoc.* ruling was widely considered either redundant or meaningless.[21] Essentially, before 2000, *pari passu* clauses in sovereign debt instruments were widespread but harmless "relics."[22]

This all changed in 2000 when a Brussels commercial court in the *Elliot* case interpreted the clause in a novel way that unsettled the sovereign lending community.[23] This ruling, which was "the catalyst for some of the most radical and far-reaching proposals for reform of the international financial system,"[24] was merely a Brussels commercial court's grant of an *ex parte* motion for preliminary injunction. Elliott Associates, a "vulture" hedge fund investor, had acquired Peruvian bonds at a steep discount and then refused to agree to proffered debt restructuring.[25] When Peru disbursed payments to Euroclear, a creditor that had accepted the restructuring, Elliott sought a court injunction of the payment, claiming a right to share in the amount distributed to Euroclear based on the *pari passu* clause in their bonds.[26] Elliott argued and the Brussels court held that the *pari passu* clause, in the absence of any other plausible meaning, must be read to give it the right to share equally in payments made by Peru to other

19. *Id.*

20. *Id.* The negative pledge clause is the main contract provision that limits a sovereign's ability to borrow additional funds. It limits future borrowing by constraining the sovereign's freedom to grant security interests in collateral. *Id.* at 25.

21. *Id.* at 25-26, 50-51. *See also* PHILIP R. WOOD, PROJECT FINANCE, SUBORDINATED DEBT AND STATE LOANS 165 (1995) ("In the state context, the meaning of the clause is uncertain because there is no hierarchy of payment which is legally enforced under a bankruptcy regime."); Buchheit, *supra* note 17, at 11 ("The fact that no one seems quite sure what the clause really means, at least in the context of a loan to a sovereign borrower, has not stunted its popularity.").

22. GULATI & SCOTT, *supra* note 7, at 14.

23. *Id.* at 12-17, 30-32, 45-51, and 176.

24. *Id.* at 12.

25. *Id.* at 13.

26. *Id.* at 12-13.

creditors.[27] Gulati and Scott opine that under different circumstances Euroclear and Peru would have launched a vigorous appeal contesting this novel interpretation of the *pari passu* clause and that perhaps the preliminary holding would have been overruled.[28] However, Peruvian politics of the day led to quick settlement of the case instead.[29] This meant that the interpretation of the Brussels court remained undisturbed.[30]

The *Elliott* ruling caused a huge stir in the sovereign finance community because it was the first time a court allowed a creditor to go beyond seeking recovery from the sovereign debtor and attach payments being made to other creditors.[31] The Brussels court effectively interpreted the *pari passu* clause as an intercreditor agreement, obligating creditors who accepted payments from a sovereign debtor (perhaps under a restructuring agreement) to share their recovery *pro rata* with unpaid creditors (perhaps who had refused to restructure the debt).[32] With this ruling, the *pari passu* clause transformed from mere surplusage into a potentially toxic provision that could discourage restructuring and encourage holdouts.[33] The holding led to an uproar in the financial community, most sovereign debt market players agreed that *Elliott*'s interpretation was an unintended, and even harmful, construction of the clause.[34] At the very least, *Elliott* alerted the market to a latent risk associated with including

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27. *Id.*

28. *Id.* at 48.

29. *Id.* at 16. Peru settled the case because of an unrelated political crisis related to then-president Alberto Fujimori. *See US Fund Takes Legal Steps in Peru Brady Bond Row*, REUTERS (Sept. 29, 2000), http://www.financialexpress.com/old/fe/daily/20000930/fns30073.html.

30. GULATI & SCOTT, *supra* note 7, at 16. The unchallenged ruling (left undisturbed by this settlement) invoked a firestorm of criticism and widespread worry about restructuring holdouts and continued misinterpretation of the *pari passu* clause. *See, e.g.*, Olivares-Caminal, *supra* note 14, at 45.

31. GULATI & SCOTT, *supra* note 7, at 16. *See also* Olivares-Caminal, *supra* note 14; LEE C. BUCHHEIT, HOW TO NEGOTIATE EUROCURRENCY LOAN AGREEMENTS 83 (2d ed. 2000); PHILIP R. WOOD, PRINCIPLES OF INTERNATIONAL INSOLVENCY 25-62 (1995).

32. GULATI & SCOTT, *supra* note 7, at 14.

33. *Id.* at 15, 17. Plus, it gave for the first time a real avenue of recovery against a sovereign, albeit indirectly. *Id.* at 17.

34. *Id.* In NY litigation against Argentina, the U.S. Department of Justice filed an amicus brief specifically disapproving of the *Elliott* interpretation of *pari passu*. This was only the third time in the history of the sovereign debt market that the Department of Justice has involved itself as an amicus in sovereign debt court proceeding. *Id.*

an identical version of the *pari passu* clause in a sovereign debt instrument.[35] The consensus was that *Elliott* was wrong and that its interpretation lowered the value of the contract, absent clarifying language.[36] Sovereign finance market players rallied for systemic responses to sovereign debt restructuring problems that had been uncovered and exacerbated by the *Elliott* ruling.[37] Proposals included establishment of an international bankruptcy court,[38] requiring a higher percentage of assenting bondholders to restructure debt, and, importantly, a clarification or removal of the *pari passu* clause in sovereign debt contracts.[39]

To date, no systemic solution has come to fruition. And in the thirteen years since *Elliott*, its novel interpretation of the *pari passu* clause has gained purchase and popularity.[40] In 2011, Elliott sought an

35. *Id.* at 50-51; *infra* note 51. *Pari passu* clauses come in multiple variations. Gulati and Scott reason that the particular formulation used in *Elliott* is the riskiest.

36. GULATI & SCOTT, *supra* note 7, at 30-32 and 50-51. *See, e.g.*, PHILIP R. WOOD, 2 THE LAW AND PRACTICE OF INTERNATIONAL FINANCE SERIES § 12-010 (2d ed. 2007); Lee C. Buchheit & Jeremiah S. Pam, *The* Pari Passu *Clause in Sovereign Debt Instruments*, 53 Emory L.J. 869, 917-18 (2004) [hereinafter *Sovereign Debt*]; Felix Salmon, Pari Passu *Clause is a Threat to Markets*, EUROMONEY (May 2004), http://www.euromoney.com/article/1001830/pari-passu-clause-is-a-threat-to-the-markets.html; Philip R. Wood, *Pari Passu Clauses—What Do They Mean?*, 18 Butterworths J. INT'L BANKING & FIN. L. 371 (2003); Lee C. Buchheit & Jeremiah Pam, *The Hunt for Pari Passu*, (pts. 1 & 2), 23 INT'L FIN. L. REV. (Feb 1, 2004); *A Victory by Default?*, ECONOMIST (Mar. 4, 2005); *Feast of the Vultures—Two Investment Funds are Suing Nicaragua*, LATIN FIN. (June 2003); *Argentina's Default Record Spawns Suits in New York*, N.Y.LJ. (Mar. 2, 2002); ANDREW G. HALDANE, FIXING FINANCIAL CRISES IN THE 21ST CENTURY (2004).

37. Anne O. Krueger & Sean Hagan, *Sovereign Workouts: An IMF Perspective*, 6 CHI. J. INT'L L. 203, 203 (2005).

38. GULATI & SCOTT, *supra* note 7, at 21; Kenneth Rogoff & Jeromin Zettlemeyer, *Bankruptcy Procedures for Sovereigns: A History of Ideas, 1976-2001*, 49 IMF Staff Papers 470, 470, 484 (2002). Sean Hagan, *Designing a Legal Framework to Restructure Sovereign Debt*, 39 GEO. J. INT'L L. 299, 341 (2005); Kreuger & Hagan, *supra* note 37, at 203. Recently, even skeptics with respect to sovereign bankruptcy have re-examined the possibility of such a regime as an answer to a myriad of sovereign debt problems, including the *pari passu* conundrum. Anna Gelpern, *A Skeptic's Case for Sovereign Bankruptcy*, 50 HOUS. L. REV. 1095, 1099 (2013).

39. Gulati and Scott give a sample "least intrusive revision" to the *pari passu* clause that would clearly improve contract value: "the bonds will rank *pari passu*, which ranking does not mean that, following a qualifying restructuring agreement, nonconsenting creditors are entitled to recover their pro rata share in the distribution of funds to consenting creditors." GULATI & SCOTT, *supra* note 7, at 32.

40. *See Sovereign Debt*, *supra* note 36, at 880.

injunction on payments to restructuring bondholder in another case on this same payment equality theory, this time in a New York federal court.[41] The Second Circuit made complete rulings on the issues and twice affirmed the reasoning of the Belgian court in *Elliot*, namely that the *pari passu* clauses prohibits preferential payments to restructuring creditors, and that holdout bondholders may seek to share in any such repayment by the sovereign.[42] The most recent Second Circuit ruling in this case came August 23, 2013, when the court affirmed the district court's amended injunction requiring Argentina to make "ratable payment" to the non-restructuring bondholder plaintiff.[43] In their opinion, the Second Circuit specifically advised sovereign issuers to change their boilerplate if they did not intend this result.[44] The *pari passu* issue may soon be before the Supreme Court.[45]

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41. The most recent round of *pari passu* clause discussion and debate has been in the context of payments on restructured Argentine bonds. For an excellent discussion of this case *see* Romain Zamour, NML v. Argentina *and the Ratable Payment Interpretation of the* Pari Passu *Clause*, 38 YALE J. OF INT'L L. ONLINE 55 (2013). Academic and financial blogs have been closely tracking the saga of Argentina's restructuring and the challenges to preferential payments that non-consenting shareholders have brought in the Second Circuit. *See, e.g.*, Joseph Cotterill, *A* Pari Passu *Upset*, FT ALPHAVILLE (Oct 26, 2012, 7:07 PM), http://ftalphaville.ft.com/2012/10/26/1232561/a-pari-passu-upset/; *Argentina's* Pari Passu *Upset—Redux*, FT ALPHAVILLE (Aug. 23, 4:36 PM), http://ftalphaville.ft.com/2013/08/23/1612253/argentinas-pari-passu-upset-redux/; Anna Gelpern, *Argentina Lost! Elliott Won!* Pari Passu *Rules! (... or Why I Love Being a Law Professor)*, CREDIT SLIPS (Oct. 26, 2012, 11:53 AM) http://www.creditslips.org/creditslips/2012/10/argentina-lost-elliott-won-pari-passu-rules-or-why-i-love-being-a-law-professor-.html; Mark Weidemaier, *Argentina's (not so) Unusual* Pari Passu *Clause*, CREDIT SLIPS, (Nov. 5, 2012, 7:00 AM). The various commentators from the academy and the media opine that the treatment of the *pari passu* clause in this context "took a lot of people by surprise" and creates huge problems in the future in restructuring debts when this clause is present.

42. NML Capital, Ltd. v. Banco Central De La Republica Argentina, 652 F.3d 172, *passim* (2d cir. 2011); GULATI & SCOTT, *supra* note 7, at 17. While not quite adopting the *Elliott* interpretation, a New York federal district court judge ruled that Argentina's actions in making preferential payments clearly violated the clause. The court did not, however, specifically rule on what the *pari passu* clause meant. *Id.* at 166-167, 171, 175. This ruling was upheld by the Second Circuit in NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246, 258 (2d Cir. 2012) (confirming the reasonableness of the district judge's interpretation of the *pari passu* clause and noting that the preferred construction of this clause in the sovereign debt context is "far from general, uniform and unvarying.").

43. NML Capital, Ltd. v. Republic of Argentina, 727 F.3d 230 (2d Cir. 2013).

44. *Id.* at 248. (The court held that "[i]f, in the future, parties intend to bar preferential payment, they may adopt language like that included in the FAA. If they

The restructuring holdout risk from retaining identically worded *pari passu* provisions in debt instruments remains quite real. And yet the clause persists in sovereign lending and has grown even more pervasive.[46] Even in the aftermath of the recent Second Circuit's ruling in the Argentina bondholder case, multiple sovereign issuances still contained a *pari passu* clause, and many such clauses mirrored precisely the clause which had caused such problems for Argentina.[47]

Gulati and Scott undertook to determine why sovereign debt instruments post-*Elliott* have not addressed the risks created (or at least revealed) by that case. They reasoned that either the clause has some residual value or there must be some other reason that the lawyers drafting the documents have not changed or deleted the clause to account for the risk that *Elliott* (and later cases) disclosed.[48]

Gulati and Scott take a "triangulated" approach to the mystery of *pari passu*, analyzing current theories in boilerplate stickiness, comparing these theories to explanations offered by market actors

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mean only that subsequently issued securities may not explicitly declare subordination of the earlier bonds, they are free to say so.")

45. Shearman & Sterling predict that Argentina will file a petition for certiorari by the end of 2013 and that the Supreme Court will rule on the petition the first half of 2014. *Don't Cry for Me, Argentine Bondholders: The Second Circuit Rules*, SHEARMAN & STERLING LLP (Aug. 27, 2013), http://www.shearman.com/files/Publication/fa3839a4-b60f-4543-9459-4725883cb902/Presentation/PublicationAttachment/91cb6a7f-dd5c-4ea3-ac43-c04d5d328e55/Don%E2%80%99t-Cry-for-Me-Argentine-Bondholders-The-Second-Circuit-Rules-LT-082713.pdf.

46. GULATI & SCOTT, *supra* note 7, at 63, 75 and 122-23. In the 1950s, only 63% of unsecured sovereign bond contracts included a *pari passu* clause, and by the 1980s, nearly 85% of contracts contained the clause. In the decade after *Elliott*, however, usage became near-universal: the clause appeared in 98.7% of sovereign bond instruments. *Id.* at 122 tbl.3. The riskiest version of the clause appears to have increased in usage as well. *Id.* at 123 fig.5; *infra* note 50.

47. Joseph Cotterill, *All of this has Happened Before and will Happen Again, Sovereign* Pari Passu *Edition,* FT ALPHAVILLE, (Dec. 6 2012, 5:40 PM), http://ftalphaville.ft.com/2012/12/06/1298193/all-of-this-has-happened-before-and-will-happen-again-sovereign-pari-passu-edition/. Cotterill opines:

> In a ruling which every sovereign debt lawyer in the business would have carefully noted, the Second Circuit decided that the second, "payment obligations" sentence of the Argentine clause "prohibits Argentina, as bond *payor*, from paying on other bonds without paying on the FAA Bonds." That is a challenge to the reigning "equal ranking" interpretation, and a potentially fatal chink in a defaulting sovereign's armor. And it's back in bond issues as if nothing had happened. That's pretty extraordinary.

Id.

48. GULATI & SCOTT, *supra* note 7, at 139-41. *See infra* Section II.

whom the authors interviewed, and comparing both of these with empirical data on what language actually was included in sovereign debt instruments before and after *Elliott*.[49] This approach allows Gulati and Scott to compare modification resistance theories with both a qualitative and quantitative dataset, gathered in two parallel tracks. To support their inquiry of *how and to what extent* this particular clause had changed historically, both before and after *Elliott*, Gulati and Scott examined terms and language of more than 1,500 sovereign debt contracts, focusing on New York and English law over the past 60 years but also including sovereign bond issuances across every jurisdiction from the 1820s.[50] They present their findings in a series of informative graphs and charts.[51] The quantitative data from these bond issuances is juxtaposed with information gleaned from more than 200 interviews of sovereign debt practitioners over the years 2005-2011[52] and the musings of sovereign debt luminaries like Lee Buchheit.[53] Their dual assessment of both the reality (what the contracts actually said) and perception (why the drafters say they did what they did) adds needed meat to the bare theoretical underpinnings of the standard form contracting process.[54] The data and interview results also provide glimpses into the workings and failings of modern law firm transactional practice.[55]

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49. GULATI & SCOTT, *supra* note 7, at 17.

50. *Id.* at 5-6, 54.

51. *Id.* at 59-69, 179-87.

52. *Id.* at 54-55. The authors characterize their impulse to ask lawyers why they do what they do as "naïve" (*Id.* at 11), but the effort is tremendously illuminating, particularly when it comes to extrapolating from this study take-away mandates for legal evolution. *See* Macaulay, *supra* note 14 (praising the data-collection efforts of Gulati and Scott).

53. GULATI & SCOTT, *supra* note 7, at 52.

54. *Id.* at 11-12.

55. *Id.* at 55. For example, the authors quote one midlevel associate's response to the question of why he or she had not tweaked the *pari passu* clause in the wake of *Elliott*:

> It would have been suicide for me to try to change the [*pari passu*] clause . . . . Everyone was aware of it . . . there were memos flying around about the problem. I could have maybe messed with some other clause and gotten away with it . . . although why would I? But trying to fix this problem without clearing it with the senior partners would have been suicide. I just left it alone in the deals I worked on. The senior partners knew the problem and could decide whether to fix it.

Id.

III. SOLVING THE MYSTERY OF *PARI PASSU* PERSISTENCE IN SOVEREIGN DEBT INSTRUMENTS

After painting the background by describing *Elliott*'s story of vulture funds and Peruvian debt and explaining the particularities of sovereign bond transactions,[56] Gulati and Scott articulate various academic theses that attempt to explain why the *pari passu* clause would remain unchanged post-*Elliott*.[57] Essentially, these theories fall into two categories: those that provide rational reasons for a fiduciary attorney to retain the clause (they call these the "faithful lawyer" theories), and those that blame inflexibility of the standard language on agency problems related to the practice of law today (termed the "imperfect agent" theories). Scholars have previously written about these theories, but no prior exploration of these theories have been tested against the types of data accumulated and here assessed by Gulati and Scott.[58]

A. *FAITHFUL LAWYER THEORIES*

Not surprisingly, many practitioners assert that a faithful lawyer theory explains why the *pari passu* clause remains intact in sovereign lending instruments post-*Elliott*.[59] One such theory holds that standardized contract terms represent the highest evolution of a given

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56. *Id.* at ch. 1-2.

57. *Id.* at ch. 3. The dominant theory behind form contracting and boilerplate is one of Darwinian contractual evolution: standard terms survive "because they represent a contractual solution which is efficient from the standpoint of the firm. . . . Harmful heuristics, like harmful mutations . . . will die out." Clifford W. Smith, Jr. & Jerald B. Warner, *On Financial Contracting: An Analysis of Bond Covenants*, 7 J. FIN. ECON. 117, 123 (1979). *See also* Paul D. Cravath, *Reorganizations of Corporations*, 1 LECTURES ON LEGAL TOPICS, 153, 178 (N.Y.B. Ass'n ed. 1917).

58. *See, e.g.*, Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1126 (2005); Omri Ben-Shahar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 654 (2006); *Innovation in Boilerplate Contracts, supra* note 2, at 934-35; Goetz & Scott, *supra* note 2, at 283-84; Anna Gelpern & Mitu Gulati, *Feel-Good Formalism*, *35* QUEEN'S LAW J. 97, 97-98, 112-13, 115 (2009); Claire A. Hill, *Bargaining in the Shadow of the Lawsuit: A Social Norms Theory of Incomplete Contracts*, 34 DEL. J. CORP. L. 191, 191, 194, 199 (2009); Claire A. Hill, *Why Contracts are Written in "Legalese"*, 77 CHI.-KENT L. REV. 59, 59-60, 63 (2001); Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1585-86 (1998).

59. GULATI & SCOTT, *supra* note 7, at 88.

type of contract, containing great collective wisdom and time-tested terms.[60] In theory, during the development of these terms, latent ambiguities and defects are weeded out through a process of rejection and refinement, resulting in a near-perfect, and wholly understood written contract form.[61] If this were indeed the case, it would be imprudent for an attorney to disturb this higher evolved contract and substitute her own judgment for collective wisdom of the ages. With respect to the *pari passu* clause, however, Gulati and Scott assert that the reality disproves the theory, since there is "near zero" consensus as to the clause's meaning or purpose in the sovereign debt context.[62] From Gulati and Scott's tracking of use of *pari passu* over time, it appears that as its meaning became obscured, use of the clause became more universal.[63] If anything, Gulati and Scott conclude that the *pari passu* clause had only "symbolic content" in the sovereign context,[64] which does not align with the theory of a higher evolved, universally understood contract form.

Another faithful lawyer theory pertains to market uniformity.[65] This theory posits that there is value to having identical contractual products in a market, and that standard terms persist because the value of uniformity outweighs the cost of coordinating a move to new contractual language among all users.[66] The reality, however, does not show any penalty pricing of idiosyncratic terms.[67] First of all, the *pari passu* clauses across the market are subject to significant variation.[68] Interestingly, the variation among clauses has been little attended by practitioners and has had no impact on bond pricing.[69] In other words, the market value of bond issuances is not impacted by the presence or absence of the riskiest formulation of a *pari passu* clause as used in

60. Goetz & Scott, *supra* note 2, at 286; *supra* note 57.

61. GULATI & SCOTT, *supra* note 7, at 74.

62. *Id.*

63. *Id.*

64. *Id.* at 75 (An anonymous interviewee explained that "[t]he *pari passu* clause is just a ritualistic beating of the chest. It is symbolic. If you tried to take it out, bankers would squeal. It is on their checklist.").

65. *Id.* at 79.

66. FRANKLIN ALLEN & DOUGLAS GALE, FINANCIAL INNOVATION AND RISK SHARING 121-22 (1994). *See also Innovation in Boilerplate Contracts*, *supra* note 2, at 947.

67. GULATI & SCOTT, *supra* note 7, at 79-80.

68. *Id.* at 79.

69. *Id.* at 79-80.

Elliot.[70] There appears to be no rational, price-based reason to reject or elect a particular formulation of the *pari passu* clause, and therefore the clause could be—but, interestingly, is not—costlessly tweaked to mitigate the *Elliott* interpretation.[71]

The most widely touted faithful lawyer theory is that making any change to form language signals a novel risk to the counterparty and/or will invite costly additional negotiation.[72] Pursuant to this theory, a sovereign having used *pari passu* clauses in the past would be loath to change their form in future borrowings because this would be perceived as signaling a change in their credit status had changed.[73] Furthermore, once changes are proposed to one part of a form, it opens up the entire document to re-negotiation, which undercuts one of the great utilities of form use to begin with, namely ease of contracting.[74] The flaw in this theory is that over the past few decades, changes to boilerplate language in fact did occur in 15 to 20 percent of all deals, even among repeat issuers and even with respect to their *pari passu* clauses.[75] Interestingly, in spite of protestations that even a minor linguistic tweak would elicit contention and slow down a deal, none of the lawyers involved in these issuances even recall the changes that in fact were made.[76] The reality is, minor changes to the *pari passu* clause create neither concern nor contention during negotiations.[77]

Finally, resistance to change of standard language is also explained by a hindsight bias theory.[78] Some interviewed lawyers contended that changing language in response to *Elliott* would somehow indicate to subsequent tribunals the parties' implicit

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70. *Id.* This trend has continued in the months since the publication of their book, even in the wake of a Second Circuit opinion adopting the *Elliott* interpretation of the clause and specifically instructing parties to make changes to their boilerplate if they do not with this interpretation to be binding. *Supra* notes 47-48 and accompanying text.

71. GULATI & SCOTT, *supra* note 7, at 80.

72. *Id.* at 80-81.

73. Robert E. Scott, *A Relational Theory of Secured Financing*, 86 COLUM. L. REV. 901, 929 (1986). *See* Omri Ben-Shahar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 652 (2006).

74. GULATI & SCOTT, *supra* note 7, at 81.

75. *Id.* at 82.

76. *Id.*

77. *Id.* at 82-83.

78. *See* Chris Guthrie, *Misjudging*, 7 NEV. L.J. 420, 433-34 (2007); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 571-73 (1998).

agreement with the Brussels court's ruling (that the prior version of the clause must have meant what the court said it did).[79] Gulati and Scott explain that this justification "does not mesh with the case law on the interpretation of boilerplate bond contracts."[80] In fact, the most relevant case law suggests the opposite is true: failure to change contracts in response to a court's interpretation is seen as tacit approval of the judicial reading of the term.[81]

Underlying these theories is the concept of satisficing contracts: The idea that clients do not want to pay for perfectly drafted contracts, merely for contracts that are "good enough to serve its primary goals."[82] In the sovereign debt *pari passu* context, however, Gulati and Scott claim that the contracts do not satisfice.[83] The *pari passu* provision now has a problematic history, it "has shown itself not to work," sparking dispute as to its meaning and purpose in every sovereign debt crisis.[84] Prior disputes with respect to this clause have uncovered the clause's lack of efficacy. In addition, satisficing is only a valid justification when the costs to changing the clause would outweigh the benefits from doing so, and here, the clause could be cheaply and easily tweaked to avoid or at least greatly minimize the *Elliott* risk.[85]

B. *IMPERFECT AGENT THEORIES*

Because empirical evidence undercut the plausibility of each of the faithful lawyer theories, Gulati and Scott assessed whether the clause has persisted in sub-optimal form because of the "cognitive shortcomings" of lawyers and/or because of an ineffective business

79. GULATI & SCOTT, *supra* note 7, at 84.

80. *Id.* at 85.

81. *Id.* (discussing Metro. Life Ins. Co. v. RJR Nabisco, Inc., 716 F. Supp. 1504 (S.D.N.Y. 1989), and Morgan Stanley & Co. v. Archer Daniels Midland Co., 570 F. Supp. 1529 (S.D.N.Y. 1983)). In the Second Circuit's most recent ruling in the Argentine bond case, the court explicitly instructs that any future debt instruments containing identical clauses will be seen as party election to adopt the court's interpretation. NML Capital, Ltd. v. Republic of Argentina, 727 F.3d 230 (2d Cir. 2013).

82. GULATI & SCOTT, *supra* note 7, at 37-38, 87.

83. *Id.* at 87.

84. *Id.*

85. *Id.; supra* notes 70-71 and accompanying text.

model for law firms today.[86] Gulati and Scott examined risk aversion, anti-innovation bias, and herd behavior among lawyers, looking to see whether fear of stepping beyond the form hamstrings individual lawyer innovation and impedes proper legal representation.[87] At first blush, commoditization alone seems to explain boilerplate stickiness, but while this is a factor, reliance on forms and routines and "assembly-line" legal practice does not in itself explain why forms do not evolve in the face of adverse judicial interpretations.[88]

In addition to commoditization, Gulati and Scott found that the incentive structures of big law firms discourage initiative and beneficial contract form development.[89] It is the structure of the firm more than individual risk aversion that deters continued form evolution and leads to boilerplate stagnation.[90] Ironically, innovators of fixes to form language are reluctant to even take credit for improvements since within the firm culture making any changes to a form is systemically decried as value detracting.[91]

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86. GULATI & SCOTT, *supra* note 7, at 89.

87. *See, e.g.*, Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 WASH. U. L. Q. 347, 354-55 (1996); Larry E. Ribstein & Bruce H. Kobayashi, *Choice of Form and Network Externalities*, 43 WM. & MARY L. REV. 79, 110 (2001).

88. GULATI & SCOTT, *supra* note 7, at 91-92. Even though it is the clients who bear the adverse consequences of vague contract terms, some practitioners interviewed by Gulati and Scott blamed the clients themselves for over-reliance on forms. The authors quote one lawyer complaining that: "Today's clients are simply not willing to subsidize the kind of mentoring and training that is needed for young lawyers to learn anything." *Id.* at 91.

89. *Id.* at 93-94.

90. Unwilling to admit that form language could be the source of the problem, a few senior lawyers suggested that perhaps deviation from the form was actually the source of the problem in *Elliott*—that some junior associate had made an unauthorized "clarification" to the clause, and this mutated *pari passu* clause created latent risk exposed in *Elliott*. The "junior associate error" story not only contradicts the theories and evidence of risk aversion but does not mesh with the contract form dataset compiled by Gulati and Scott. GULATI & SCOTT, *supra* note 7, at 94-95. Furthermore, this explanation does not provide a reason for the proliferation of the "flawed" *pari passu* clause across the market, since now 40% of all documents in the market contain the "flawed" (most risky) version of the clause. *Id.* at 95.

91. *Id.* There is also sort of an anti-copyright status quo for contract drafting, where not only are innovations left unrewarded, but individuals do not seek to innovate or take credit for innovations they make. *See* Larry E. Ribstein, *Sticky Forms, Property Rights and Law*, 40 HOFSTRA L. REV. 65, 73-74 (2012) [hereinafter *Sticky Forms*] for a discussion of how a new property formulation for contract innovations may correct

Sovereign lending legal inadequacies also indicate a collective action problem.[92] In the years after *Elliott,* no single firm or lawyer was willing to undertake contractual reformulation while the market awaited an official response from, for example, the IMF, the Bank of England, the U.S. Treasury, or the Paris Group.[93] While official actors believe that solving the broader problem involving restructuring and holdout investors should be resolved at the public level,[94] this does not adequately explain why private actors did not undertake deal-specific solutions for their clients as the best resolution pending a public, global remedy.

The data compiled and analyzed by Gulati and Scott are better at disproving these various theories of contract form stickiness in the context of *pari passu* than proving the true reason for the clause's persistence. The most benign theory that is not disproven by the data is that there could be some utility in allowing a vague and incomprehensible clause to persist in a contract precisely in order to allow a clause to "shape-shift to fit contemporary circumstances."[95] But the authors could not find any real evidence of deliberate, strategic contractual vagueness. Considering the lack of proof to the contrary, the authors conclude that the most reasonable and consistent explanation is actually the more damning one: This is a structurally engendered agency failure.[96] Law firms discourage contract evolution, push transactional volume and conformity, and penalize innovation.[97]

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incentives in this realm. Gulati and Scott further credit (blame?) the lack of innovation on the compensation structure of law firms that reward lawyers for getting the deals done quickly rather than having perfectly designed contracts. GULATI & SCOTT, *supra* note 7, at 96. *See also* Gillian K. Hadfield, *Legal Barriers to Innovation* 19 (Univ. of S. California Law Sch., Legal Studies Working Paper Series, Paper No. 26, 2009), *available at* http://law.bepress.com/usclwps-lss/art26/; Larry E. Ribstein, *The Death of Big Law*, 3 WIS. L. REV. 749, 785-86 (2010).

92. Lee C. Buchheit & G. Mitu Gulati, *Sovereign Bonds and the Collective Will*, 51 EMORY L.J. 1317, 1344 (2002).

93. GULATI & SCOTT, *supra* note 7, at 99.

94. *Id.* at 99-100.

95. *Id.* at 105.

96. *Id.*

97. *Id.* at 79-81, 89-90, 93-94, 139-43, 148-49, 155-56. *See also* LEGAL MARKET REPORT, *supra* note 2, at 13 (noting that client hiring decisions is based on predictability and cost effectiveness rather than quality). *See also Sticky Forms*, *supra* note 91, at 70-71; Larry E. Ribstein, *The Death of Big Law*, 3 WIS. L. REV. 749, 785 (2010).

Furthermore, lawyers conceal and perpetuate this state of affairs through a broad mythology regarding origins of boilerplate language.[98] Essentially, law firms have failed to engage in the vital process that Gulati and Scott call contract research and design.[99]

IV. UNANSWERED QUESTIONS: WHAT DOES STICKY BOILERPLATE DISCLOSE FOR MODERN CONTRACT LAW AND LEGAL PRACTICE

Upon close inspection, the phenomenon described in *The Three and a Half Minute Transaction* seems to be a riddle wrapped in a mystery. The very existence and origin of the *pari passu* clause in sovereign debt instruments is enigmatic – one of the great unknowns of the practice, subject to deep inquiry and much debate.[100] Gulati and Scott explore the mystery and illuminate the origin and proliferation of *pari passu* clauses in sovereign debt instruments, an effort of much value in the current context of sovereign debt crises.[101] And Gulati and Scott attempt to unravel the riddle of why this clause persists in light of adverse client interests, although even their extensive empirical studies and theory analyses fail to offer a definitive answer to the *pari passu* persistence puzzle.[102] The authors' sleuthing and conclusions disclose

98. GULATI & SCOTT, *supra* note 7, at 109-11. *See also* Mark Weidemaier, Robert E. Scott & Mitu Gulati, *Origin Myths, Contracts, and the Hunt for Pari Passu*, 38 LAW & SOC. INQUIRY 72, 72-73 (2013).

99. In commenting on their studies, Larry Ribstein takes Gulati and Scott's conclusion one step further, explaining that a property-rights-based incentive problem further underlies the issue of contract form innovations. *Sticky Forms*, *supra* note 91, at 75 ("[P]art of the solution to the problem of sticky contracts may lie in giving the creation of law intellectual property protection comparable to that for other innovations.").

100. *Sovereign Debt*, *supra* note 36, at 874-75.

101. Most recently, Greece is experiencing a sovereign debt crisis and attempting a bond restructuring, "the largest such sovereign workout since the Hague Convention of 1907 barred countries from waging war on one another when debts go unpaid." Brian Baxter, *Trio of Top Firms Take Lead on $173 Billion Greek Debt Deal; The Firms*, AM. LAWYER (Feb. 21, 2012), http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202549872547. *See also* GULATI & SCOTT, *supra* note 7, at ch. 11. For recent innovations in sovereign debt lending in the Eurozone (which do not, incidentally, include removal of *pari passu* but instead require collective action clauses), *see* Michael Bradley & G. Mitu Gulati, *Collective Action Clauses for the Eurozone: An Empirical Analysis* 2 (March 28, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1948534.

102. GULATI & SCOTT, *supra* note 7, at 139-51. The danger of an *Elliott*-like interpretation of *pari passu* in the sovereign debt context remains real. For example,

even more compelling questions of broader impact on the law and legal practice. Although unarticulated in Gulati and Scott's book, their *pari passu* case study informs two broader inquiries. First, what does the reality of contract drafting today suggest about certain underlying assumptions in contract law? And, second, what does this story of boilerplate stickiness portend for the future of law practice?

Contract law presumes a writing is the best indication of contracting party intent,[103] and several key legal doctrines are based on this assumed primacy of a written document. For example, it is axiomatic in contract law that a signed writing evidences party intent and objective assent to terms contained therein.[104] Interpretive principles and the parol evidence rule bolster the legal treatment of a writing as the best indicator of agreement.[105] In interpreting a written contract, courts consider each provision to be deliberately included and

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the issue has been hotly contested in the Second Circuit as the court considers the case of Argentine bond restructuring.. Order, NML Capital, Ltd. v. Republic of Argentina, 699 F. 3d 246 (2d Cir. 2012), *available at* http://blogs.reuters.com/felix-salmon/files/2012/04/2012-02-23-Equal-Treatment-Remedy-Order.pdf. *See also* GULATI & SCOTT, *supra* note 7, at 14; Anna Gelpern, *Revival on the Head of a Pin: Do U Pari Passu?*, CREDIT SLIPS (Apr. 6, 2012, 4:26 PM), http://www.creditslips.org/creditslips/2012/04/revival-on-the-head-of-a-pin-do-u-pari-passu.html.

103. Michigan Chandelier Co. v. Morse, 297 N.W. 64, 67 (Mich. 1941) ("It is not within the function of the judiciary to look outside of the instrument to get at the intention of the parties and then carry out that intention regardless of whether the instrument contains language sufficient to express it; but their sole duty is to find out what was meant by the language of the instrument." (citing 12 Am.Jur. at 746-48)); *In re* Chicago & E.I. Ry. Co., 94 F.2d 296, 299 (7th Cir. 1938) ("[T]he intention of the parties must be found in the language used to express such intention."); *In re* Liljeberg Enterprises, Inc., 304 F.3d 410, 439 (5th Cir. 2002) ("[T]he contract's meaning and the intent of its parties must be sought within the four corners of the document and cannot be explained or contradicted by extrinsic evidence." (quoting Am. Totalisator Co., Inc. v. Fair Grounds Corp., 3 F.3d 810, 813 (5th Cir. 1993))); United States v. Johnson, 236 F. Supp. 2d 943, 949 (N.D. Iowa 2002) ("Absent ambiguity, intent is determined by the written words of the contract itself." (quoting Iowa Fuel & Minerals, Inc. v. Iowa Bd. of Regents, 47 N.W. 2d 859, 862 (Iowa 1991))).

104. Mellon Bank, N.A. v. Aetna Business Credit, Inc. 619 F.2d 1001, 1009 (3d Cir. Pa. 1980) ("The strongest external sign of agreement between contracting parties is the words they use in their written contract. Thus, the sanctity of the written words of the contract is embedded in the law of contract interpretation.").

105. RESTATEMENT (SECOND) OF CONTRACTS §§ 209-218; *see also* E. ALLEN FARNSWORTH, Contracts §§ 7.2-7.6 (3d ed. 2004). The parol evidence limits the admissibility of "extrinsic" evidence to contradict or supplement a written agreement.; U.C.C. § 2-202 (1970).

intended to have purpose and meaning.[106] If a writing is merely a collection of mindless repetitions of un-considered or even ritualistic and meaningless clauses, this assumption cannot really be justified.

The problem of sticky boilerplate in high-level, sophisticated sovereign transactions is thus another iteration of the broader problem of finding true assent in standard forms and contracts of adhesion. While contract law clearly holds that parties are bound by their manifested assent to terms that they clearly did not read or consider,[107] at the same time, courts have recognized that many such writings do not in any real sense indicate actual, subjective mutual assent.[108] Sovereign debt instruments are not adhesion contracts meriting judicial policing, but at the same time, the durability of boilerplate in even such

106. *E.g.*, Interpretive maxims require that a court "read a contract as a whole" and "give each provision and term effect, so as not to render any part of the contract mere surplusage." JFE Steel Corp. v. ICI Americas, Inc., 797 F. Supp. 2d 452, 469 (D. Del. 2011). *See, e.g.*, Goodman v. Resolution Trust Corp., 7 F.3d 1123, 1127 (4th Cir. 1993) (Contract terms must be construed "to give meaning and effect to every part of the contract, rather than leave a portion of the contract meaningless or reduced to mere surplusage."); Delta & Pine Land Co. v. Monsanto Co., No. Civ.A.1970-N, 2006 WL 1510417, at *4 (Del. Ch. May 4, 2006) ("[C]ontracts must be interpreted in a manner that does not render any provision 'illusory or meaningless.' "). *See also* Goetz & Scott, *supra* note 2, at 314.

107. *See, e.g.*, Desert Outdoor Adver. v. Superior Court, 127 Cal. Rptr. 3d 158, 163 (Cal. Ct. App 2011), reh'g denied (July 15, 2011), review denied (Sept. 28, 2011) ("A cardinal rule of contract law is that a party's failure to read a contract, or to carefully read a contract, before signing it is no defense to the contract's enforcement."); Advance Elevator Co., Inc. v. Four State Supply Co., 572 N.W.2d 186, 188 (Iowa Ct. App. 1997) ("Generally, an agreement in writing speaks for itself and absent fraud or mistake, ignorance of the contents will not serve to negate or avoid its contents"); Davis v. Davis, 124 S.E.2d 130, 133 (N.C. 1962) ("One who signs a written contract without reading it, when he can do so understandingly, is bound thereby unless the failure to read is justified by some special circumstance."); Odum v. Cotton States Fertilizer Co., 142 S.E. 470, 471 (Ga. Ct. App. 1928) ("Where one who can read signs a contract without apprising himself of its contents, otherwise than by accepting representations made by the opposite party . . . he cannot defend an action based on it, on the ground that it does not contain the contract actually made . . . .").

108. This reality is articulated in the Restatement (Second) of Contracts, that states, "A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms. . . . Customers do not in fact ordinarily understand or even read the standard terms." RESTATEMENT (SECOND) OF CONTRACTS §211 cmt. b. The Reasonable Expectations Doctrine with respect to boilerplate-based insurance contracts is based on the judicial presumption that insured parties do not read insurance contracts. *See, e.g.*, C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 176 (Iowa 1975); Elliott Leases Cars, Inc. v. Quigley, 373 A.2d 810, 813 (R.I. 1977).

elite deals casts doubt on the primacy of the writing approach to contract interpretation.[109]

Persistence of boilerplate is at once unsurprising and sobering. As the practice of law has changed from an art to a business, volume production of contracts combined with modern ease of duplication offers lawyers great profit potential.[110] This is true both for "Big Law" representing corporations and governments based on complicated firm precedents and for solo practitioners who pull legal forms off the Internet.[111] Clients also push contract commoditization by demanding cheaper, faster legal solutions to their business goals.[112]

Interestingly, the resultant reality for contract law is the same regardless of why off-the-rack contracts are chosen: Reliance on forms leads to divergence of intent from contractual language.[113] And, as the story of *pari passu* persistence shows, over-reliance on boilerplate creates risks as well, particularly when contract design does not account for contract litigation outcomes.[114] The divorce of intent from contract boilerplate causes a divorce of reality from the law and unjustifiably creates or perpetuates avoidable client risks. It is not enough to explain why this divergence occurs; there must be a plan to avoid it in the future.

This leads to the second unanswered question suggested by Gulati and Scott's informative study: What is the future for the transactional practice of law? Since the problem of sticky boilerplate reveals much about the failings of the transactional practices of today's lawyers and law firms and provides further ammunition in the popular attack on current lawyering practices, what can be done?[115] The story of *pari*

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109. *See* Andrea J. Boyack, *Common Interest Community Restrictions and the Freedom of Contract Myth*, J. OF L & POLICY (*forthcoming* 2014).

110. MACEWAN, *supra* note 1 (discussing profit increases in U.S. law firms over the past decade). *See also generally* LEGAL MARKET REPORT, *supra* note 2.

111. CHRIS BULL, THE LEGAL PROCESS IMPROVEMENT TOOLKIT (2012).

112. SUSSKIND, *supra* note 1, at 4.

113. BULL, *supra* note 108. Darryl R. Mountain, *Disrupting Conventional Law Firm Business Models using Document Assembly*, 15 INT'L J. L. & INFO. TECH. 170 171-72 (2006).

114. GULATI & SCOTT, *supra* note 7, at 93-99, 145-51, 163-65.

115. *See* MACEWAN, *supra* note 1. Current dissatisfaction with respect to legal services proceeds on the dual tracks of less valuable services and unduly expensive legal costs. Much client concern with respect to the latter has focused on the billable hour fee structure. Reform proposals and best practices and efficiency studies have all targeted hourly billing as a huge barrier to cost-effective and efficient delivery of legal

passu persistence in sovereign debt documents is really a wake-up call for all law firms and lawyers. In today's tighter and more cynical legal market, it is vital that lawyers at every level add sufficient value to a transaction to justify their salary and employ.[116] Transactional legal practice must focus on adding true value as an *ex ante* advocate, and that involves contract research and design, not just mechanical contract production.[117] Clients deserve creative, flexible, dynamic problem solvers,[118] and therefore law firms and law schools must evolve to encourage the bright legal minds of today to become just that.

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services. *See, e.g.*, Press Release, Huron Consulting Group, Huron Legal Survey Findings Provide Operational Efficiency Best Practices, Proven Tactics to Reduce Legal Spend for General Counsel (Jan. 25, 2013), *available at* eon.businesswire.com/news/eon/20130123005094/en/legal/law-department.

116. Susskind notes that "[m]ost clients tell me that they do not mind paying significant rates for experienced lawyers but they do object, with increasing indignation, to paying, for example, high hourly rates for relatively junior lawyers to undertake what they perceive as routine and repetitive work. This is the crux of the matter." SUSSKIND, *supra* note 1, at 20.

117. MATTHEW PARSONS, EFFECTIVE KNOWLEDGE MANAGEMENT FOR LAW FIRMS 10 (2004); MACEWAN, *supra* note 1, at 16-21(discussing the need of law firms to innovate in "research and design," comparing this mandate to developments in Proctor & Gamble since 2000); William Hornsby, *Challenging the Academy to a Dual (Perspective): The Need to Embrace Lawyering for Personal Legal Services*, 70 MD. L. REV. 420, 430 (2011) (advocating an overhaul of how and to whom legal services are provided in the United States). Law firms have traditionally developed specialties by disaggregating legal services, maximizing volume and expertise. GULATI & SCOTT, *supra* note 7, at 145-51. The findings of Gulati & Scott call into question the overall wisdom of disaggregation when it comes to contract research and design. *Id.* The disaggregation trend, however, is only accelerating among legal service providers. *See* Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 FORDHAM L. REV. 2137, 2139 (2010). The need to reinvent the role of lawyers has been a hot topic of discussion among both attorneys and clients. *See, e.g.*, Tricia Pelton, *The New Normal: Collaboration Between Corporates, Law Firms and LPO Providers*, HILDEBRANDT INST. (Nov. 15, 2012), http://hildebrandtblog.com/2012/11/15/the-new-normal-collaboration-between-corporates-law-firms-and-lpo-providers/ ("The legal profession isn't immune from process re-engineering: it needs to flex and keep changing and law firms need to embrace that change if they are to remain competitive." quoting John Collins of Royal Bank of Scotland).

118. Clients today demand superlative lawyering, and the competition among lawyers for clients is becoming more and more pronounced. *See* LEGAL MARKET REPORT, *supra* note 2, at 14 (calling the market for legal services "significantly more competitive"); SUSSKIND, *supra* note 1. On barriers to innovation in transactional law practice, *see* Goetz & Scott, *supra* note 2, at 263-64.

Gulati and Scott's research supports their assertion that transactional legal practice has evolved into a quantity over quality endeavor.[119] Of course, Gulati and Scott are not the first to point out this trend.[120] While commoditization may, to some extent, be a welcome cost-saver,[121] mindless boilerplate churning is a distressing development for lawyers as well as clients. Contracting commoditization not only dissociates transactional practice from the creative and analytic skills prized by generations of lawyers and honed in our law schools, but as a practical matter renders lawyers less valuable and less necessary to contracting.[122] Furthermore, transactional practice focused on producing assembly-line contracts is far less fulfilling for the practitioner.

There is an escape from such a tedious future for transactional practice, and the next generation of lawyers need not be doomed to exist as modern versions of Herman Melville's Bartleby the Scrivener,[123] mindlessly yet painstakingly copying reams of legalese. Lawyers today can reinvent their roles, and embrace form contract use that involves adequate attention to contract research and design. This seems to be the unstated moral of Gulati and Scott's *pari passu* tale. Since the dawn of form contracts, contract research and design has been touted in theory, if not in practice.[124] Law firm structure,

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119. GULATI & SCOTT, *supra* note 7, at 90-91, 145, 149, 156. Associates have been replaced by contract lawyers who can be outsourced to poorer nations and who in turn can be replaced by machines. The real future of law practice lies in finding a way to reintroduce quality in a way that justifies client costs. *See also* BULL *supra* note 108; *infra* note 117.

120. *See* SUSSKIND, *supra* note 1, at 23-26.

121. *Id.* at 23 ("[F]rom the client's point of view, this shift towards routinization is a good thing, because it attracts much lower fees).

122. *Id.* at 20 (Distinguishing true value-adding legal processes from those that "can be routinized and undertaken more efficiently, whether by less qualified, lower-cost human beings, or through computerization.").

123. Herman Melville, *Bartleby*, *in* THE COMPLETE STORIES OF HERMAN MELVILLE, (Jay Leyda ed., 1949). *See also* Tal Kastner, *"Bartleby:" A Story of Boilerplate*, 23 LAW & LIT. 365 (2011).

124. For example, in a series of articles, Latham & Watkins partner Joshua Stein has addressed template improvement as an important and valuable part of transactional practice. Joshua Stein, *Template for a Template: A Checklist to Prepare or Improve Any Model Document*, PRACTICAL LAWYER, Apr. 2000, at 15, *available at* http://www.joshuastein.com/infoFrame.php?pdf=71; Joshua Stein, *How Could Anyone Possibly Have Comments on My Masterpiece?*, PRACTICAL LAWYER, June 2000, at 12,

however, must devote resources to contract research and design in order to actually realize it. If nothing else, *The Three and a Half Minute Transaction* shows why attending to the contract forms and maintaining and updating boilerplate are vital to managing client risks. Commoditization is unavoidable, but it is not the problem *per se*. Commoditization can be managed in order to serve the twin goals of efficiency and efficacy.[125] It is true that lawyers are less valuable in truly rote legal practices, but contract research and design demands all the creativity, depth of understanding, and problem-solving that the best lawyers can provide.[126]

V. CONCLUSION

The Three and a Half Minute Transaction is a cautionary tale about modern legal practice where the protagonist is the standard sovereign debt contract. The book discloses an undeniable flaw in sovereign bond boilerplate that, in spite of expensive, sophisticated lawyering, perpetuates a risky disconnect between party intent and contract terms.[127] The fact that boilerplate terms persist even in elite

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available at http://files.ali-cle.org/thumbs/datastorage/lacidoirep/articles/PL_TPL0006_Stein_thumb.pdf.

125. One recent model of embracing technology and using it to enhance legal problem solving rather than creating lawyer redundancy is Kingsley Martin's firm KMStandards. Martin has been named a "Legal Rebel," and his company and approach to legal services have been highlighted by the American Bar Association. *See* Stephanie Francis Ward, *Simplify Contracts with Software, Says Legal Rebel*, ABA JOURNAL (May 28, 2013, 3:16 PM) *available at* http://www.abajournal.com/legalrebels/article/legal_rebel_kingsley_martin. Alexander Graham Bell said, "[w]hen one door closes, another opens; but we often look so long and so regretfully upon the closed door that we do not see the one which has opened for us." CHINAZOM B. C. IWUABA, SHAPED BY STRUGGLES 70 (2010).

126. Susskind opines that tomorrow's clients will expect more from their lawyers in terms of understanding their business models and goals and creative approaches to managing their risks and solving their problems. SUSSKIND, *supra* note 1, at 64, 67.

127. Since *Elliott,* numerous other litigants have advanced the previously-unknown interpretation of the *pari passu* clause, lending credence to Gulati and Scott's claim that the persistence of this clause in boilerplate does have a real, and likely risky, effect. *See* Republic of Nicaragua v. LNC Invs. LLC, General Docket No. 2003/KR/334, P11 (Court of Appeal of Brussels, 9th Chamber, Mar. 19, 2004); Kensington Int'l Ltd. v. Republic of Congo, [2003] EWCA (Civ) 709 [2] (Eng.), 2003 WL 1935493 (May 13, 2003); Order Granting Motion for (1) Specific Performance in Aid of Execution; and (2) Assignment of Assets at 2, Red Mountain Fin., Inc. v. Democratic Republic of Congo, No. CV 00-0164 R (BQRx) (C.D. Cal. May 29, 2001); Complaint at 11, 15, Kensington Int'l Ltd. v. BNP Paribas SA, No. 03602569 (N.Y.

sovereign-lending practices suggests that the problem of over-reliance on unexamined standard form language is ubiquitous.[128] When contract terms diverge from client needs and intent, lawyers have neither provided clients client risk management nor justified their fees.

Focused on solving the *pari passu* clause origin and proliferation mysteries, Gulati and Scott suggest but refrain from spelling out the resolution to the agency failure they uncover. Awareness that the problem exists, however, it is a vital first step. Situated in the context of sovereign debt failures and a profession at a crossroads, the authors' engaging book sounds a well-researched wake-up call to the law. *The Three and a Half Minute Transaction* offers no specific answers to either sovereign debt or transactional legal practice shortcomings, but it does something perhaps even more important: It motivates the reader to seek her own remedy. This sort of careful and compelling tale of legal imperfections can encourage lawyers to apply their creative problem-solving skills to update and improve the practice of law itself.

Sup. Ct. Aug. 13, 2003). *See also* Olivares-Camina *supra* note 14 and GULATI & SCOTT, *supra* note 7, at ch. 11.

128. GULATI & SCOTT, *supra* note 7, at 162-63. *See, e.g.*, Omri Ben-Shahar & James J. White, *Boilerplate and Economic Power in Auto Manufacturing Contracts*, 104 MICH. L. REV. 953 966 (2006).