The Rise of Form Contract:
Contract Design and Enforcement in the First Corporations

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ABSTRACT. England's first business corporations, the joint stock trading companies, grew from small entrepreneurial ventures to define a century of world trade. This Article revisits the law's role in their success. The central claim is that the companies succeeded not only because of their innovations in *organizational form*, which are widely appreciated, but also because of their innovations in *contractual form*. The joint stock companies faced a daunting challenge – to manage agents trading under uncertain conditions and at vast distances of time and space. This challenge was only sharpened because as novel business ventures opening trade with foreign polities, they could not rely on the mechanisms of kinship, reputation, and shared norms often celebrated by historians of premodern commerce.

I show how two of the largest joint stock companies, the East India Company and Hudson's Bay Company, responded to this challenge by developing sophisticated standard form contracts that tailored employees' duties and established complex remedies. The East India Company aggressively litigated its contracts in England's high courts, generating a substantial body of novel case law. This heavy reliance on formal design and enforcement contrasts with much of the scholarship on premodern contracting, which often emphasizes private ordering without the state. Yet the joint stock companies show how formal contract design and enforcement could already offer powerful advantages in seventeenth century England. Form contracting enabled the firms to apply an intricate, well-defined set of incentives and sanctions to all employees, strengthened the clarity and enforcement of contract terms, and provided uniform, shared expectations as a substitute for pre-existing social and cultural ties. This account has implications for how we understand the common law of contracts, the efficiencies of standard form contracting, and the role of contract law in economic development.

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INTRODUCTION

In the middle of the sixteenth century, England began its experiment in the organizational form that has come to dominate global commerce.[1] It began chartering business corporations. These entities, known as the joint stock trading companies, were created by the English Crown to allow domestic merchants to compete with the growing commercial empires of the time.[2] They began as small entrepreneurial ventures, but some of them would come to shape world trade, linking Europe with what is now Russia, Canada, and India. Over the course of the early modern era, the joint stock companies would prove themselves a driving force in the English economy.[3]

How was this possible? This Article revisits the law's role in the joint stock companies' success. Its central claim is that the companies succeeded not only because of their innovations in *organizational law*, which are widely appreciated, but also because of their innovations in *contract law*. At an organizational level, the companies' combined two preexisting but distinct legal technologies—the corporate form, previously used by municipalities and monasteries, and joint stock financing—to give birth to the business corporation.[4] This new organizational form could be used to raise enormous amounts of capital from dispersed and passive shareholders.

Yet raising capital was only one ingredient necessary for the companies' success. The joint stock trading companies faced the daunting challenge of managing agents trading at vast distances from London. Roundtrip communication between headquarters and traders was measured in years, and directors had little ability to monitor the opportunities their merchants encountered. Domestic legal enforcement was often difficult and prospects

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[1] *See, e.g.*, Giuseppe Dari-Mattiacci et al., *The Emergence of the Corporate Form*, 33 J. L. ECON. & ORG. 193, 194 (2017); Harold J. Laski, *The Early History of the Corporation in England*, 30 HARV. L. REV. 561 (1917) (exploring developing conceptions of organizational forms as possessing separate personality).

[2] Ron Harris, *The English East India Company and the History of Company Law*, *in* VOC 1602-2002, 400 YEARS OF COMPANY LAW, SERIES LAW OF BUSINESS AND FINANCE, Vol. 6, at 219-247 (Ella Gepken-Jager, Gerard van Solinge, Levinus Timmerman eds. 2005).

[3] By the end of the seventeenth century, the joint stock companies had a combined value of £4.25 million in a country whose total industrial wealth has been estimated at £33 million. W.R. SCOTT, JOINT-STOCK COMPANIES TO 1720, Vol. III, at 336, 462-470 (1911). In fact, Scott estimates that the capital raised by joint stock companies as of 1720 constituted 13 percent or so of the national wealth of the time, and a far higher percentage of the wealth resulting from trade, rather than from land, cattle, homes, and household goods. *Id.* at 439. For just a sense of why the companies could be so valuable to the English economy, consider that in 1750, the Indian subcontinent accounted for roughly a quarter of global manufacturing, while Britain accounted for 1.2 percent. Bengal, for a long time the heart of EIC operations in India, was then the area's most prosperous province. Three of those companies were responsible for over half of all of the companies' value. SCOTT, *supra* note 52, at 336; *see also* Svetlana Andrianova, Panicos Demetriades & Chenggang Xu, *Political Economy Origins of Financial Markets in Europe and Asia*, 39 WORLD DEV. 686 (2011).

[4] Harris, *supra* note 2, at 23.

for overseas enforcement dim. The result was that while large efficiencies might flow from the use of agents in overseas trade, the effective control of those agents could pose a prohibitive challenge.

That challenge was only sharpened because many of the tools favored by premodern enterprises to manage their agents were unavailable to the joint stock companies. Some of economic history's most iconic work celebrates the role of informal norms and networks in overcoming barriers to long-distance trade.[5] Family firms grew to substantial size in Eurasia, Southeast China, and Gujarat.[6] Merchant networks, typically based on shared kinship, religion, and regional origin, played an important role in Mediterranean trade.[7] Seminal work on the Maghribi traders argues that they deployed a socially exclusive "coalition" to share reputational knowledge that disciplined agents' self-interest.[8]

England's first business corporations could not avail themselves of any of these strategies. By dint of their very objective of opening trade with distant territories, the joint stock companies could not rely on preexisting relationships and thick norms among trading counterparties. They benefited from accumulating capital from a broad and dispersed base of shareholders,[9] but this also left them with few social connections to build on as a result. The agency and management problems the companies faced, however, were exceptionally severe. If these newly chartered businesses were to succeed, they would have to develop successful commercial enterprises with little social glue to bind together employees. The cost of the joint stock companies' failure would have been significant for England. As Douglass North once noted, "the inability of societies to develop effective, low-cost enforcement of contracts is the most important source of both historical stagnation and contemporary underdevelopment."[10]

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[5] Avner Greif, *Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders*, 49 J. ECON. HIST. 857 (1989).

[6] RON HARRIS, GOING THE DISTANCE: EURASIAN TRADE AND THE RISE OF THE BUSINESS CORPORATION, 1400-1700, at 173 (2020).

[7] *Id.* at 198. *See, e.g.*, N. ROSENBERG & L.E. BIRDZELL, JR., HOW THE WEST GREW RICH (1986); *see also infra* note 145and accompanying text. For examples in the modern world of reliance on norms for contract enforcement, see Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms and Institutions*, 99 MICH. L. REV. 1724, 1760 (2001) ("The cotton industry has almost entirely opted out of the public legal system, replacing it with one of the oldest and most complex systems of private commercial law.").

[8] *Id.* Later work revisiting the Maghribi emphasized the intertwining of reputation and agency relationships. Jessica L. Goldberg, *Choosing and Enforcing Business Relationships in the Eleventh-Century Mediterranean: Reassessing the 'Maghribi Traders'*, 216 PAST & PRESENT 3 (2012).

[9] Giuseppe Dari-Mattiacci et al., *supra* note 1, at 194.

[10] DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 54 (1990); *see also* Douglass C. North & Robert Paul Thomas, *An Economic Theory of the Growth of the Western World*, 23 ECON. HIST. REV. 1 (1970); Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803 (1989). More recent work by economists, economic historians, and legal scholars continues to emphasize the importance of institutions to economic growth, *see, e.g.*, Daron Acemoglu & Simon Johnson, *Unbundling*

Legal scholars and economists have dedicated enormous attention to the joint stock companies' innovations in organizational form.[11] Indeed, the "key institutional innovation" of the corporate form is one of the defining moments in modern business history, and theories devoted to explaining its emergence comprise a significant literature.[12] Yet, no legal scholar has had anything to say about the joint stock companies' contracts. In fact, a large portion of contracts scholarship mistakenly assumes that standard form contracts developed in the nineteenth century, two hundred years after their use by the joint stock companies.[13] Economists have done better, and Santhi Hejeebu's important work has explored how the East India Company managed its agents in eighteenth century Bengal.[14] But economists have understandably paid little attention to the legal structures the contracts adopted or to the legal innovations the companies' developed. Yet those innovations played an important role in the companies' success.

This article shows how England's first business corporations developed sophisticated standard form contracts to address the problem of managing agents abroad and aggressively enforced those contracts in court. To understand the joint stock companies, I study two of the largest ones, the Hudson's Bay Company (HBC) and the East India Company (EIC). In particular, the EIC will be my focus because of the exceptionally rich set of primary documents it left behind. To the best of my knowledge, this is the first paper to systematically explain the design choices reflected in the EIC and HBC contracts with their agents, to marshal empirical evidence suggesting the importance of formal enforcement of these contracts, or to suggest that the technology of standard form contracts played an important role in these companies' success.

The paper makes three principal contributions. First, I document and explain the companies' contract design, beginning with the EIC's earliest surviving standard employment contract from the 1600s and tracing its development to a far longer and more complex form in the late eighteenth century. Figure 1 depicts the sample of surviving EIC

Institutions, 113 J. POL. ECON. 949 (2005) (disaggregating "property rights institutions" and "contracting institutions" and analyzing their effects on economic growth); Daron Acemoglu et al., *Institutions as a Fundamental Cause of Long-Run Growth*, in 1A HANDBOOK OF ECONOMIC GROWTH 385 (Philippe Aghion & Steven N. Durlauf eds., 2005); Nathan Nunn, *Relationship-Specificity, Incomplete Contracts, and the Pattern of Trade*, 122 Q. J. ECON. 569 (2007) (arguing for the decisive importance of a country's ability to enforce contracts in its economic development).

[11] *See, e.g.*, Graeme G. Acheson, Gareth Campbell, John D. Turner & Nadia Vanteeva, *Corporate Ownership and Control in Victorian Britain*, 68 ECON. HIST. REV. 911, 911-13 (2015); K. N. Chaudhuri, *The English East India Company in the 17th and 18th Centuries: A Pre-Modern Multinational Organization, in* COMPANIES AND TRADE: ESSAYS ON OVERSEAS TRADING COMPANIES DURING THE ANCIEN RÉGIME 29, 29-30, 41 (Leonard Blussé & Femme Gaastra eds., 1981); M. Schmitthoff, *The Origin of the Joint-Stock Company*, 3 U. TORONTO L.J. 74, 88-96 (1939); Philip J. Stern, *The English East India Company and the Modern Corporation: Legacies, Lessons, and Limitations*, 39 Seattle U.L. Rev. 423, 445 (2016); John D. Turner, *The Development of English Company Law Before 1900*, at 2-3 (Queen's Univ. Ctr. for Econ. Hist., Working Paper No. 2017-01, 2017).

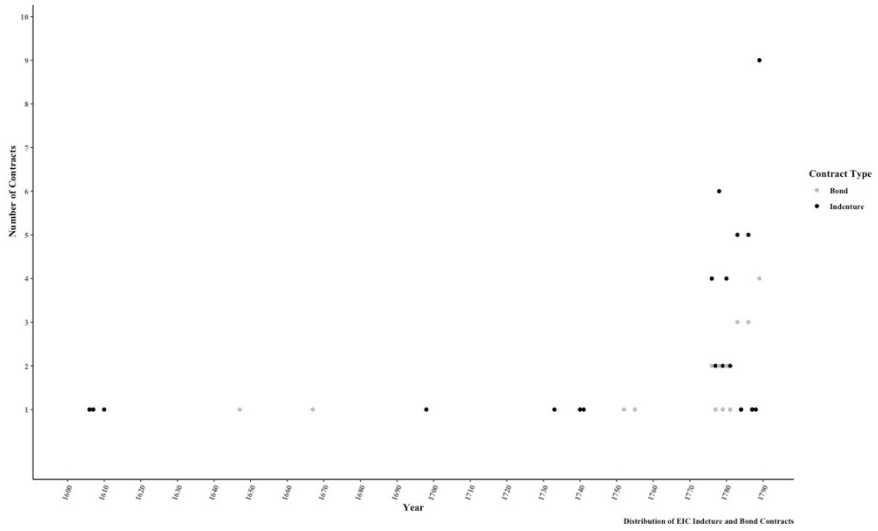
[12] Oscar Gelderblom et al., *The Formative Years of the Modern Corporation: The Dutch East India Company VOC, 1602-1623*, 73 J. ECON. HIST. 1050, 1050 (2013)

[13] *See infra* notes 175-183 and accompanying text.

[14] Ann M. Carlos & Stephen Nicholas, *"Giants of an Earlier Capitalism": The Chartered Companies as Modern Multinationals*, 62 BUS. HIST. REV. 398, 400-02 (1988); *see infra* note 31 and accompanying text.

contracts.[15] In the EIC's earliest contracts, the fundamental design choices are to specify agents' affirmative obligations, explicitly prohibit agents from trading for themselves, and require agents to obtain two sureties who provide "penal bonds"—commitments to pay the company a fixed sum (£200 in 1608) in the event of an agent's contractual breach.

Figure 1. EIC Contracts between 1600-1780



Yet by the middle of the seventeenth century, the EIC was developing a far more complex standard form. Consider an example. On February 19, 1740, William Price entered a contract with the East India Company.[16] The contract was printed on a single, large parchment, but would run to eight or so printed pages today. It was the same contract that every other employee joining the EIC would enter that year. That contract contained a list of duties and sanctions that is almost astonishing. William Price agreed to obey company directions, resist those violating company directions, disclose other employees' wrongs to the company, and keep its confidences and accounts; to trade for his own profit only among the ports of India, and to otherwise trade only for the company's profit, to pay the company double the worth of any goods traded without its approval, and to waive a variety of procedural rights in court if sued for trading illicitly for his own profit; and to pay damages to any third parties injured by his conduct abroad. And, in fact, he agreed to much more. An individual joining the Hudson's Bay Company in the eighteenth century would have encountered something similar, if briefer. A standard form employment contract, signed by every employee, that provided in detail for terms governing the affirmative duties

[15] Figure 1 depicts the number of contracts I am able to observe, depicted by year (from 1600 and 1780) and contract type. Contract type denotes whether a contract is an indenture or bond. The indenture was the principal contract and contained the terms that governed the relationship between the company and its factors. *See infra* notes 71-76 and accompanying text. The bond, often referred to as a "penal bond" or "conditional bond," was a contract that stipulated a sum the factor, or the factor's guarantors ("sureties") owed the company in the event of breach. *See infra* notes 89-94 and accompanying text.

[16] India Office Records (hereinafter "IOR"), Series O/1/1, Indenture of William Price, dated February 19, 1740.

of employees, the regulation of self-dealing by them, and the damages available in the event of breach.[17] Figure 2 is an image of an early indenture.

This newer contract reflected a markedly different design vision. The agency problem that most concerned the joint stock companies was the problem of "private trade"—of agents trading for their own account, rather than the company's.[18] In 1657, the EIC's board of directors amended the indenture to authorize their agents (also known as "factors") to engage in limited private trade. Factors could now trade for their own account, provided they do so solely within India, but not with Europe, and that they trade only a particular set of commodities, specified by EIC policy.[19]

But in terms of complexity and design, the central preoccupation of this mature contract involved *remedies*. The contract now provided for three distinct but overlapping damages regimes.[20] The first specified that in the event of any breach a factor lost entitlement to all contractual benefits due to him.[21] This was a remedy already available under the common law.[22] The second regime created processes for investigating complaints against factors by third parties in the Indian subcontinent, providing for formal EIC adjudication of those complaints, and damages that the company would hold in trust to remit to the harmed parties.

The last and most complex regime involved damages from private trade. The contract tailored both damages and procedure for breaches involving private trade. It established a liquidated damages formula under which a factor owed the EIC double any gains from private trade.[23] The indenture also contracted over the procedural rules involving an EIC suit based on private trade – a factor agreed not to dispute motions aimed at discovery concerning the extent of private trade in return for damages concessions.[24]

Why this extraordinary complexity dedicated to tailoring damages from private trade? England's early modern law of contracts provided for both specific performance and expectation damages where appropriate.[25] Yet the EIC's ability to observe and verify damages from private trade faced such extreme obstacles, that recourse to the expectation remedy would have proved dramatically under-compensatory. I explain that the EIC's ability to observe and prove damages from private trade would have faced almost

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[17] *See infra* Section II.B.

[18] The joint stock companies' concern for managing their agents' self-dealing is echoed throughout the historical literature on the companies. *See, e.g.*, P.J. MARSHALL, EAST INDIAN FORTUNES: THE BRITISH IN BENGAL IN THE EIGHTEENTH CENTURY (1976) (documenting the enormous fortunes that East India Company employees could gain while trading in India); *see also* EMILY ERIKSON, BETWEEN MONOPOLY AND FREE TRADE: THE ENGLISH EAST INDIA COMPANY (2014).

[19] Santhi Hejeebu argues for the efficiency of this switch to selectively authorized private trade. *See* Pablo Casas-Arce & Santhi Hejeebu, *Job Design in the Presence of Career Concerns*, 21 J. ECON. & MGMT. STRAT. 1083 (2012).

[20] *See infra* Section III.B.

[21] *See infra* notes 107-118 and accompanying text.

[22] *See infra* notes 97-106 and accompanying text.

[23] *See infra* notes 104-106.

[24] *See infra* note 115 and accompanying text.

[25] *See infra* Section III.B.

insuperable difficulties, far exceeding the already familiar limits of the expectation remedy. Alongside these difficulties, the Chancery court increasingly invalidated penal bonds as unconscionable penalties, founding the current doctrinal prohibition on penalty clauses in contract.

Yet the company's shift from penal bonds to a liquidated damages formula could only succeed if the courts found that the formula differed materially from a penalty. In 1670s Chancery litigation, the company sought £26,000 in damages from William Blake, its chief factor for Bengal, for illicit private trade. Blake argued that the damages provision was an unenforceable penalty. In a 1673 decision, *East-India Company v. Blake*,[26] the Chancery Court rejected Blake's arguments, finding that the liquidated damages provision was not intended to function as a penalty but rather as an ex ante estimate of damages, designed to restrain factors from private trade. The decision, cited repeatedly in upholding other joint stock companies' damages provisions, meant the EIC had a new, powerful tool to deter private trade and recoup losses.

Figure 2. Early EIC Indenture

The second contribution of the paper is to study contract enforcement. The EIC was an aggressive litigant who made extensive use of formal enforcement in English courts, as well as informal, internal enforcement (e.g., dismissal of factors, out-of-court enforcement or cancelation of bonds, and settlement of claims). I survey the published case law on the EIC and digitize various primary sources to cast light on the avenues through which private trade occurred, how the companies detected it, and the damages at issue.[27]

The last contribution of the paper explains why, in the face of conditions that one might have imagined would make public enforcement impracticable, the design and enforcement of formal contracts played such a strikingly prominent role. The companies' contracting practices show how advantageous standardized contracting could be, even in seventeenth century England. In particular, form contracting enabled the companies to apply an intricate, well-defined set of incentives and sanctions to all employees, strengthened the clarity and enforcement of contract terms, and provided uniform, shared expectations as a substitute for pre-existing social and cultural ties.[28] In ways that have not

[26] Rep. Temp. Finch, 118, English Reports Vol. 23 (Chancery 1673).
[27] *See infra* Part IV.
[28] *See infra* Part V.

been appreciated, standardization and formal enforcement also reinforced each other. This account relates the theory of contractual standardization to a central theme in the economic study of historical contracting, namely, merchants' choice between formal, public enforcement of contract by state institutions and enforcement through private order.[29]

It is worth noting two caveats upfront. The first is that serious limitations in data remain, even though a central benefit of studying the EIC is its enormous archive. Valuable materials have been lost to time, and the vast majority of the archive is not digitized. For instance, only a small portion survives of the internal records of the Committee of Lawsuits (a committee of the EIC board that oversaw both the terms of contracts and litigation). The second proviso is that understanding the EIC's contracts requires drawing on three distinct literatures. The first is the large literature on the joint stock companies.[30] Here, I am especially indebted to economic historian Santhi Hejeebu's pioneering work on the East India Company.[31] The second is the legal history of contract law in the late Medieval and early modern world, which reveals the indispensable background against which the joint stock companies drafted their contracts.[32] The last is the literature studying historical contracting practices, noted above.[33]

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[29] *See infra* notes 140-142 and accompanying text.

[30] For seminal work, *see* K.N. CHAUDHURI, THE ENGLISH EAST INDIA COMPANY: THE STUDY OF AN EARLY JOINT-STOCK COMPANY 1600-1640 (1965) (providing classic analysis of the first half-century of East India Company business); K.N. CHAUDHURI, TRADING WORLD OF EAST ASIA AND THE ENGLISH EAST INDIA COMPANY, 1660-1760 (1978) (analyzing a century of East India Company business); WILLIAM DALRYMPLE, THE ANARCHY: THE RELENTLESS RISE OF THE EAST INDIA COMPANY (2019); PHILIP J, STERN, THE COMPANY-STATE: CORPORATE SOVEREIGNTY AND THE EARLY MODERN FOUNDATIONS OF THE BRITISH EMPIRE IN INDIA (2011). For research on the joint stock companies in general, see, e.g., ROBERT BRENNER, MERCHANTS AND REVOLUTION: COMMERCIAL CHANGE, POLITICAL CONFLICT, AND LONDON'S OVERSEAS TRADERS, 1550-1653 (1993).

[31] *See* Santhi Hejeebu, *Contract Enforcement in the English East India Company*, 65 J. ECON. HIS. 496 (2005). Hejeebu's main argument is that the company controlled its employees through a combination of future income prospects and the threat of dismissal. Hejeebu was not interested in any specific provisions in the contracts other than the authorization of private trade; in the early modern contract law against which the contracts were drafted; or in the doctrinal innovations the contract inaugurated. *See, e.g.*, Ann M. Carlos & Stephen Nicholas, *Theory and History: Seventeenth-Century Joint-Stock Chartered Trading Companies*, 56 J. ECON. HIST. 916, 921-23 (1996).

[32] Perhaps no part of the English legal system has been the subject of as much historical study as the common law of contracts. As a result, the literature here is vast. *See, e.g.*, A. W. B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT, v (1975); *see also* SIR JOHN BAKER, THE OXFORD HISTORY OF THE LAWS OF ENGLAND, VOL. VI, 1483-1558, at 813 (2003); DAVID J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS (2001). However, the vast majority of that literature overwhelmingly focuses on legal doctrine. For an exception that focuses on how commercial activity shaped law, see ROSS CRANSTON, MAKING COMMERCIAL LAW THROUGH PRACTICE, 1830-1970 (2021).

[33] *See also* Emily Kadens, *The Dark Side of Reputation*, 40 CARDOZO L. REV. 1995, 1998 (2019) (discussing the role of reputation in commerce based on premodern examples); Emily Kadens, *The Medieval Law Merchant: The Tyranny of A Construct*, 7 J. LEGAL ANALYSIS 251 (2015) (arguing that Medieval merchants had little use for a specialized body of mercantile law); Emily Kadens, *Order Within Law, Variety Within Custom: The Character of the Medieval Merchant Law*, 5 CHI. J. INTL. L. 39 (2004).

The paper proceeds as follows. Section 1 provides a brief overview of the joint stock companies and the problem of private trade. Section 2 explains the principal design choices made by the EIC and HBC's contracts, with the emphasis on the EIC's design of its remedial scheme. Section 3 explores why formal contracting and enforcement proved so advantageous to the companies. Section 4 discusses implications before concluding.

II. OVERVIEW OF THE COMPANIES

This part briefly discusses the emergence of England's first business corporations, the joint stock companies, in Section A, and the problem of private trade that they faced, in Section B.

A. The Joint Stock Companies

This Section discusses the joint stock companies' historical and economic significance, and in particular, the EIC and HBC. The English East India Company, Hudson's Bay Company, Muscovy Company, Levant Company, and their lesser-known peers occupy justly prominent places in the history of corporate law and the early modern world.[34] They are the English world's first business corporations. As such, they inaugurated groundbreaking financial and organizational innovations.[35] Some of those companies, such as the EIC and HBC, would not only come to organize a vast amount of profitable commerce, but would also become prominent colonial powers exercising control over vast swaths of the globe.[36] It is worth briefly introducing the companies and their historical context before focusing on the nature of their contracts.

In the decades after 1500, significant economic pressures came to bear on traders in England. The possibility of a North East or North West passage to Asia offered the prospect for enormous gains from trade. At the same time, Portugal and Spain had begun to expand their empires, while Dutch merchants developed extensive overseas trading networks.[37] It became obvious to England's commercial and political classes that it was necessary to broaden English trading interests. The capital and logistical demands of long-

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[34] For an incisive analysis of the corporate governance of the first joint stock companies, *see* MARK FREEMAN, ROBIN PEARSON & JAMES TAYLOR, SHAREHOLDER DEMOCRACIES?: CORPORATE GOVERNANCE IN BRITAIN AND IRELAND BEFORE 1850 (2012); *see also* Ron Harris, *The English East India Company and the History of Company Law*, *in* VOC 1602-2002, 400 YEARS OF COMPANY LAW, SERIES LAW OF BUSINESS AND FINANCE, Vol. 6, at 219-247 (Ella Gepken-Jager, Gerard van Solinge, Levinus Timmerman eds. 2005).

[35] *See* Dari-Mattiacci et al., *supra* note 1.

[36] ANDREW PHILLIPS & J. C. SHARMAN, OUTSOURCING EMPIRE: HOW COMPANY-STATES MADE THE MODERN WORLD (2020); PHILIP J, STERN, THE COMPANY-STATE: CORPORATE SOVEREIGNTY AND THE EARLY MODERN FOUNDATIONS OF THE BRITISH EMPIRE IN INDIA (2011); PHILIP J, STERN, EMPIRE, INCORPORATED: THE CORPORATIONS THAT BUILT BRITISH COLONIALISM (2023).

[37] HARRIS, *supra* note 6, at 40.

distance trade to Asia were enormous, however, and the sixteenth century English state lacked robust administrative capacity.

In the middle of the sixteenth century, England thus began its experiment in the organizational form that has come to dominate global commerce.[38] It began chartering business corporations.[39] For centuries, the workhorse of Western business had been the partnership—an organizational form characterized by joint capital and labor investments by a group of individuals who both worked for and owned the business.[40] Importantly, each partner in a partnership retained the right to demand the business's dissolution if they withdrew their investment.[41] Because the law would not allow individuals to contract out of this right, partnerships remained fragile and exposed to the ongoing threat of dissolution.

The corporation contrasts with the partnership in fundamental ways.[42] A corporation can directly own assets, contract in its own name, and act as a legal person separate from its principal owners and managers. Important consequences of this include that its investments are "locked-in" against easy withdrawal by investors, allowing for longer-term, capital-intensive investment and more easily centralized management.[43] The joint stock companies differed in the permanence of lock-in. While the Muscovy Company began with permanent capital, the EIC only transitioned to permanent capital in 1657.[44]

Despite a number of differences, the first joint stock companies share many basic structural features with the modern corporation. A large class of capital was contributed by shareholders who played no role in the company's governance, establishing an early

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[38] *See, e.g.*, Giuseppe Dari-Mattiacci et al., *The Emergence of the Corporate Form*, 33 J. L. ECON. & ORG. 193, 194 (2017); Ron Harris, *Law, Finance and the First Corporations*, *in* GLOBAL PERSPECTIVES ON THE RULE OF LAW, 145-173 (James J. Heckman, Robert L. Nelson & Lee Cabatingan eds. 2010).

[39] The history of corporate personality in England is a vast and complicated subject. *See, e.g.*, Harold J. Laski, *The Early History of the Corporation in England*, 30 HARV. L. REV. 561 (1917) (exploring developing conceptions of organizational forms as possessing separate personality).

[40] Henry Hansmann, Reinier Kraakman & Richard Squire, *The New Business Entities in Evolutionary Perspective*, 1 U. ILL. L. REV. 5 (2005).

[41] Giuseppe Dari-Mattiacci et al., *The Emergence of the Corporate Form*, 33 J. L. ECON. & ORG. 193, 194 (2017) (particularly emphasizing the importance of locked-in capital in the Dutch East India Company's success); *see also* Naomi R. Lamoreaux & Jean-Laurent Rosenthal, *Corporate Governance and the Plight of Minority Shareholders in the United States before the Great Depression*, *in* CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY 125 (Edward L. Glaesser & C. Goldin eds. 2006). It is important to note that a less-storied competitor to the corporation, which shares many of its fundamental features, was the common law trust. See Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 NYU L. REV. 434 (1998); John D. Morley, *The Common Law Corporation*, 116 COLUM. L. REV. 2145 (2016).

[42] *See* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 416 (2000); Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335, 1336 (2006).

[43] KRAAKMAN ET AL., ANATOMY OF CORPORATE LAW (2D ED. 2009); See Margaret M. Blair, *Locking In Capital: What Corporate Law. Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387 (2003).

[44] Dari-Mattiacci et al, *supra* note 1, at 198.

"separation of ownership and control."[45] At the top, they were managed by a small set of actors, elected by shareholders, and with the intent that they manage the company in order to produce profits for those shareholders.[46] Senior managers were called officers. Unlike modern corporations, of course, these early English corporations were explicitly creatures of Royal permission.[47] The early joint stock companies are thus also called "chartered companies" because they existed by way of special grant of privilege from the English Crown.[48] The EIC, for instance, was granted its Royal Charter by Queen Elizabeth I, who gave it a monopoly on English trade from the "Cape of Good Hope to the Streits of Magellan," including the "East Indies."[49] King Charles II of England would create the HBC, granting a Royal Charter to the "the Governor and Company of Adventurers of England trading into Hudson Bay" on May 2, 1670.[50] That charter granted the HBC exclusive control over English trade in the entire area that drained into Hudson Bay—a vast body of land covering almost half of modern Canada.[51]

My focus will be on the contracts of the EIC and HBC. There are several reasons for this focus. The first is a simple but indispensable evidentiary consideration. Both of these companies left extensive surviving records. In contrast, even earlier joint stock companies, such as the Muscovy Company (widely considered England's very first corporation) and the Levant Company, left far less behind.[52] The first century of records for the Muscovy Company, established in 1555 to trade with what is now Russia, did not survive the Great

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[45] Vijay K. Seth, *The East India Company—A Case Study in Corporate Governance*, 13 GLOBAL BUS. REV. 221 (2012); ADOLF A. BERLE & GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

[46] The senior management of the EIC was formally called the Court of Directors and consisted of the Governor, a Deputy Governor, and a shifting number of other directors ranging up to two dozen. The Court of Directors was elected by the General Court (also known as the Court of Proprietors), which encompassed all shareholders possessing voting rights. Committees of the Court of Directors focused on different aspects of its business, such as accounting or private trade. *See* Huw V. Bowen, *The 'Little Parliament': The General Court of the East India Company, 1750–1784*, 34 HIS. J. 857 (1991).

[47] Harris, *supra* note 29, at 219 ("By the 16th century, an explicit, *ex-ante*, and direct authorization by the King or Queen had become the only mode of incorporation in England."). The early English corporations chartered by the Crown could take on one of two legal forms, called "regulated corporations" and "joint-stock corporations." *See* Harris, *supra* note 34, at 223. The former resembled a guild that was housed in a legal entity. The members of the regulated corporation continued to trade for their own account. Fees collected by the company from its members were used to provide members with assistance. In contrast, the joint-stock company had a single account and all members shared in its net income. *Id.*

[48] Carlos & Nicholas, *supra* note 14.

[49] Seth, *supra* note 45, at 223.

[50] Global History of Capitalism Project, *The Hudson's Bay Company: Royal Charters, Rivalries and Luxury Hats in the North American Fur Trade*, Case Study 10, 2019.

[51] https://www.hbcheritage.ca/things/artifacts/the-royal-charter.

[52] What became the Muscovy company was actually chartered in 1551 to locate a northeastern passage to China; it became the Muscovy company in 1555. See also Harris, *supra* note 34, at 223. The joint stock companies did not rapidly proliferate once first established. By 1600, there were only about ten. Id. Only three of the joint stock companies formed before 1630 involved domestic industry. W.R. SCOTT, JOINT-STOCK COMPANIES TO 1720, Vol. III, at 462-470 (1911); see also C.T. CARR, SELECTED CHARTERS OF TRADING COMPANIES A.D. 1530-1707 (1913).

Fire of London of 1666.[53] A second reason is the magnitude of their impact. The EIC and HBC grew from small enterprises into businesses of world-historical importance that shaped not only the English economy but the destiny of distant reaches of the globe.[54]

Both firms managed far-reaching commercial enterprises from their London boardrooms. Indeed, both the EIC and HBC are some of the earliest examples of multi-divisional, multinational businesses that employed managerial hierarchies to facilitate trade across large spans of distance and time.[55] The companies also faced core economic problems that remain of pervasive significance, particularly the agency problem of controlling agents, which was exacerbated by the information asymmetries between employees abroad and senior management in London.[56] Indeed, the EIC is often and with some merit characterized as the first publicly-held corporation in England, the first multinational corporation, and as the largest business in the world for over one-hundred years.[57]

The joint stock companies also make a compelling case study for the contracting practices of early modern England because they were major commercial participants, deeply enmeshed with English legal, political, and economic elites, and who actively litigated their contracts in the courts.[58] From their origin, the joint stock companies necessarily enjoyed at least some of the attention of the English Crown. During the early modern era, the joint stock companies were a driving force in the English economy. In 1695, the 140 or so joint stock companies in existence had a combined market value of £4.25 million pounds.[59] Three of those companies were responsible for over half of that

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[53] On the early struggles of the Muscovy Company with Russian traders, see Maria Salomon Arel, *Masters in Their Own House: The Russian Merchant Élite and Complaints against the English in the First Half of the Seventeenth Century*, 77 SLAV. & EAST EUR. REV. 401 (1999).

[54] *See* EDITH I. BURLEY, SERVANTS OF THE HONOURABLE COMPANY: WORK, DISCIPLINE, AND CONFLICT IN THE HUDSON'S BAY COMPANY, 1770 - 1870 (1997); SCOTT P. STEPHEN, MASTERS AND SERVANTS: THE HUDSON'S BAY COMPANY AND ITS NORTH AMERICAN WORKFORCE, 1668-1786 (2019); STEPHEN B. BROWN, THE COMPANY THE RISE AND FALL OF THE HUDSON'S BAY EMPIRE (2020).

[55] Gary M. Anderson, Robert E. McCormick & Robert D. Tollison, *The Economic Organization of the English East India Company*, 4 J. ECON. BEHAV. & ORG. 221, 227-37 (1983) (arguing that while Alfred Chandler and Oliver Williamson and others saw the multi-divisional enterprise as invented in the 20th century in the United States, it was in fact invented by the East India Company).

[56] Carlos & Nicholas, *supra* note 31, at 916.

[57] See, e.g., RON HARRIS, INSTITUTIONAL INNOVATIONS, THEORIES OF THE FIRM, AND THE FORMATION OF THE EAST INDIA COMPANY, at 1. The EIC is often called the world's first corporation, but that is almost certainly an exaggeration. Plausible cases for earlier versions of the corporate form occur in fifteenth century Europe or even in India in 800 B.C. *See* Vikramaditya Khanna, *Business Organizations in India Prior to the British East India Company*, *in* RESEARCH HANDBOOK ON THE HISTORY OF CORPORATE AND COMPANY LAW, 33-64 (Harwell Wells ed. 2018) (2018).

[58] *See* BRUCE G. CARRUTHERS, CITY OF CAPITAL: POLITICS AND MARKETS IN THE ENGLISH FINANCIAL REVOLUTION (1999).

[59] SCOTT, *supra* note 52, at 336. In fact, Scott estimates that the capital raised by joint stock companies as of 1720 constituted 13 percent or so of the national wealth of the time, and a far higher percentage of the wealth resulting from trade, rather than from land, cattle, homes, and household goods. *Id.* at 439. For just a sense of why the companies could be so valuable to the English economy, consider that in 1750, the Indian subcontinent accounted for roughly a quarter of global manufacturing, while Britain accounted for 1.2

value with a combined market capitalization of £2.14 million.[60] In the emerging stock market of the time, the EIC and HBC were thus behemoths—more dominant than any Apple, Google, or Amazon today. Scott, whose early treatment remains widely admired, estimates the total industrial wealth of England in Wales at that time as £33 million.[61] Even in terms of the entire English economy, the EIC and HBC had a leading place.

The English East India Company also had a uniquely intimate relationship with the political system of the time. The company made significant loans to English royalty and received bailouts from the English Crown as well, both in terms of the loan of funds and of English military power.[62] It is, in the end, unthinkable that these companies' contracting practices were a historical accident, or a niche phenomenon of which the broader English legal system remained unaware.

Lastly, there is a long history of the use of case studies in contract law.[63] The use of case studies in the empirical study of contracts, even today, is almost a necessity. Unlike say stock prices or even corporate charters, there has not been a legal mandate in the common law tradition for the public disclosure of contracts.[64] As a result, the text of contracts typically remains confidential, and parties may even consider a well-crafted contract to provide them with a competitive advantage, creating an interest in confidentiality. Yet contracts remain a foundation of commerce, and contract law one of the legal pillars of the economy. As a result, understanding economic history, development, and legal history requires the empirical study of contracts and contract institutions, if only piecemeal.

B. The Problem of Private Trade

In this Section, I explain the core problem the companies faced in managing their agents—self-dealing in the form of private trade—as well as how the company detected agents' private trade. This is valuable context, but it is also worth addressing because a reader could plausibly wonder whether private trade was rare, or that it was common, and that the companies could not detect it. It turns out, as we will see, that private trade was a

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percent. Bengal, for a long time the heart of EIC operations in India, was then the area's most prosperous province.

[60] SCOTT, *supra* note 52, at 336; *see also* Svetlana Andrianova, Panicos Demetriades, and Chenggang Xu, *Political Economy Origins of Financial Markets in Europe and Asia*, 39 WORLD DEV. 686 (2011).

[61] SCOTT, *supra* note 52, at 337.

[62] The initial 218 subscribers to the EIC raised £68,373. For a sense of scale, consider that a skilled artisan of the time might earn less than ten pence per day. British Library, *East India Company*, https://www.bl.uk/learning/timeline/item102770.html.

[63] The deployment of history and historical case studies in contract law has a long and storied history. *See, e.g.*, Lisa Bernstein, *Merchant Law in A Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1770 (1996); Bernstein, *supra* note 5; Greif, *supra* note 5.

[64] A modern exception is the Securities and Exchange Commission's requirement that public companies publicly disclose material contracts. Several large-scale empirical projects have now used this source. *See* Theodore Eisenberg & Geoffrey P. Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1973, 1979-83 (2006); Sarath Sanga, *Choice of Law: An Empirical Analysis*, 11 J. EMPIRICAL LEGAL STUD. 894 (2014).

pervasive problem and that the EIC developed a vast array of techniques for detecting and deterring it.

Indeed, there were a large number of ways in which agents could profit at the companies' expense. The EIC's obsession was private trade, the form of self-dealing in which agents traded goods for their own profits, rather than the company's. Even once the EIC authorized agents to trade certain commodities within India, they remained focused on illicit private trade, which typically involved transferring goods to Europe's lucrative markets.

Private trading took a huge number of forms. These are reflected in the company's correspondence with trading centers, its accounting books, and court records. For instance, agents traded for their own account when prices were particularly advantageous and traded for the company when they were not.[65] Some factors generally prioritized the sale of their goods, saturating markets to the company's detriment.[66]

Private trading took a number of more egregious forms as well. Factors reported paying more for commodities with EIC money than they had and pocketed the rest.[67] They charged counterparties' low rates for company goods or overpaid with company money for commodities in return for bribes, gifts, or favors. Factors borrowed money from the company's account, invested it in goods for their own purposes rather than the EIC's, and returned the principal. Many senior merchants of the company, including Elihu Yale, the namesake of Yale University, were thought to routinely engage in such conduct. For instance, the company accused the one-time head of its Bengal factory of investing company money in his own account ("That hee invested into goods, the companies money . . . the goods to bee sold, the principall to bee brought to the Companies Account, the profitt to Mr. Blake's.").[68] The company accused Yale of something similar:

> "...You next asperse me [Elihu Yale] with making use of and employing the Right Honorable Company's Cash to my own profit, which the Almighty God knows is as false as he is true, I having often freely supplied their occasions with many thousands pagodas, but I thank God had never any inclination or occasion to make use of theirs…"[69]

Given the EIC enjoyed astonishing success during some periods, the returns to private trade could be enormous. Beyond these instances of self-dealing, factors also engaged in more traditional forms of criminal misconduct. They embezzled tens of

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[65] *See, e.g.*, JAMES TALBOYS WHEELER, MADRAS IN THE OLDEN TIME: BEING A HISTORY OF THE PRESIDENCY FROM THE FIRST FOUNDATION OF FORT ST. GEORGE TO THE OCCUPATION OF MADRAS BY THE FRENCH (1639-1748), at 47 (1861) ("The sums acquired by these, and other doubtful transactions, were indisputably large. When considerable and certain profits were to be made, they preferred trading on their account, rather than on the account of the Company.").

[66] *See, e.g.*, Letter to Bantam Agent & Factors, 1661 March 21, *in* East India Company, Letter Book 3, 1661-1666, IOR/E/3/86.

[67] Charges against Thomas Chamber, *in* East India Company, Letter Book 3, 1661-1666, IOR/E/3/86.

[68] Particulars to be enquired into regarding the conduct of persons on the Coromandel Coast), *in* East India Company, Letter Book 3, 1661-1666, IOR/E/3/86.

[69] WHEELER, supra note 65, at 154-157.

thousands of pounds from company coffers or stole commodities from company warehouses.

The fact that factors could earn significant profits from misconduct does not mean they could return those profits to England. Agents had a kind of "foreign exchange" problem to resolve. Had they been limited to enjoying profits in India, the incentives to engage in misconduct would have been materially dampened. Nonetheless, agents' ingenuity meant they developed many avenues for translating Indian gains into European income. These could involve monetary transfers or the shipment of illicit goods.

Agents sometimes used company ships to transfer their own goods back home, but this form of smuggling was frequently discovered. Some factors purchased or built their own ships. Others would send privately traded goods to Europe on the ships of foreign merchants or English merchants operating in India in violation of the East India Company's exclusive license (called "interlopers").[70] Servants nearing the end of their tenure would often liquidate their Indian estates for jewels, particularly diamonds, or currency, which could often be taken back to England without detection.[71] Lastly, the EIC itself established a remittances system for factors by which they could deposit rupees or pagodas (the leading Indian currencies) with the company in India and receive pounds sterling on return to England.[72] While the remittances system would have doubtless been the easiest way to move profits, the possibility of detection probably meant that the largest sums were transferred in other ways.

Given the possibilities of profiting from private trade and successfully transferring those profits home, the EIC faced the forbidding challenge of detecting and deterring factors' misconduct. To do so, it employed a variety of methods to monitor agents and detect misconduct.

The EIC employed an elaborate system of record-keeping, registration, and auditing to track commerce and discover illicit trade. Servants kept detailed, overlapping records of accounts (including their personal accounts), which could be cross-checked and which they regularly submitted to superiors for review.[73] Factors' covenants required them to report other agents' misconduct, which they routinely did.[74] The EIC went so far as to hire a number of factors specifically for the purpose of investigating and reporting back to the company regarding illicit private trade.[75] While the informational environment of contracting parties is sometimes treated as exogenous to their contracts, the EIC contract directly established methodologies for monitoring factors in those contracts.

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[70] *See* Dari-Mattiacci et al., *supra* note 1.

[71] *See, e.g.*, WHEELER, supra note 65, at 97-98.

[72] The remittances system permitted company factors to deposit domestic Indian currencies with the EIC and receive pounds sterling on return to England. The system is well-documented in company correspondence. K. N. Chaudhuri, *India's Foreign Trade and the Cessation of the East India Company's Trading Activities, 1828-40*, 19 ECON. HIST. REV. 345, 360 (1966).

[73] Perticulars of the Companies Demands against Mr. Matthew Andrews, *in* East India Company, Letter Book 3, 1661-1666, IOR/E/3/86.

[74] Directors' Dispatch to Surat 1653, *in* East India Company, Letter Book 3, 1661-1666, IOR/E/3/86.

[75] *See, e.g.*, IOR/B/22 Court Minutes, 13 November 1646.

The company's response to potential private trade routinely involved the compilation of charges, gathering of witnesses, and initiation of a process for dismissing the servant, seizing his goods, and potentially bringing suit. Servants accused of private trade often had their goods and accounts seized as security or damages by the EIC. For instance, when the company accused Elihu Yale of misconduct, they seized and sold his ships, goods, and estate for approximately £30,000.[76] Factors also routinely forfeited their bonds when the company detected them engaged in private trade.[77]

III. AN ECONOMIC ANALYSIS OF THE CONTRACTS' STRUCTURE AND REMEDIES

This Part seeks to explain the design of the standard form contracts the EIC and HBC used for their agents. This requires detailed consideration both of the terms of the contracts as well as of the doctrines, procedures, and remedies afforded by the English legal system of the time. I begin in III.A with the form of contract chosen by the companies, the covenant indenture. In III.B, I discuss the default remedies afforded by the English legal system, their limits, and the contractual remedies the companies created in response.

A word on sources is also appropriate upfront. The article draws on a wide variety of sources, but its main primary sources are the archives of the Hudson's Bay Company and the India Office Records located in the British Library.[78] From these archives, I collect and, to my knowledge, digitize for the first-time hundreds of the joint stock companies' contracts.

I code the provisions of those contracts. A summary of the provisions of the HBC contract and mature (1740) EIC indenture are included as an Appendix.[79] The contracts are centered around three basic concerns—specifying the affirmative obligations of factors;

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[76] WHEELER, supra note 65, at 184-86.

[77] *See, e.g.*, Particulars of the Companies Demands against Mr. Matthew Andrews, *in* East India Company, Letter Book 3, 1661-1666, IOR/E/3/86.

[78] The India Office Records contain 14 kilometers of volumes, making possible unusually in-depth analyses of the East India Company. I collect contracts from a number of sources. The earliest contracts of the company only survive as transcriptions of instruments in the "letter book" of the EIC. Letter book is a term used for internal compilations of important business documents by companies of the period. The principal source of contracts by number is the India Office Record "O" series, which includes a large sample of factor indentures and bonds from the eighteenth century. Invaluable examples of contracts from between the early years and beginning of the O series come from a number of archival sources. The Hudson's Bay Company sources are largely from the HBC's archive. After an official history of the Hudson's Bay Company was published in 1920, SIR WILLIAM SCHOOLING, THE GOVERNOR AND COMPANY OF ADVENTURERS OF ENGLAND TRADING INTO HUDSON'S BAY DURING TWO HUNDRED AND FIFTY YEARS, 1670–1920 (1920), there was widespread recognition of the importance of the HBC's records. An official HBC Archive was established in 1928 and now resides in Winnipeg, Manitoba. That archive is the principal source of contracts for the HBC. HUDSON'S BAY COMPANY ARCHIVES, ARCHIVES OF MANITOBA, https://www.gov.mb.ca/chc/archives/hbca/.

[79] Although I did not make use or consult it in developing my coding scheme, I thank Santhi Hejeebu for sharing her unpublished analysis of EIC contracts with me.

regulating self-dealing either by directly prohibiting or selectively permitting it; and, most importantly, specifying damages.

A. The Covenant Indenture

An important initial question is why the joint stock companies chose to use express, written contracts at all, when informal, unwritten service contracts were routine in sixteenth century England. In principle, the companies could have done without a contract at all. The Statute of Artificers and common law would have recognized the companies' relationships with its workers as one of master and servant and imposed a range of default rules.[80] Opting out of those otherwise applicable default rules, such as a presumptive term of one year of service, provided the companies with an immediate reason to choose a written contract.[81] More importantly, the companies' ambition to structure their relationship with agents along complex lines would have led them to opt for a formal, written agreement.

The specific form of written contract the companies used was known as an "indenture," so-called because it was written and sealed on a thick parchment that was then irregularly cut in half, or "indented," so that both halves could later be compared and confirmed as originals. Workers entering such indentures were either apprentices, a status of worker who trained with a master in a trade, or a "covenant servant," which was the class of worker to which company agents belonged.[82] Their contractual instrument was thus known as a "covenant indenture" and the specific terms in it as covenants.

The use of this contractual form served a number of legal and economic functions. In terms of law, formalities were central to early modern contract law, although it is controversial as to whether they served a primarily evidentiary role or instead helped define substantive conceptions of contract.[83] The use of an indenture created a duality fundamental to understanding the legal status of the companies' relationship with their agents. As with any other worker, the joint stock companies had recourse to master and servant law with its characteristic processes of enforcement by magistrate.[84]

The use of a written contract ensured that contractual claims were available to the parties that required "specialty," or that a document be under seal. In particular, by use of

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[80] Douglas Hay & Paul Craven, *Introduction*, *in* MASTERS, SERVANTS, AND MAGISTRATES IN BRITAIN AND THE EMPIRE, 1562-1955, at 7 (Douglas Hay and Paul Craven, eds., 2004).
[81] Douglas Hay, *England, 1562-1875: The Law and Its Uses*, *in* MASTERS, SERVANTS, AND MAGISTRATES IN BRITAIN AND THE EMPIRE, 1562-1955, at 68 (Douglas Hay and Paul Craven, eds., 2004).
[82] Douglas Hay, *Master and Servant in England: Using the Law in the 18th and 19th Centuries*, *in* PRIVATE LAW AND SOCIAL INEQUALITY IN THE INDUSTRIAL AGE: COMPARING LEGAL CULTURES IN BRITAIN, FRANCE, GERMANY AND THE UNITED STATES, at 227, 228 (Willibald Steinmetz ed. 2000).
[83] Baker, Volume VI, *supra* note 32.
[84] Hay, *supra* note 81, at 68.

a covenant, their workers became covenant servants who could be sued in covenant,[85] and ultimately in assumpsit, the core "contract" claim in early modern England.[86]

The companies did not choose the indenture covenant form primarily for the legal consequences that flowed from it, however. If they had, their contracts would have resembled the hundreds of apprentice indentures that survive from the early modern era. Those contracts largely reiterated obligations that the law already imposed but did not attempt to craft their own remedies regime, alter legal procedure, or specify obligations in the way the companies did.

B. Remedies

The EIC faced an extreme version of the agency problem characteristic of early overseas trade. Long-distance trade offered enormous efficiencies, but traders operated at great distance from their principals and under conditions of extreme uncertainty. In the case of the EIC, round-trip communication from England to India took between seven months and well-over one year.[87] Factors operating in the major trading centers of Surat, Madras, Calcutta, or Bombay encountered lucrative opportunity sets to which the directors on Leadenhall Street in London had little access. Cross-border legal enforcement by coordinated public institutions was non-existent. Yet managing private trade was a precondition for commercial success. Earning £6,000 or £7,000 from private trade seems to have been routine,[88] while fortunes of £70,000 or £200,000 were not unheard of.

To address this problem, the company provided for contractual sanctions and the character of these sanctions evolved substantially over the course of a century. To sum things up in advance, the company's damages regime began with penal bonds and transitioned to liquidated damages. The major causes of this development are plausibly both economic and legal. The Chancery and common law courts increasingly invalidated penal bonds, while the company succeeded in convincing Chancery that their substantial liquidated damages formula was an economically necessary response to the evidentiary difficulties of prohibiting private trade. Economically, the EIC would have surely realized that the gains ex post from certain agents' misconduct could exceed by orders of magnitude any bond the company could plausibly demand of each agent ex ante.

I proceed by first outlining the remedies afforded by the background rules of English law, before turning to the companies' contractual structures.

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[85] A covenant servant was a worker, often highly skilled, who entered a written agreement for service under express conditions and duration. Hay & Craven, *supra* note 80, at 7.

[86] Douglas Hay, *England, 1562-1875: The Law and Its Uses*, *in* MASTERS, SERVANTS, AND MAGISTRATES IN BRITAIN AND THE EMPIRE, 1562-1955, at 68 (Douglas Hay and Paul Craven, eds., 2004). As will be discussed later in connection with the remedies the law afforded the companies, the use of a covenant indenture allowed the companies to sue a worker by writ of covenant as well as under master and servant law. *See infra* notes 79-85 and accompanying text.

[87] *See* Hejeebu, *supra* note 19, at 507.

[88] *See, e.g.*, PERCIVAL SPEAR, THE NABOBS: A STUDY OF THE SOCIAL LIFE OF THE ENGLISH IN EIGHTEENTH CENTURY INDIA, 157 n.94 (1963).

1. The Remedies provided by Law

It is important to appreciate the claims and remedies England's early modern legal system offered. The companies crafted their own contractual order in light of that background law and sometimes relied directly on those claims as well. Two broad bodies of law governed the relationship between the companies and their agents: (1) master and servant law, and (2) contract law.

Master and servant law, or what we now call employment law, governed the relationship between most employers and their workers from the fifteenth century well into the nineteenth century. That body of law viewed the relationship between master and servant as fundamentally one of private contract but layered over it a complex body of statutory regulation and a system of enforcement by local magistrates or justices of the peace.[89]

Master and servant law provided a number of stringent civil penalties and punitive penal ones. Abatement of wages was routine as was dismissal and forfeiture of all wages upon dissolution of contract.[90] For most employers, these were powerful tools, but they were ill-suited to the core problem faced by the joint stock companies. This is because the fundamental objective of the sanctions of master and servant law was to induce workers to perform the work they had committed to do.[91] The problem for the companies, however, was deterring self-dealing, not deterring shirking, and recouping profits from self-dealing, rather than lost wages. As a result, the principal civil penalties of master and servant law, however severe, were of little use with respect to a successful private trader.

The civil penalties of partial abatement of wages or even forfeiture of all wages due to a worker, while powerful, would have been completely inadequate in deterring private trade whenever the prospects for such trade were attractive. The problem for the joint stock companies was not recovery of the wages they paid employees. Factors' wages paled in comparison to the profits trading opportunities made possible. Master and servant law's monetary remedies were designed for the normal case in which a servant's wages were the core compensation a worker could receive. They did not contemplate that a worker might stand to gain vastly more from self-dealing than their wages. Penal sanctions provided even stronger medicine, but their ultimate function was to secure performance of the employment contract through short terms of imprisonment.[92]

The joint stock companies could also sue their workers under contract law. Early modern English contract law did not offer a single framework for addressing all claims, but

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[89] Douglas Hay & Paul Craven, *Introduction*, *in* MASTERS, SERVANTS, AND MAGISTRATES IN BRITAIN AND THE EMPIRE, 1562-1955, at 5 (Douglas Hay and Paul Craven, eds., 2004).
[90] Douglas Hay, *England, 1562-1875: The Law and Its Uses*, *in* MASTERS, SERVANTS, AND MAGISTRATES IN BRITAIN AND THE EMPIRE, 1562-1955, at 60 (Douglas Hay and Paul Craven, eds., 2004).
[91] Hay, *supra* note 90, at 61.
[92] Hay, *supra* note 90, at 61.

instead encompassed multiple distinct claims.[93] Because company workers signed covenant indentures, their status as covenant servants allowed the joint stock companies to sue them in debt, covenant, and eventually assumpsit. Debt was a prominent claim for breach of contract but would have been of little use to the joint stock companies. An action for debt could only seek recovery of a sum certain.[94] The very nature of private trade, however, meant the companies had little foreknowledge of which employees would prove successful private traders, and if they did, what their profits from private trade would be.

The writ of covenant enforced formal written agreements under seal.[95] It could give rise to money damages or specific performance depending on the nature of the action.[96] If a specific item had been contracted for, then specific performance was the likely remedy. In a contract for personal services, however, the norm was money damages assessed by a jury.[97]

The major conceptual development in contract law over the early modern era was the emergence of assumpsit as the principal cause of action.[98] Assumpsit was a basically tort law claim that treated contractual breach as a wrong committed in performance of an undertaking. By the establishment of the joint stock companies, assumpsit would have been a familiar claim, although for more than a century it would co-exist with the other, older claims like covenant and debt.[99] The crucial fact about assumpsit was that it could afford expectation damages as a remedy.[100]

In principle, expectation damages are an extraordinarily powerful remedy, but in practice, its failure to vindicate parties' expectation interests are well-known. There is the failure to include litigation costs or the costs of delay due to litigation. More importantly, there are difficulties of certain proof and court competence in calculating damages. Private trade provides a fiendish version of these difficulties. The companies had little knowledge of the opportunities individual traders faced, of the profits they lost the company in self-dealing, and almost certainly no ability to prove those lost profits. The result is that joint stock companies limited to the remedies already offered by English law would have had little ability to deter private trade or recoup an agent's profits from such trade. Most importantly, the expectation remedy requires damages to be proven with reasonable

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[93] During much of the Middle Ages, English contract law provided no general cause of action for breach of promise. The major claims for breach of a consensual transaction were debt and covenant.

[94] Robert E. Scott & George G. Triantis, *Embedded Options and the Case against Compensation in Contract Law*, 104 COLUM. L. REV. 1428, 1437 (2004). ("The plaintiff sought relief for a debt that was due and owing recovery of a sum for a debt that was due and owing, fixed by the parties' prior agreement, and the court in no sense awarded compensation for breach of contract.").

[95] SIMPSON, A HISTORY, *supra* note 32, at 13-14.

[96] SIMPSON, A HISTORY, *supra* note 32, at 13-14; Hazeltine, *Early History of English Equity*, in ESSAYS IN LEGAL HISTORY, at 261 (1913).

[97] SIMPSON, A HISTORY, *supra* note 32, at 18.

[98] *Id.* Medieval English law did not recognize an action as giving rise to a claim in both covenant and debt. The two were mutually exclusive. Eventually, this rule was displaced, however.

[99] *Id.*

[100] Simpson, *Horwitz Thesis*, at 547-556.

certainty and for a court to be able to calculate the plaintiffs' losses. It would have been extraordinarily difficult, however, to reliably calculate a servant's gains from private trade.

2. The Companies' Contractual Remedies

Given these difficulties, the companies turned to crafting their own remedies by contract. There are broad similarities in the EIC and HBC's approach to damages, but the EIC provides a particularly clear illustration of evolution from an approach based around penal bonds to one based on contractually specified liquidated damages.

Penal Bonds. The earliest HBC and EIC indentures are accompanied by separate contracts known as conditioned ponds or "penal bonds." The conditioned bond was a simple but ingenious mechanism for creating a fixed sum payable in the event of breach of contract. A bond was a deed in which one party acknowledged owing a specific sum of money to another.[101] The conditioned bond included a caveat or condition that if performance of an underlying promise or contract was completed, then the sum was no longer owed (i.e., the bond was void). In effect, the conditioned bond specified a penalty to be paid in the event of contractual breach, formulated in terms of an obligation to pay a debt that was excused by contractual performance. It was typical for the EIC to require two individuals to act as "sureties," guaranteeing the debt in the event of default.[102]

The bond permitted a plaintiff to avoid the need to demonstrate any damages and instead to recover a known and fixed sum in the event of breach. The conditional bond was an extraordinarily popular device.[103] Yet by the sixteenth century, the Chancery court had begun invalidating these bonds on the grounds that it was unconscionable for a creditor's contract recovery to exceed actual loss. Over the course of the seventeenth century, the other English courts progressively adopted this approach. By 1700, the prohibition on penalty provisions was being adopted into statutory law.[104]

Given these changes, in the latter half of the seventeenth century, the EIC largely abandoned enforcing penal bonds and adopted a liquidated damages regime instead. There were both economic and legal reasons for this change. Given the potential gains from private trade, the size of any plausible penal bond was grossly under-compensatory. The company could not identify which factors would attain senior merchant status, let alone become wildly successful traders, and it is unlikely that factors earning an upfront salary of less than £100 could have found sureties to provide bonds in excess of £5,000.

Liquidated Damages. In the middle of the seventeenth century, the EIC developed a new approach to damages—it adopted *liquidated damages* in its indenture and abandoned

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[101] Baker, *supra* note 32.
[102] Hejeebu, *supra* note 31, at 500.
[103] Baker, *supra* note 32, at 338; *id.* at 345 ("by Tudor times actions of debt on an obligation were the commonest single type of action in the Common Plea rolls.").
[104] *Id.* at 347.

reliance on penal bonds, which nonetheless remained part of the contracting process.[105] There were both economic and legal reasons for this shift in approach. As the company soon came to understand, the gains from private trade could easily range into the tens of thousands of pounds rendering any plausible penal bond grossly under-compensatory. As importantly, the Chancery court increasingly invalidated conditional bonds as improper penalties.

In a Chancery court opinion directly addressing the company's contractually specified damages, the court noted the EIC's view on penal bonds:

> [T]he [EIC] formerly took Bonds of their Factors in great Penalties conditioned, that they should not trade in those Goods; and yet notwithstanding such Bonds the Factors did trade in them at pleasure; because when they returned, and the Bonds were put in Suit, they were relieved in this Court against the Penalties; and Trials at Law were directed to prove their Damages, which at that Distance (the Company's Affairs did lay) was impossible for them to do.[106]

Indeed, scholars of the EIC have often been puzzled by the inclusion of penal bonds with indentures since the EIC seemed to have made no use of them. Hejeebu, for instance, observes, "[a]lthough bonds had the potential to constrain opportunism, they did not. There is no evidence to suggest that the bond played a role in sustaining the employment relationship. Directors never exercised the ability to reclaim losses from a bond sponsor."[107] This is an artifact of Hejeebu's focus on the eighteenth century, however. In its first century, the EIC made extensive use of the bonds to discipline factors.[108]

Mature Contract Remedies. It is worth emphasizing at the start that the EIC's mature standard form contract established damages *regimes*. The contract creates an extraordinarily involved set of rules covering three distinct kinds of potential breach by a factor. In total, specifying these remedies occupies the majority of the contract's text.

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[105] I base this dating on facts depicted in *Blake* (discussing the declining usefulness of penal bonds due to their invalidation by Chancery and the difficulty of proving actual damages at trial because of problems of proof). Further support for *Blake*'s description of this change comes from its statement that liquidated damages have been included "*for sixteen Years* past" (i.e., from 1657). The directors' minutes for those years discuss altering the indenture's remedy provision. *See* E.B. SAINSBURY, A CALENDAR OF THE COURT MINUTES, ETC. OF THE EAST INDIA COMPANY, 1655-1659, at 203, *A Court of Committees for the New General Stock*, Dec. 24, 1657 ("Certain of the Committees are requested to perfect the draft of the covenant for the engagement of factors", and "The covenant for factors is read and ordered to be printed.").

[106] *Blake*, at 121.

[107] Hejeebu, *supra* note 19, at 504. HISTORY

[108] I discover voluminous evidence that bonds were in fact frequently used by the EIC to discipline factors. For instance, the minutes of the boards of directors' meetings and accompanying notes include routine discussion of recouping bonds in response to agent misbehavior. In analyses I do not discuss in the main text, I read and code multiple volumes of the board minutes for mentions of bonds, remedy provisions, and other terms. *See* W.N. SAINSBURY, CALENDAR OF STATE PAPERS, COLONIAL SERIES, EAST INDIES, ETC, [1513-1634] 5 VOLS (LONDON, 1862-92); *see also* E.B. SAINSBURY, A CALENDAR OF THE COURT MINUTES, ETC. OF THE EAST INDIA COMPANY, [1635-1679] 11 vols. (1903-38).

First, the contract defines remedies applicable to any violation of the contract's terms ("in any wise make default in Performance of the Covenants aforesaid"). The remedy stated is forfeiture of any benefits otherwise due the factor,[109] and a related provision empowers the EIC to seize a factor's goods until damages are satisfied.[110]

Second, the contract creates a specific process for addressing claims by third parties against factors, including a system by which the EIC recouped damages in trust for those third parties. The contract identifies the general problem the EIC faced of factors committing "heinous and grievous Offences" against other persons living in the Indian subcontinent, including persons indigenous to the region and other traders, and then specifically prohibits appropriating money or goods by extortion or force "from any Person or Persons whatsoever within the Company's Limits of Trade."[111] If such events occur, the contract authorizes third parties to complain to the EIC, which is thereby entitled to investigate the complaints "and to Award Satisfaction and Reparation to be made by the said [factor] to the said Company, for the Benefit of such Injured Persons."[112] The EIC commits to turn the damages over to the injured party. The contract also obligates the factor to "pay and satisfy to the [EIC], for their own Use and Benefit, all such Damages as they shall have sustained by Reason or Means of any such Offence or Offences as aforesaid."[113]

Lastly, the contract creates a specific remedies and procedural system for private trade. Because this component of the contract is both the most complex and the heart of the company's concerns, I focus on it in the subsection. It is worth noting an important feature upfront: The *pattern* of these provisions shows that the EIC viewed the issue of damages from private trade as a distinct challenge from generic damages due to other violations of contract. It is only for damages from illicit private trade that the company created a specific liquidated damages formula and a series of specific procedural waivers that iteratively halved potential damages based on agents' concessions.

Contractually Specified Remedies for Private Trade. After specifying the damages for general breaches and third-party harms, the contract returns to the issue of private trade, explicitly prohibiting a factor from "directly or indirectly, by himself, or in Conjunction, with any Person or Persons whatsoever, carry or use, or be concerned in any sort of Trade" except as explicitly permitted by the indenture.[114] In the event of breach, the factor agree to pay "as and by way of Stated Damages, double the Value of all and every Goods and

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[109] India Office Records (hereinafter "IOR"), Series O/1/1, Indenture of William Price, dated February 19, 1740 ("The said William Andrew Price shall not be intitled, to any of the Payments, Advantages and Benefits hereby otherwise intended him."). These provisions occur in virtually every indenture for decades. I cite Price's indenture merely as an exemplar.

[110] *Id.* ("for and towards Satisfaction for what shall be due from him to the said Company . . . It shall and may be lawful . . . to Seize, or cause the Goods of . . . [the factor] to be Seized.").

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

Merchandizes Traded for",[115] as well as the loss of all benefits otherwise due the factor and the termination of service ("shall also from thenceforth cease to be the said Company's Servant or Agent."). The company couples this extraordinary double-damages formula with two provisos.

First, if the factor voluntarily reveals the private trade to the company then the EIC agrees to "Accept the single Value instead of the double Value" of the privately traded goods.[116] Second, the contracts tailors the procedure to be followed in the event of formal adjudication of private trade. It provides that "in order to a Discovery of, and a satisfaction for such Illicit Trade as aforesaid," it will be lawful for the company to "file any Bill or Bills of Complaint, or Discovery" in the Courts of Chancery or Exchequer, and that the factor agrees to not contest the discovery or relief sought by the company, in which case it will accept as damages half of the amount of the gains from private trade.[117]

The use of this complex regime for managing damages from private trade reflects the exceptional difficulties the EIC would have faced in proving damages by ordinary means. As mentioned above, expectation damages were in principle available to a litigant under early modern English contract law. Yet familiar limitations of that remedy were present in extreme form for the EIC.

Those limits involved difficulties of both *knowledge* and *proof* (or observability and verifiability). The EIC's leadership in Leadenhall Street in London had no direct access to particular factors' trading opportunities. Through the indenture and corporate policy, the EIC did establish a complex network of information flows based on dense and carefully maintained accounting records. This permitted lagged vertical monitoring of trading centers by the EIC's directors. The EIC also facilitated networks of horizontal monitoring whereby factors were both obligated and incentivized to report on one another's private trade. Despite these efforts, however, measuring agents' private trade in India would have been a daunting challenge for the company, and credibly proving damages to an English adjudicator almost insuperably difficult.

While useful in concept, the EIC's contractual damages regime would have had little real-world value if it was not enforceable. Strikingly, the historical record actually contains case law directly addressing its enforceability. In a 1670s litigation, the EIC argued for the provisions' importance, insisting that reliance on expectation damages would radically undercompensate it because "their *Factors* had many secret Opportunities to abuse the *Company*."[118] This litigation was crucial to the success of the EIC's change in damages design. As noted above, one reason for the company's abandonment of reliance on penal bonds was the Chancery court's jurisprudence invalidating those bonds as penalty clauses.

The case involved William Blake, who was the East India Company's chief factor in Bengal, and thus occupied a position of considerable importance. After managing the company's affairs there for several years, the company came to view Blake as engaging in

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[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *East-India Company v. Blake*, Rep. Temp. Finch 118, 119 (1673).

an excessive amount of self-dealing. In 1670, they brought an action of debt upon a covenant against him. The company sued for breach of Blake's covenant indenture. It was an action both for covenant and for debt because the company was suing for a sum certain on the basis of the indenture's liquidated damages provision.

The company sought damages from Blake for various forms of misconduct, but many of the sums were small. The centerpiece of the case was that Blake owed the company £26,000 in damages for engaging in private trade, based on the covenants' liquidated damages term. As the court noted, "'tis a Custom for the *Factors of the Company* to enter into Covenants to them with great Penalties, . . . if they should trade in such Goods for themselves, or for any Person or Persons, except for the Company."[119] Blake attacked the enforceability of the provisions. He argued that he would not have signed the agreement except company representatives assured him the penalties were never enforced and that the company never sought damages in excess of its actual losses from private trade. Blake sought to have the Chancery Court invalidate the damages terms, leaving the company only with an action of covenant in which they would have to prove their actual damages.[120]

In response, the company argued that their agents abroad had sufficient opportunities for self-dealing that if they were left only with the background rules of law, the company might not be able to function. The EIC added that while they had previously made extensive use of penal bonds, the Chancery Court had often invalidated them as penalties, leaving the company to prove their actual damages, "which as that Distance (the Company's Affairs did lay) was impossible for them to do." As a result, the company had since the mid-1650s required agents to agree to "*certain stated and adjusted Damages* in Case they shall trade in the said prohibited Commodities; and which were equally and indifferently estimated to be reasonable in respect of the great Damages the *Company* might sustain by such a private Trade in prohibited Goods." In particular, the company stressed that the damages provisions were not intended to function as penalties, but merely as effective restraints on private trade.[121] The Court of Chancery agreed, holding that the covenant was enforceable, and that its principal function was to restrain agents' self-dealing and to secure their promises in light of the companies' difficulty of obtaining recovery in other ways.[122]

Importantly, *Blake* was not a one-off case with no precedential value. Instead, it seems to have served as a touchstone for later cases addressing the same subject matter. For instance, in 1691, the Chancery Court again encountered the question of the enforceability

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[119] *Id.*

[120] *Id.*

[121] "[T]he Payments these Factors were to make for such trading contrary to their Agreements and Covenants were not intended to be in the Nature of *Penalties*, but adjusted Damages agreed on before-hand between the Company and them; and that they were intended to restrain them from Trading at all in such Goods."

[122] Id. A year later, a second opinion heard an appeal and upheld the result. *Blake v. The East India Company*, 2 Chanc. Case. 197 (1674). The opinion again addressed the objection "that this Covenant was a greater Penalty than a Bond of double the Value; so it was but an artificial Dividing of a Penalty of a Bond," and again upheld it under a general freedom of contract theme, observing "I see not how the Company can subsist unless such Trade be restrained." *Id.*

of a covenant to pay double in liquidated damages for any prohibited private trade in a contract involving a different joint stock company.[123] The defendant again plead that "the sums therein mentioned [in the contract], were of double the value of the goods themselves, and so was in the nature of a penalty."[124] The Chancery Court held for the plaintiff, noting that "it hath been adjudged so several times in the case of the *East India* company."

The Hudson's Bay Company. Damages provisions are also a prominent part of the HBC form contract. The provisions define very specific consequences for any contractual breach.[125] The first of the two damages terms provides for forfeiture of compensation due to an employee in the event of breach of contract:

> And in Case I the said [Name] Labourer shall make any Breach or Default of, or in Performance of all, or any of the aforesaid Covenants, Agreements, or Things, Then I and my Executors and Administrators will not only forfeit and lose all Wages, Salary, and Monies, as by Virtue of this Contract, or otherwise, shall be due to me, or them, from the said Governor and Company, or their Successors, which I do hereby enable them to detain to their own Use and Benefit . . . .[126]

The second provision is a liquidated damages provision that provides for a specific monetary sum due to the HBC in the event of default.[127] Given the wages paid to an employee:[128]

> But also I and my Executors and Administrators will, for every such Breach or Default, also forfeit and pay to the said Governor and Company the Sum of Twelve Pounds of lawful money of England, over and above all Damages that may arise, or happen to them, by Reason or Means of such Breach or Default.[129]

The terms of the contract indicate the core managerial concerns of the HBC regarding employment, or at least those the company believed could be managed by law. The basic bargain was wages for services provided, but it was supplemented with distinct obligations to avoid private trade and to accept harsh sanctions in the event of breach.

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[123] African (Societas) Co. v. Parish, 2 Vern. 244 (Ch. 1691) (the defendant contracts "that if the defendant traded in the goods the company dealt in, he would pay such and such particular sums to the Company in respect thereof").

[124] *Id.*

[125] Indenture of John Cromertie, June 20, 1780, IOR, Series O/1/1.

[126] *Id.*

[127] A liquidated damages provision exists when parties stipulate the amount of money damages a court should grant in the event of breach. *See* DANIEL MARKOVITS & [__], CONTRACTS: LAW, THEORY, AND PRACTICE (2018).

[128] A penalty clause exists when a liquidated damages sum functions as a deterrent of breach rather than a reasonable estimate of damages. *Id.*

[129] Contract of John Cromertie, June 20, 1780.

III. ENFORCEMENT

The East India Company was extraordinarily litigious. It routinely enforced its covenants through formal proceedings in England's high courts. In terms of English case law, I obtain from court archives a number of proceedings that have never been digitized, but I also rely on the *English Reports*. The English Reports is the largest set of published judgments of higher English courts from the Middle Ages to 1866, while still capturing only a small fraction of all higher court decisions during the period.[130] There are 57 judgments in the English Reports in which the East India Company is the named plaintiff. I use this sample to briefly explore the EIC's litigation in English courts.

Figure 3 depicts the English Reports sample broken down by number of cases per decade and by court in which the proceeding occurred. A number of interesting facts emerge. The most common court in which the EIC initiated claims was the Chancery court, particularly in the seventeenth and eighteenth centuries, when the vast majority of suits are in Chancery. In twelve of the English Reports cases, it is clear that the legal dispute follows from an agency problem with a company servant. Ten of those cases were in Chancery. The reasons for the heavy use of Chancery are complex but almost certainly reflect both jurisdictional and substantive considerations. By the sixteenth century, Chancery had developed a general jurisdiction over contract disputes, enabling petitioners to seek enforcement or redress from it for a variety of reasons.[131] Chancery also offered a more developed body of contract jurisprudence. This was due to the fact that the common law courts left far more issues to the jury, leaving little precedent in the form of rules.[132] The other court in which a number of suits are litigated is the major common law forum of the Court of King's Bench.

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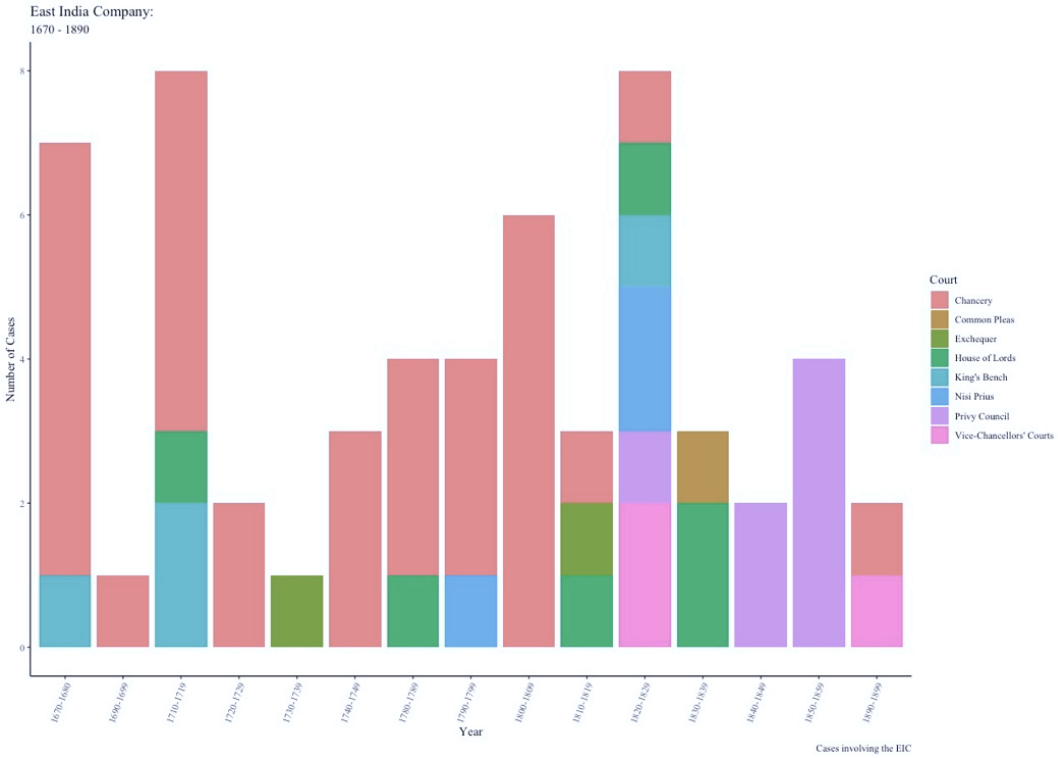
[130] The Medieval and early modern English court system was byzantine. Major courts, such as the Court of Star Chamber, emerged and disappeared during the early modern period. Not only did the doctrine of courts change, but their jurisdiction, procedure, and staffing could also evolved dramatically during the period. *See* Baker, *supra* note 32.

[131] BAKER, *supra* note 32; *see also supra* note 62 and accompanying text.

[132] *Id.*

Figure 3. EIC-Plaintiff Cases in English Reports



Formal enforcement played an important role in the EIC's success and suggested the scale of the losses that agency issues with its factors could impose on the company. Powerful evidence for this lies in the sums of money contested in a number of the cases. The sums of money at issue are often staggering. Alongside the £26,000 sought in *Blake*, the company sought £60,000 in *Henchman*,[133] £35,000 in *Lewis*,[134] and £26000 in *Clavel*.[135] Those four cases alone amount to £147,000. As mentioned earlier, the company seized £30,000 from Elihu Yale. EIC merchant William Bolts made a fortune of £90,000 in only six years and the company accused him of amassing a total fortune of £200,000 through illicit private trade.[136] For a sense of perspective, an agricultural laborer in seventeenth

[133] East India Co. v. Henchman, 1 Yes. Jun. 287; 1 Yes. Jun. Supp. 124 (1791).
[134] East India Co. v. Lewis, 3 Car. & P. 358 (1828).
[135] East India Co. v. Clavel Prec. Ch. 377, 380, Chancery, 24 Eng. Rep. (1557-1865) Precedents in Chancery; Peere Will (1714).
[136] N.L. HALLWARD, WILLIAM BOLTS: A DUTCH ADVENTURER UNDER JOHN COMPANY, at 110 (1920). *See also id.* ("Mr. William Bolts who returned hither from your Presidency on the Valentine having represented that by your obliging him to leave Bengal, his own and the fortunes of several for whom he was concerned to the amount of upwards of £110 ,000 are left at the mercy of the natives in different parts of the country, and that the greatest part thereof under the oppressions he has suffered, he apprehends will never be received without our interposition."). WILLIAM BOLTS, CONSIDERATIONS ON INDIA AFFAIRS; PARTICULARLY RESPECTING THE PRESENT STATE OF BENGAL AND ITS DEPENDENCIES (1772). Bolts wrote a three-volume sequence of books attacking the East India Company and in attempt to vindicate his name in the face of the company's litigation against him.

century England might have earned £10 per year, while £26,000 in 1650 would be equivalent to almost £3,000,000 today, and in a vastly poor and still largely agricultural society.[137]

Indeed, the gains from private trade were large *relative to the company's entire annual profits*. Recall that William Bolts' fortune from private trade was estimated at £90,000. From 1666 to 1682, the EIC averaged approximately £117,000 in yearly profits, while in the eighteenth century, its years as the world's largest business brought it to average annual profits of £310,000 (1710-1745).[138] As a result, the fortunes of the most successful private traders would have been large relative to the company's annual profits and economically consequential to it.

An important source of information on the East India Company's efforts to resolve their agency problem by detecting misconduct and punishing agents is a book it created recording agent behavior, named the "Black Book of Misdemeanours."[139] The version of the book that survives in the company's records covers the period from 1624-1698. It records managers complaints made in correspondence from company servants. The book provides a vivid window into the incidence of misconduct, its forms, and the company's methods of detection. I obtain and digitize the book and then code its rich qualitative data along a number of dimensions, including the date of the complaint, position of agent, name of accuser, nature of charge, and form of punishment. Figure 4 depicts the number of entries in the book per year, while Figure 5 depicts number of charges per category, where charges are broken down into private trade, embezzlement, and other forms of misconduct. As the figure shows, private trade was by far the most common charge and is almost always formulated in explicit terms. Embezzlement, in contrast, I use broadly to include any charge of improper behavior based on harm to the company's "bottom line," which often included theft, improper use of company resources for personal indebtedness, and the like. Other forms of misconduct were typically rooted in personal behavior, including debauchery, injuries inflicted on third parties, or drunkenness. The book is important evidence of how seriously the company took internal, formal detection, documentation, and enforcement of its prohibition on private trade.

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[137] The National Archives, *Currency converter: 1270–2017*, https://www.nationalarchives.gov.uk/currency-converter/.

[138] *See* CHAUDHURI, TRADING WORLD, *supra* note 30, at 419 Table A.20; *id.* at 440, Table A.26.

[139] *See, e.g.*, British Library, Untold lives blog, *The East India Company's Black Book of Misdemeanors*, mar. 24, 2017.

Figure 4. Entries per year in the Black Book

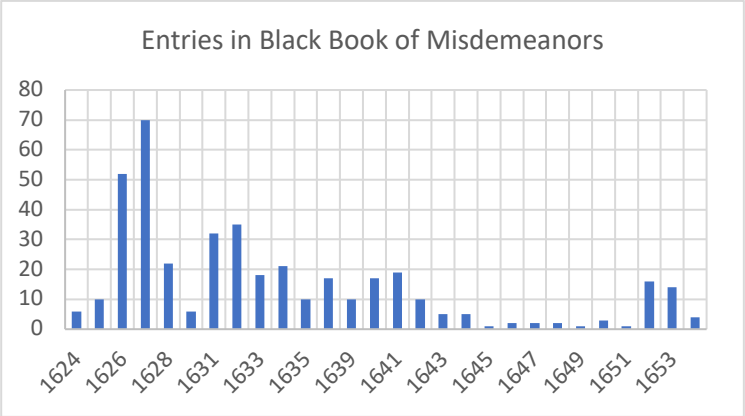
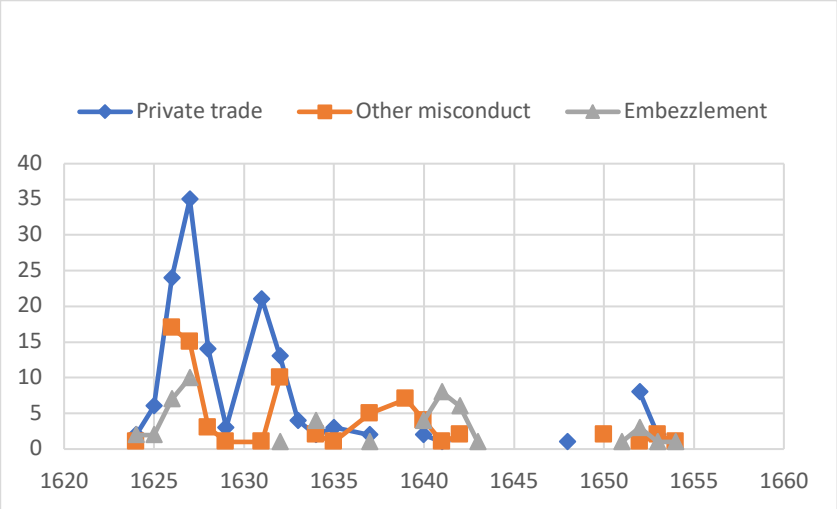


Figure 5. Incidence of Charges



IV. STANDARD FORM CONTRACTING AND FORMAL ENFORCEMENT

A core theme in the historical study of contracting has been the contrast between formal and informal enforcement.[140] Merchants typically a choice between designing and

[140] *See* Avner Greif, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition*, 83 Am. Econ. Rev. 525, 528-31 (1993); Paul R. Milgrom, Douglass C. North & Barry R. Weingast, *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 Econ. & Pol. 1, 4-6 (1990) (arguing for the importance of adjudication by merchants in commercial fairs); Barak D. Richman, *Norms and Law: Putting the Horse Before the Cart*, 62 Duke L.J. 739, 766 (2012). For a more recent example, *see* Meng Miao, Guanjie Niu & Thomas Noe, *Contracting Without Contracting Institutions: The Trusted Assistant Loan in 19th Century China*, 140 J. FIN. 166 (2021).

enforcing contracts through the formal, legal institutions of the state or through one of many available methods of private ordering. A large portion of the historical literature on contracting has focused on important periods of economic development, during which the institutions of formal, public enforcement have been seen as weak or problematic, and in which merchants have successfully developed forms of private, informal enforcement as substitutes for state enforcement.[141] A growing part of that scholarship asks more granular questions as well, exploring the sometimes complicated tradeoffs between formal and informal enforcement and the ways in which formal and informal enforcement can be *complements* as well as substitutes.[142]

Against the backdrop of this literature, the EIC and HBC stand out for their extensive reliance on the design of formal, legal contracts and the EIC's serial use of formal adjudication in England's high courts. Why did formal contractual institutions—formal contract design and formal, public enforcement of contracts—play such a significant role when it might have been thought to face insuperable obstacles?

In this Part, I offer an account of the distinctive advantages of formal design and enforcement for the companies. Section A outlines what prior scholarship has identified as the central problems facing long-distance trade in the late Medieval and early modern world. Section B discusses the important benefits that contractual standardization offered the companies. Section C explains how standardization and formal enforcement were mutually reinforcing, with each making the other more valuable.

A. Long-Distance Trade in the Premodern World

In a famous essay, Douglass North noted that cooperation is easy when, in game theoretic terms, play is repeated, players possess complete information about each other's performance, and the number of players is small.[143] But "turn the game upside down" with no or little repeat play, incomplete information, and many players, and cooperation becomes difficult to sustain. During the Medieval and early modern periods, long-distance trade posed an especially severe version of this predicament with two main facets.[144] First, the senior management of an overseas trading business faced a particularly severe agency problem. Representatives went abroad to serve the interests of the business, but their ability

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[141] *See, e.g.*, Michael Trebilcock & Jing Leng, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 VA. L. REV. 1517, 1519, 1522 (2006); *see also* Kevin J. Fandl, Esq., *The Role of Informal Legal Institutions in Economic Development*, 32 FORDHAM INTL. L.J. 1, 31 (2008). As Avner Greif notes, economists, particularly those interested in game-theoretic analysis, have often focused on "the study of private order, particularly one in which property rights are secured and contracts are fulfilled in the absence of an effective legal system administered by the state." AVNER GREIF, INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE, at 8 (2006).

[142] W. Bentley MacLeod, *Reputations, Relationships, and Contract Enforcement*, 65 J. ECON. LIT. 595, 619-20 (2007) (surveying the literature on private contractual enforcement).

[143] Douglass C. North, *Institutions*, 5 J. ECON. PERSP. 97, 97 (1991).

[144] North, *Institutions*, *supra* note 143, at 99-100 ("The growth of long distance trade poses two distinct transaction cost problems . . . a classical problem of agency . . . [and] contract enforcement and negotiation in alien parts of the world").

to serve their own interests instead was heightened by management's incomplete information about the opportunities agents encountered and the extreme difficulties of observing the quality of performance. Second, long-distance traders not only faced weak contract enforcement domestically, but formal contract enforcement across borders was almost non-existent.

Avner Greif's work illustrates a classic "solution" to overseas trade under these circumstances—the repurposing of thick preexisting social norms, particularly kinship networks, to lower information costs and facilitate group ostracism of defectors.[145] In Greif's famous example of the Maghribi traders, a close-knit, ethnically homogeneous group of Jewish Mediterranean traders developed a collective reputation mechanism to ensure cooperation. This mechanism turned on individuals' reputations being common knowledge among the group and on harshly penalizing misconduct by exclusion. As a result, Greif argues, overseas agents acting on a trader's behalf were effectively deterred from self-dealing.[146]

This basic problematic of overseas trade also existed for the joint stock trading companies. The prospects for effective enforcement of English law against agents abroad was weak. The agency problem facing senior management of the firms remained as sharp as ever. The Hudson's Bay and East India companies were London-headquartered businesses that were sending employees abroad to conduct overseas trade. Each companies' directors had little ability to ascertain agents' trading opportunities, little ability to directly observe employees' conduct abroad, and even less ability to verify the true quality of their performance.

Indeed, the problem was in some ways particularly hard because the joint stock trading companies could not rely on the solutions that Greif and others famously offered—mechanisms that rely on social norms.[147] The joint stock companies were mobilizing vast amounts of capital to pursue major new trading opportunities in areas where the English world had only a limited footprint. Moreover, their very strategy of accumulating capital from a large and diffuse body of subscribers—of separating ownership and control—made

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[145] *See* Avner Greif, *Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders*, 49 J. ECON. HIST. 857 (1989); see also Avner Greif, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition*, 83 AM. ECON. REV. 525 (1993); Avner Greif et al., *Coordination, Commitment, and Enforcement: The Case of the Merchant Guild*, 102 J. POL. ECON. 745 (1994); Avner Greif, *The Birth of Impersonal Exchange: The Community Responsibility System and Impartial Justice*, 20 J. ECON. PERSP. 221, 222 (2006). See also North, *Institutions*, *supra* note 10, at 106 (describing "the traditional resolution of this problem [of maintaining control of agents involved in long distance trade] in medieval and early modern times was the use of kinship and family ties to bind agents to principals"). Subsequent historical work has questioned the accuracy of Greif's account. See, e.g., JESSICA L. GOLDBERG, TRADE AND INSTITUTIONS IN THE MEDIEVAL MEDITERRANEAN: THE GENIZA MERCHANTS AND THEIR BUSINESS WORLD (2012). For recent work reappraising Greif, *see, e.g.*, Lisa Bernstein, *Contract Governance in Small-World Networks: The Case of the Maghribi Traders*, 113 NW. U. L. REV. 1009 (2019).

[146] See Avner Greif, History Lessons, *The Birth of Impersonal Exchange: The Community Responsibility System and Impartial Justice*, 20 J. Econ. Pers. 221 (2006).

[147] *See supra* notes 140-142 and accompanying text. *See also* Paul R. Milgrom et al., *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1, 4-6 (1990).

reliance on social cohesion among the owners, managers, and traders abroad unlikely. There was little prospect for kinship networks or thick preexisting social norms to substitute for weak cross-border legal enforcement.[148]

B. The Effects of Standardization

Under these conditions, the standard form contract plausibly offered a kind of contractual institution with important advantages for the joint stock companies. In this section, I explore those advantages. In the next, I discuss how they promoted the use of formal enforcement. The standardized contracts offered by the EIC and HBC facilitated cooperation with agents in a number of respects. As many have pointed out, standardization can generate economies of scale.[149] It is implausible that creating a highly tailored set of incentives and sanctions for all company employees would have even been possible without the use of highly standardized forms.

As is often noted, standardization reduces drafting costs.[150] Rather than having to invent provisions, terms are pulled off-the-rack and applied. As a result, crafting one form contract that binds all employees, or all of a class of employees, dramatically lowers the per-employee cost of contract design. At a fundamental level then, form contracting allowed for the EIC and HBC to offer highly considered and tailored contracts to each new agent. Consider the range of considerations encompassed by the EIC's mature standard form indenture. It not only defined a lengthy set of affirmative obligations. It crafted an elaborate remedial regime with three distinct components. It created an informational environment designed to facilitate the prohibition on illicit private trade by mandating that factors keep elaborate records and communicate contractual non-compliance by other factors to the EIC. Rather than leaving the quantity of information available to managers exogeneous to the contract, it shaped it.

The companies' standardized contracts also reflect what Kahan and Klausner called "learning benefits"—advantages conferred on subsequent users of a common contract term by the initial drafter of that term.[151] The perceived enforceability of a contract term is in part a function of the likelihood that a court will enforce this term. A

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[148] That the joint stock companies encountered these difficulties of long-distance trade has not been lost on economic historians of the period. Ever since Adam Smith, commentators have been alive to the agency problem of managing managers abroad. Anne Carlos, who studies the HBC and Royal African Company, focuses on the social systems and monitoring pursued by the companies, but relies on limited primary sources and does not emphasize formal contracts. Carlos & Nicholas, *supra* note 31. Hejeebu provides a widely illuminating analysis of primary texts, including multiple helpful discussions of contracts in footnotes, and ultimately emphasizes career concerns and dismissals.

[149] Economies of scale involve decreasing costs per unit of a product as the volume of production increases.

[150] Stephen J. Choi & G. M. Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129 (2006) (offering a nuanced analysis of the drafting costs and other benefits and costs of different interpretive approaches to boilerplate).

[151] *See, e.g.*, Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713 (1997); *see also* Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261 (1985).

familiar benefit of boilerplate is precisely that it can create a stock of judicial precedents that has already enforced a term.[152] This makes it clear both *that* the contract provision will be enforced and *how* it will be enforced. In part due to such learning benefits, standardization heightened the costs of agent defection because it made sanctions sharper and enforceability clearer.

Alongside learning benefits, network effects are another familiar advantage of standardization. Network effects occur when the value of using a product or service increases alongside the number of persons using the product or service. If the meaning of a complex contractual provision is favorably clarified by a court, then it immediately benefits all others of the provision. As lawyers and other professionals become familiar with the term, it further increases its value as there is a knowledgeable community available to use the provision.[153] Due to the use of a standardized contract for all factors, an important network effect for the companies is that all of their traders would have been familiar with the meaning and implications of those contracts' terms. The companies' employees were situated within an intricate ecology of incentives that they all shared. In essence, a significant network economy of standardization is that it improves "horizontal" monitoring among agents by ensuring common knowledge of employee rights and obligations.

The scale and duration of the EIC mean that the company itself internalized to a large extent the learning and network benefits flowing from its contractual standardization. Standardization also generated network and learning *externalities*, however, in the form of network benefits conferred on other joint stock companies. Importantly, *Blake*, in which the court of Chancery upheld the EIC's liquidated damages provision, was not a one-off case, but one that developed precedential value. In a Chancery court opinion in 1691,[154] the Chancery court addressed a covenant between the defendant, Parish, and another company. The covenant stated that if Parish engaged in private trade, he would pay the company double the value of the goods traded. When the company sought discovery as to whether Parish had engaged in private trade, he objected that the covenant was a penalty. The Chancery court upheld the provision,[155] noting that "it hath been adjudged so several times in the case of the *East India* Company."[156]

C. Standardization and Formal Enforcement

Standardization not only delivered benefits to the companies, but the magnitude of those benefits increased the value of formal enforcement, even as formal enforcement

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[152] See also Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 776 (1995) (arguing that network benefits accrue from the fact that "[a] judicial opinion that interprets one corporation's contract term in effect embeds that interpretation in the contracts of all firms that use the same term").

[153] Kahan & Klausner, *supra* note 151, at 726.

[154] Chancery, African (Societas) Co. v. Parish, 2 Vern. 244, 23 Eng. Rep. (1557-1865) Reports Temp. Finch; Vernon's Case (1691).

[155] Id. ("The defendant must be bound by his own agreement.").

[156] Id.

increased the benefits of standardization. In essence, there were significant synergies between contractual standardization and formal enforcement. The use of standard forms thus partly explains why the EIC found formal enforcement attractive.

To begin with, some of the most important benefits of standardization require adjudication that binds future adjudications and provides clear, public notice regarding the meaning and enforceability of terms.[157] While a private institution might be able to provide such notice, it is rare to find such adjudication in private ordering. Adjudication by England's high courts did offer such clarity, however. The learning and network benefits turned on the precedential value of decisions and formal, public enforcement created precedents. Formal enforcement thus increased the value of the contracts by clarifying their enforceability and meaning.

The sophistication enabled by standardized forms also reduced the costs of formal enforcement.[158] Recall that the mature EIC covenant indenture not only contracted over the nature of remedies, tailoring their content and scope, it also tailored the procedure that parties would follow in court in the event of a dispute. In effect, the indenture required a signatory to waive the right to dispute certain discovery motions in court. Of course, this provision would have to be enforceable to serve its intended function.

In *East-India Company v. Atkyns*, the Chancery court addressed the issue.[159] In the case, the EIC accused Atkyns—who was in charge of overseeing a vessel's cargo—of private trade. The company sought discovery. In Atkyns' contract, he had promised not only to refrain from private trade, but also that if the company sought discovery against him in Chancery he would answer on the merits, rather than plead any procedural bar to such discovery. Now Atkyns sought to raise exactly such a procedural bar.

The parties advanced arguments that are still familiar today. Summarizing the defendant's arguments, the court observed, "It is indeed a covenant of an extraordinary nature, that he shall not make part of his defence; if he may be abridged of one part of his defence, why not of the whole?"[160] Yet the Lord Chancellor concluded by upholding the provision: "It is a negative privilege which the allows, that a man is not obliged to discover what may subject him to a penalty, but it is not a natural right, for then a discovery, if he is pleased to make it, would invade that right; . . . Though the law doth not oblige him any one to subject himself to penalties, yet he may if he will, if he thinks it for his advantage."[161]

Atkyns illustrates the mutually reinforcing benefits of standardization and formal enforcement. Standardization allowed the EIC to craft a complex, intricately structured contract for all servants. Those terms displaced background procedural and remedial rules afforded by the English legal system, lowering the costs to the EIC of recourse to the

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[157] *See supra* notes 150-153 and accompanying text.

[158] As discussed above, standardization makes formal enforcement less costly by economizing on drafting costs and litigation strategy through economies of scale.

[159] "[T]he Payments these Factors were to make for such trading contrary to their Agreements and Covenants were not intended to be in the Nature of *Penalties*, but adjusted Damages agreed on before-hand between the Company and them; and that they were intended to restrain them from Trading at all in such Goods."

[160] *Id.* The court also observed, summarizing the defendant, "The rule, that no person shall be compelled to subject himself to penalties and forfeitures, is founded on natural right and justice: . . . it would be a monstrous thing in a Court of Equity to subject us to them." *Id.*

[161] *Id.*

English high courts. Formal enforcement of those terms clarified their enforceability and meaning, increasing the value of the terms.

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It is worth contrasting this argument with Santhi Hejeebu's work, which provides the only in-depth study of a joint stock company's contracting practices in the prior literature.[162] Hejeebu's argument is that the East India Company managed its agents—curtailing excessive self-dealing and motivating profitable trading—by two fundamental mechanisms: the threat of dismissal and the authorization of selective private trade.[163] In her view, the basic disciplining force on agents' self-interest came from the fact that trading in India could make a factor enormously wealthy (through private trade), but that trading too much at the company's expense would result in termination of employment (by dismissal).[164] The desire to retain access to a future profit stream thus resulted in agents' generally acting to enrich the company. In later work, Hejeebu and Pablo Casas-Arce also argue that there were synergies between a factor engaging in profitable private trade and acting as a profitable trader for the company.[165] In essence, being good at trade in one function facilitated one's skill at the other because the basic abilities underlying both were shared. Hejeebu and Casas-Arce argue that this explains the unusual structure of the East India Company's employment relationship, which authorized factors to privately trade even though that trade could compete with the company's own business.[166]

Importantly, Hejeebu's argument is complementary to the argument here. The principal difference is that Hejeebu focuses on informal, economic forms of discipline, while I explore the formal, legal mechanisms used for broadly similar ends. It is worth being explicit about the differences, however, as well as a few places of disagreement. First, Hejeebu's argument is based on incentives implemented through private behavior, rather than about recourse to the formal legal system. She explicitly rejects the significance of penal bonds and implicitly takes formal enforcement of remedies to have been unimportant to the company's success.[167] Instead, the key mechanisms of enforcement are informal, namely, the provision of incentives and the threat of private sanction in the form of dismissal.

I have argued for the central role of formal design and enforcement. Formal contract design established an initial remedy—the penal bond—that the company extensively used. Hejeebu's dismissal of the penal bond arises from her temporal frame of

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[162] Hejeebu's work has been widely cited in the economic and historical literature. *See, e.g.*, James I. Stewart, *Cooperation when* N *is large: Evidence from the mining camps of the American West*, 69 J. Econ. Behav. & Org. 213 (2009).

[163] Hejeebu, *supra* note 31, at 500 ("Contracts were successful because they were based upon a coherent design of economic incentives (private trade) and control (dismissals) that kept employee malfeasance within tolerable bounds.").

[164] *Id.*

[165] Pablo Casas-Arce & Santhi Hejeebu, *Job Design in the Presence of Career Concerns*, 21 J. Econ. & Mgmt. Strategy 1081 (2012).

[166] *Id.* at 1082.

[167] Hejeebu, *supra* note 31, at 504 ("There is no evidence to suggest that the bond played a role in sustaining the employment relationship").

reference given that her analysis is of traders in Bengal during the years between 1700 and 1756.[168] It was evolution in formal design too that enabled the East India Company to de facto replace the penal bond with liquidated damages and associated remedial provisions.[169] As importantly, I have argued that the sums of money in the available record of case law are so significant that the equilibrium effect of contractual enforcement was surely material to the East India Company.

This all suggests that private and public contractual mechanisms functioned as complements. Dismissal surely was important,[170] but if it had effectively solved all of the company's management problems there would have been little incentive for a large and sophisticated business enterprise to invest the enormous resources that it did in enforcement in England's high courts. Indeed, the co-existence of these formal and informal mechanisms suggests the possibility for future work to engage in a more fine-grained comparison of why and when the company deployed each tool. For instance, it may have been the case that dismissal ceased to be a viable threat during the last phases of an agent's career, meaning that recourse to formal sanctions and potential disgorgement of prior profits would have been the only remedy with any bite.

V. IMPLICATIONS

The history of joint stock company contracting casts new light on debates concerning the balance of public and private enforcement and provides a rich laboratory for testing theories of contract. It also informs longstanding debates about the history of form contracting and that history's implications for how standard form contracts should be treated today.

A. Testing Empirically the Theory of Contracts

The contracts of the EIC and HBC provide a powerful setting for empirically testing theoretical claims about contract and about the economic functions of boilerplate in particular. They possess two unusual virtues. The first, which has been relevant here, is historical. They are two of England's first for-profit corporations and their contracting practices thus provide a window into the early history of this dominant organizational form. The second is that they permit the study of within-firm contracting practices *in the long-run*. It is unusual to be able to obtain a decade's worth of employment contracts for an important firm. The earliest surviving texts of EIC indentures date to 1608. I study them and explore Series 1-4 of the India Office Records, which covers indentures and bonds from 1740-1798. But the EIC's records contain at least another fifty years' worth of contracts from the nineteenth century (1814-1865). In principle, the evolution of the EIC employment contract could be studied across 250 years. The HBC also provides a long-term view. I rely

[168] *Id.* at 514.
[169] *See supra* notes 92-104 and accompanying text.
[170] Hejeebu finds that of the 303 persons in the Bengal service from 1700 to 1756, 40 were suspended or dismissed. Hejeebu, *supra* note 31, at 514.

on the first forty-five years of surviving company contracts (1776-1818), but the HBC Archives contain thousands of employment contracts continuing all the way until 1927.[171]

The opportunity to observe how the employment contracts of two major commercial enterprises evolved over such a period provides a powerful setting to test hypotheses in contract theory. For instance, Marcel Kahan and Michael Klausner have observed that the benefits of boilerplate can also create substantial "switching costs" to contractual evolution.[172] Where these costs are significant, they undermine any analytical basis for judging a given contract as optimal under present circumstances.

B. A Myth of Contract's Origins

Claims about the history of contract practice and doctrine sometimes plays a role in contract theory. Subsection 1 illustrates how contract theory has deployed a specific history of contracting practice to motivate a normative view about the status and enforceability of form contracts. It surveys both the conventional wisdom and its characteristic use in contract theory. Subsection 2 surveys the historical and theoretical debates about when modern contract law formed. While historians and commentators have often disagreed vehemently about precisely when modern contract law emerged, they have also set plausible limits for that period. Subsection C suggests lessons from dispelling the conventional wisdom.

1. Contract Theory and Contract's Past

A century old tradition in contracts scholarship contrasts modern contracts with how contracts (supposedly) worked during the period in which contract law crystallized.[173] The contemporary experience of contracting is pervaded by adhesion and boilerplate, from the shrinkwrap and clickwrap of twenty-years ago to the lengthy and ubiquitous electronic agreements of today.[174] Individuals are routinely asked to agree to standard forms they played no role in crafting and typically do no read.

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[171] Archives of Manitoba, *Understanding the Index to HBC Servants' Contracts, 1776 -1927*, https://www.gov.mb.ca/chc/archives/hbca/name_indexes/understanding_servants_contracts_index.htm.

[172] Kahan & Klausner, *supra* note 151. The literature on boilerplate is vast. *See, e.g.*, Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 636 (2002); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 240 (1995) (explaining that concerns about the role of form contracts stem from individuals' cognitive limits); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003) (arguing that efficient form contract terms should not be expected given bounded rationality); Oren Bar-Gill, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS; Roscoe Pound, *Liberty of Contract*, 18 YALE. L.J. 454 (1909); see also Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 379 (1921).

[173] See *infra* notes 175-179 and accompanying text.

[174] *See, e.g.*, John J. A. Burke, *Contracts as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 290 (2000) ("Today, the use of uniform and inflexible contract terms is the unquestioned and universal manner of doing business.").

A classic source here is Otto Prausnitz, whose "The Standardization of Commercial Contracts in English and Commercial Law,"[175] was famously reviewed by Karl Llewellyn in the pages of the Harvard Law Review in 1939.[176] The book's foreword boldly declares that for lawyers, "there has been no more important development in the commerce of recent times than the growth of the use of standardized forms of contract," and that standard form contracts were "[c]onfined originally, almost entirely, to the Lloyd's Policy of Marine Insurance."[177] Indeed, Prausnitz's view was that standard form contracts emerged in mercantile law, and in particular, in marine insurance in the second half of the eighteenth century.[178] Some have followed him in that dating, while many others date boilerplate back to common carriers disclaiming liability through form terms in the late eighteenth century.[179] Baker's leading history of contracts, for instance, associates standard-form contracts with "[t]he growth of large-scale manufacturing, trading and public utility companies after the Industrial Revolution," which "inevitably brought changes in contract-making practices."[180] But this is at least a century too late.

On the basis of this contrast, some of boilerplate's most able critics motivate the view that form contracts are deviations from the normative baseline appropriate to or constitutive of a contract. Consider a recent article authored by Robin Kar and Margaret Radin.[181] More than anyone else, Radin may be boilerplate's leading critic.[182] While their argument is complex, what is most immediate significance is Kar and Radin's use of history. For Kar and Radin, uses of terms such as "agreement" and "contract" for boilerplate today "have fundamentally different meanings than the same-sounding words as used in 1883."[183] Compared to the "centuries" during which contract was "a legal regime grounded in actual

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[175] O. PRAUSNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW (1937)

[176] *Book Review*, 52 HARV. L. REV. 700 (1939); *see also* Alan Schwartz, *Karl Llewellyn and the Origins of Contract Theory* (2000).

[177] *Id.* at v (by R.H. Chorley). Prausnitz's primary ambition was to offer a comprehensive treatment of the law governing standard form contracts. Only as a preface to that ambition did he "inquire shortly into their history, and to ascertain the degree of economic progress which is necessary for their development." *Id.* at 8. *See also* T. A. (ASHE), OF GRAY'S INN, THE LAW OF OBLIGATIONS AND CONDITIONS (1693).

[178] *Id.* at 11.

[179] *See, e.g.*, Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1264 (1993) (endorsing Prausnitz's view that standard form contracts were first used in marine insurance in the late eighteenth century); see also John J. A. Burke, *Contract As Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 325 (2000) (noting the use of standard form contracts in marine insurance in the late eighteen century); Andrew Burgess, *Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and A Suggestion*, 15 ANGLO-AM. L. REV. 255 (1986) (dating standard form contracts to the late eighteenth century when common carriers used them to disclaim liability).

[180] *Id.* at 359.

[181] Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 HARV. L. REV. 1135, 1139 (2019); *see also* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013).

[182] See Radin, *supra* note 181.

[183] Kar & Radin, *supra* note 181, at 1140.

agreement with common understanding" it has now slipped into something quite different, such that "[a]t the end of this process, 'contract' . . . is no longer contract."[184]

History, in their argument, is ontology. The kind of thing that a contract *is* was determined by how parties contracted during the formative period of modern contract law.[185] Contract law developed to regulate exchanges in which two actors jointly negotiated terms and then agreed to them. Boilerplate, in contrast, involves the unilateral provision of terms by one party that the other party had no role in crafting and often neither reads nor understands. The key conclusion of this normative argument is a shift in the burdens of argument. For Kar and Radin, a view of history shifts the burden of proof to boilerplate's defenders to demonstrate why this quite different social and economic arrangement should be governed by the rules of contract law, when contract law's rules emerged to govern jointly negotiated agreements.

The joint stock companies, however, were clearly crafting complex standard form contracts in the 1600s. Indeed, the idea that contracting practices during English contract law's formative periods were all bilaterally dickered contracts, and that standardized forms arose later, is a kind of origin myth of contract law. What explains the remarkable resilience of this view that contractual standardization postdates the rise of modern contract law among contracts scholars, if not early modern historians?[186] There are at least two reasons why this view may have persisted.

First, the structure of contract law invites the idea that the contracting practices during its formative years must have shared a certain structure. The implicit assumption

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[184] Id.

[185] Periodizing contract law has turned out to be a battleground among legal historians. What drives the development of doctrine—social forces, ideas, jurisprudential borrowing—has proved a matter of great disagreement, as has periodizing our legal past. *See infra* note 179 and accompanying text. Agreeing on what doctrines constitute Anglo-American contract law and identifying when and why they emerge has often been elusive. Of course, even what is meant by "modern" contract law is ambiguous, and other scholars and commentators on contract law have used the term for a much later period in the history of English or American contract law. Philip A. Hamburger, *The Development of the Nineteenth-Century Consensus Theory of Contract*, 7 L. & HIST. 241, 241 (1989). Many of the great Twentieth Century theorists of contract law suggested a view of when modern contract law developed. See GILMORE, DEATH OF CONTRACT, 13 (suggesting that modern contract law emerges in the late nineteenth century); see Atiyah, *Contracts, Promises and the Law of Obligations*, 94 L.Q.R. 193, 194 (1978); see P.S. Atiyah, *Contracts, Promises and the Law of Obligations*, 94 L.Q.R. 193, 194 (1978); P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT, 398 (1979) (finding modern contract law to have emerged in the late eighteenth and nineteenth centuries as a result of emerging intellectual and social trends). Nonetheless, there is significant convergence on a negative thesis—that modern contract law was still early in development in the 1750s.

[186] *See, e.g.*, James Oldham, *Reinterpretations of 18th-Century English Contract Theory: The View from Lord Mansfield's Trial Notes*, 76 GEO. L.J. 1949 (1988); Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917 (1974); Baker, *Book Review*, 43 MOD. L. REV. 467, 467 (1980) (reviewing P.S. ATIYAH'S THE RISE AND FALL OF FREEDOM OF CONTRACT (1979)); A.W.B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533, 535 (1979); S.J. STOLJAR, A HISTORY OF CONTRACT AT COMMON LAW, at 5 (1975). The puzzle deepens since other, older civilizations have been known to make use of boilerplate. Peter Temin, *Financial Intermediation in the Early Roman Empire*, Massachusetts Institute of Technology Department of Economics Working Paper 02-39, at 19 (2002) (suggesting the use of boilerplate maritime shipping contracts in ancient Rome).

here is that contract doctrine mirrors in some sense contract practice, and that contract law takes as its paradigm and central case the typical contract of the time. Even more temptingly, the fact that contract jurisprudence before 1900 does not seem to offer an analytical approach distinctive to form contracts suggests that they had failed to raise distinctive issues for courts until that time—presumably, because they did not exist, or at least were not in material use.

Second, the cultural, social, and economic milieu of England during the formative period of modern contract law lends additional plausibility to this view of contract's common law origins. Yeomen farmers, merry shopkeepers, and the burgeoning but diffuse commercial class of the seventeenth century, this story runs, would have had little use for standardized contracts.

2. New Questions for Contract's Past

The "origin myth" view of history serves a number of prominent roles in argument. Above all, it gives aid and comfort to positions critical of the enforceability of boilerplate, and its principal use in those arguments is to cast form contracts as deviating so dramatically from the historical baseline of contract, in which two actors of roughly equal standing negotiate terms afresh, that form contracts might plausibly fail to be contracts at all. The practices of a certain historical period pivotal to legal development are seen to define the very kind of thing that a contract *is*—the kind of thing that contract law is apt for.[187]

One central implication of this article's empirical findings is to undermine the plausibility of that narrative. Documenting the pervasive use of boilerplate contracting before and during the formation of modern contract law undermines the plausibility of those normative positions that depend on the myth in some way for their plausibility. At least it undermines aspects of the overall argument, such as Kar and Radin's move to shift the burden of proof to boilerplate's defenders.

One other example. It might be thought that the early development of form contracting undermines the attractiveness of anti-form contracting positions period. And surely the efficiency considerations at play in the joint stock companies' contracting practices is grist for the mill of form contracting's defenders. It need not favor such a position, however. I prefer the view that, if anything, form contracting's early history unmoors our intuitions from the doctrinal tableaux. There's something odd about contract doctrine if it develops as it does in the face of form contracting.

C. Contract Theory Implications

[187] While the use of the origin myth to motivate normative positions is commonplace, how is actually it does so is rather complex. Part of this is because implicit in this use of the origin myth is a view of how contract law formed and of how real-world contracting practices relate to contract law. This implicit theory seems to be that the kinds of contracts that courts confronted in litigation shaped the doctrine they crafted. This is a plausible theory, and it is the most obvious way in which early corporate form contracting undermines that theory. For the joint stock companies litigated their form contracts in court, and judges seemed familiar with those contracts *as form contracts*.

The account of the companies' contracting practices developed here also provides us with new insights into the study of contracting more broadly, and particularly the interplay of "private" and "public" mechanisms of contract. As noted earlier, it demonstrates the formidable powers of formal enforcement in circumstances where sanction by English courts might have been thought to face impossible odds. The value of standardization is important here, as it both lowered the costs of future enforcement through avenues such as creating a stock of precedent and increased the value of enforcement.

Indeed, the contracting practices of the joint stock companies call into question the usefulness, or at least the tidiness, of the distinctions between public and private, formal and informal enforcement in the first place. The common law of contract is largely a system of *default* rules—rules that govern parties unless the parties choose to displace them with an alternative. By the early modern period, this feature of English contract law was already firmly in place.[188] The English courts would largely enforce the structures and rules crafted by parties and permit them to displace most, but not all, of the default rules provided by case law. Yet because the common law enforces rules crafted by parties, it offers *public adjudication* of *privately-crafted* rules. The legal directives governing the factors of the EIC were designed by the largest business of the time, but they were publicly enforced by English courts. Appreciating the indeterminacy of the distinction between public and private contract enforcement, at least within the English common law system, is a step toward more refined and sophisticated categories for analyzing contractual institutions.

CONCLUSION

This paper has been primarily dedicated to explaining the contracts between the joint stock companies and their factors. The EIC and HBC used form contracts to structure their employment relationships in an era thought to feature widely different contractual structures. Their form contracts standardized the terms of employment across employees, but they also extensively tailored employees' incentives and sanctions. Both companies' mature form contract customized affirmative duties, the regulation of self-dealing, and damages terms.

These contracts plausibly played a role in the joint stock companies' enormous commercial success. They reduced the costs of contract drafting, making it possible to write extensively tailored contracts for every employee. They provided a uniform and shared set of expectations for agents. And as the companies came to actively litigate the contracts' terms, they would have made understanding those terms and their enforceability clearer. The form contract emerged as a private contractual institution that made cooperation easier and defection costlier in a world of fraught international trade.

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[188] *See, e.g.*, Baker, Volume VI, *supra* note 32.

APPENDIX A. CONTRACT PROVISIONS IN THE MATURE EIC AND HBC CONTRACTS

Figure 1: Provisions in the HBC Employment Contract

Provision
Parties
Duration
Compensation (additional for inland)
Notice of non-renewal
Terms of renewal
Terms for return passage
Affirmative Duties
Duty to travel to Hudson's Bay
Duty to remain
Duty to obey company directives
Duty to defend company operations
Private trade
Prohibition on private trade
Duty to hold goods in trust for company
Duty to hinder, detect, and disclose private trade of others
Damages Provisions
Forfeiture of compensation for breach
Liquidated damages

Figure 2: Provisions in the EIC Employment Contract

Provision
Date
Parties
Occupation (variable)
Duration & scope (term of years)
Compensation/Wages (additional for inland)
Affirmative Duties
Duty of obedience
Duty to resist persons violating company direction
Duty to protect company
Duty to disclose wrongs against company
Duty to use company stock and credit for company affairs
Duty to keep company confidences
Duty to keep accounts
Duty of truthfulness in accounting with company
Duty to refuse gifts from counterparties
Duty to deliver company accounts
Duty to make good on monies owed
Duty to pay debts to non-subjects
Duty of good behavior

Private trade
Authorization of private trade
Prohibition on private trade unless here authorized
Damages for private trade
Damages if private trade is disclosed
Liquidated damages for privately traded goods
Duty to hinder, detect, and disclose private trade of others
Damages Provisions
Sanctions for indebtedness: Loss of entitlement to payments
Sanction: Company right to seize goods
Company right to inquire into harms to third parties
Duty to pay company awards to third parties
Duty to pay company for injuries sustained incidentally
Accounts are for company use and not binding on it
Terms of renewal