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The International Market for Contracts: The Most Attractive Contract Laws

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The International Market for Contracts: The Most Attractive Contract Laws

*By Gilles Cuniberti**

Abstract: This Article aims to contribute to a better understanding of the international contracting process by unveiling the factors that influence international commercial actors when they choose the law that governs their transactions. Based on an empirical study of more than 4,400 international contracts by approximately 12,000 parties who participated in arbitrations under the aegis of the International Chamber of Commerce, this Article offers a method of measuring the international attractiveness of contract laws. It shows that parties' preferences are homogenous and that the laws of five jurisdictions dominate the international market for contracts. Among them, two are chosen three times more often than their closest competitors: English and Swiss laws. This Article then inquires which features made English and Swiss laws more attractive than other jurisdictions' laws and seeks to verify whether the postulate is true that international commercial parties are rational actors. It concludes that while some parties might have the resources to study the content of available laws before deciding which one to choose, others have no intention of investing such resources and are happy to rely on cheaper means to assess the content of foreign laws, including proxies. Furthermore, some parties suffer from cognitive limitations, the most important of which is parties' fear of the unknown and their correlative need to select a law resembling their own. Finally, unsophisticated parties might not fully appreciate the extent of their freedom to choose the law governing their transaction and might wrongly believe that it is constrained by largely irrelevant factors such as the venue of the arbitration.

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I. INTRODUCTION

Parties to international business transactions may freely choose the law governing their contract. Particularly in the context of international commercial arbitration, parties' freedom of choice is not limited by a requirement that the chosen law be connected to the transaction or, for that matter, to the parties themselves.[1] As a result, sophisticated parties are free to choose a contract law that best fits their needs, irrespective of its connection to the particular transaction. Accordingly, more attractive laws might frequently be chosen, bringing additional business to the lawyers trained in that particular law. Such success might also create an international market for contracts in which lawyers and states could opt to compete.

In recent years, some national lawyers' associations have competed for international contracts through marketing materials that promote their contract law. The Law Society for England and Wales initiated the practice when, in 2007, it issued a brochure promoting England and Wales as the Jurisdiction of Choice.[2] In 2008, the German federal Ministry of Justice, in conjunction with the German legal professions, published a similar brochure praising German law in general and German contract law in particular.[3] These marketing efforts demonstrate that elites in at least some jurisdictions believe that there is an international market for contracts in which it is worth competing.

In 2009, Geoffrey Miller and Theodore published the results of an empirical study of U.S. domestic contracts that involved publicly held companies. This study revealed a robust market for large commercial contracts in the United States dominated by New York.[4] Is there a comparable market for international contracts? Do international commercial parties provide for laws other than their own?

This Article offers an empirical study of more than 4,400

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[1] *See infra* notes 13–14 and accompanying text. The same freedom is less common in the context of international litigation. For instance, it exists in the European Union. *See* Rome I Regulation, 593/2008, art. 3, 2008 O.J. (L 177) 6, but not in the United States. *See infra* note 14.

[2] LAW SOC'Y OF ENGLAND & WALES, ENGLAND AND WALES: THE JURISDICTION OF CHOICE (2007).

[3] BUS. OFFICE OF THE ALLIANCE FOR GERMAN LAW, LAW—MADE IN GERMANY: GLOBAL, EFFECTIVE, COST-EFFICIENT (2d ed. 2012).

[4] Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073 (2009) [hereinafter Miller & Eisenberg, *Market for Contracts*]; Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475 (2009) [hereinafter Eisenberg & Miller, *Flight to New York*].

international contracts concluded by close to 12,000 parties based on an analysis of data published by the International Chamber of Commerce (ICC) regarding contractual practices used in ICC arbitrations (the "ICC Arbitration Data"). This is, by far, the largest study of international contractual practices ever conducted. Previous comparable studies were limited to samples of a few hundred arbitral awards or interviews of practitioners.[5]

This Article offers two important contributions. First, it provides empirical evidence of the existence of a market for international contracts comparable to the market currently found in the United States. This Article also attempts to assess the market for international contracts' actual size: it might be as large as 30% of all international contracts. If there is evidence that parties to international commercial transactions often choose to apply a contract law other than their own, the next question is which contract laws do such parties choose? Given the diversity of such parties, one might expect their preferences to be heterogeneous.

This Article's second contribution is to provide empirical evidence that such parties' preferences are quite homogenous and that the laws of a small number of jurisdictions dominate the international market for contracts. More precisely, this study reveals that, when international commercial parties select a law other than their own, they generally choose the law of one of five jurisdictions. However, these five jurisdictions are not equally attractive to international parties: two are chosen three times more frequently, and thus, considered market leaders. This Article also offers a method for measuring these contract laws' international attractiveness. Using that method, I determined that the attractiveness of these laws ranks as follows:

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[5] *See* Stefan Vogenauer, *Perceptions of Civil Justice Systems in Europe and Their Implications for Choice of Forum and Choice of Contract Law: An Empirical Analysis*, *in* CIVIL JUSTICE SYSTEMS IN EUROPE: IMPLICATIONS FOR CHOICE OF FORUM AND CHOICE OF CONTRACT LAW 1 (Stefan Vogenauer & C. Hodges eds., forthcoming 2014) (survey of 100 businesses); Stefan Voigt, *Are International Merchants Stupid? Their Choice of Law Sheds Doubt on the Legal Origin Theory*, 5 J. EMPIRICAL LEGAL STUD. 1 (2008) (580 awards); Stefan Vogenauer & Stephen Weatherill, *The European Community's Competence to Pursue the Harmonisation of Contract Law—An Empirical Contribution to the Debate*, *in* HARMONISATION OF EUROPEAN CONTRACT LAW: IMPLICATIONS FOR EUROPEAN PRIVATE LAWS, BUSINESS AND PRACTICE 105 (Stefan Vogenauer & Stephen Weatherill eds., 2006) (survey of 175 businesses); Corinne Truong, *The Law Applicable to the Merits in International Distribution Contracts: An Analysis of ICC Arbitral Awards*, 12 INT'L CT. OF ARB. BULL. 37 (2001) (141 awards).

Type	2007–2012
English Law	11.20
Swiss Law	9.91
U.S. State Laws	3.56
French Law	3.14
German Law	2.03

Part II of this Article presents the ICC Arbitration Data and explains the methodology used in this study.

Part III seeks explanations for the observation that English and Swiss laws are around three times more attractive to international commercial actors than U.S., French, or German contract laws. Intuitively, assuming most international commercial actors are sophisticated, their more frequent choice of English or Swiss law might suggest that those contract laws afford rules that are better suited to the actors' interests. There are, however, a number of factors other than the intrinsic qualities of specific contract laws that might influence the parties' choice of law in international contracts. First, I consider what these extrinsic factors might be. I then explore whether the intrinsic qualities of English and Swiss law fully explain their international attractiveness. I conclude that no extrinsic or intrinsic factors, by themselves, can explain my findings. In particular, there is no discernable particularity shared by English and Swiss law that explains their international attractiveness.

Finally, in Part IV, I consider whether my results could be explained by distinguishing different categories of parties that might have different preferences and, therefore, might rely on different factors for the purpose of choosing the law that governs their contract. I conclude that, while international commercial parties might have similar preferences, these parties address choice of law differently for three reasons. First, they might want to invest different resources in the process of selecting the applicable law. While some parties may be ready to incur the costs of determining the content of foreign law, others might want to assess the quality of foreign laws through less rigorous but cheaper means. Second, their rationality might be bounded by a number of considerations, the most important of which being the fear of the unknown and the correlative need for selecting a law resembling their own. Third, unsophisticated parties might not fully appreciate the extent of their freedom to choose the law governing their transaction and might wrongly believe that it is constrained by largely irrelevant factors such as the venue of the arbitration.

II. THE STUDY OF 4,427 INTERNATIONAL CONTRACTS

A. The Sample

This Article analyzes empirical evidence on commercial parties' choice of contract law in international transactions. At the outset, it must be conceded that the study of international contractual practices presents numerous methodological difficulties. The first and most obvious difficulty comes from a lack of access to the relevant data. Public information is scarce. Many commercial contracts are subject to confidentiality clauses. Moreover, private commercial parties are typically not obligated to make their contracts public even when no confidentiality clause exists.[6] A second difficulty is the sheer volume of international commercial contracts executed around the world. The total number is undoubtedly enormous, which raises questions about the representativeness of any sample considered as part of an empirical study.

Acknowledging these methodological difficulties, this Article posits that the statistics published by the International Court of Arbitration of the International Chamber of Commerce—the ICC Arbitration Data[7]—are meaningful for the purpose of empirically studying the contractual practices of international commercial parties.[8] The ICC is one of very few institutions involved in international commerce, and may be the only one to publish data on the subject. Most other arbitral institutions do not.[9] Considered the

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[6] In some circumstances, applicable law may compel certain types of commercial actors to publish some of their contracts (in whole or in part), but these contracts could, at best, only aid in understanding the practices of those subject to such requirement. Moreover, the contracts might not be international. For instance, U.S. law requires publicly traded companies to publish portions of certain types of contracts, a review of which revealed that they were typically domestic. *See* Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1975 (2006).

[7] The ICC Data is published each year in the ICC International Court of Arbitration Bulletin. All ICC Data cited throughout this Article for a given year is thus available in one of the early issues of the ICC International Court of Arbitration Bulletin for the following year.

[8] For a prior analysis of data for year 2008, see Voigt, *supra* note 5. Voigt's project was different, however, because his aim was not to assess the international attractiveness of contract laws, but rather to challenge the legal origin theory developed by La Porta, Lopez de Silanes, Shleifer, and Vishny. *See, e.g.*, Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998).

[9] I have personally contacted the Stockholm Chamber of Commerce and the London Court of International Arbitration, which both declined to provide statistics to me. Although no reason was given, the most likely is that none of these institutions has collected such data. One exception is the Swiss Chambers' Arbitration Institution, which has begun publishing statistics in 2011. I discuss those statistics below in the text accompanying notes 55–60. Finally, two

leading arbitral institution in the world for settling international commercial disputes, the ICC handles between 600 and 800 commercial disputes each year. This study focuses on the period from 2007 to 2012, during which the ICC provided precise data on more than 4,400 international contracts. From my perspective, the sample is of a reasonable size to draw some conclusions about international commercial practices.

1. Arbitral Awards as Data on Contractual Practices

At the outset, it must be acknowledged that the ICC Arbitration Data only concerns contracts that gave rise to disputes requiring external resolution. Unlike these contracts, most commercial contracts do not require external resolution. It could, therefore, be argued that the ICC Arbitration Data is not representative of international commercial contracts in general, but only of those which give rise to disputes that could not be resolved without resort to external dispute resolution. Such disputes may arise out of the particular contracts precisely because of clauses they contain, which might incentivize the parties to seek external resolution. These clauses might include choice of law clauses. Thus, one might argue that the ICC Arbitration Data does not reveal those laws which commercial parties generally prefer, so much as those laws which are preferred by parties who eventually sue each other. Taking that argument to its logical conclusion, this could mean that some laws would be prone to require external dispute resolution while others would not.

While this hypothesis cannot be excluded, I have not found a study that suggests its veracity. Rather, this Article might provide evidence that this hypothesis should be rejected. Arguably, some laws might be more prone to require external dispute resolution because they lack precision. Conversely, laws affording detailed and precise rules should be less prone to require external dispute resolution and, therefore, should not be well represented in contracts that end up in arbitration.[10] However, English law is often described as one of the most precise and detailed contract laws in the world. If the choice of the law governing contracts significantly impacted the external dispute resolution rate, one would expect English law to do

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Asian arbitral institutions have recently agreed to provide data on choice of law to me. The author is currently working on a paper presenting and analyzing them.

[10] Precise rules should make the outcome of litigation predictable and, therefore, more likely to give to the parties an incentive to settle any disagreement by negotiation without incurring litigation costs.

poorly in any study based on disputed cases. However, in this study, it ranks first as the law chosen by commercial actors resorting to external dispute resolution.[11]

A second peculiarity with respect to the ICC Arbitration Data is that the international contracts it includes gave rise to disputes, which the parties agreed to arbitrate rather than litigate. Commercial contracts providing for arbitration are likely to differ from other contracts in one important respect: their average value is likely to be much higher. This is because, in most countries, arbitration is significantly more expensive than litigation. Arbitrators must be compensated, and attorneys often charge higher fees.[12] As a result, one might assume that sophisticated parties provide for arbitration only when a certain minimum value is at stake.[13] The link between this monetary issue and the parties' choice of law, however, seems tenuous. Nevertheless, one might reasonably believe that sophisticated commercial actors in high-stake transactions are far less likely than parties in lower-stake transactions to leave the choice of law governing their contracts to the vagaries of private international law. Rather, such parties are far more likely to invest their resources in negotiating an acceptable choice of applicable law provision. Thus, the ICC Arbitration Data may actually be much more meaningful than a sample of international cases adjudicated in national courts.

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[11] Of course, it is possible that the study will still understate the attractiveness of English law, which might be underrepresented in the ICC Arbitration Data as contracts governed by English law may be less likely to give rise to disputes (or at least disputes that require external dispute resolution) than others.

[12] This statement might come as a surprise to many U.S. lawyers, as the United States is one of the few, if not the only jurisdiction where arbitration is perceived as a cheaper mode of dispute resolution. However, litigation is much cheaper in civil law jurisdictions, if only because of the absence of pre-trial discovery and of the much shorter duration of trials. As a consequence, lawyers charge much less for litigation, and arbitration appears as a much more sophisticated and expensive mode of dispute resolution.

[13] Cases going to ICC arbitration rarely involve less than $200,000. *See* 19 INT'L CT. OF ARB. BULL. 13 (11.3% in 2007); 20 INT'L CT. OF ARB. BULL. 14 (7% in 2008); 21 INT'L CT. OF ARB. BULL. 14 (7% in 2009); 22 INT'L CT. OF ARB. BULL. 14 (6.8% in 2010); 23 INT'L CT. OF ARB. BULL. 14 (5.3% in 2011); 24 INT'L CT. OF ARB. BULL. 13 (5.8% in 2012). Moreover, the value of the disputes between $200,000 and $1 million represent less than a fifth of the cases. *See* 19 INT'L CT. OF ARB. BULL. 13 (18% in 2007); 20 INT'L CT. OF ARB. BULL. 14 (20.7% in 2008); 21 INT'L CT. OF ARB. BULL. 14 (16.4% in 2009); 22 INT'L CT. OF ARB. BULL. 14 (17.9% in 2010); 23 INT'L CT. OF ARB. BULL. 14 (17.5% in 2011); 24 INT'L CT. OF ARB. BULL. 13 (19.1% in 2012). On the other hand, around half of the cases involve values between $1 million and $30 million. *See* 19 INT'L CT. OF ARB. BULL. 13 (46.6% in 2007); 20 INT'L CT. OF ARB. BULL. 14 (47.7% in 2008); 21 INT'L CT. OF ARB. BULL. 14 (50.5% in 2009); 22 INT'L CT. OF ARB. BULL. 14 (50.5% in 2010); 23 INT'L CT. OF ARB. BULL. 14 (50.9% in 2011); 24 INT'L CT. OF ARB. BULL. 13 (50.3% in 2012).

Furthermore, parties have far greater freedom to choose their preferred contract law in the context of international arbitration than in litigation before national courts. This is because the vast majority of national arbitration laws recognize the parties' unlimited freedom to choose the applicable law,[14] while courts will sometimes only enforce the parties' choice of law if the clause calls for the application of a law connected to the dispute.[15] Moreover, national judges are almost invariably lawyers trained in a single legal system. Sophisticated parties might thus be reluctant to ask a national court to apply any law other than its own, since asking a national judge to apply a foreign law would not only be costly, but could easily result in errors and misinterpretations as to that foreign law's content. In contrast, members of arbitral tribunals do not typically come from a single legal background. Moreover, the parties can freely choose the tribunal members after a particular dispute arises, allowing them to take the specific dispute and the applicable law into account when making that choice and to appoint arbitrators familiar with the applicable law. This freedom to choose arbitrators based on their background and expertise allows commercial actors to, at the time of formation, ignore questions about the quality and skill of the adjudicator.

2. *Types of Contracts and Geographical Origin of the Parties*

Another aspect of the ICC arbitration statistics that may raise questions about the sample's representativeness could be that the data only involves certain types of contracts, or only parties from certain parts of the world. But the industries involved in the statistics are remarkably varied. Construction and engineering disputes are the most numerous, accounting for more than 15% of the cases.[16] Energy disputes account for about 10% of the cases.[17] The

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[14] *See*, *e.g.*, UNCITRAL Model Law on International Commercial Arbitration art. 28 (1985).

[15] This has long been the general rule in the United States. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971). The only exception is that a number of states have derogated to the Restatement for choices of forum law under certain conditions. *See infra* note 42.

[16] *See* 19 INT'L CT. OF ARB. BULL. 12 (14.3% in 2007); 20 INT'L CT. OF ARB. BULL. 13 (over 15% in 2008); 21 INT'L CT. OF ARB. BULL. 14 (15% in 2009); 22 INT'L CT. OF ARB. BULL. 14 (almost 17% in 2010); 23 INT'L CT. OF ARB. BULL. 14 (18.5% in 2011); 24 INT'L CT. OF ARB. BULL. 13 (17% in 2012).

[17] *See* 19 INT'L CT. OF ARB. BULL. 12 (10.8% in 2007); 20 INT'L CT. OF ARB. BULL. 13 (10.4% in 2008); 21 INT'L CT. OF ARB. BULL. 14 (almost 10% in 2009); 22 INT'L CT. OF ARB. BULL. 14 (almost 13% in 2010); 23 INT'L CT. OF ARB. BULL. 14 (12.5% in 2011); 24 INT'L CT. OF ARB. BULL. 13 (15% in 2012).

remaining 75% of the disputes involve a variety of other sectors, with arbitrations addressing disputes in telecommunication and information technology,[18] finance and insurance,[19] transport,[20] general trade and distribution,[21] and industrial equipment.[22]

The origins of parties to ICC arbitrations are also remarkably diverse. In fact, more than 120 nationalities are represented.[23] The ICC is a truly international organization. Nevertheless, the proportion of certain nationalities participating in ICC arbitrations suggests that some are overrepresented in the sample. Although, the United States has been the most represented nationality over the last ten years, it seems that European parties are overrepresented in ICC arbitrations. They consistently represent more than half of the parties,[24] while Asia (and Pacific) and the Americas typically contribute only 20% of all parties each,[25] and Africa 6%.[26] Europe's share in world trade, however, has long been less than 50%; its share is around 40% for

[18] *See* 19 INT'L CT. OF ARB. BULL. 12 (10.2% in 2007); 20 INT'L CT. OF ARB. BULL. 13 (8.1% in 2008); 21 INT'L CT. OF ARB. BULL. 14 (7.7% in 2009); 22 INT'L CT. OF ARB. BULL. 14 (8.2% in 2010); 23 INT'L CT. OF ARB. BULL. 14 (9% in 2011); 24 INT'L CT. OF ARB. BULL. 13 (8% in 2012).

[19] *See* 20 INT'L CT. OF ARB. BULL. 13 (7.2% in 2008); 21 INT'L CT. OF ARB. BULL. 14 (almost 10% in 2009); 22 INT'L CT. OF ARB. BULL. 14 (9.1% in 2010); 24 INT'L CT. OF ARB. BULL. 13 (8% in 2012).

[20] *See* 20 INT'L CT. OF ARB. BULL. 13 (6.8% in 2008); 21 INT'L CT. OF ARB. BULL. 14 (6% in 2009); 22 INT'L CT. OF ARB. BULL. 14 (7.1% in 2010).

[21] *See* 20 INT'L CT. OF ARB. BULL. 13 (6.5% in 2008); 21 INT'L CT. OF ARB. BULL. 14 (5.6% in 2009); 24 INT'L CT. OF ARB. BULL. 13 (6% in 2012).

[22] *See* 20 INT'L CT. OF ARB. BULL. 13 (6.2% in 2008); 21 INT'L CT. OF ARB. BULL. 14 (5.3% in 2009); 24 INT'L CT. OF ARB. BULL. 13 (6% in 2012).

[23] The ICC reports that parties came from 125 countries in 2006, 126 countries in 2007, 120 countries in 2008, and 128 countries in 2009. *Statistics*, INT'L CHAMBER OF COMMERCE, http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/ (last visited Feb. 28, 2014).

[24] *See* 19 INT'L CT. OF ARB. BULL. 7 (55.3% in 2007); 20 INT'L CT. OF ARB. BULL. 8 (53% in 2008); 21 INT'L CT. OF ARB. BULL. 6 (53% in 2009); 22 INT'L CT. OF ARB. BULL. 7–9 (50.3% in 2010); 23 INT'L CT. OF ARB. BULL. 7 (52.2% in 2011); 24 INT'L CT. OF ARB. BULL. 7 (48.9% in 2012).

[25] *See* 19 INT'L CT. OF ARB. BULL. 6–7 (in 2007, 22.1% for the Americas and 19.1% for Asia and the Pacific); 20 INT'L CT. OF ARB. BULL. 6–7 (in 2008, 22% for the Americas and 20% for Asia and the Pacific); 21 INT'L CT. OF ARB. BULL. 6 (in 2009, 21% for the Americas and 20% for Asia and the Pacific); 22 INT'L CT. OF ARB. BULL. 8 (in 2010, 23.7% for the Americas and 19.8% for Asia and the Pacific); 23 INT'L CT. OF ARB. BULL. 7 (in 2011, 19% for the Americas and 21% for Asia and the Pacific); 24 INT'L CT. OF ARB. BULL. 7 (in 2012, 22.2% for the Americas and 22.7% for Asia and the Pacific).

[26] *See* 19 INT'L CT. OF ARB. BULL. 7 (3.5% in 2007); 20 INT'L CT. OF ARB. BULL. 6 (6% in 2008); 21 INT'L CT. OF ARB. BULL. 6 (6% in 2009); 22 INT'L CT. OF ARB. BULL. 7–9 (6.2% in 2010); 23 INT'L CT. OF ARB. BULL. 7 (7.8% in 2011); 24 INT'L CT. OF ARB. BULL. 7 (6.2% in 2012).

services, and only slightly above 30% for goods.[27] Such figures, of course, are not exactly comparable: the ICC reports on single disputes, while world trade is calculated in value. Yet, as it would be impossible to know, much less consider, all international commercial contracts concluded in a given year around the world, comparing the relative proportion of nationalities in world trade seems to be a logical and reasonable method to get a sense of whether the ICC data is or is not representative. From a geographical perspective, based on the origin of the parties, the comparison suggests that the data sample is not. European parties are likely to be overrepresented while American and Asian parties underrepresented.

This lack of representativeness, however, does not negatively impact this study. The purpose of my Article is to assess the international attractiveness of different contract laws. As I will explain in more detail below, I contend that such attractiveness can be determined by looking at situations in which parties to an international transaction deliberately choose a third-state law. If Europeans are, in fact, overrepresented in the data, this suggests only that the study is more representative of their preferences than, say, the preferences of American or Japanese parties. But this does not mean that American or Japanese contract laws are disadvantaged in any way in the study. Rather, if there are fewer American parties in the sample, the consequence is only that there are more cases where neither party is American. As a result, the parties could choose American law as a law applicable to their contract. If there is a bias in the data, then it is against the laws of European states, and in favor of U.S. State laws.

B. An Empirical Analysis of the Choice of National Law

1. The Hypothesis

Two data points are essential for assessing the international attractiveness of different contract laws. The first data point is the law that parties choose to govern their contracts. International contracts are typically concluded by parties based in different jurisdictions. Each typically knows the laws of his particular jurisdiction, but does not know those of other jurisdictions, including

[27] *See Reports*, UNCTADstat, http://unctadstat.unctad.org/ReportFolders/reportFolders.aspx (last visited Apr. 19, 2014) (between 2007 and 2012, the share of Europe in world trade decreased from 50% to 45% for export of services, from 46% to 40% for import of services, from 40.38% to 33.67% for exports of goods, and from 40.58% to 33.14% for import of goods).

the law of the other party. Accordingly, parties often prefer to submit their contract to their law—both because they would not incur the additional costs associated with learning a foreign law and because it is psychologically more comfortable to know that a law that they are familiar with is being applied.[28] However, it is not always possible to satisfy parties from different jurisdictions in international contracts. Rather, the parties must settle on one of two solutions. The first is to choose the law of one party. When they do this, it can be for reasons unrelated to the quality of the chosen law. For example, one party may have greater bargaining power and, because of this, be able to impose his own law. The parties may also choose one party's law simply to save the costs of learning of a foreign law for at least one of them.[29]

In the alternative, the second solution is to choose a third-state law. Despite the fact that both parties must incur the cost of learning a foreign law when this option is followed, conventional wisdom suggests that parties select this option when they are unable to agree on either of their own laws, and that this solution is the only way to resolve an otherwise intractable issue.[30] Conventional wisdom suggests that the reason for choosing the third-state is purely negative: neither party wants the law of the other to apply. However, once that negative decision is made, the choice of which third-state law becomes a positive choice: the parties have to agree on a third-state law, which is attractive to both of them. Efficiency-minded parties may choose a highly attractive foreign law if they believe that it brings them benefits which outweigh the costs of learning that foreign law. One such benefit could be that the third-state law would be perceived as superior to the national law of either party. Therefore, I propose that the attractiveness of a given contract law can be assessed by determining the number of cases in which it was chosen as the third-state law. In that regard, the ICC has been collecting and publishing useful data on the nationalities of ICC arbitrations parties and the law chosen to govern their particular contracts. This data can be used to determine the extent to which these arbitration parties chose third-state law. Arguably, it might have been more interesting to compare the laws chosen by parties against their actual places of business, but such information is harder

[28] *See*, *e.g.*, Stefan Vogenauer, *Regulatory Competition Through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence*, 21 EUR. REV. PRIVATE L. 23 (2013); Gary Low, *A Psychology of Choice of Laws*, 24 EUR. BUS. L. REV. 363, 374 (2013).

[29] Obviously, any cost savings could then be shared between the two parties and would not, therefore, only benefit the party who does not actually incur them.

[30] *See, e.g.*, Vogenauer, *supra* note 28, at 24.

to collect because the ICC does not collect or publish their arbitration parties' places of business. Nevertheless, I submit that commercial parties typically operate from the jurisdiction of their nationality, making nationality a sufficient proxy for place of business.

The only significant exception may be companies incorporated in jurisdictions that are known to be offshore financial centers. Although such companies appear in ICC reports as nationals of those financial centers, their management will often be operating in another jurisdiction and will, thus, almost certainly be familiar with the law of that other jurisdiction. Anecdotal evidence confirms this perception. For example, take an ICC case disputing Brazilian shareholders' rights: the agreement was governed by Brazilian law, and all parties were Brazilian, with the sole exception being a Luxembourg company which, in all likelihood, was a tax vehicle controlled by Brazilian actors.[31]

However, while many companies incorporated in offshore financial centers are managed from other jurisdictions, others might not be. Some jurisdictions known as offshore financial centers also have other industries. This is the case in places like Singapore, Switzerland, and Luxembourg. Companies incorporated in these jurisdictions could therefore actually be based and managed from there. Even in jurisdictions such as the British Virgin Islands or the Cayman Islands, tourism often accounts for a significant part of the GDP.[32] Therefore, it cannot be excluded that some disputes handled by the ICC concern transactions related to this business, for instance construction disputes. While recognizing the potential impact on my study of actors incorporated in offshore financial centers,[33] I decide to ignore the issue.

2. Available Data and Methodology

To assess whether parties to international contracts choose one of their own laws or a third-state law, data must be compared on both

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[31] Award of 2006, 23/1 ICC BULL. 77 (2012).

[32] It is considered, for instance, that 45% of the national income of the British Virgin Islands is generated by tourism. *See The World Factbook: British Virgin Islands*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/vi.html (last visited Apr. 22, 2014).

[33] For instance, eight of the most represented countries considered tax havens in ICC reports have been the British Virgin Islands, the Cayman Islands, Bermuda, Trinidad and Tobago, Panama, the Channel Islands, Cyprus, and Luxembourg. They contributed 69 parties in 2007 (4.2%), 56 in 2008 (3.1%), 120 in 2009 (5.7%), 125 in 2010 (5.8%), 115 parties in 2011 (5%), and 123 parties in 2012 (6%).

the nationalities of parties to international contracts and their ultimate choice of law.

For more than ten years, the ICC has published reports specifically identifying the nationalities of ICC arbitration parties. Unfortunately, the ICC only started identifying the contract law chosen by parties in 2007.[34] Thus, precise data for both nationality and the chosen law are only available for the period 2007-2012. This six-year period constitutes the data used in this study.

a. Choice of Law Clauses

Since it began publishing choice of law clause information in 2007, the ICC has provided the percentage of cases in which the parties selected one of the top ten bodies of national law in a given year. Swiss and English contract laws were consistently preferred; they were each typically chosen in more than ten percent of the reported cases.

However, not all international contracts coming before an ICC arbitration panel contain a choice of law provision. In that regard, the ICC has also annually published the percentage of those contracts that are either silent with respect to a choice of law or choose to apply non-national law. Over the last five years, and indeed over the last ten years, this percentage has not varied by much, and has remained around 20%. These contracts are irrelevant for our purposes; however, because we only consider contracts that choose to apply a national law. Moreover, the existence of contracts without choice of law clauses does not affect the accuracy of the figures reported by the ICC on those contracts that contain choice of law provisions, but it complicates data confrontation with the data on the parties' nationalities. The ICC provides party nationality for all ICC arbitrations without distinguishing between cases in which parties stipulated the law applicable to their contract and those in which they did not. That is, the two data points do not have the same base. To address this issue, I assume there is no significant variation between nationalities with respect to the probability of including a choice of law provision in their international contracts, and weight all data on nationalities accordingly and identically for each given year.[35] An example is given in Table 1 for U.S. parties.

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[34] Prior to 2007, the ICC would only rank the laws chosen by the parties, reporting which national law was most chosen, then which one came second, etc.

[35] For each given year, therefore, I reduce the share of all nationalities by the same figure, which corresponds to the number of cases that did not include a clause providing for the application of a national law.

TABLE 1.

Year	2007	2008	2009	2010	2011	2012
Number of U.S. parties	8.44%	10.35%	7.78%	8.67%	6.76%	7.12%
Percentage of contracts including a choice of law provision	.79	.84	.87	.82	.82	.85
Weighted number U.S. of parties	6.67%	8.69%	6.77%	7.11%	5.54%	6.05%

b. Party Nationality in ICC Arbitrations

The ICC has consistently reported the nationality of parties involved in ICC arbitrations for a long period, longer than it has reported on the inclusion of choice of law provisions. Over the last ten years, U.S. parties have almost always been the most numerous. Between 2002 and 2008, they typically represented 10%–12% of all plaintiffs and defendants, although their relative share has recently declined, falling to a record low of just 6.76% in 2011. During the same period, the next most represented nationalities were French and German parties, each representing 5%–8% of such parties, with the exception of 2011. Surprisingly, and for the first time during the ten-year period, Spanish parties were the second largest group in 2011 at 6.28%.[36]

For the purpose of this study, it is necessary to first assess the number of cases in which one of the parties had a given nationality. The goal is to compare this number with the number of cases in which the law of that nationality was stipulated as the governing law to determine whether parties of other nationalities considered that law appealing. This comparison would be easy if all ICC arbitrations involved two parties of different nationalities, meaning that the percentage of parties of a given nationality would be equal to the number of cases involving a party of that nationality and, therefore, to the number of cases in which a party of that nationality negotiated the terms of an international contract, including its choice of law provision. However, a number of ICC arbitrations do not correspond to this model.

First, although disputes submitted to the ICC are typically

[36] France and Germany ranked, respectively, third and fourth.

international and, thus, involve parties of different nationalities, some do not. Each year, some 16–19% of the total number of ICC arbitrations can be considered domestic cases (i.e., all parties of the same nationality). These cases are not particularly interesting for determining parties' preferences as far as choice of law is concerned, since it seems unlikely that parties sharing the same nationality would choose to apply any law other than the one common to both of them.[37] Furthermore, these cases inflate the number of parties of a given nationality. Fortunately, the ICC typically publishes the precise number of domestic cases for each of the most represented nationalities in ICC arbitrations. It is thus possible to simply exclude them from the study. In 2010, 2011, and 2012, there were no domestic cases involving any of the nationalities on which this study focuses. On the other hand, in 2006, 2007, and 2008, the ICC reported the number of such cases involving French or German nationals. Thus, for purposes of this study, I subtract them from the number of nationals involved in ICC arbitration in the relevant year.[38]

Second, some ICC arbitrations involve more than two parties. Although the ICC publishes the percentage of these cases, it has not always been precise in its reporting. For example, in 2011 it provided an exact percentage (31%), while in other years it only stated that "a third," or "slightly less than a third" of the cases involved more than two parties. Moreover, ICC publications do not specify the exact number of parties in multiparty arbitrations (e.g., three, four, or five parties).[39] The only precise figures that the ICC always gives are the total number of international cases (be they two-party or multi-party cases) and the total number of parties for a given year. Assuming there is no significant variation between nationalities in this respect, one possible way to address the issue is to weight the data on party nationality by calculating the ratio of the number of cases divided by the total number of parties and then multiplying that ratio by two. The result is the total amount of contracts in which at

[37] For anecdotal evidence confirming this hypothesis, see Award of 2011 in ICC Case No. 10341, 22/1 ICC BULL. 50, 52–53 (2011), where two Belgian parties had provided for the application of Belgian law (seat of the arbitration: Switzerland), and Award of 2001 in ICC Case No. 10696, 15 ICC BULL. 94 (2004), where two Thai companies had provided for the application of Thai law (seat of the arbitration: Singapore).

[38] Finally, in 2009, the ICC report did not give any precise figures but indicated that 16% of the total number of cases were domestic (i.e., single nationality) cases, and that some involved U.S., German, or French parties.

[39] Until 2011, the ICC reported unevenly on multiparty arbitrations, but most often distinguished between cases involving more than two parties and cases involving more than five. The 2012 Report is more precise.

least one party of a given nationality participated. An example is given in Table 2 for U.S. parties.

TABLE 2.

Year	2007	2008	2009	2010	2011	2012
Number of cases [a]	599	663	817	793	796	759
Number of parties [b]	1611	1758	2095	2145	2293	2036
Ratio [2(a/b)]	.74	.75	.77	.73	.69	.74
Number of US parties [c]	8.44%	10.35%	7.78%	8.67%	6.76%	7.12%
Weighted number US of parties [(2(a/b)) x c]	6.27%	7.81%	6.07%	6.41%	4.69%	5.30%

Table 3 offers an example of final weighting of one nationality.

TABLE 3.

Year	2007	2008	2009	2010	2011	2012
Number of cases [a]	599	663	817	793	796	759
Number of parties [b]	1611	1758	2095	2145	2293	2036
Ratio[2(a/b)]	.74	.75	.77	.73	.69	.74
Percentage of contracts including a choice of law clause [d]	.79	.84	.87	.82	.82	.85
U.S. single nationality cases [e]	0	0	16%	0	0	0
Number of U.S. parties [c]	8.44%	10.35%	7.78%	8.67%	6.76%	7.12%
Weighted number of U.S. parties [(2(a/b) x d(c-e)]	4.98%	6.56%	4.84%	5.25%	3.86%	4.51%

The weighted number of parties shows the number of parties of a given nationality who were involved in cases where the contract was negotiated with a counterparty of a different nationality, and included a choice of law provision in their contract. The two parties had two possibilities for that choice: they could either submit their contract to the law of one party, or to a third-state law. The minimum number of parties who decided to submit their contract to a given third-state law is the difference between the number of clauses providing for the application of that law and the number of nationals of that third state who participated, to the negotiation of international

contracts (see, for example, Table 4). This difference provides one way to measure the international attractiveness of the relevant contract law.

TABLE 4.

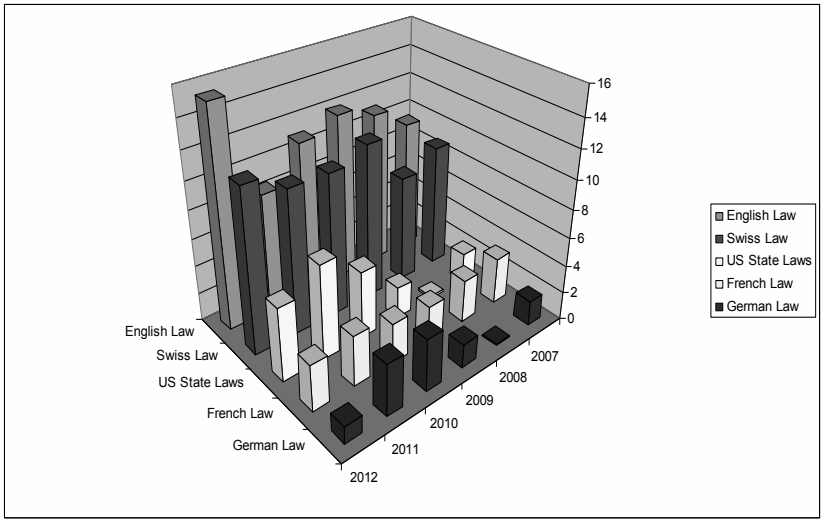
Year	2007	2008	2009	2010	2011	2012
Weighted number U.S. of parties	4.98%	6.56%	4.84%	5.25%	3.86%	4.51%
Number of choices of U.S. laws	7.1%	6.7%	7.1%	10.1%	10.6%	9.78%
Int'l attractiveness of U.S. laws	2.12	0.14	2.25	4.85	6.74	5.26

3. Results

This analysis of the data generates two sets of results. First, it allows for an empirical measurement of the relative attractiveness of various contract laws. The study shows that, for international contracts involving international parties, English and Swiss laws are on average three times more attractive than U.S. State laws and French law, and almost five times more attractive than German law.

TABLE 5. International Attractiveness Compared

	2007	2008	2009	2010	2011	2012	2007–2012 (average)	2007–2012 (mean)
English Law	9.37	10.98	11.91	11.00	8.50	15.43	11.20	10.99
Swiss Law	8.77	7.62	11.06	10.16	10.28	11.59	9.91	10.22
U.S. State Laws	2.12	0.14	2.25	4.85	6.74	5.26	3.56	3.55
French Law	3.33	3.08	2.62	2.90	3.61	3.31	3.14	3.19
German Law	1.78	0.08	1.72	3.71	3.66	1.24	2.03	1.75



Second, it measures how often parties to international transactions are willing to subject their contracts to a third-state law. Over the last six years, the data reveals that at a minimum more than 20% of the parties were willing to do so, and that the actual percentage has hovered around 30% during the last four years (see Table 6). These figures only take into account parties who opted for one of the five most popular contract laws. Only incomplete data is available concerning Spanish and Brazilian laws (see Table 7). Where available, these figures reveal that Spanish and Brazilian laws are rarely chosen as third-state laws to govern international transactions.

TABLE 6. Current International Market for Contracts

	2007	2008	2009	2010	2011	2012	2007–2012 (average)
UK Law	9.37	10.98	11.91	11.00	8.50	15.43	11.20
Swiss Law	8.77	7.62	11.06	10.16	10.28	11.59	9.91
U.S. Laws	2.12	0.14	2.25	4.85	6.74	5.26	3.56
French Law	3.33	3.08	2.62	2.90	3.61	3.31	3.14
German Law	1.78	0.08	1.72	3.71	3.66	1.24	2.03
Total	25.37%	21.9%	29.56%	32.62%	32.79%	36.83%	29.85%

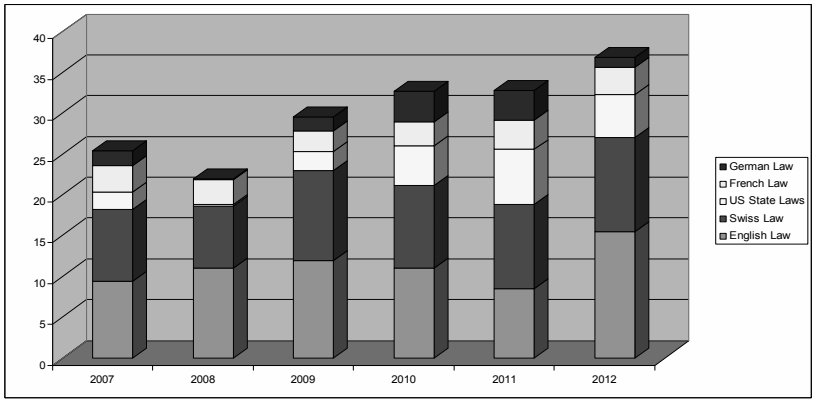


TABLE 7. International Attractiveness of Spanish and Brazilian Laws

	2007	2008	2009	2010	2011	2012
Spanish Law	No data	0.72	No data	0.16	- 0.49	No data[40]
Brazilian Law	No data	No data	- 0.18	1.71	0.38	0.96

Therefore, it seems that more than 30% of parties to international contracts chose laws other than their own to govern them. In a series of articles published in 2009, Geoffrey Miller and Theodore Eisenberg argued that there existed a market for large commercial contracts in the United States, and that New York actively competed in, and dominated, this market.[41] Miller and Eisenberg based their argument on an empirical analysis of domestic contracts entered into by publicly held companies, which showed that New York state law was chosen in 45% of those contracts.[42] That parties to international transactions are willing to choose a third-state law for at least 30% of their contracts shows that a substantial international market for contracts also exists. In fact, in recent years, several national lawyer associations have made clear that they intend to compete in this market by convincing international commercial actors to choose the law of their particular

[40] Spanish law was not among the ten most popular laws in ICC arbitrations in 2012. As the ninth and the tenth most popular laws (Indian and Romanian laws) were chosen in 1.96% of the cases, it can be inferred that Spanish law was chosen in even fewer cases. Spanish law's international attractiveness for 2012 was, therefore, negative (below -0.32%).

[41] Miller & Eisenberg, *Market for Contracts, supra* note 4, at 2073.

[42] *Id*.

jurisdiction. For example, the English Law Society and the German Ministry of Justice have issued advertising brochures promoting their respective contract laws.[43] Lawmakers have also sometimes made similar efforts, as for instance New York in 1984.[44] The existence of an international market for contracts is indeed clear.

III. EXPLAINING THE INTERNATIONAL ATTRACTIVENESS OF CONTRACT LAWS

The main conclusion to be drawn from my analysis is that English and Swiss laws are, on average, three times more attractive to commercial parties than any other laws. Below, I seek to explain this finding. Intuitively, one would think that with parties to international commercial transactions being typically sophisticated actors, the choice of English and Swiss laws should reveal that those laws afford rules which are better suited to the interests of international commercial actors. While such rules might exist, there are also a number of factors other than the intrinsic qualities of specific contract laws, which could influence the choice of law in international contracts. First, I consider what these extrinsic factors might be. Then, I explore whether the intrinsic qualities of English and Swiss laws explain their international attractiveness.

A. Extrinsic Factors

1. Seat of the Arbitration

An important factor potentially impacting the parties' choice of law is the seat of the arbitration. The main offices of the ICC are based in Paris, France. However, this is not to say that arbitrations conducted under the aegis of the ICC are necessarily located in Paris. The parties may choose the seat of the arbitration, and most often do. The ICC reported in 2011 that parties to its arbitrations selected seats in 63 different countries. The two countries that have been selected the most frequently, by far, over the last six years and, indeed the last decade, are France and Switzerland. The United Kingdom, the

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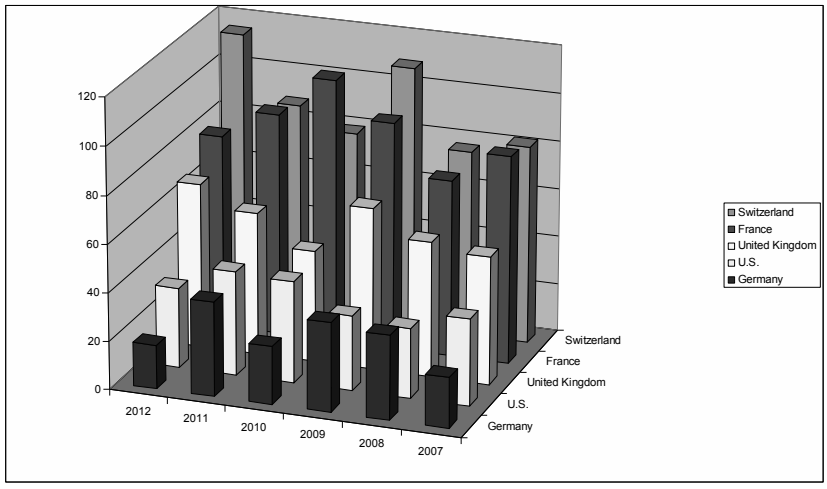
[43] *See supra* text accompanying notes 2–3, 99–103.

[44] N.Y. General Obligations Law § 5-1401; *see also* Miller & Eisenberg, *Market for Contracts*, *supra* note 4, at 2091. The New York legislature, however, did not amend specific substantive rules of New York contract law, but only enabled parties to freely choose New York law in major transactions. While some associations of lawyers have tried to lobby their legislature to amend their contract law, there is no evidence of any positive response and action by lawmakers. *See generally* Vogenauer, *supra* note 28.

United States, and Germany follow.

TABLE 8. Preferred Seats of ICC Arbitration

Seat Chosen by Parties (number of cases)	2007	2008	2009	2010	2011	2012	2007–2012 (average)
Switzerland	82	77	109	79	88	115	91.6
France	86	73	94	109	92	80	89
United Kingdom	53	56	67	46	59	68	58
U.S.	36	29	31	42	43	33	35.6
Germany	21	35	37	24	39	18	29



The seat of the arbitration does not directly influence the law applied by arbitrators to decide disputes on their merits. Under most international arbitration laws, the real consequence of designating the seat of the arbitration is to determine the law applicable to the arbitration itself (*lex arbitri*)[45] and the courts that will have jurisdiction to review the validity of the arbitral award.[46] Virtually all national arbitration laws provide that parties have the freedom to choose which law governs the substance of the dispute and, if such a choice has been made, which law should be applied by the arbitrators to resolve the dispute.[47] As a result, parties often

[45] *See, e.g.*, UNCITRAL Model Law on International Commercial Arbitration art. 1(2) (1985).
[46] *See, e.g.*, GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2402 (2009).
[47] *See, e.g.*, UNCITRAL Model Law on International Commercial Arbitration art. 28 (1985).

select one jurisdiction as the seat of the arbitration while choosing the law of another jurisdiction to govern the contract or dispute. This makes perfect sense, as the rationales for choosing the arbitration's seat and the law governing the contract is quite different. On the one hand, the arbitration's seat should be chosen to ensure that the applicable national arbitration law favors international commercial arbitration and its national courts adhere to such law. For instance, local courts should stand ready, willing, and able to offer efficient and effective remedies to aid the arbitration should one party become recalcitrant. On the other hand, the law governing the contract should be chosen because of the quality of its contract law.

The arbitration's seat has no direct impact on the nationality—or background—of the arbitrators. Under most national arbitration laws, the parties are free to appoint whomever they choose as an arbitrator; arbitrators need not be lawyers particularly lawyers trained in the law of the jurisdiction in which the arbitration is seated. If a dispute under the contract containing an arbitration clause arises, the agreed upon seat of the arbitration will often have little significance when appointing the arbitrators.[48]

Thus, at first blush, the seat of ICC arbitrations might appear irrelevant for the purposes of this Article, and that would indeed be true if arbitration provisions in international contracts were always negotiated by sophisticated lawyers capable of advising their clients on the subtleties of international commercial arbitration law. However, there is no reason to believe that this is the case. I am convinced that many parties to international commercial transactions do not completely understand the intricacies of their contracts—many of which contain "boilerplate" clauses the parties perceive to be not worthy of negotiation—when negotiating in the

[48] It could be, however, that in certain circumstances, the chair of the arbitral tribunal will regularly be chosen among the practitioners of the seat of the arbitration. Arbitral tribunals composed of three members are typically appointed in two stages. The parties first appoint one arbitrator each. As it is their only chance to directly influence the composition of the tribunal, parties often use this opportunity to appoint an arbitrator with a background close to theirs. *See, e.g.*, NATHALIE VOSER & ELIANE FISCHER, INTERNATIONAL ARBITRATION IN SWITZERLAND: A HANDBOOK FOR PRACTITIONERS 58 (E. Geisinger & N. Voser eds., 2d ed. 2013). The party appointed arbitrators are then meant to agree on the third arbitrator, who will chair the tribunal. In order to avoid any imbalance in the tribunal, the chair will be chosen among professionals with a background other than those of the parties. *Id*. If a neutral jurisdiction was chosen as the seat of the arbitration, looking for a local professional might then appear as logical and more efficient. It could be, therefore, that chairs of international arbitral tribunals sitting in Switzerland would often be Swiss practitioners. This, in turn, could appear as a guarantee to have a lawyer trained in Swiss law, including Swiss contract law, as a member of the tribunal.

absence of sophisticated counsel. In particular, it is not at all clear that parties understand the distinction between the venue of the arbitration and the law applicable on the merits.[49] Their confusion may be further reinforced by their prior exposure to litigation choice of law/choice of jurisdiction provisions (as opposed to alternative dispute resolution provisions). Typical choice of law/jurisdiction provisions that contemplate litigation choose a local court linked to the law chosen to govern the contract, which makes perfect sense in that context—a local court is in the best position to apply its own jurisdiction's law.

As a consequence, it is likely that a fair number of parties simply choose to apply the substantive law of the jurisdiction mentioned as the seat of any contemplated arbitration in the contract's arbitration clause. Some arbitral tribunals have expressly recognized that parties might make this mistake.[50] Anecdotal evidence confirms this suspicion. Examples include ICC case no 7673 (French and Finnish parties provided for arbitration in Switzerland and the application of Swiss law),[51] ICC case no 12365 (Norwegian and Belgian parties provided for arbitration in the Netherlands and the application of Dutch law),[52] and ICC case no 7754 (Polish and Singapore parties provided for arbitration in France and the application of French law).[53]

If these assumptions are correct, the success of some jurisdictions as arbitration venues could explain the success of their contract laws. The two most often used arbitration venues in Europe are France and Switzerland. It could very well be that a number of parties provide for the application of Swiss and French substantive law because they selected these jurisdictions as the seat of the arbitration. The proposition is appealing as it offers an explanation for the remarkable attractiveness of Swiss contract law. However, if success as an arbitration venue were an important

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[49] *See, e.g.*, JAN PAULSSON, NIGEL RAWDING, LUCY REED ET AL., THE FRESHFIELDS GUIDE TO ARBITRATION CLAUSES IN INTERNATIONAL CONTRACTS 17 (2010) ("Some negotiators have the impression that by opting for arbitration in country X they have chosen the law of that country to govern the merits of any dispute.").

[50] *See, e.g.*, Award of 2000 in ICC Case No. 10228, 21/1 ICC BULL. 61, 62 (2010) (the parties may even have assumed, as London was the place, that English law would naturally be applied).

[51] 6 ICC BULL. 56 (1995); *see also* Award of 2000 in ICC Case No. 9651, 12/2 ICC BULL. 76, 80 (2001) (German and Indian parties choosing Swiss seat and Swiss law).

[52] Award of 2004, 21/1 ICC BULL. 82 (2010).

[53] 11/2 ICC BULL. 46–47 (2000); s*ee also* ICC Case No. 6773, 6/1 ICC BULL. 66, 67–68 (1995) (where Italian, Luxembourg, Belgian, and American parties provided for arbitration in France and the application of French law).

factor for the purpose of explaining the success of particular contract laws, the attractiveness of French contract law should be much higher. Yet, despite the fact that France is designated as the arbitration seat more frequently than Switzerland, French contract law remains substantially less attractive than Swiss contract law, which is chosen three times more often.

TABLE 9. Attractiveness of Contract Laws and Seat of Arbitration Compared

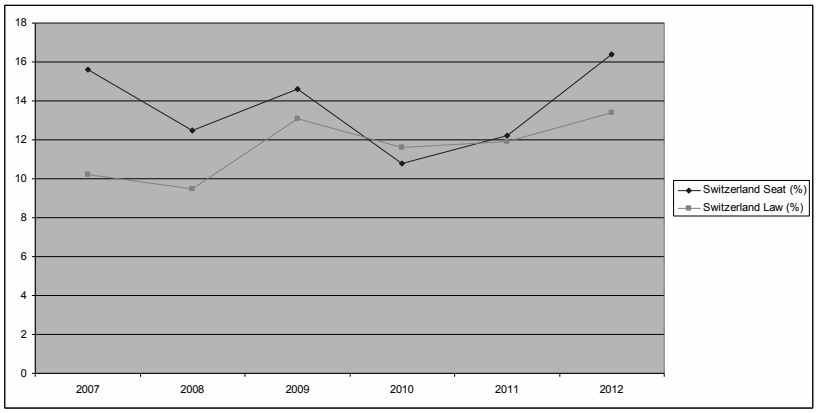
	Attractiveness of Law 2007–2012	Seat 2007–2012
England	11.20	58
Switzerland	9.91	91.6
U.S.	3.56	35.6
France	3.14	89
Germany	2.03	29

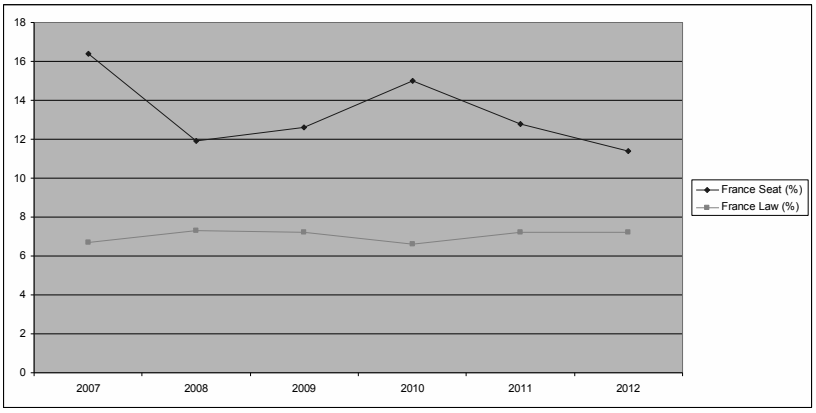
Interestingly, the data for the period 2007 to 2012 reveals a correlation between the arbitration's seat and the substantive law chosen by the parties for Switzerland, but not France.

TABLE 10. Choice of Law and Seat of Arbitration Compared [54]

		2007	2008	2009	2010	2011	2012
Switzerland	Seat (%)	15.6	12.5	14.6	10.8	12.2	16.4
	Law (%)	10.2	9.5	13.1	11.6	11.9	13.4
France	Seat (%)	16.4	11.9	12.6	15	12.8	11.4
	Law (%)	6.7	7.3	7.2	6.6	7.2	7.2

[54] The data compared are the actual choices made by the parties. The percentage of choice of the seat of the arbitration is therefore calculated by using only data on cases where the parties actually chose the seat only (as opposed to cases where, in the silence of the parties, the seat was determined by the ICC).





Therefore, it could be that Swiss contract law benefits from Switzerland's leading position as an arbitration venue, while French contract law does not.

The correlation between the choice of Switzerland as an arbitration venue and the choice of Swiss contract law is confirmed by data collected by the Swiss Chambers' Arbitration Institution. The ICC is not the only arbitral institution offering its services to parties wishing to arbitrate in Switzerland. For decades, the chambers of commerce and industry of several Swiss cities have had their own arbitration institution. In 2004, the chambers of commerce and industry of Basel, Bern, Geneva, Lausanne, Lugano, Neuchâtel, and Zurich decided to establish a single arbitral institution, the Swiss Chambers' Arbitration

Institution.[55] Between 2004 and 2012, 663 cases were submitted to this new Swiss institution.[56] Most of them were international,[57] but the parties were overwhelmingly European.[58] As could be expected, parties to these cases virtually always choose a Swiss city as the seat of the arbitration—between 2004 and 2012, they have in more than 95% of the cases.[59] Since Swiss parties have only accounted for 22% of the parties to these cases over the same period, one might have expected choices of law to be much more varied. They were barely so. Swiss contract law was chosen in more than 72% of the cases. No other law was chosen in more than 5% of the cases. German law ranked second with 5% of the choices. "UK law" ranked third, with 3%.[60]

Regardless of the actual impact of the success of Switzerland as an arbitration venue on the frequency with which Swiss law is chosen to govern international contracts, the attractiveness of Swiss contract law cannot be explained by this factor alone: even if the attractiveness of Swiss contract law was discounted by the success of Switzerland as an arbitration venue, Swiss law remains more attractive than U.S. or German contract law. To discount the success of Switzerland as an arbitration venue, I calculate the ratio of the number of cases where either the US or Germany was chosen as an arbitration venue to the number of cases where Switzerland was chosen as an arbitration venue and then apply it to the attractiveness of Swiss contract law (Table 11).

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[55] SWISS CHAMBERS' ARBITRATION INST., https://www.swissarbitration.org/sa/en/ (last visited Apr. 23, 2014)

[56] ARBITRATION STATISTICS 2012, SWISS CHAMBERS' ARBITRATION INST. (2012).

[57] In 2012, 75% of parties to arbitrations administered by the Swiss Chambers' Arbitration Institution had their registered office or domicile outside of Switzerland. *See Newsletter—1/2013*, SWISS CHAMBERS' ARBITRATION INST. (2013), https://www.swissarbitration.org/sa/download/newsletter_2013_1.pdf. Between 2004 and 2012, the figure was higher at 78%. *See* ARBITRATION STATISTICS 2012, *supra* note 56.

[58] Between 2004 and 2012, 22% of the parties came from Switzerland, 52% from Western Europe, and 6% from Eastern Europe and the former USSR. Only 4% came from North American, and 10% from Asia and the Middle East. *See* ARBITRATION STATISTICS 2012, *supra* note 56.

[59] *Id.*

[60] *Id.*

TABLE 11. Attractiveness of Swiss Law After Discounting Success as Arbitration Venue

	Attractiveness 2007–2012	Seat 2007–2012
Swiss Law (adjusted)	9.91/91.6 x 35.6 = 3.85	91.6
U.S. State Laws	3.56	35.6
Swiss Law (adjusted)	9.91/91.6 x 29 = 3.13	91.6
German Law	2.03	29

2. Language

Another important factor in the international success of various contract laws should be the language in which they are available. One can assume that international parties speak the language of their jurisdiction. They will also typically speak at least one language that is used in international commerce, which is currently dominated by English. Other languages might be widely used at a regional level, for instance French in Western Africa or Spanish in Latin America. If international transaction parties are to consider applying third-state law, then it is logical to assume they prefer laws available in a language they understand.

Because English is currently the dominant language in international commerce, laws available in English should enjoy a clear advantage over laws written in other languages: English law and U.S. State laws should, therefore, benefit from the language in which they are written, and part of their success may be explained by their availability in English. When English attorneys market their legal services abroad, the first argument that they put forward is that English law is in English, which is "one of the most widely spoken languages in the world."[61]

It would be tempting to argue that the lesser attractiveness of French and German laws can be explained by the fact that neither French nor German is used as widely as English. This is clearly true for German, which is spoken by few people outside of central Europe, less so for French, which is spoken in many of its former colonies and remains the second language in international diplomacy. The success of Swiss law, however, suggests that the importance of language might be limited or that the impact of languages on the attractiveness of laws is a more complex phenomenon. There are

[61] *See, e.g.*, LAW SOC'Y OF ENGLAND & WALES, *supra* note 2, at 8.

three official languages in Switzerland: German, French, and Italian. As a consequence, Swiss law is available in three languages: all statutes, codes, and cases can be found in each of the three languages. Treatises on Swiss law are also available in each language.

Thus, Swiss law can be distinguished from Germany and France because its contract law is available in several languages, while it is only available in one in Germany and France. Could that explain why language might have positively (or maybe less negatively) impacted the international attractiveness of Swiss law? Swiss lawyers regularly make an argument of the availability of Swiss law in three different languages in support of their attempt to market their legal services to foreigners.[62]

It is hard to believe, however, that the availability of any law in several languages could be a decisive factor for parties choosing the law to govern their contract. One would expect international transaction parties to care whether the chosen law is available in a language that they understand. However, if a given party does not understand any of the three languages in which a law is written, that party is in no better situation than if the law was written in a single, unknown language. From that perspective, for Switzerland to benefit from its contract law being available in three languages, a significant number of parties potentially interested in applying Swiss law to their contracts would need to understand at least one of these three languages. Two of Switzerland's official languages—German and Italian—are spoken in a very limited number of countries in the world, making it hard to believe that the availability of Swiss law in these two languages makes a significant difference at a global level. Its third official language—French—is more widely spoken and thus, might be considered in a somewhat different category. But, if the availability of Swiss law in French explained the success of Swiss contract law, it would appear logical that French contract law would benefit, too. It does not. As previously noted, the data suggests that Swiss contract law is three times more attractive than French contract law.

A far more convincing hypothesis is that language is only of limited importance in determining the attractiveness of particular contract laws. It could very well be that many parties to international transactions do not know the contract law they ultimately choose, as

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[62] Matthias Scherer and Michael E. Schneider, *An Analysis of International Construction Contracts: Switzerland*, *in* FIDIC—AN ANALYSIS OF INTERNATIONAL CONSTRUCTION CONTRACTS 313 (Knutson ed., 2005).

they have neither the time, nor the training, to read and understand statutes, cases or treatises; rather, they ask their lawyer to advise them as to which law to select (or negotiate for). The issue of language remains, of course, but it does not concern the ability of the contract parties to actually read and understand the law in its original language; they only need to understand the lawyers they hire, who one assumes to be trained in the relevant legal systems. Thus, all that matters is whether the lawyers are able to explain the content of the law in a language their client understands. Since many Swiss lawyers speak English and are able to explain the content of Swiss law in English to their clients, the language in which Swiss contract law is drafted may be irrelevant.

3. Neutrality

One of the most common arguments made in favor of choosing Swiss law to govern international contracts is its alleged neutrality. Swiss practitioners invariably insist on it in their writings.[63] The Swiss Arbitration Association's Web site also states that "[m]any international contracts referring to arbitration in Switzerland are governed by Swiss substantive law, as a neutral law."[64] The proposition was even endorsed by arbitral tribunals. The arbitral tribunals explained that the application of Swiss law clauses are intended to ensure the application of a neutral law.[65]

The argument of Swiss law's neutrality, however, is quite puzzling.[66] As pointed out by Christiana Fountoulakis,[67] a professor of international business law at a Swiss university, the claim seems to be built on two misunderstandings.

The first misunderstanding confounds political neutrality with the "neutrality" of a particular contract law. Political neutrality is a concept of public international law that applies to states. States that are neutral, willingly or not, do not take part in any war and remain

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[63] *See, e.g.*, Scherer & Schneider, *supra* note 62, at 313; Nadine Magaud, *Die Vorteile der Anwendung schweizerischen Rechts bei verborgenen Mängeln im Recht der internationalen Warenkaufverträge,* RECHT DER INTERNATIONALEN WIRTSCHAFT 387, at 389 (1996); Marc Iynedjian, *Gas Sale and Purchase Agreements Under Swiss Law*, 30 ASA BULLETIN 746 (2012).

[64] *Arbitration in Switzerland*, ASA, http://www.arbitration-ch.org/pages/en/arbitration-in-switzerland/index.html (last visited Nov. 27, 2012).

[65] *See, e.g.*, ICC Arbitration Award No. 8482 of December 1996, *available at* http://cisgw3.law. pace.edu/cases/968482i1.html (last visited Nov. 27, 2012).

[66] Christiana Fountoulakis, *The Parties' Choice of 'Neutral Law' in International Sales Contracts*, 7 EUROPEAN J.L. REFORM 303 (2005).

[67] *Id.* at 305.

neutral towards belligerents. Switzerland has been a neutral state since 1815. Switzerland's neutrality as a state, however, has no impact on the content of its contract law, which belongs to private law. Private law is not concerned with wars, but rather with disputes between private individuals. Rules of private law create rights and obligations for such individuals. Typically, a private law, such as contract law, establishes the duties and obligations owed by one party to another, as well as the rights one party has against another, in a particular type of situation.[68] In other words, private law typically creates an obligor and an obligee and, thus, a potential winner and loser. Rules of private law are not neutral and Swiss private law (e.g., its contract law) is no exception.[69]

The second misconception confounds Switzerland's neutrality as a dispute resolution venue with the neutrality of its contract law.[70] As mentioned above, Switzerland is a leading arbitration venue. One reason commercial actors choose Geneva or Zürich as the seat for arbitration is that neither the Swiss courts, nor any other arm of the Swiss government, are likely to interfere in the arbitration proceedings. Thus, locating an arbitration in Switzerland guarantees neutrality of dispute resolution (provided Swiss parties are not involved) as neither party enjoys a home-court advantage and neither can use political connections to have a local court or any other authority interfere with the proceeding. That neutrality, however, has no impact whatsoever on the content of the law applied by the arbitrators. Neutral arbitrators—applying private law rules—must still determine which party is the obligor and which party is the obligee in the particular circumstances and then determine whether or not all of the obligations have been fulfilled. The distinction between the forum and the applicable law is often difficult to grasp for non-lawyers, however, which might explain why a number of international contracts include jurisdiction clauses, including arbitration clauses, but no choice of applicable law.[71]

Notwithstanding those common misunderstandings, a claim that Swiss law is neutral could be understood in a more sophisticated manner. Swiss lawyers regularly argue that Swiss law has borrowed from a variety of legal traditions. For instance, they insist that the Swiss Code of Obligations integrates concepts from several legal

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[68] Some rules of private law are different, empowering parties to conclude certain acts.

[69] *See* Fountoulakis, *supra* note 66, at 307 (giving examples of the operation of Swiss rules of sales law).

[70] *Id.* at 306.

[71] *See supra* text accompanying note 34 (discussing that this occurs in approximately 20% of cases submitted to ICC arbitration).

systems and is, thus, suitable for cross-cultural relations.[72] Swiss law could, therefore, be presented as culturally neutral. As its rules and concepts come from different traditions, one might argue that Swiss law always has aspects somewhat familiar to virtually any party, regardless of their background. French or German parties might find familiar rules and concepts in Swiss law.

Nevertheless, regardless of the accuracy of the claim that Swiss contract law might be culturally neutral, the argument that cultural neutrality is a decisive factor for parties to choose Swiss law is unconvincing. One would think that sophisticated parties would carefully assess the content of a foreign law before deciding to subject their contract to it, to ensure that the rules of the relevant law are efficient and tailored to their needs. In other words, sophisticated parties should only consider the content of the law governing their contract. It is hard to see why the origin of its rules should matter at all. Why would parties be happy to know that a given rule of the chosen law also exists in their jurisdiction, particularly if they find that rule inefficient or harmful? Perhaps it is the underlying assumption—that is, that parties to international transactions are sophisticated— that is at issue. Some such parties, perhaps many of them, do not want to incur the costs of verifying the content of a particular contract law before subjecting their contract to it. For such parties, it is easier to understand why the purported "cultural neutrality" of Swiss law might be appealing. In such cases, their goal may only be to assure themselves that the chosen law does not contain completely unfamiliar concepts, rather than a full understanding of that law's intricacies.

4. Model Contracts

The use of certain contract laws in widely used model contracts could contribute to these laws' international success. It could be expected that parties to such contracts would not amend them with respect to choice of law and thus endorse this clause as they endorse others. This would increase the number of contracts governed by the relevant laws. It is doubtful, however, that such choices should be regarded as revealing the international attractiveness of these laws. It seems clear that parties resorting to model contracts do not review all clauses. They simply endorse most of them, which should not, therefore, be considered positive choices.

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[72] Scherer & Schneider, *supra* note 62, at 313.

It is difficult to say the extent to which the result of my study could be explained by the use of model contracts. To answer this question would require investigating whether the industries represented in the ICC Data[73] typically use model contracts, and whether one contract law in particular governs such contracts. One such example could be finance contracts, which accounts, together with insurance contracts, for slightly less than 10% of ICC cases.[74] International financial contracts notoriously provide for the application of English or New York law.[75] It can thus be expected that model contracts issued by the finance industry include a choice of law clause in favor of one or the other. This is the case, for instance, of the Master Agreement of the International Swaps and Derivatives Association (ISDA).[76] The success of New York and English law, therefore, owes a little to this contractual practice.

But there are also reasons to believe that the influence of model contracts on my study is limited. The most important is that trade associations produce many model contracts. These contracts often provide for the application of a particular contract law. For example, the model contracts issued by both the Grain and Feed Trade Association and the Refined Sugar Association, which are widely used in each of these industries,[77] provide for the application of English law. However, these associations have also very often established their own dispute resolution center. This means that disputes arising out of such model contracts will typically not be resolved through ICC arbitration, but rather by the arbitration center of the relevant trade association. As a consequence, none of these contracts and disputes should appear in, and thus impact, the ICC Data on which this study is based.

Interestingly enough, the ICC also happens to be a producer of model contracts. The most famous are certainly the International Commercial Terms (INCOTERMS), which are widely used throughout the world in international sales of goods. But the ICC has also issued many other model contracts for sales,[78] commercial agency contracts,[79] distributorship contracts,[80]

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[73] See *supra* text accompanying notes 15–21.

[74] See *supra* note 19.

[75] *See, e.g.*, Pascal Durand-Barthez, *The "Governing Law" Clause: Legal and Economic Consequences of the Choice of Law in International Contracts*, INT'L BUS. L.J. 505, 513 (2012).

[76] *See* ISDA Schedule to the 2002 Master Agreement, Part 4 (h), at 34.

[77] *See, e.g.*, GAFTA Contract No. 64, General Contract for Grain in Bulk, art. 24 (2006).

[78] *See, e.g.*, INT'L CHAMBER OF COMMERCE, THE ICC MODEL INTERNATIONAL SALE CONTRACT—MANUFACTURED GOODS INTENDED FOR RESALE (1997).

or intermediary contracts.[81] Remarkably, however, these model contracts typically include a choice of law clause encouraging parties to provide for the application of non-national rules. The most common clause offers an option to the parties.[82] Alternative A is to adopt a clause providing for the application of (1) "the rules and principles of law generally recognized in international trade as applicable to international contracts", (2) trade usages, and (3) the UNIDROIT Principles on International Commercial Contracts.[83] Alternative B is to provide for the application of a national law of the parties' choice. However, the drafters warn potential users of the model contracts that they "were drafted under the assumption that [they] would not be governed by a specific national law (as stated in Alternative A of [the relevant article])".[84] Therefore, the ICC does not encourage parties to provide for the application of any particular national contract law.[85]

In theory, some widely used model contracts could have a huge impact on parties' choice with respect to the applicable law, and thus explain part of the ICC Data. I am not aware, however, of their existence.

5. Law Firms

It is likely that many parties involve lawyers when negotiating international contracts. When this is the case, law firms should play an important role in their client's choices of law. In an ideal world, the involvement of lawyers should only improve the information available to the parties hiring them, and allow them to choose the law best fitting their interest. In certain circumstances, however, lawyers will be interested in the eventual choice of their clients, and so have incentives to influence it so that it conforms to their own interest. The issue of choice of law

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[79] INT'L CHAMBER OF COMMERCE, THE ICC MODEL COMMERCIAL AGENCY CONTRACT (2002).

[80] INT'L CHAMBER OF COMMERCE, THE ICC MODEL DISTRIBUTORSHIP CONTRACT (2002).

[81] *See, e.g.*, INT'L CHAMBER OF COMMERCE, THE ICC MODEL OCCASIONAL INTERMEDIARY CONTRACT (2000).

[82] *See, e.g.*, *id.* art. 13.1; INT'L CHAMBER OF COMMERCE, *supra* note 79, art. 24.1.A; INT'L CHAMBER OF COMMERCE, *supra* note 80, art. 24.1.A.

[83] *See, e.g.*, INT'L CHAMBER OF COMMERCE, *supra* note 79, art. 24.1.A; INT'L CHAMBER OF COMMERCE, *supra* note 80, art. 24.1.A.

[84] *See, e.g.*, INT'L CHAMBER OF COMMERCE, *supra* note 79, art. 24.1.A; INT'L CHAMBER OF COMMERCE, *supra* note 80, art. 24.1.A.

[85] For an analysis of the rationale of such clauses, see Gilles Cuniberti, *Three Theories of* Lex Mercatoria, 52 COLUM J. TRANSNAT'L L. 428 (2014).

clauses in international contracts clearly raises such a conflict of interests. Lawyers are typically trained in the law of one legal system, and thus admitted (and insured) to practice one law. If their client eventually decides to provide for another law to govern her contract, only lawyers admitted to practice that other law will be able to advise her with respect to the particular transaction. In most cases, this will mean that only those lawyers will be able to make profit out of the relevant transaction. The result is that most lawyers have strong incentives to see their client provide for the law in which they are trained.[86]

The situation will not be different in most global law firms. Lawyers losing future work to partners from other offices of the same firm will still be losing work, and gaining limited credit for bringing it to others. Some firms have adopted sophisticated systems where lawyers bringing work to others are compensated for doing so. Only meaningful compensation could cancel to some extent the incentives to make all possible efforts to keep the work for oneself.

The ICC does not report on lawyers who participated in the drafting of the contracts from which it draws its statistics. In any case, it is unclear how it could gather accurate information in this respect, as lawyers involved in the negotiation of contracts are typically not mentioned on them.

Despite the absence of any data, both on the lawyers advising parties entering to international transactions and the proportion of parties negotiating such contracts without lawyers, there are reasons to believe that English and U.S. laws should benefit more than any other from the involvement of lawyers. U.S. and English law firms have a notoriously wider international presence than law firms from any other jurisdictions. Furthermore, they not only have offices in a number of foreign jurisdictions, but they actually often dominate their legal markets. In many jurisdictions, the local offices of U.S. and English firms are perceived as the top practices for high-end legal services such as capital markets or corporate/mergers and acquisitions.[87] In Germany, for instance, since U.S. and UK firms' expansion began in the 1990s, international law firms have transformed the German

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[86] Jürgen Basedow, Lex Mercatoria *and the Private International Law of Contracts in Economic Perspective*, *in* AN ECONOMIC ANALYSIS OF PRIVATE INTERNATIONAL LAW 67 (2006); Vogenauer, *supra* note 28, at 24.

[87] D. Daniel Sokol, *Globalization of Law Firms: A Survey of the Literature and a Research Agenda for Further Study*, 14 IND. J. GLOBAL LEGAL STUD. 5, 9 (2007).

legal market and have become the legal elite.[88] While most lawyers staffing these local offices of international firms will be trained and admitted to practice locally, some will be expatriates practicing solely U.S. or English law. When their clients negotiate international contracts, their incentive will thus be to provide for the application of the laws of England or of a U.S. state.[89]

6. Colonial Empires

A final factor in the international success of certain contract laws could be that a number of jurisdictions are former colonies of two European countries. As such, their laws will often closely follow the laws of the country that once occupied them. The law of the former colonial power will thus be at least familiar to any actor originating from one of these colonies. So it could be predicted that those parties would view the law of the former colonial power as not truly foreign, and would thus be happy to provide for its application. The idea was expressed by the arbitral tribunal sitting in ICC case 10228: "In considering the matter, I think it is perfectly possible that a Cypriot party, whose law closely has followed the law of England and a party from a British Colony would quite naturally wish to apply English law, especially as the other possibilities - French, Swiss and Ukrainian - would probably be quite unknown, but known to be different from the law they were used to."[90]

The two biggest colonial empires in recent history were the British and the French empires. Part of their legacy has been that most of their former colonies have indeed closely followed their legal systems and laws. Former British colonies not only became common law jurisdictions, but also still consider the Common Law as one single set of rules administered from different jurisdictions.[91] Former French colonies have similarly followed the French model: they became civil law jurisdictions, adopted

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[88] *Id*. at 11.

[89] Voigt, *supra* note 5, at 11.

[90] Award of 2000 in ICC Case No. 10228, 21 ICC BULL. 61 (2010).

[91] *See, e.g.*, *Waghorn v Waghorn* (1942) 65 CLR 289, 297 (Austl.) ("But where a general proposition is involved the court should be careful to avoid introducing into Australian law a principle inconsistent with that which has been accepted in England. The common law is administered in many jurisdictions, and unless each of them guards against needless divergences of decision its uniform development is imperiled." The United States is a notorious exception.)

French codes and, for many of them, have cited judgments from French highest courts as authoritative.

The international attractiveness of both English and French laws could therefore owe a great deal to the fact that many countries in the world have laws, which were modeled on either English or French law. Commercial actors from former English or French colonies could perceive the law of their former colonial power as not foreign to them, and could thus be more than happy to concede its application as a third law. The attraction of the law of the former colonial should logically be strongest when both parties would originate from former colonies.[92] But even if one of the parties only was from a former colony, the choice of the law of its former colonial power could still be more satisfactory for both parties than the law of origin of any of them.[93]

During the timeframe of the study, parties originating from jurisdictions following the English model[94] accounted for 11% to 14% of the total number of parties to ICC arbitrations, while parties originating from jurisdictions following the French model[95] accounted for 6% to 8% of the same parties. After using the same formula set for calculating the international attractiveness of contract laws,[96] one finds that the maximum impact of this factor on the international attractiveness of English and French laws could be as high as 7.6% for English law and 4.3% for French law (Table 12).

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[92] For anecdotal evidence, see Award of 2002 in Case No. 11315, 21 INT'L COMM. ARB. BULL. 69 (2010) (parties from the British Virgin Islands and Gibraltar, choice of English law and English seat of arbitration); Award of 2008 in Case No. 14269, 22 INT'L COMM. ARB. BULL. 91 (2011) (parties from Hong Kong and Singapore, choice of English law and Swiss seat of arbitration).

[93] *See, e.g.*, Award of 1999 in Case No. 9594, 12 INT'L COMM. ARB. BULL. 73 (2001) (parties from Spain and India, choice of English law and English seat of arbitration).

[94] I have considered that the following jurisdictions follow the English model: Australia, Bahamas, Bangladesh, Barbados, Belize, Bermuda, British Virgin Islands, Canada, Cayman Islands, the Channel Islands, Cyprus, Ghana, Gibraltar, Grenada, Hong Kong, India, Isle of Man, Ireland, Jamaica, Kenya, Liberia, Malta, New Zealand, Nigeria, Saint Kitts and Nevis, Saint Vincent and Grenadine, Singapore, Tanzania, Turks and Caicos Islands, Trinidad and Tobago, Uganda, and Zimbabwe. I have not considered jurisdictions that were not involved in ICC arbitrations during the timeframe of the study.

[95] I have considered that the following jurisdictions follow the French model: Algeria, Belgium, Benin, Burkina Faso, Cameroon, Chad, Comoros, Republic of Congo, Ivory Coast, Dominican Republic, Gabon, Gambia, Guinea, Haiti, Lebanon, Luxembourg, Mali, Madagascar, Mauritania, Morocco, Romania, Senegal, Togo, Tunisia, and Zambia. I have not considered jurisdictions that were not involved in ICC arbitrations during the timeframe of the study.

[96] *See supra* text accompanying Table 3.

TABLE 12. Jurisdictions Following English or French Law

Jurisdiction		2007	2008	2009	2010	2011	2012	2007–2012
- Following English law	% of parties to ICC arbitrations	10.92	11.32	13.99	14.78	9.38	13.26	
	% weighted	6.41	7.17	9.49	8.96	5.34	8.40	7.63
- Following French law	% of parties to ICC arbitrations	6.15	5.92	6.4	7.51	7.85	8.1	
	% weighted	3.61	3.75	4.34	4.55	4.47	5.13	4.31

The average international attractiveness of English and French contract laws between 2007 and 2012 was 11.2% and 3.14%, respectively.[97] During the same period, parties familiar and comfortable with English or French law were involved in respectively 7.61% and 4.31% of the relevant cases and thus in the negotiation of the relevant contracts. If all these parties had been able to convince their counterparty to provide for the law of their former colonial power, the legal background of these parties could explain two-thirds of the cases where non-English parties have chosen English law. It is interesting to note that even if the legal background of parties had such a maximal impact, English law would still have remained attractive to parties with no familiarity with it in 3.59% of the cases, which would be comparable to the international attractiveness of U.S. state laws (3.56%) and higher than the attractiveness of any other law, Swiss law excepted.

But there are a number of reasons to believe that the legal background of parties could not have such a high impact on choices of law. First, it takes two parties to agree on any contractual clause. Parties familiar with either English or French law negotiate contracts with other parties who are not, and who thus have no incentive to accept a clause providing for the law of the former colonial power of the other party. Indeed, if the goal of providing for a third law is to avoid granting any advantage to the other party, parties unfamiliar with a given contract law, be it English or French law, should refuse any clause providing for its application when dealing with parties with an English or a French background. Second, while the law of

[97] *See supra* Table 5 and accompanying text.

some jurisdictions might once have been influenced by English or French law, it might have developed independently, to the extent that modern corporate lawyers might not feel comfortable anymore with the law of the former colonial power.[98] This is obviously the case with U.S. parties, but it could also be the case of other jurisdictions, for instance Belgium with respect to France.[99] Third, a number of the jurisdictions under consideration are tiny territories, often islands, in which companies incorporate for tax reasons.[100] Their directors will typically have no other connection with these jurisdictions, and certainly no background in their laws.

B. Intrinsic Qualities of Contract Laws

While exogenous factors may contribute to the international attractiveness of particular contract laws, the most important factor ought to be the quality of the contract law itself. All other things being equal, international parties should prefer the law that best fits their needs. Thus, one would expect the most attractive contract laws to be the best, at least from the perspective of the parties.

The preferences of international commercial parties, therefore, might reveal which qualities they value and look for when choosing the law governing their contract. The ICC data reveals that English and Swiss contract law are each selected three times more often than any other law. Below, I consider whether this preference can be explained by certain particularities of those contract laws.

1. Marketing Materials

I begin my inquiry with marketing materials offered by an English bar association and by individual Swiss commercial lawyers, as it seems obvious that such an organization and individuals would be in the best position to understand the qualities of their jurisdiction's contract law and, with respect to individual practitioners, to frequently

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[98] Similarly, parties with a strong bargaining power might prefer to impose their law rather than try to secure the application of their former colonial power's law. There is anecdotal evidence of the fact that Indian companies prefer Indian law. *See, e.g.*, Award of 1996, Case No. 8175, 15 INT'L COMM. ARB. BULL. 85 (2004) (Indian and Canadian parties, choice of Indian law and of France as the seat of the arbitration); *see also* Award of 2002 in Case No. 11209, 16 ICC BULL. 102 (2005).

[99] *See, e.g.*, Award No. 9301, 12 INT'L COMM. ARB. BULL. 140 (2001).

[100] This is especially true for former English colonies, which include the Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Cayman Islands, Channel Islands, Cyprus, Gibraltar, Grenada, Isle of Man, Malta, Saint Kitts and Nevis, Saint Vincent and Grenadine, Turks and Caicos Islands, and Trinidad and Tobago.

advise clients negotiating international contracts. Of course, opinions of practicing lawyers and bar associations should be used with caution: the existence of an international market for contracts means that lawyers engage in a worldwide competition to attract and retain clients. Bar associations and practicing lawyers are, therefore, unlikely to portray the law of their jurisdiction in a negative light. However, while they might be tempted to hide some of the drawbacks and issues raised by the law of their jurisdiction, they have no reason to refrain from advertising its good qualities to attract business for their members. Indeed, these associations might be accused of overemphasizing or magnifying the good aspects, while ignoring any negative ones. But, it would be highly surprising if they were to fail to mention any good aspects of their law, particularly those qualities that they truly regard as essential to their target audience—international commercial actors. Thus, the marketing materials published by the bar associations and practicing lawyers of leading jurisdictions in the international market for contracts should be useful for assessing the qualities of the laws which have made those laws so attractive.

The Law Society of England and Wales issued an infamous brochure marketing England as the jurisdiction of choice for international transactions.[101] The document attempts to show that English law is superior to civil law systems, suggesting that English practitioners believe that England competes with civil law jurisdictions in the international market. The brochure asserts that English law is a better choice for several reasons. First, English law is transparent and predictable, offering greater certainty than many civil law systems.[102] Second, it is more flexible than civil law systems.[103] Third, it better supports the needs of international commerce, as it can adapt more quickly than statute-based laws.[104] Finally, England has a fairly "light touch" regulatory system, which many companies prefer.[105]

The Swiss bar, on the other hand, has not felt the need to issue a similar document. However, many individual Swiss practitioners write on Swiss law in a variety of publications and they often offer explanations for the success of Swiss law. Their most common argument is that Swiss law is perceived as "neutral." Another argument is that Swiss law is available in several languages. But, one can search

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[101] LAW SOC'Y OF ENGLAND & WALES, *supra* note 2.
[102] *Id.* at 7.
[103] *Id.*
[104] *Id.* at 8.
[105] *Id.* at 14.

high and low for references to the qualities of Swiss law that make it attractive to international commercial actors. Swiss lawyers sometimes assert that the Swiss Code of Obligations is "concise" and "relatively easily accessible"—these statements appear to damn the Code with faint praise.[106] Some also argue that there are fewer mandatory rules in Swiss law than in many other systems.[107] Finally, some underscore that Swiss law is particularly well suited to certain types of commercial contracts, such as distribution agreements.[108]

The arguments put forward by both the English and Swiss law advocates are surprisingly general. The Law Society of England and Wales only asserts, for instance, that English law is more transparent, predictable, and flexible than others, while both English and Swiss laws allegedly contain fewer mandatory rules. But neither the English nor the Swiss supporters point to any specific rules that make their particular contract law a better fit for international commercial actors. Why is this? Could it be that no specific rules, or combination of specific rules, make English or Swiss law unique (meaning there is no reason in particular that can explain why English and Swiss law are chosen more often than any other law)? As noted, if such specific rules exist and can explain English and Swiss law dominance in the international market for contracts, one would expect English and Swiss practitioners to trumpet their existence and superiority from the highest ramparts when marketing their particular law to international commercial actors. The fact that they do not suggests that they are either unable or unwilling to do so.

One explanation may be that there simply are no specific rules that explain why international commercial actors choose English or Swiss law to govern their contracts so much more frequently than other laws. English and Swiss practitioners would not regularly convince clients that they should choose English or Swiss laws because of the existence of certain specific rules of contract law. They might have tried to argue that some rules justified choosing their law but realized that their clients were not sensitive to such arguments. They might never have tried, because they did not really see which specific rule to put forward. In any case, choices of law would be made on other grounds.

An alternative explanation may be that specific rules exist, but

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[106] Scherer & Schneider, *supra* note 62, at 313.

[107] Christoph Wildhaber, *Franchising—Switzerland: Pre-contractual Disclosure Obligations*, INT'L LAW OFFICE (Nov. 14, 2006), http://www.internationallawoffice.com/newsletters/detail.aspx?g=a6405696-1070-db11-a275-001143e35d55.

[108] Sebastian Brachert & Andreas Dietzel, *Deutsche AGB-Rechtsprechung und Flucht ins Schweizer Recht,* ZEITSCHRIFT FÜR DAS GESAMTE SCHULDRECHT 441 (2005).

that English and Swiss law promoters are unwilling to rely on them in their marketing materials. Such behavior might at first seem surprising, but can be explained. First, one might believe that English and Swiss law supporters do not want to disclose the rules that make their "product" superior to others in an attempt to prevent competitors from closing the gap by improving their own. A similar argument was made in the corporate charter competition among the different U.S. states. Scholars argued that the state of Delaware consciously chose not to adopt precise corporate law rules in order to prevent its potential competitors from simply copying its rules.[109] Instead, those scholars argued, Delaware chose to rely on its highly skilled and well-respected Court of Chancery to adapt and clarify its corporate law rules, which was far more difficult for its competitors to emulate.[110] The theory remains disputed in the United States,[111] and I am unaware of any evidence that a similar theory might apply in the context of the international market for contract law.

Yet another theory for the English and Swiss law advocates' lack of specificity is a desire to remain general because being too specific would be too costly. In sophisticated jurisdictions like England, Switzerland, France, or Germany, particular types of commercial contracts are governed by rules tailored to the type of contract. The quality of a chosen contract law, therefore, must be assessed on the basis of the distinctive rules governing that particular type of contract. The issue is not, therefore, whether general English contract law is superior to general French contract law. It is whether the English law governing financial contracts is superior to the French law governing financial contracts, or whether Swiss franchise law is superior to German franchise law. The logical consequence would require national law promoters to not only present and praise that nation's general contract law, but also to highlight and applaud the distinctive rules for each particular type of contract.[112] Any such attempt would, of course, raise several issues. First, the advertising

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[109] *See, e.g.*, Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1910 (1998).

[110] *See, e.g.*, Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 276 (1985); Kamar, *supra* note 109, at 1925.

[111] Many scholars explain Delaware's success by the precision of its highly developed case law. *See, e.g.*, Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 484 (1987); Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition Over Corporate Charters*, 112 YALE L.J. 553, 554 (2002).

[112] Some practitioners do, in fact, argue that the law of their particular jurisdiction is specifically well suited to certain types of transactions. *See, e.g.*, Brachert & Dietzel, *supra* note 108 (arguing that Swiss law is well suited to distribution contracts).

campaign would be prohibitively expensive. One can imagine that The Law Society of England and Wales might not have had the necessary resources to first survey the national rules governing all of the particular types of contracts and then determining which were more beneficial for international commercial actors than the rules of its competitors. Rather, one can imagine an organization settling for a much cheaper alternative: issuing a brochure promoting, in highly general terms, the benefits of English law.

Second, a particular body of national contract law might afford a distinctive, competitive legal regime for certain types of contracts, but not for others. Practitioners specialized in transactions governed by a competitive legal regime might be happy to explain why such a regime is superior, and underscore the specific rules which make it so. However, practitioners specializing in transactions governed by a less distinctive regime would not be able to market themselves as effectively and might therefore suffer from the publication of a brochure by their jurisdiction's professional association which touts the benefits of laws governing only certain types of transactions while saying nothing about their specialty. In such circumstances, avoiding specificity might satisfy a greater number of the association's members.

Third, it could be that English and Swiss law promoters target potential clients who may not be overly impressed by complex legal arguments based on the nuances of a particular contract law. Rather, such promoters may consciously choose to target business decision makers, rather than lawyers from other jurisdictions or even in-house counsel looking for local counsel, who are not particularly interested in details which may or may not be relevant to their situations.[113] From that perspective, easily understood, general arguments could be considered more effective.[114] Whether choice of law provisions are indeed negotiated by such business decision-makers (and whether the latter should be the target of such marketing efforts), however, remains to be seen.

2. General Features of Legal Systems

For whatever reason, the promoters of English and Swiss law focus on general features of their respective contract laws when

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[113] Vogenauer, *supra* note 28, at 33. Some of the advice given by the Law Society's brochure (i.e., to provide for the application of English law, to include a choice of law clause to that effect) confirms it.

[114] *Id.*

alleging their respective superiority. I will first discuss their arguments and explain why I find them unconvincing. I will then consider whether more specific arguments can be identified that better explain the attractiveness of these two contract laws.

English law advocates, on one hand, make four basic assertions: (1) that English law offers greater legal certainty than civil law systems, (2) that it is more flexible, (3) that it is more adaptable to quickly address the needs of commerce, and (4) that it includes fewer mandatory rules.[115] On the other hand, Swiss law promoters assert that Swiss law has fewer mandatory rules and is easily accessible.[116]

At the outset, one must acknowledge that one of the oldest and most traditional endeavors of comparative law scholarship has been to compare the English common law and civil law systems. Thus, a serious assessment of the Law Society of England and Wales' assertions relating to the English law's greater legal certainty and flexibility are far beyond the scope of this Article. But a consensus among scholars suggests that such an assessment would not prove particularly useful: all legal scholars who have commented on the Law Society's brochure have been highly critical of it,[117] and some have even gone so far as to identify a number of its inaccuracies and misleading statements.[118] Clearly, the brochure is a marketing tool that does not aim at contributing to legal science. Its target is business people, perhaps because they, lacking legal sophistication could be more easily convinced by such arguments. I will thus only briefly discuss the accuracy of the advertising claims made in the Law Society's brochure.

Any claim that English common law offers greater legal certainty than its civil law counterparts is built on the idea that a system of precedent produces more precise rules. The English system of precedents certainly produces precise rules, because precedents are defined by reference to the *ratio decidendi* of cases, and thus to the facts of cases. Civil law systems, however, can produce equally precise rules. First, legislation can be very precise, as English statutes demonstrate. Some French or German statutes are

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[115] *See supra* text accompanying notes 101–04.

[116] *See supra* text accompanying notes 105–06.

[117] *See* Christian von Bar, *Konkurrenz der Rechtsordnungen und "Law Made in Germany,"* LIBER AMICORUM OLE LANDO 13 (M.J. Bonell, M.-L. Holle, P.A. Nielsen eds., 2012); Hein Kötz, *The Jurisdiction of Choice: England and Wales or Germany?*, 18 EUR. R. PRIVATE L. 1243 (2010); Vogenauer, *supra* note 28, at 33; Volker Triebel, *Der Kampf ums anwendbare Recht: Offener Brief eines Anwalts an die Bundesjustizministerin*, *in* ANWALTSBLATT 306 (2008).

[118] *See, e.g.*, Triebel, *supra* note 117; Kötz, *supra* note 117.

equally precise. Second, and more importantly, precision in civil law systems comes from a feature of the civil law tradition foreign to the English common law: abstraction. Civil law systems are not just a collection of rules. Instead, they aspire to attain a system of coherent wholes in which particular rules can be deduced from general principles. Civil law systems are the result of centuries of attempts to systematize and organize the law in a logical, hierarchical way. The consequence is that lawmakers, whether legislatures or courts, can refer to highly abstract concepts developed by scholars over the years. In light of this conceptual background, civil law rules can be short and use seemingly vague words that are actually very precise terms of art. Observers unaware of this particularity of the civil law tradition might easily conclude that civil law systems produce less precise rules than the common law tradition. They would be wrong. The claim that the English common law is more precise than its civil law counterparts reveals, at best, ignorance of how civil law systems work and, at worst, a purposeful attempt to mislead business actors.

The brochure's claims that the English common law is more flexible than civil law systems and that it has a "light touch regulatory system" (as opposed to the implicit "heavy touch" used in civil law systems) essentially express the same idea: English common law contains more default rules, and fewer mandatory rules, than civil law. As a consequence, the brochure suggests, parties to commercial transactions have more freedom to agree on contractual provisions when English law governs the contract. However, there is simply no empirical basis for such a claim. To begin with, Swiss lawyers make exactly the same claim with respect to Swiss law, which belongs to the civil law tradition.[119] And indeed, commercial contract law in civil law jurisdictions is essentially composed of default rules that can be varied by contract, just as they can under the English law.[120] In the words of legendary comparative law scholar Hein Kötz, "some common [law] lawyers still seem to think that the German or French code provisions on contract law lay down a rigid and unbendable set of mandatory rules and thereby severely limit the parties' freedom of action. This is misleading, to put it mildly."[121]

The last claim—that English law adapts more quickly than civil law and is, therefore, more supportive of the needs of international commerce—is equally inaccurate. It builds, once again, on a simplistic view of the civil law tradition, which is perceived as a

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[119] *See* Wildhaber, *supra* note 107.
[120] *See* Kötz, *supra* note 117, at 1246.
[121] *Id.*

legal system relying exclusively on codes. The alleged English advantage would therefore come from the fact that judges make the law, and can adapt it each time they are confronted with a new commercial practice. The reasoning is flawed in many ways. First, judges also make the law in civil law jurisdictions. In France, for instance, before European harmonization, judges made most of tort law[122] and the entire conflict of laws. Not only did France's highest courts engage in lawmaking in the absence of legislative intervention,[123] but they also rewrote sections of the Civil Code when they found it outdated, or simply inappropriate.[124] France's highest courts adapted French law as much and as often as they wanted. Ironically, it is unclear whether the same could be said of England's highest courts. England's highest courts may not freely overrule their own precedents. The United Kingdom Supreme Court may only do so under certain limited conditions, which do not include the mere inappropriateness of an old precedent.[125] The Court of Appeal of England and Wales has simply no power to do so.[126] When one knows that, in practical terms, many cases must end at the level of the Court of Appeal, one can legitimately wonder whether English judges have the power to adapt the Common law to any new need facing society.

To conclude, it is highly doubtful that the general features of the English law described in the Law Society's brochure or of Swiss law described by Swiss practitioners can explain why those two contract laws are so often chosen by parties to international transactions.

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[122] *See, e.g.*, FRANÇOIS TERRÉ, PHILIPPE SIMLER & YVES LEQUETTE, DROIT CIVIL—LES OBLIGATIONS 15 (9th ed. 2005).

[123] For instance, the French Parliament almost never legislated in private international law, which was thus entirely made by the French Supreme Court for private and criminal matters. *See, e.g.*, DOMINIQUE BUREAU & HORATIA MUIR WATT, DROIT INT'L PRIVÉ 36 (2d ed. 2010) (Fr.).

[124] The vast majority of the Civil Code sections on the law of obligations date back to 1804. Many were reinterpreted in ways amounting to redrafting in recent years. For instance, Article 1184 of the Civil Code provides that the termination for breach of contracts must be judicial. The *Cour de cassation* has held that the other party could also declare termination. *See* Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Feb. 20, 2001, Case No. 99-15170 (Fr.).

[125] Practice Statement, [1966] 1 W.L.R. 1234.

[126] Davis v. Johnson, [1979] A.C. 317 (H.L.).

3. *Exploring Some Particularities of English and Swiss Contract Laws*

For a yet-to-be-determined reason, Swiss and English law promoters have decided, for the most part, to advocate the use of their respective contract laws by emphasizing their own, perhaps skewed, perception of the general features of their legal system rather than specific contract law rules. Regardless of their particular marketing strategies, it could well be that such specific rules exist and that sophisticated commercial parties know about them and purposely choose to apply Swiss or English law to take advantage thereof. Below, I reflect on what such specific rules might be.

One obvious reason to prefer one law over another is the existence of mandatory rules prohibiting certain types of contract clauses or even certain types of transactions altogether. Commercial parties can be expected to avoid contract laws that contain such restrictions, and prefer more liberal ones. It could be, therefore, that some types of transactions or particular contract terms are authorized under English or Swiss law, while forbidden under many other laws. As noted, this is certainly the general claim made by some promoters of these two contract laws.[127] Are there, however, specific examples and, at a minimum, anecdotal evidence that this is the case?

As a preliminary point, I am only discussing mandatory contract rules. Many other regulatory regimes are irrelevant for our purposes because their territorial scope of application is left untouched by choice of law clauses. Competition law, for example, regulates transactions without regard to which contract law is chosen by the parties to govern their contract.

As noted, despite the general claims made by their advocates, it is unclear whether either English or Swiss contract law is significantly more liberal than the commercial laws of other liberal states.[128] There is no doubt, however, that the English legal system has developed very differently from civil law systems and that this divergence has resulted in certain particularities that have generated unique legal doctrines. One example is the English law's distinction between law and equity, which generated distinctive common law doctrines and mechanisms, such as that of a trust. Such doctrines allow English practitioners to structure commercial transactions in ways that were not only unknown to the civil law tradition, but that are also very hard to replicate thereunder. In financial law, the trust

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[127] *See supra* notes 119–21 and accompanying text.
[128] *See supra* notes 119–21 and accompanying text.

doctrine enables English lawyers to establish security trustees who hold and manage, in trust, securities for a syndicate of creditors. The law of many civil law jurisdictions simply does not allow the appointment of a trustee with the same powers and with the same results.[129] One can understand, therefore, why parties to such transactions choose English law to govern them. To compete with the English law, some civil law jurisdictions have tried to reform their law of secured transactions to offer an equivalent to the trust,[130] but the results have not always been satisfactory.[131]

There may be other types of transactions for which English law is uniquely suited; choice of English law, therefore, could be explained by its specific rules and doctrines in certain cases. There is no evidence, however, that this is actually the case for a large number of transactions. Some practitioners have reported that this is not the case for construction, sales, or mergers and acquisition contracts.[132] It is thus unlikely that the dominance of English law is explained on that basis alone.[133]

Once parties to commercial transactions have determined that their contract will be found valid and enforceable in the competent jurisdiction, their next concern is likely performance thereunder. Thus, the rules applicable to the interpretation and performance of commercial contracts should be of critical importance to them. When parties conclude a commercial contract, one might further expect parties to agree on a law that will strictly enforce the specific terms of that contract. Similarly, although the issue is hotly debated among legal scholars,[134] one might reasonably assume that commercial parties want the language of their contract to be taken seriously and, thus, any interpretation thereof to be as literal as possible. Conversely, one could expect that contract laws that allow a court to rewrite provisions of negotiated contracts, and to otherwise assess the fairness of their terms, to be viewed with suspicion.

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[129] *See, e.g.*, Pierre Crocq, *Lacunes et limites de la loi au regard du droit des sûretés*, 24 RECUEIL DALLOZ 1354 (2007) (Fr.).

[130] *See, e.g.*, Claude Witz, *La fiducie française face aux expériences étrangères et à la convention de La Haye relative au trust*, 20 RECUEIL DALLOZ 1369 (2007) (Fr.).

[131] *See, e.g.*, Christian Larroumet, *La loi du 19 février 2007 sur la fiducie*, 9 RECUEIL DALLOZ 1350 (2007) (Fr.); Crocq, *supra* note 129.

[132] *See* Durand-Barthez, *supra* note 75, at 505.

[133] Indeed, many of the particularities of English law (for example, distinction between equity and common law, trust) are shared by other common law jurisdictions, including the laws of the various states in the United States, and their laws are not as successful. By contrast, Switzerland is a civil law jurisdiction, and its laws are as successful as English law.

[134] *See, e.g.*, Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926 (2010); STEVEN J. BURTON, ELEMENTS OF CONTRACT INTERPRETATION (2009).

Geoffrey Miller used his above-referenced study of over 2,800 U.S. commercial contracts[135] to test empirically these assumptions and this hypothesis.[136] Miller's analysis revealed that U.S. commercial parties chose New York state law in 46% of their contracts, while California state law was chosen in only 8% of them.[137] Miller then set about comparing New York and California state law on a wide range of issues and finally concluded that the essential difference between the two could be found in their respective rules on interpretation and enforcement of contracts. While Miller characterized New York state judges as "formalists" with "little tolerance for attempts to rewrite contracts to make them fairer or more equitable" and found that they "look at the written agreement as the definitive source of interpretation," he asserted the following about California judges:

> [They are] more willing to reform or reject contracts in the service of morality or public policy; it places less emphasis on the written agreement of the parties and seeks instead to identify the contours of their commercial relationship within a broader context framed by principles of reason, equity, and substantial justice.[138]

Several American scholars cite Miller's study as evidence that commercial parties prefer "formalist" or "textualist" contract laws (i.e., laws strictly enforcing the contract's agreed-upon terms and relying on "plain meaning" rules of interpretation).[139]

It is interesting to consider whether, in a similar vein, parties to international commercial transactions also prefer formalist contract laws. However, the ICC arbitration data does not bear out such a conclusion, particularly with respect to the two preferred contract laws: English and Swiss. Although English law has long been known for being very formalist, Swiss law places far less emphasis on written agreements and offers a variety of doctrines that enable courts to rewrite contracts to make them more equitable and fair.

English law has traditionally been perceived as being much more textualist and as enforcing contractual obligations more strictly than the laws of European civil law jurisdictions. English law places

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[135] Eisenberg & Miller, *Flight to New York*, *supra* note 4.

[136] Geoffrey P. Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 CARDOZO L.R. 1475 (2010) [hereinafter Miller, *Bargains Bicoastal*].

[137] Eisenberg & Miller, *Flight to New York*, *supra* note 4, at 1490.

[138] Miller, *Bargains Bicoastal*, *supra* note 136, at 1478.

[139] *See, e.g.*, Schwartz & Scott, *supra* note 134, at 957.

a strong emphasis on written agreements, following an objective approach with respect to the determination of contractual terms and to contract interpretation.[140] The intent of the parties is determined by objective criteria, such as the language used by the parties, rather than by subjective criteria.[141] In this respect, its parole evidence rule—which excludes the use of extrinsic evidence to add to, vary, or contradict the plain meaning of the written terms of a contract—is key.[142] English law also favors a more formalist approach to contract interpretation. Interpretation focuses on the language in the document itself. Unlike civil law jurisdictions, English law typically does not allow the consideration of pre-execution negotiations,[143] or the manner in which performance has been rendered post-execution,[144] to determine the meaning of contractual clauses. That is not to say that English courts inevitably interpret contracts in a formal, literal manner. Although the general rule is, indeed, that words should be given their plain and ordinary meaning, it has long been accepted that drafting mistakes can be made.[145] In these circumstances, a contextual interpretation is necessary, which will focus more on how reasonable commercial actors would construe the contract, rather than on how the particular actors might have interpreted it.[146] More importantly, English courts are not easily convinced that the drafted language in a written contract did not, in fact, represent the intent of the parties at the time of execution, such that a resort to contextual interpretation is required.[147] Finally, a characteristic feature of English law is its rejection of a duty of good

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[140] *See, e.g.*, JOHN CARTWRIGHT, CONTRACT LAW: AN INTRODUCTION TO THE ENGLISH LAW OF CONTRACT FOR THE CIVIL LAWYER 61 (1st ed. 2007).

[141] *Id.* at 62; s*ee also* Chartbrook Ltd. v. Persimmon Homes Ltd., [2009] UKHL 38 [39].

[142] *See generally* Jack Beatson, Andrew Burrows & John Cartwright, ANSON'S LAW OF CONTRACT 138 (24th ed. 2010).

[143] Prenn v. Simmonds, [1971] 1 W.L.R. 1381 (H.L.); Chartbrook Ltd. v. Persimmon Homes Ltd., [2009] UKHL 38 (H.L.).

[144] L. Schuler AG v. Wickman Machine Tool Sales Ltd., [1974] A.C. 235 (H.L.) [252].

[145] Investors Comp. Scheme Ltd. v. West Bromwich Bldg. Soc'y, [1997] UKHL 28.

[146] Prenn v. Simmonds, [1971] 1 W.L.R. 1381 (H.L.) [1384]; Mannai Invs. Co. Ltd. v. Eagle Star Life Assurance Co. Ltd., [1997] A.C. 749 (H.L.). In recent years, the United Kingdom's highest court has adopted such a purposive approach in a number of cases. *See, e.g.*, Re Sigma Fin. Corp. (in administration), [2009] UKSC 2. In *Chartbrook Ltd.*, for instance, Lord Hoffmann held that, as the literal meaning of a clause would make certain other provisions in the agreement appear arbitrary and irrational, the business purpose of the clause should be considered to interpret it. Even if one considers these precedents as evidence of an ongoing evolution of English law towards a less textualist approach to contract law, the difference remains clear with the law of European civil law jurisdictions, and the perception of commercial actors probably even clearer.

[147] Investors Comp. Scheme Ltd. v. West Bromwich Bldg. Soc'y, [1997] UKHL 28.

faith in either the formation or the performance of the contract, which could be used to limit its strict enforcement in any way.[148]

The other contract law preferred by international commercial actors—Swiss law—is far less formalist. Like many other continental legal systems,[149] Switzerland does not enforce contracts as strictly as England. Rather, for the Swiss, the basic principle is that contracts are interpreted according to the common intent of the parties. For that purpose, what matters is the intent of the actual parties, rather than what a reasonable person would believe the contract meant.[150] The written agreement is, of course, taken into consideration for determining what the parties actually wanted, but it is only one element among others. Circumstances surrounding the negotiation and execution of the contract, as well as its subsequent performance, may also be taken into consideration.[151] Not only does Switzerland eschew England's parole evidence and plain meaning rules, but it does not even establish a hierarchy between the written agreement and extrinsic evidence.[152] Thus, even when the written agreement is seemingly clear and unambiguous, extrinsic evidence is still admissible to demonstrate that the written agreement does not reflect the actual intent of the parties.[153] Further, a general principle of Swiss contract law requires parties to exercise their rights and perform their obligations in good faith:[154] the Swiss principle of good faith, like those of other European civil law systems, can result in the judicial creation of additional, accessory duties or obligations binding upon the parties,[155] as well as judicial creation of default rules designed to supplement incomplete contracts in the absence of statutory default rules.[156] Swiss law allows a court to modify the parties' obligations due to changed circumstances in the absence of such a clause if it decides that the parties should have included such a clause, but failed to do so.[157]

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[148] CARTWRIGHT, *supra* note 140, at 59.

[149] For the same conclusion regarding Germany, see Kötz, *supra* note 117, at 1248.

[150] PIERRE TERCIER & PASCAL PICHONNAZ, LE DROIT DES OBLIGATIONS 211 (5th ed. 2012).

[151] *Id.* at 212.

[152] PIERRE TERCIER, LE DROIT DES OBLIGATIONS 174 (3rd ed. 2004).

[153] TERCIER & PICHONNAZ, *supra* note 150, at 212 (citing Tribunal fédéral [TF] [Federal Tribunal] Oct. 26, 2006, 133 [ATF] III 61; Tribunal fédéral [TF] [Federal Tribunal] Mar. 1, 2007, 133 [ATF] III 280; Tribunal fédéral [TF] [Federal Tribunal] July 5, 2001, 127 [ATF] III 444).

[154] SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] [Civil Code] Dec. 10, 1907, SR 210, RS 210, art. 2 (Switz.); TERCIER & PICHONNAZ, *supra* note 150, at 26.

[155] TERCIER & PICHONNAZ, *supra* note 150, at 64.

[156] *Id.* at 216.

[157] *Id.* at 217.

Obviously, the differences between English and Swiss law with respect to contract interpretation and enforcement are striking.[158] In that regard, one could argue that Swiss and English law are as different as New York and California law. However, unlike California, Switzerland does not seem to suffer from its far less formal approach to contract interpretation, since it is chosen only slightly less often than English law. Why is that? There are three possible explanations. As the initial hypothesis suggested that commercial parties generally prefer more formalist/textualist contract law, one obvious explanation is that the hypothesis is simply wrong. Perhaps some, or even all, commercial parties find the distinction irrelevant or the distinction only makes a difference for certain types of transactions. One could imagine, for instance, that parties to long-term contracts might actually prefer a more contextualist approach, while parties to short-term contracts prefer more formalist laws. Another explanation could be that, while some commercial parties are highly sophisticated, others are not. Sophisticated commercial parties would be expected to make informed decisions with respect to choosing the contract's governing law, taking into account the important specific rules of each of the possibilities. Unsophisticated commercial parties might make their decisions for other reasons. For example, as discussed above, such parties might simply choose Swiss law because Switzerland is their preferred seat for any arbitration arising from the contract, despite the fact that there is no logical relationship between the choice of seat and choice of law.[159] Anecdotal evidence, however, seems to refute this particular conjecture, as major German corporations have a policy of choosing Swiss law and it is unlikely that many, or even some, of them would be considered to be unsophisticated parties.[160] Yet a third possibility could be that decisions with respect to choice of law are made after taking into consideration a variety of factors. One such factor is likely to be the appropriateness of the most important rules of a particular contract law, but it would not be the only, or even the most

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[158] Eugen Bucher, *Law of Contracts*, *in* INTRODUCTION TO SWISS LAW 113 (F. Dessemontet and T. Ansay eds., 2d ed. 1995).

[159] *See supra* text accompanying notes 49–53.

[160] *See, e.g.*, Vogenauer, *supra* note 28, at 36. While German companies might play an important role in the success of Swiss contract law, they could not explain it alone. The number of German parties in ICC arbitration is typically much lower than the number of parties providing for Swiss law (2012: 6.48% of German parties, 13.43% of parties providing for Swiss law; 2011: 5.15% of German parties, 11.9% of parties providing for Swiss law; 2010: 7.41% of German parties, 11.6% of parties providing for Swiss law). *See also infra* notes 162–64 and accompanying text.

important, one. In this scenario, parties weigh the intrinsic quality of a given contract law against other factors, perhaps resulting in the selection of a law that is less than optimal from a quality perspective but which is more appealing on other grounds.

To properly assess the perception of Swiss law by commercial parties, it is important to mention the German debate on the so-called flight of German businesses from German to Swiss law.[161] German legal practitioners are openly expressing concerns that they are losing business to Swiss legal practitioners. Specifically, they are concerned that German parties active in international commerce choose Swiss, rather than German, law to avoid German law's rather strict control of standard terms in B2B contracts.[162] Ironically, it seems that Swiss law is perceived to be *more* formalist than German law insofar as Swiss law, unlike German law, does not enable courts to review contract terms. A German courts' power to police (and override) standard contract terms is not considered business friendly, such that it encourages German businesses to avoid their own law! The concerns of such German businesses and practitioners have become so great that a number of German interest groups have proposed reforms to Germany's law of standard terms, some of which are expressly intended to improve the international competiveness of German contract law.[163] These reforms, however, are not universally acclaimed: other interest groups, in particular small- and medium-sized businesses, view the existing German regime as some protection against the superior bargaining power of larger businesses and, therefore, resist any reforms.[164]

Regardless of the success or failure of proposed reforms intended to make German law more competitive, the German debate, as well as the German actors' perceptions of Swiss law, are not entirely consistent with theory that commercial parties prefer the most formalist contract laws. Clearly, many Germans believe the flight *from* German law is due to that country's contextual approach to contract law, leading businesses to seek more formalist laws. But,

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[161] *See, e.g.*, Vogenauer, *supra* note 28, at 63.

[162] *See, e.g.*, *id.*; Horst Eidenmüller, *The Transnational Law Market, Regulatory Competition, and Transnational Corporations*, 18 IND. J. GLOBAL LEGAL STUD. 720 (2011).

[163] *See, e.g.*, Vogenauer, *supra* note 28, at 64. One proposal was prepared by the Committee for Private Law Matters of the German Bar Association. Another was issued by the representative bodies of the machine building and electrical engineering industry, the Frankfurt Chamber of Commerce, and various practitioners and in-house counsels which had established an "Initiative for the Development of the Law of Standard Terms in Business Transactions" for that purpose. *Id*.

[164] Vogenauer, *supra* note 28, at 65.

that cannot explain German businesses flight *to* Swiss law, which is far less formalist than other contract laws. If German businesses are seeking more formalist contract laws, why hasn't their flight *from* German law benefited English or New York law, for example? Of course, one can always fall back on the notion that the underlying hypothesis—that commercial parties generally prefer more formalist/textualist contract laws—is simply wrong: some might and some might not, such that their preferences are hetero- rather than homogeneous. Another explanation, as discussed above, is that the intrinsic quality of a particular contract law is just one factor taken into consideration when making such choices. Perhaps German parties perceive Swiss law as a better choice than English or New York law because they expect it to be more familiar. English contract law is based on common law doctrines, with unfamiliar concepts like consideration and equitable estoppel, while Swiss contract law relies on many doctrines that also exist in Germany. Moreover, Swiss law is available in German.[165] One would not expect sophisticated parties to choose a law to govern their contract on the basis of such factors, but the fear of the unknown (which may be fueled, in part, by the rather ubiquitous notion that civil law and common law systems are so disparate that they are, essentially, incompatible, with both sides believing their system is "right" and the other "wrong") may be a very powerful force indeed. The lesson to be drawn from this may well be that international transactions are essentially different from domestic transactions, such that the relevance of Eisenberg and Miller's study is limited to U.S. domestic transactions.

IV. FOUR HYPOTHESES ON PARTIES' PREFERENCES

In the previous Part, I sought to identify various factors that could explain the preferences of international commercial parties, which could, in turn, influence their choice of law in their contracts. I concluded, however, that none of those factors, alone, could explain my findings. In particular, there is no discernible factor common to both English and Swiss law that explains their international attractiveness.

Intuitively, one would think that parties' preferences would be as heterogeneous as the parties, and their transactions, are. After all, they have very diverse backgrounds and international commercial transactions are very diverse, as well. Nevertheless, one would have

[165] *See id.* at 59.

expected such heterogeneity to lead to far greater diversity in the results. But, the ICC Arbitration Data suggests that, essentially, international commercial parties resort to five laws out of more than 200 and strongly prefer two among those five. While being much more heterogeneous than the U.S. domestic situation, where one law clearly dominates, the preferences of international commercial parties actually seem quite homogeneous.

An alternative and, perhaps, more convincing explanation might be that, while such parties have similar preferences, they address the issue of choice of law differently. A first reason could be that they wish to invest different resources in the process of selecting the applicable law. A second reason could be that their reasoning is bounded in a number of ways, which might explain why they are ready to make decisions on the basis of factors having varying degrees of relevance.

A. Sophisticated Parties Ready to Incur Necessary Transaction Costs

One category of international commercial parties is composed of sophisticated actors who appreciate that choosing the law governing their contract subjects their relationship to the specific rules of the chosen contract law and who are ready to incur the necessary costs to study the content of that law. As a result, the driving force in such parties' choice is the content of the law. Such parties, therefore, choose a given national law after verifying that its particular rules fit their needs.

For them, the attractiveness of different contract laws is a function of the perceived qualities thereof. Thus, the most attractive contract laws should be those that contain specific rules which best fit the needs of these commercial actors. For such parties, English law or Swiss law is preferable because they perceive that some of the specific rules are better suited to them in contrast to rules existing in other contract laws.

As previously noted, I have been unable to identify any rule common to both Swiss and English law that could explain their particular success. On the contrary, English and Swiss law are markedly different with respect to a number of important issues, such as the manner of contract interpretation, the existence of an obligation of good faith, and the possibility of distinguishing legal and equitable ownership.[166] Thus, if sophisticated parties are

[166] *See supra* Part III.B.3.

choosing specific contract laws based on their specific content, those parties would have to value different contract law rules, with some finding English rules more attractive and others finding Swiss rules more attractive. How so? Parties to short-term contracts might, for example, value strict enforcement of contractual terms, while parties to long-term contracts might consider a literal interpretation too restrictive, such that they prefer a contract law that gives courts tools to adapt initial obligations to changed circumstances. I have, however, no evidence to back this supposition.[167] Quite to the contrary, data collected by the Swiss Chambers' Arbitration Institution[168] suggests that international contracts providing for arbitration in Switzerland and the application of Swiss law are often short-term contracts.[169]

Moreover, even if this second proffered explanation for the parties' choices is correct, it only explains why Swiss and English law dominate the market. But it would still beg the question of why other contract laws, which are similar to either Swiss or English law, are not chosen more often. For example, if one assumes that English law is popular because it strictly enforces contractual terms, why is it that New York law, which shares that trait, is not more appealing to international commercial parties and, thus, chosen by them more often? Recall that I have pooled the data with respect to ICC arbitrations in which the law of any U.S. State was chosen, to compare the choice of all U.S. contract laws to the choice of non-U.S. contract laws and, as so pooled, the ICC Arbitration Data shows that U.S. law is chosen three times less often than English law. However, New York law, alone, represents half of the ICC arbitrations that chose any U.S. law, such that New York law, which shares many of the same features as English law, is approximately six times less attractive than English law. Why is that?

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[167] The ICC does not report on the specific contracts for which English or Swiss law was chosen.

[168] On the Swiss Chambers' Arbitration Institution, see *supra* text accompanying notes 54–59. Between 2004 and 2012, parties choosing to resort to this institution provided for the application of Swiss contract law in 72% of the cases. See *supra* notes 58–59.

[169] Between 2004 and 2012, the four most represented kinds of contracts in arbitration proceedings supervised by the Swiss Chambers' Arbitration Institution were purchase and sale of goods (29%), purchase/sale of shares (13%), distribution/agency contracts (13%), and service contracts (10%). *See* ARBITRATION STATISTICS 2012, *supra* note 56. While those categories are not defined by the authors of the statistics, it seems that contracts belonging to the first two would mostly be short-term contracts.

B. Sophisticated Parties Unwilling to Incur Necessary Transaction Costs

Another category of international commercial actor might well appreciate the importance of the law governing their transactions, but be unwilling to incur the cost of exploring and understanding the content of foreign contract laws. For this reason, they would first try to secure the application of their own law. If the other party has the same mindset, the two would be unlikely to agree on one of their own contract laws, making it highly plausible that they will settle on a third state law. Parties unwilling to incur the costs of verifying the content thereof, much less comparing the content of several third-state laws, would eventually choose the applicable law for reasons other than the quality thereof.

To verify the content of a foreign contract law typically involves hiring local counsel (i.e., a lawyer trained in that particular contract law), even if the party already has outside counsel. One might expect that, in light of the sheer volume of international contracts executed each day, parties often negotiate their transactions without the benefit of any lawyer, or at least without any outside counsel, as lawyers can significantly increase the cost of a transaction. Rather, such parties might well rely on their own in-house knowledge (including, perhaps, the expertise of in-house counsel). But, such internal knowledge will typically be limited to knowledge of their jurisdiction's law. Moreover, while still other parties may use the services of attorneys in their negotiations, such attorneys will typically be the parties' habitual lawyers, schooled in the law of the party's jurisdiction.[170]

Thus, in virtually every case in which the specter of a foreign law arises, local counsel is likely to be needed to truly understand the implications of the choice, but the circumstances of the particular transaction may make seeking such expertise neither timely nor cost-effective. So, parties may end up choosing the applicable law without having the relevant information on the particularities of any contract law other than their own. One can only assume that, when this situation arises, the parties make their decision on other grounds.

If sophisticated parties (i.e., parties who understand the importance of the law governing their contract),[171] find themselves in

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[170] An important issue is whether competent and ethical lawyers should actually advise their clients to seek local expertise before agreeing to subject their contract to any foreign law. I leave this issue for further research.

[171] For unsophisticated parties, see *infra* Part IV.D.

such a situation, one would expect them to either (i) seek the relevant information on the content and qualities of foreign laws in a time-efficient and cost-effective manner or (ii) try to assess its qualities indirectly, using proxies.

The first approach—seeking inexpensive and easily accessible information about a particular contract law might be sufficient for some international commercial actor and they may make their choice on this basis. In this regard, marketing materials (such as the brochure published by the Law Society of England and Wales), which provide brief explanations of the general features of a contract law, might prove quite useful; such materials are made available for free, are generally a very quick read, and make reasonably convincing arguments.

Likewise, such parties might be sensitive to arguments that a given contract law offers a mix of legal cultures and systems, such that it shares a number of rules and doctrines with other legal systems (perhaps the actor's own contract law). Indeed, such statements might offer some comfort to such parties, allowing them to believe that any additional time and expense associated with understanding the specific content of such mixed laws (e.g., the cost of hiring local counsel) is simply not worthwhile. Rather, such parties might think that, having already decided (for whatever reason) that knowing the specific rules of the chosen law is not an option, the next best thing is to choose a law that has commonalities with many other laws and is, therefore, likely to contain some familiar rules.

The other approach to choosing a law, for sophisticated parties unable or unwilling to incur the costs of verifying the specific content of third state laws, is to seek indirect assessment of the quality of such contract laws through proxies. The most obvious proxy is the opinion expressed by other commercial actors (either directly or indirectly). International commercial parties might simply want to follow the most common practice in their particular trade. If they hear that similarly situated parties often provide for English law or that they typically designate Switzerland both as the venue for arbitration and the applicable law, they might think that it is safe to do the same.[172] Moreover, if a standard form contract provides a default contract law in the absence of the parties' specific choice of a

[172] *See* Vogenauer, *supra* note 28, at 60 ("It seems that many parties to international transactions choose English law simply because they assume that others do the same."). Vogenauer also argues that parties choosing a law often chosen by other parties would benefit from a network effect. *Id*. at 25.

different one, the parties may simply stick with the default law, as the form's drafter obviously thought it would be acceptable.

C. Sophisticated Parties Bounded Rationally

A third category of international commercial parties might appreciate the importance of the law governing their transactions, but suffer from cognitive limitations, which would prevent them from making a fully rational choice.

An important development of law and economics scholarship in the last 15 years has been the recognition that the rationality assumption of traditional law and economics scholarship is often mistaken, and that actors suffer various cognitive limitations that bound their rationality.[173] The project of behavioral law and economics scholarship is to identify such cognitive limitations and predict how actors really behave when suffering them.[174] While most of the findings of these scholars do not seem to be directly relevant for the purpose of this Article, there are two cognitive limitations that might regularly influence choice of law in international contracts.

The first is choice overload.[175] As noted, parties agreeing to arbitrate their disputes may choose the contract law of any state in the world. They therefore have more than 200 options.[176] Some parties might be overwhelmed by the range of available choices. As a result, they may simply decide not to make use of the possibility to compare even a small number of laws. They could either abdicate the decision-making entirely, and not choose any law at all, or stick to the habitual choice of governing law.[177] The psychology literature has long identified the risks of decisional paralysis[178] or of status quo

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[173] *See generally* Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998) (describing many applications in legal fields other than antitrust fifteen years ago); Cass R. Sunstein, *Behavioral Law and Economics: A Progress Report*, 1 AM. L. & ECON. REV. 115, 115 (1999) (describing a "flood" of behaviorally oriented legal research existing in 1999).

[174] *See generally* Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000).

[175] *See* Low, *supra* note 28, at 373.

[176] *See supra* text accompanying note 13.

[177] Low, *supra* note 28, at 373.

[178] *See, e.g.*, Barry Schwartz, *Self-determination: The Tyranny of Freedom* 55 AM. PSYCHOLOGIST 79 (2000); BARRY SCHWARTZ, THE PARADOX OF CHOICE (2004); Sheena Iyengar & Mark Lepper, *When Choice is Demotivating: Can One Desire Too Much of a Good Thing?*, 79 J. PERSONALITY & SOC. PSYCHOL. 995 (2000).

bias arising out of choice overload.[179]

The finding that parties might suffer from choice overload is useful to explain why a number of commercial do not make any choice of law in their contracts. It may also suggest that many parties would not change easily their preferences with respect to choice of law, and that lawmakers eager to compete on the market for contracts might have to invest significant resources to succeed. But cognitive limitations preventing parties from making choices will not, by definition, help understand why (other) parties positively choose certain laws.

Another cognitive limitation that could be relevant for the purpose of this Article is the fear of the unknown. An important lesson of prospect theory[180] is that actors have a strong preference for certainty and are willing to sacrifice income to achieve more certainty.[181] In the context of international contracting, this finding might explain why some parties would strongly prefer to choose a law which is perceived to be similar to their own. They would highly value avoiding risks of being surprised by the content of the chosen law, and might thus be ready to prefer a law less adapted to their needs but closer to their own and thus more familiar.[182]

A number of scholars have speculated that parties might prefer to choose a foreign law that resembles their own as closely as possible.[183] One explanation for the success of Swiss law could be that parties originating from civil law jurisdictions would prefer to choose Swiss law because of its commonalities with the laws of several civil law jurisdictions, namely French and German law. Some parties might also have a preference for laws enforcing strictly promises. For this reason, they might prefer to provide for the application of a formalist law. However, their preference for certainty would prevent them from choosing the law of common law jurisdiction even if it were more formalist than the law of any civil law jurisdiction. This might be the explanation for the practice of German businesses seeking to avoid the German regime of standard terms to provide for the application of Swiss law.[184]

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[179] *See, e.g.*, William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988); Daniel Kahneman et. al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991).

[180] Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979).

[181] Jolls, Sunstein & Thaler, *supra* note 174, at 123.

[182] Vogenauer, *supra* note 28, at 25.

[183] *Id.*

[184] *See supra* text accompanying notes 162–65.

D. Unsophisticated Parties

Finally, a fourth category of international commercial parties undoubtedly exists: parties who simply fail to fully appreciate the importance of their choice of law to govern their contracts because they are unsophisticated from a legal point of view. It would be absurd to believe that all parties concluding contracts, even international commercial ones, fully comprehend the importance of the law they select. Most of them are, after all, businessmen and, although some may have some legal training, most will not and some will have no higher education at all.

The extent of international commercial actors' lack of legal sophistication can vary substantially. Some parties might simply ignore the legal aspect of their transaction; they would probably be happy not to include any choice of law clause in their contract, in the hope that the transaction works exactly as agreed and requires no resort to the law to enforce it. One can imagine that thousands of such transactions are concluded each and every day without the need to resort to external dispute resolution. And, if a more sophisticated party confronts such parties with the issue, they might simply concede to the other party's proposal or may even try to obtain some small advantage in exchange for conceding to that other party's preferred law.

Still other unsophisticated parties might have a better sense of the significance of the law governing their transaction, but still fail to understand all implications of a choice of law. They might, for example, wrongly believe that the issue of the applicable law is related to other issues that are, in truth, unrelated. As a consequence, they may make such choices relying on factors that are simply irrelevant. It is, of course, difficult to speculate on how unsophisticated parties might err. One mistake, however, is undoubtedly very common: the confusion between choice of venue and choice of law. For unsophisticated parties, it is likely that choosing a court or the seat of the arbitration is indistinguishable from choosing the law applicable to the contract. Such mistake can result in two different behaviors. On the one hand, such parties might neglect to choose the applicable law after choosing the venue, as they will fail to appreciate the difference between the two.[185] On the other, they might feel that choice of venue dictates choice of law, such that they believe it natural to choose the same jurisdiction for both. This second alternative could, in fact,

[185] The ICC reports that 20% of parties to ICC arbitrations, who will have provided in most cases for the venue of the arbitration, do not provide an applicable law.

explain the success of Swiss contract law.[186] Switzerland is one of the most successful venues for international arbitration in Europe; Swiss contract law might benefit from that success because many parties believe that choosing Switzerland as the venue entails choosing Swiss contract law. To prove this hypothesis, however, would require an analysis of data from other arbitral institutions and an exploration of the extent to which parties who choose a different seat for their arbitration choose Swiss law.[187]

V. CONCLUSION

This Article is based on an empirical study of the data published by one arbitral institution. While parties to ICC arbitrations are very diverse, I have noted that European parties are overrepresented and American and Asian parties are underrepresented.[188] The study could be complemented by a study of cases arbitrated under the aegis of the major arbitral institutions in Asia and in the Americas.[189]

From the perspective of the United States, an important question would be whether the study of Asian and American cases would confirm the poor performance of U.S. state laws in general and New York law in particular. Received wisdom is that English and New York law dominates international business transactions. This study and the preliminary results of the study of Asian data reveal that the truth of the matter might well be that New York is far from being a serious competitor to English law. This finding, if confirmed, would be counterintuitive as the contents of English and New York law are very similar. Is New York law suffering from the incomprehension and fear that the American legal system inspires to the rest of the world?[190] I leave this question for further research.

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[186] *See also supra* Part III.A.1.

[187] This author is currently conducting such a study in Asia. The preliminary results for Singapore and Hong Kong are that parties choosing to arbitrate in either Singapore or Hong Kong virtually never provide for the application of Swiss law, but often provide for the application of English law or the law of the seat of the arbitration (i.e. either Singapore or Hong Kong law).

[188] *See supra* text accompanying notes 23–25.

[189] Unfortunately, while major Asian institutions have agreed to provide the necessary data, the American Arbitration Association has so far not responded to any of my inquiries.

[190] *See* Stefan Vogenauer, *Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law—A Business Survey—Final Results* (2008) (U.S. law is the first contract law the choice of which European businesses try to avoid (21%), the laws of Islamic countries ranking second (13%)).

APPENDIX. ICC Data

		2007	2008	2009	2010	2011	2012
Number of Cases		599	663	817	793	796	759
% choice of national laws		0.79299	0.84	0.8678	0.82	0.8232	0.85
Parties		1611	1758	2095	2145	2293	2036
Switzerland	% of parties	2.42086	2.96	3.01	2.38	2.83	2.9
	% of parties (weighted)	1.42758	1.8754	2.0372	1.443	1.6174	1.8379
	% of choice of law	10.2	9.5	13.1	11.6	11.9	13.43
	Seat	82	77	109	79	88	122
	Attractiveness	8.77242	7.6246	11.063	10.16	10.283	11.592
England	% of parties	4.28305	3.19	3.53	3.12	3.84	2.4
	% of parties (weighted)	2.52571	2.0211	2.3891	1.892	2.1947	1.521
	% of choice of law	11.9	13	14.3	12.9	10.7	16.95
	Seat	53	56	67	46	59	71
	Attractiveness	9.37429	10.979	11.911	11.01	8.5053	15.429
USA	% of parties	8.44196	10.35	7.78	8.67	6.76	7.12
	% of parties (weighted)	4.97821	6.5576	4.8443	5.257	3.8636	4.5122
	% of choice of law	7.1	6.7	7.1	10.1	10.6	9.78
	NY law (%)	3.5	4.1875	3.124	4.747	5.4272	5.5746
	Seat	36	29	31	42	43	41
	Attractiveness	2.12179	0.1424	2.2557	4.843	6.7364	5.2678
France	% of parties	6.45562	7.22	7.35	6.11	6.28	6.09
	% of parties (weighted)	3.36761	4.2143	4.5766	3.705	3.5893	3.8595
	% of choice of law	6.7	7.3	7.2	6.6	7.2	7.17
	Seat	86	73	94	109	92	101
	Attractiveness	3.33239	3.0857	2.6234	2.895	3.6107	3.3105
Germany	% of parties	9.80757	7.85	6.87	7.41	5.15	6.48
	% of parties (weighted)	5.41746	4.7213	4.2777	4.493	2.9434	4.1067
	% of choice of law	7.2	4.8	6	8.2	6.6	5.35
	Seat	21	35	37	24	39	19
	Attractiveness	1.78254	0.0787	1.7223	3.707	3.6566	1.2433