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### Whither Bespoke Procedure?

David A. Hoffman

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## WHITHER BESPOKE PROCEDURE?

David A. Hoffman\*

*Increasingly we hear that civil procedure lurks in the shadow of private law. Scholars suggest that the civil rules are mere defaults, applying if the parties fail to contract around them. When judges confront terms modifying court procedures—a trend said to be explosive—they seem all-too-willing to surrender to the inevitable logic of private and efficient private ordering.*

*How concerned should we be? This Article casts a wide net to find examples of private contracts governing procedure, and finds a decided absence of evidence. It explores a large database of agreements entered into by public firms and a hand-coded set of credit card contracts. In both databases, clauses that craft private procedural rules are rare. This is a surprising finding given recent claims about the prevalence of these clauses and the economic logic which makes them so compelling.*

*A developing literature about contract innovation helps to explain this puzzle. Parties are not rationally ignorant of the possibility of privatized procedure, nor are they simply afraid that such terms are unenforceable. Rather, evolution in the market for private procedure, like innovation in contracting generally, is subject to a familiar cycle of product innovation. Further developments in this field will not be linear, uniform, and progressive; they will be punctuated, particularized, and contingent.*

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\* James E. Beasley Professor, Temple University Beasley School of Law. Sandy Hill and Paul Garcia provided invaluable research assistance, while Sarah Escalante, Katie Faris, and Scott Vernick helped with coding. Jane Baron, Jaime Dodge, Christopher R. Drahozal, Jeff Dunoff, Craig Green, Jerry Hoffman, Ken Jacobson, Alon Klement, Greg Mandel, Dan Markel, Florencia Marotta-Wurgler, Tess Wilkinson-Ryan, and participants at the 2013 Midwestern Law and Economics Association meeting provided insightful comments.

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## I. INTRODUCTION

Imagine that two individuals are about to enter a contract and are worried that if they fall out, discovery in the resulting litigation would be hideously expensive. They discuss inserting an arbitration clause in their contract, but decide not to forgo the public subsidy that court proceedings provide.<sup>1</sup> Another option is for them to agree now to refrain from later searches of metadata, or onerous and barely relevant document re-

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1. See Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1593 (2005) (discussing how competent courts subsidize contract production).

quests, regardless of what the Federal Rules nominally permit.<sup>2</sup> Better yet, our nervous contracting parties might write a contract term limiting Rule 30(a)(2)(A)(i)'s generous ten-deposition baseline if they go to court. By so doing, while retaining the trappings and coercive power of a judicial proceeding, they would enjoy litigation costs more typical of arbitration.

Contract law's sovereignty over litigation procedure is a radical and exciting idea, and it's not limited to discovery. Do you dislike the settlement-forcing aggregation power of Rule 23 of the Federal Rules? Dispense with class actions in your contract.<sup>3</sup> Do you believe the Supreme Court's recent procedural blockbusters, *Twombly* and *Iqbal*, unduly narrow your access to the courthouse?<sup>4</sup> Then agree to a pleading standard that works for you.<sup>5</sup> Do you find the Rules of Evidence mysterious and arcane? Imagine ones that are less irritatingly complex, contract with your counterparty to apply your preferred rules if you sue each other, and you need never worry about hearsay objections again.<sup>6</sup>

The normative desirability of such privatized procedural rules is a hot topic in the civil procedure academy. Emboldened by a series of recent Supreme Court decisions promoting arbitration,<sup>7</sup> some distinguished scholars now argue that parties' greater ability to contract out of federal and state procedural rules entails the lesser power to modify them.<sup>8</sup> Perhaps procedural "rules" are public goods for courts to apply in the absence of explicit bargaining, and should be analyzed using conventional tools of economic and behavioral legal theory.<sup>9</sup> Under such theories, sophisticated parties would weave procedural options into their bargains as appropriate, making any post-contract litigation tailored just for them. Civil procedure would not be like that off-the-rack suit or dress that does

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2. See generally Jay Brudz & Jonathon M. Redgrave, *Using Contract Terms to Get Ahead of Prospective eDiscovery Costs and Burdens in Commercial Litigation*, 18 RICH. J.L. & TECH. 13 (2012).

3. See Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 778 (2011).

4. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007).

5. See, e.g., Daphna Kapeliuk & Alon Klement, *Contracting Around Twombly*, 60 DEPAUL L. REV. 1 (2010).

6. Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579, 607 (2007).

7. See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011).

8. Cf. Albert Choi & George Triantis, *Completing Contracts in the Shadow of Costly Verification*, 37 J. LEGAL STUD. 503 (2008); Noyes, *supra* note 6, at 620; Alan Schwartz, *Contracting About Bankruptcy*, 13 J.L. ECON. & ORG. 127 (1997).

9. The two key articles in this tradition are Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 856–78 (2006), and Daphna Kapeliuk & Alon Klement, *Contractualizing Procedure* (Dec. 31, 2008) (unpublished draft), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1323056](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323056) [hereinafter Kapeliuk & Klement, *Contractualizing*]. Others include Sergio J. Campos, *Erie as a Choice of Procedural Defaults*, 64 FLA. L. REV. 1573, 1577 (2012) (arguing that the *Erie* doctrine functions as default rule in federal and state courts); Daphna Kapeliuk & Alon Klement, *Changing the Litigation Game: An Ex Ante Perspective on Contractualized Procedures*, 91 TEX. L. REV. 1475 (2013); Kapeliuk & Klement, *supra* note 5; Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461 (2007); Robert J. Rhee, *Toward Procedural Optionality: Private Ordering of Public Adjudication*, 84 N.Y.U. L. REV. 514 (2009).

not quite fit. It would be made for you—it would be, in a word, *bespoke*.<sup>10</sup>

But a larger and equally distinguished community of academic proceduralists has recoiled from this privatized vision.<sup>11</sup> They argue that party bargaining around our public procedural law threatens its legitimacy.<sup>12</sup> Worse, procedural bargains are often distributively unfair, as they result from form contracts and inequality.<sup>13</sup> As Judith Resnik argued in *Procedure as Contract*: at stake is nothing less than the “outsourcing” of the judicial role, and the abandonment of a seventy-year-old commitment to our “trans-substantive” procedural regime.<sup>14</sup>

This heated debate masks two broadly shared premises.<sup>15</sup> *First*, authors often claim that there is an accelerating trend toward more bespoke procedure: parties “increasingly” attempt to contract around procedure;<sup>16</sup> such contracts have become a “fixture in consumer, franchise, and employment agreements;”<sup>17</sup> and customization is on the verge of be-

10. For other uses of this charmingly antiquarian word in a legal context, see RICHARD SUSSKIND, *THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES* 6 (2008) (arguing that legal services are moving away from bespoke (one-off) servicing); Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT'L L. 1, 3 (2010).

11. See, e.g., Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329 (2012); Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507 (2011); Dodge, *supra* note 3, at 724–25; David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 660–66 (2010) (noting that post-contract modification poses challenges for traditional defenses of contracting around procedure); David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973 (2008); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005) (focusing largely on post-dispute contracting); David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085 (2002); Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181 (2006).

12. Bone, *supra* note 11, at 1384–97.

13. A classic statement of this position is seen in Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 351–61.

14. Resnik, *supra* note 11, at 596–97.

15. In this arena, distinguishing between prescriptive and descriptive claims is difficult, especially as such arguments may be interwoven within one article. In their seminal article *Anticipating Litigation in Contract Design*, for instance, Scott and Triantis state that some clauses are “common,” like venue, while others are little discussed in the literature, like burden shifting, even though there is “ample evidence that many contracts in fact contain such provisions.” Scott & Triantis, *supra* note 9, at 857–58. However, in context, it’s obvious that Scott and Triantis intend to make a largely normative point that such clauses ought to be treated as defaults and do not claim that there is a trend toward more such clauses over time, or that there were many such clauses in 2006 as compared to the universe of all possible contracts. Similarly, Kapeliuk and Klement’s *Twombly* essay is basically prescriptive, though the authors do make some claims about the typicality of bespoke procedure. Kapeliuk & Klement, *supra* note 5, at 16 (describing some clauses as “often” appearing in contracts). Indeed, the descriptive and the prescriptive can bleed into one another, as an absence of evidence of terms can easily be downplayed as evidence of (un)warranted fear of judicial backlash.

16. Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1109 (2011) (mainly discussing arbitration); Marcus, *supra* note 11, at 974 (explaining that contracting around procedure is playing “an increasingly central role”); Resnik, *supra* note 11, at 667–68 (discussing the “trend” toward contract procedure).

17. Horton, *supra* note 11, at 611; see also Davis & Hershkoff, *supra* note 11, at 517 (“There is a widespread perception that customized procedure is an increasingly important feature of contracting practice . . .”).

ing “systematic.”<sup>18</sup> *Second*, contracts modifying procedure are “broadly enforceable,” which is to say that courts generally enforce what the parties have written.<sup>19</sup> While a few authors worry that “we know surprisingly little” about customized procedure,<sup>20</sup> scholarship has generally proceeded to work out ever-more-sophisticated theoretical frameworks to govern the appropriate relationship between private and public procedural rulemaking.

It is somewhat embarrassing, then, to find that this broad and thoughtful research movement is built on a tiny handful of cases ruling on contract terms that would finely tailor procedure to the parties’ tastes.<sup>21</sup> Even forum selection, choice of law, and arbitration clauses are less common than is generally imagined.<sup>22</sup> Putting aside these three categories of clauses, almost no courts have even *considered* the kinds of precisely tailored procedural contracting that has excited scholarly ferment. There is exactly one published opinion that approves of a predispute contract modifying the rules of discovery—surely the most practically and economically significant area of civil procedure imaginable. That case is from a federal trial court and dates to the 1950s.<sup>23</sup> Cases considering more sophisticated terms, such as ones setting pleading standards by contract, simply do not exist.

To be sure, the absence of evidence is not (always) evidence of absence. Simply because procedural bargaining is not in our cases does not mean it is not in our contracts.<sup>24</sup> Bespoke procedural bargaining might not turn up in case law for several reasons. Perhaps parties are such effective tailors that litigation never materializes; or the kinds of rulings that would address procedural terms rarely end up written into opinions available on Westlaw.<sup>25</sup> Or it may be that procedural tailoring is accomplished *ex post* (likely in arbitration) rather than *ex ante*.

But perhaps the absence of data suggests that scholars have been much too hasty to spot a trend. In light of the enormous efficiency gains promised by procedural tailoring, this would create a real puzzle. If par-

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18. J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1167 (2012).

19. Dodge, *supra* note 3, at 724.

20. Davis & Hershkoff, *supra* note 11, at 516.

21. Bone makes a similar point. See Bone, *supra* note 11, at 1345 (“[T]he cases cover a much more limited range” than what is theoretically possible.); cf. Dodge, *supra* note 3, at 737 (“[T]he Supreme Court has not yet conclusively determined the enforceability of terms that regulate the courts directly.”).

22. See *infra* text accompanying notes 88–95.

23. Elliott-McGowan Prods. v. Republic Prods., Inc., 145 F. Supp. 48 (S.D.N.Y. 1956).

24. On the relationship between opinions and disputes, see David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 689–90 (2007) (finding that trial court opinions are written at moments in litigation where the judge can expect an appeal).

25. Or perhaps the disputes that do arise are so efficiently adjudicated that settlements occur quickly, making court decisions on procedural terms unnecessary.

ties are as smart and sophisticated as we think they ought to be, why have they overlooked this innovative procedural tool?<sup>26</sup>

This Article explores the problem of the procedural dog that has not barked.<sup>27</sup> I begin by discussing the theoretical promise of bespoke procedure. In its maximalist form, as I will show in Part II, contract scholars have suggested that if parties can customize public dispute resolution processes, we might want to rethink the rules of procedure as a set of defaults. To set such defaults, scholars suggest that we look not simply at typical public law goals like distributive fairness and efficiency, but instead adopt a dynamic approach focusing on parties' strategy, and consequently the role of information exchange through rulemaking.<sup>28</sup> That is, civil procedure would be reimagined as an arm of private law.

Part III illuminates the exceedingly weak descriptive foundation of this grand cathedral of privatized civil procedure. Supplementing the extant literature on dispute resolution cases and a small empirical literature about dispute resolution clauses in actual contracts, this Article reports research in both reported case law and databases of consumer and commercial agreements. Specifically, I examine both the contracts that sophisticated parties make with one another, accessed through the SEC's EDGAR repository, and the contracts they impose on consumers through a hand-coded dataset of over 1200 credit card agreements. Simply put, even in circumstances where we would expect them to, parties almost never use contract terms to vary their post-dispute procedural contests.

This is a startling finding, and it cries out for an explanation. I offer one in Part IV, which looks at the new literature on the evolution of contract terms. This research finds that change in contract language mirrors innovation in other kinds of products and technologies.<sup>29</sup> Contract terms do not evolve linearly and progressively in rational counterpoint to slow changes in doctrine. They change contingently, explosively, and at moments punctuated by shocks.

Bringing the literature on contract innovation to bear on the problem of missing procedural terms may help scholars to cabin their claims appropriately and to look in the right places for evidence of them. I suggest that the scholarly consensus that there is a *trend* toward private procedure fundamentally misunderstands how the market for contract terms operates. We appear to be currently in a period where some terms are widely accepted—like forum selection—while others operate only at the

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26. Cf. Gregg D. Polsky & Dan Markel, *Taxing Punitive Damages*, 96 VA. L. REV. 1295, 1297 (2010) (manifesting similar concern over the curious anomaly in which plaintiffs' lawyers unwittingly leave financial opportunities for themselves and their clients behind due to ignorance of how tax law works).

27. Cf. ARTHUR CONAN DOYLE, *Silver Blaze*, in THE MEMOIRS OF SHERLOCK HOLMES 1, 26 (1892).

28. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L. J. 87, 94 (1989) (discussing the theory of default rule setting).

29. See generally Kevin Davis, *Contracts as Technology*, 88 N.Y.U. L. REV. 83 (2013); see also *infra* text accompanying notes 192–211.

margins—like those that would limit discovery. But the market as a whole has not adopted a standard of bespoke procedural contracting. The revolution promised by so many scholars will not occur until we are shocked to a new equilibrium.

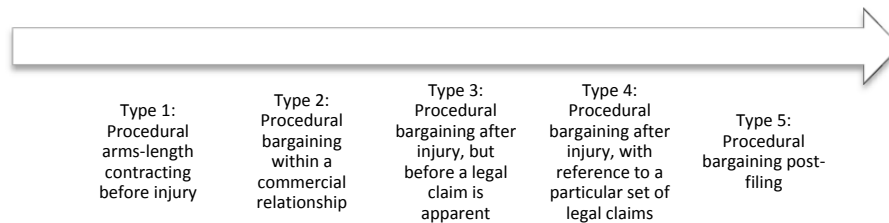
## II. IMAGINING THE DEFAULT RULES OF PROCEDURE

I begin with some definitions. In this Article, *bespoke procedure* refers to terms created in contracts drafted before the parties anticipate particular legal claims, and which attempt to control the resolution of procedural court rules. This definition is obviously narrow, and entails two very significant exclusions from the analysis:

- Most importantly, I am not going to talk much about contracts containing arbitration clauses. Though parties arbitrate against the shadow of court enforcement proceedings and legal rulings, and often mimic court rules, the analytical problems involved in opting out of litigation are quite distinct from those arising inside the courtroom.<sup>30</sup>
- Similarly distinct—and similarly ignored in this Article—are clauses in contracts that control the remedies courts may provide for contractual breach.<sup>31</sup>

I further want to focus on clauses arising from contracts drafted at a particular moment in parties' relationships. The following Figure lays out some possibilities:

FIGURE 1:PROCEDURAL BARGAINING AND TIME



30. For an example of this rich theoretical and normative debate, see Drahozal & Rutledge, *supra* note 16.

31. Scholars of bespoke procedure typically avoid analysis of liquidated damage clauses, arguing that they are substantive, not procedural, and in any event that damage regimes “cannot affect litigation behavior” per se as they are conditioned on breach, “independent of litigation.” Kapeliuk & Klement, Contractualizing, *supra* note 9, at 14–15 & n.60. Though formally there is something to this argument, as a description of how parties are likely to behave in reaction to liquidated damage terms it is questionable. See generally Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Efficient Breach? A Psychological Experiment*, 108 MICH. L. REV. 633, 663 (2010) (showing that parties are more likely to breach contracts containing liquidated damage clauses).



Working backward (in time and in animosity), Type 5 bargains can be easily imagined: the parties come to some agreement about scheduling deadlines, and, typically, seek the judge's approval.<sup>32</sup> The literature to date has held such Type 5 bargains apart, privileging them and assuming that they are ordinarily enforceable and desirable.<sup>33</sup>

But these are not the only kinds of procedural contracts imaginable. Lawyers may discuss whether to enter a tolling agreement about a claim they are aware of (Type 4) or a party may seek a release as to all claims arising from an accident before a lawyer arrives to understand the particular legal merits (Type 3). Less ordinarily, parties in ongoing commercial relationships may constantly renegotiate their deals, including inserting new dispute-resolution-relevant terms (Type 2). And finally, the most recent literature—on which this Article focuses—turns a spotlight on bargaining that is arms-length—i.e., a contract between the parties when they just meet, which purports to craft how formal litigation should look.<sup>34</sup>

Scholars typically argue that bargains negotiated after the parties are already adversely positioned to one another should be considered differently from those struck when the parties are friendly.<sup>35</sup> The Federal Rules of Civil Procedure themselves explicitly encourage the parties to modify particular provisions as litigation draws near. Rule 26, which requires parties to confer about deadlines, results in a scheduling conference and an agreed order under Federal Rule 16.<sup>36</sup> Rule 29, governing discovery, provides that “parties may stipulate” to particular changes to deposition practice.<sup>37</sup> Parties can similarly agree to the admissibility of parties' pieces of evidence by coming to joint lists of trial exhibits and deposition snippets.<sup>38</sup>

Such bargains, because they are uncontested, will rarely be adjudicated.<sup>39</sup> And if adjudicated, enforcement seems likely, as the parties will have entered into procedurally-shaping agreements with their eyes wide open, and with the judge's approval.<sup>40</sup> The same sort of argument would probably prevail with respect to agreements entered into after the parties have reason to know of their dispute, but before a complaint has been filed. Thus, the enforceability of statute of limitation tolling agreements

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32. *In re Multi-Circuit Episcopal Church Prop. Litig.*, 76 Va. Cir. 976, 977–78 (2008) (enforcing scheduling deadlines and refusing to allow evidence into trial that was submitted after the deadline).

33. See, e.g., Bruce L. Hay, *Procedural Justice—Ex Ante vs. Ex Post*, 44 UCLA L. REV. 1803, 1827 & n.66 (1997); Kapeliuk & Klement, *Contractualizing*, *supra* note 9, at 12–14.

34. The leading work in this tradition is Kapeliuk & Klement, *Contractualizing*, *supra* note 9.

35. *Id.* at 6.

36. FED. R. CIV. P. 16(a), (b).

37. FED. R. CIV. P. 29.

38. 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5039.5 (2d ed. 2005).

39. Bone, *supra* note 11, at 1346 (“It would not be surprising if parties relied on . . . [the Rules] process rather than formal discovery agreements . . .”).

40. Moffitt, *supra* note 9, at 478–491.

is generally appreciated (even though *ex ante* contracts to extend the limitations period are suspect).<sup>41</sup>

The harder case for bespoke procedure results from agreements entered into *before* the parties have reason to believe their interests are adverse. The premise is simple: parties will write ordinary contracts (about some good or service to be purchased), and such contracts will contain a term or terms that purport to govern the contours of any litigation that results between the parties. These terms are different from contracts that demand arbitration in that they explicitly contemplate resort to the public, formal, dispute resolution system.<sup>42</sup> Finally, the terms are different from the four other categories of contracting I have just discussed in that they are entirely private—they do not exist with reference to a pending or actual public case. These Type 1 bespoke procedural deals will be the focus of the rest of this Article.

#### A. *A Survey of Scholarship on Procedural Predispute Contracting*

Scholars have claimed that the scope of such predispute contracting is vast.<sup>43</sup> To organize the discussion below, I put the kinds of contracting discussed in the literature into three roughly chronological buckets: (i) *Contracting About Court Access*, (ii) *Contracting About Litigation Practice*; and (iii) *Contracting About Trial and Appeal*.

##### 1. *Contracting About Court Access*

What must a plaintiff plead to gain access to court? Basic civil procedure principles suggest that the plaintiff must execute service that complies with statutory and constitutional standards, including personal jurisdiction, that she must advance a claim in a court of competent subject matter jurisdiction, and that her complaint must provide the defendant sufficient notice of her claim to fairly permit a defense.<sup>44</sup> Bespoke proceduralists argue that these requirements are negotiable.

Even before the recent federal pleadings revolution,<sup>45</sup> defendants apparently were permitted to contract away their right to receive particular forms of notice and service.<sup>46</sup> Parties—it was said—could also contract around the rules of personal jurisdiction through permissive “consent-to-jurisdiction” clauses.<sup>47</sup> Finally, it seems settled that parties can

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41. Bone, *supra* note 11, at 1347.

42. Cf. Horton, *supra* note 11 (lumping together arbitration, choice of law, and jury trial waivers).

43. Again, I credit the work of Prof. Bone, *supra* note 11, at 1342–51, who uses a related typology to mine and often qualifies others’ claims of the scope of bespoke ordering.

44. 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1063 (3d ed. 2002).

45. See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 4–5, 10 (2010) (criticizing recent Supreme Court cases as dramatically changing the nature of pleading practice).

46. Nat’l Equip Rental Ltd. v. Szukhent, 375 U.S. 311, 316 (1964).

47. Bone, *supra* note 11, at 1344.

precommit to complaints being brought in a particular court, assuming subject matter jurisdiction.<sup>48</sup>

It is less clear that the parties can contract around the rules of pleading *sufficiency*. After *Twombly* and *Iqbal*,<sup>49</sup> and related state cases,<sup>50</sup> courts have been paying more attention to the quality and plausibility of complaints.<sup>51</sup> Professors Kapeliuk and Klement argue parties should be permitted to contract around *Twombly* by, for instance, opting into a pre-*Twombly* pleading regime.<sup>52</sup> Under a bespoke procedural regime, adjudicative rules about complaint sufficiency would be treated as defaults, to be applied if the parties failed to contract around them.<sup>53</sup> The same kind of analysis holds regarding defendants' answers and affirmative defenses. Indeed, scholars have long argued that parties can waive their right to raise affirmative defenses like the statute of limitations<sup>54</sup> and contractual condition.<sup>55</sup>

## 2. Contracting About Litigation Practice

It has long been settled that parties can choose the substantive law applicable to their suits, though the exact scope of that power is a topic of extraordinary complexity.<sup>56</sup> What about the operative rules regarding the adjudication of disputes? Some scholars have argued that particular provisions—like Rule 6 (timing),<sup>57</sup> Rule 23 (class action status),<sup>58</sup> and

48. See Noyes, *supra* note 6, at 599–600 (explaining that parties may stipulate in advance about which court will hear their complaint).

49. Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–56 (2007).

50. See, e.g., Doe v. Bd. of Regents of Univ. of Nebraska, 788 N.W.2d 264, 278 (Neb. 2010) (approving the *Twombly* standard and holding that “a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face”).

51. For more on the debate on whether and how *Twombly*'s effect can be measured, see Christina L. Boyd, David A. Hoffman, Zoran Obradovic & Kosta Ritovski, *Building a Taxonomy of Litigation: Clusters of Causes of Action in Federal Complaints*, 10 J. EMPIRICAL LEGAL STUD. 253 (2013); David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203 (2013).

52. Kapeliuk & Klement, *supra* note 5, at 18–20.

53. *Id.* at 23–28.

54. See Dodge, *supra* note 3, at 746 n.89 (citing literature that six percent of contracts modified the statute of limitations). *But see* Bone, *supra* note 11, at 1347–48 (noting that while parties are generally free to shorten the statute of limitations, they are less able to lengthen it by agreement).

55. See Dodge, *supra* note 3, at 746 n.88 (citing literature on disclaimer of warranties).

56. See generally LAURA LITTLE, CONFLICTS OF LAW (2013).

57. See Kapeliuk & Klement, *supra* note 5, at 16. Notably, however, many jurisdictions generally disfavor deadline changing by contract. See, e.g., *In re Sonoma V*, 703 F.2d 429, 431 (9th Cir. 1983) (“The implication of the rule is that only the court may order an enlargement of time (and only for cause shown) and that the parties may not stipulate without court approval to an extension of time.”); 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1165 (3d ed. 2002).

58. Almost all such literature is given over to analyzing class action waivers included as a part of mandatory arbitration clauses. See, e.g., Myriam Gilles, *Procedure in Eclipse: Group-Based Adjudication in a Post-Concepcion Era*, 56 ST. LOUIS U. L.J. 1203, 1208 (2012) (“[C]lass action waivers will soon seep into every contract . . . until aggregate litigation itself becomes a procedural relic examined only briefly in courses on the legal history of the twentieth century, that long-ago era where legal claims were actually adjudicated in public courts of law.”); J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1740–47 (2006).

Rule 65 (injunction bonds)<sup>59</sup>—may be easily modified. More broadly, some claim that the background burdens of proof<sup>60</sup> and summary judgment production may be rearranged by contract.<sup>61</sup>

A more significant possibility concerns discovery. It is no secret that “[o]ne of the most important characteristics of modern civil procedure is the extent to which it relies on individual parties’ efforts in discovery to aid in the fact finding process.”<sup>62</sup> Unsurprisingly, in a recent study of trial attorneys, large majorities agreed that discovery was unduly burdensome and was too expensive.<sup>63</sup> In response, commentators suggest that part of the solution to the discovery quagmire is to allow parties more control in determining their own rules of discovery.<sup>64</sup> The Federal Rules already provide for broad customization within the “party-driven process” of discovery.<sup>65</sup> It is but a small step to suggest that parties should be given equivalent control before they have begun to dispute.<sup>66</sup> An increasing number of scholars argue that parties routinely make such contracts, and courts routinely enforce them.<sup>67</sup>

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59. Kapeliuk & Klement, *supra* note 5 at 17.

60. Dodge, *supra* note 3, at 751–52 (“[E]vidence does exist for a broader generalization: commercial contracts often modify default procedures through downward departures minimizing procedure but simultaneously enhancing liability provisions, shifting the burden toward the defendant.”); Scott & Triantis, *supra* note 9, at 867 n.165 (listing contracts containing express provisions regarding standard of proof).

61. Dodge, *supra* note 3, at 751–52; *see also* Kapeliuk & Klement, *Contractualizing*, *supra* note 9, at 9–10 & n.33 (finding examples of contracts that purport to permit parties to avoid making a complaint but instead summarily adjudicate); Scott & Triantis, *supra* note 9, at 876–77.

62. Moffitt, *supra* note 9, at 499 (“In short, discovery is essentially a party-driven process.”).

63. Am. College of Trial Lawyers, *Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery & the Institute for the Advancement of the American Legal System* 16 (2009), available at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008>.

64. *See, e.g.*, Brudz & Redgrave, *supra* note 2, at 32–33; Moffitt, *supra* note 9, at 469.

65. Moffitt, *supra* note 9, at 499; *see also* Patrick E. Higginbotham, *Duty to Disclose; General Provisions Governing Discovery*, in 6 JAMES WM. MOORE, *MOORE’S FEDERAL PRACTICE* 26-1, at 26-35 (3d ed. 2013) (“Parties may mutually stipulate to use procedures for discovery that vary from the rules.”); Moffitt, *supra* note 9, at 469 (“Federal Rule of Civil Procedure 29 provides an example of the kind of judicial intervention contemplated by modern discovery rules. It provides that litigants’ agreements with respect to discovery timing are subject to ‘the approval of the court’ if the customization would disrupt a previously adopted calendar or timetable.”); Thornburg, *supra* note 11, at 202 (“During litigation, Rule 29 allows the parties by written stipulation to ‘modify procedures governing or limitations placed upon discovery.’ Further, Rule 26 requires a discovery planning conference, and notes that the conference should include consideration of whether discovery should be limited to particular issues, whether changes should be made in the limitations on discovery, and whether other limitations should be imposed.”).

66. Thornburg, *supra* note 11, at 204 (speculating that time limits are “an existing part of the courts’ current options”).

67. *See, e.g.*, 11 MATTHEW BENDER & CO., *BENDER’S FORMS OF DISCOVERY* § 1.04 (2011) (“[P]rovided there is no inequality of bargaining power, [parties] may also contractually limit discovery with respect to future litigation.”); Dodge, *supra* note 3, at 767; Noyes, *supra* note 6, at 609–10 (proposing a system whereby instead of opting out of the public system of adjudication in favor of private arbitration, parties “opt-in” and choose the public courts as the forum for dispute resolution, yet waive, modify, and displace the ‘normal’ litigation rules”); Thornburg, *supra* note 11, at 202 (stating that parties can limit discovery by contract); *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 YALE L.J. 352, 364 (1982) (assuming that parties can “make judicially enforceable private agreements concerning discovery”); *cf.* Bone, *supra* note 11, at 1346 (“The conventional wisdom re-

### 3. *Contracting About Trial and Appeal*

Finally, parties might wish to modify how courts proceed with trial and post-trial matters. One example, common in the literature, is a clause waiving both parties' right to seek a jury trial. Such waivers are classically thought to be generally enforceable subject to relatively minor limitations.<sup>68</sup> But there are more exotic possibilities.

Consider, for example, contracts purporting to modify evidentiary rules.<sup>69</sup> In 1872, the Supreme Court of the United States explained that “[a] party may waive any provision, either of a contract or of a statute, intended for his benefit.”<sup>70</sup> More recently, the Court, in dicta in the criminal proceeding *United States v. Mezzanatto*,<sup>71</sup> suggested that “[t]he presumption of waivability has found specific application in the context of evidentiary rules.”<sup>72</sup> Scholars seeking to extend *Mezzanatto* to civil cases argue that the rules of evidence are mere starting points for negotiation.<sup>73</sup>

Thus, Jaime Dodge explained that “sophisticated commercial parties *regularly* modify the rules . . . of evidence to improve substantive outcomes, whether through greater efficiency or greater accuracy.”<sup>74</sup> Such clauses are not only purportedly common, they are said to be judicially sanctioned: Professor Noyes has argued that “[i]t is generally acknowledged that *ex ante* contracts to alter the rules of evidence are enforceable.”<sup>75</sup> He further argued that “[c]ourts have enforced agreements that waive hearsay objections, objections to authenticity of documents, objections to qualifications of expert witness, and invocations of privileges.”<sup>76</sup> But the examples adduced by Noyes and others are almost all pre-trial stipulations, not predispute contract clauses, and thus are only *ex ante* in a very narrow sense.<sup>77</sup>

#### B. *Default Analysis*

In this section, I will accept for a moment the assumptions that contract clauses modifying public litigation are both common and generally enforceable. As the reader will see, ultimately I conclude that these assumptions are unwarranted. But, as a thought experiment, and to emphasize how important the stakes of the debate are, I will proceed in this section to work through the implication of the scholarly consensus.

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peated in treatises and commentaries is that parties have broad power to contract for discovery limits *ex ante* . . .”).

68. Horton, *supra* note 11, at 641.

69. The classic work here is John W. Strong, *Consensual Modifications of the Rules of Evidence: The Limits of Party Autonomy in an Adversary System*, 80 NEB. L. REV. 159 (2001).

70. Shutte v. Thompson, 82 U.S. 151, 159 (1872).

71. 513 U.S. 196 (1995).

72. *Id.* at 202.

73. See 1 WIGMORE, EVIDENCE § 7a (Little, Brown & Co. 1983).

74. Dodge, *supra* note 3, at 745 (emphasis added).

75. Noyes, *supra* note 6, at 607 (citing *Mezzanatto*, 513 U.S. at 202).

76. *Id.* at 607–08 (footnotes omitted).

77. See Dodge, *supra* note 3, at 784; Noyes, *supra* note 6, at 609–10.

Briefly, if you think that procedural contracting is common, you might also be pushed to reimagine the rules of procedure as a default regime.<sup>78</sup>

The familiar law and economics toolkit begins by noting that rule selection can occur at a general or a specific level—that is, the legislature can pick rules to apply to all disputes, while judges sometimes must fill lacunae in such rules for particular litigations.<sup>79</sup> For both general and specific problems, bespoke procedure would have us reimagine procedural rules as litigation algorithms to apply only when the parties do not write contrary provisions in their contracts. When the parties do contract for procedure, we should enforce their deals unless there is good reason not to, as such private ordering between adversaries will “improve the efficiency and justice of their individual lawsuits.”<sup>80</sup>

In the world so reimaged, parties’ contracts will be incomplete regarding procedure, but rationally so. Consequently, the procedural regime should generally strive to fill incomplete contracts with majoritarian terms, even if providing “information forcing” defaults sometimes will lead to socially optimal outcomes.<sup>81</sup> This would affect both general and specific problems. Generally, when considering new proposed amendments to the Rules—like the ones which would undo *Twombly*’s pleading regime—we would want to consider parties’ preferences about the content of the rule and how such preferences would be expressed in private agreements. In the specific case, imagine that the court is to grapple with a hard, but as-yet-unsettled, problem—say, the appropriate scope of internet jurisdiction for a passive website. Assuming that the parties *could* have contracted about that topic, we would want to adopt a rule for that case that mimics what the parties would have done had they in fact come to an agreement.<sup>82</sup>

Implicit in this analysis is the normative claim—common in contract theory but novel to procedure—that analysts not employ as a first-order criterion concerns about *fairness*. As an example, while it may be true that a public (default) rule that requires a bond before the filing of a suit may at first blush result in fewer lawsuits and thus deterrent effects, a default analysis suggests that parties will contract out of this rule if it does

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78. Klement and Kapeliuk have pushed this concept further and better than any others, and I will use them as a guide in the discussion below.

79. Ayres & Gertner, *supra* note 28, at 91–92 (1989) (distinguishing tailored and untailored defaults).

80. Kapeliuk & Klement, *supra* note 5, at 14.

81. Kapeliuk & Klement, *Contractualizing*, *supra* note 9, at 51–56.; *see also* Drahozal & Rutledge, *supra* note 16, at 1159–62 (describing default rule analysis of arbitration gaps, with a focus on transaction cost avoidance). *But see* Ayres & Gertner, *supra* note 28 (discussing shortcomings of majoritarian defaults).

82. The example is particularly useful in light of some parties’ attempts to use website terms to contract around the prevailing *Zippo* test. Domino’s Pizza’s website contains the following terms of use: “You agree that: (i) the Domino’s Website shall be deemed solely based in Michigan; and (ii) the Domino’s Website shall be deemed a passive website that does not give rise to personal jurisdiction over Domino’s, either specific or general, in jurisdictions other than Michigan . . .” *See* DOMINO’S PIZZA TERMS OF USE, *available at* <https://order.dominos.com/en/pages/content/content.jsp?page=terms> (last visited Nov. 13, 2013). A default rule analysis would look at the prevalence of such terms as a part of the majoritarian inquiry.

not meet their individual preferences. Care must be taken to avoid picking “sticky” defaults, which would apply even when social welfare otherwise demands.<sup>83</sup> But in general we should be relatively sanguine about the stakes: The fairness consequences of procedural ordering will largely be sorted out through *ex ante* bargaining.<sup>84</sup> Or to put it differently, *the focus of civil procedure rules should be to minimize transaction costs, not to maximize procedural justice.*

Even within the model, complicated questions arise when parties lack an opportunity to bargain before disputing.<sup>85</sup> Estimates of the scope of this problem vary. In federal court, a recent analysis found that only around fourteen percent of pled causes of action raised a contract claim.<sup>86</sup> And in state court, a recent survey found that about thirty-six percent of trials raised contract claims.<sup>87</sup> In either case, a decided minority of claims result from relationships where the parties had an opportunity to bargain *ex ante*. This narrowed scope would cause complications for our transsubstantive set of procedural rules.<sup>88</sup>

This is one of many, many criticisms of the bespoke project. Others have asserted normative critiques from a variety of perspectives, seeking to limit the enforceability of procedural contracts.<sup>89</sup> Indeed, determining the appropriate scope of private control over public litigation is increasingly said to be *the* central issue at stake in procedure today, and for the foreseeable future.<sup>90</sup> Claims for and against procedural contracting range widely, both in and out of the law reviews.<sup>91</sup> But before (or even instead of) engaging in that heady discussion, perhaps we ought to take a more granular look at the field. *Is there actually a groundswell of case law and contract terms seeking to privatize procedure?*

### III. AN ABSENCE OF EVIDENCE

We can look for evidence of bespoke procedure in two basic places: judicial opinions and contracts. As I have mentioned above, there are very few opinions on most kinds of procedural contracting. As we will

83. Kapeliuk & Klement, *supra* note 5, at 27.

84. Classically in such analyses, the distributional consequences of private ordering will be resolved through the tax-and-transfer system. See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 994–95 & nn.65–66 (2001).

85. Kapeliuk & Klement, *Contractualizing*, *supra* note 9, at 45.

86. Boyd et al., *supra* note 51, at 260–61.

87. See THOMAS H. COHEN & KYLE HARBACEK, U.S. DEP’T JUSTICE, PUNITIVE DAMAGE AWARDS IN STATE COURTS, 2005 2 tbl.1 (2011), available at <http://bjs.gov/content/pub/pdf/pdasc05.pdf>.

88. Klement and Kapeliuk introduce the possibility of having contract-case specific rules, but do not endorse it. Kapeliuk & Klement, *supra* note 5, at 27. To add complications, many cases where the plaintiffs’ claim sounds in tort will have contract defenses. See Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 419–421 (2005) (arguing that many forms of consumer protection law are subject to contractual defenses).

89. See *supra* note 11.

90. See Taylor & Cliff, *supra* note 11, at 1087.

91. See, e.g., Irving M. Geslewitz, *Should Employers Adopt Class Action Waivers?*, EMP. BENEFIT NEWS (Nov. 30, 2012), available at <http://ebn.benefitnews.com/news/should-employers-adopt-class-action-waivers-2729334-1.html>.

see, the same lack of evidence is apparent with respect to many of the terms discussed in Part II. Indeed, as Professors Davis and Hershkoff remark, “we lack empirical data about patterns in the use of procedural terms; and we know little about the distribution of the practice across different kinds of parties, claims, and industries.”<sup>92</sup>

### A. Literature and Methodology

Though evidence of bespoke procedure is generally spotty, there have been several empirical studies of particular kinds of highly salient procedural terms—arbitration clauses, in particular, as well as choice of forum, law, jury trial waivers, and attorney fee provisions.<sup>93</sup> The leader in this field is Professor Ted Eisenberg. In a series of papers, Eisenberg and his co-authors demonstrated that use of procedural clauses varies widely across types of contracts.<sup>94</sup> For example, Eisenberg, Miller and Sherwin found that arbitration clauses were used asymmetrically: Over three quarters of firms in the sample used such clauses in their consumer agreements, whereas less than ten percent of firm-to-firm contracts contained such opt-outs.<sup>95</sup> That work concluded that arbitration clauses were being used primarily to avoid class adjudication,<sup>96</sup> while emphasizing the significant differences between kinds of contracts and contracting parties.<sup>97</sup>

Eisenberg has also shown that while choice of law clauses are ubiquitous, choice of forum clauses occur in only a minority of contracts.<sup>98</sup>

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92. Davis & Hershkoff, *supra* note 11, at 517–18.

93. See Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J. L. REFORM 871, 877 (2008) [hereinafter Eisenberg et al., *Summer Soldiers*].

94. *Id.*

95. *Id.* at 886–87 (reviewing literature finding rates of arbitration clause utilization vary widely with contract type); see also Christopher R. Drahozal & Quentin R. Wittrock, *Franchising, Arbitration, and the Future of the Class Action*, 3 ENTREPRENEURIAL BUS. L.J. 275, 278 (2009) (noting variance in rate of clauses based on type of contract); Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 457–67, 470–72 (2010) (contesting Eisenberg's results and further arguing for differences between kinds of markets).

96. Eisenberg et al., *Summer Soldiers*, *supra* note 93, at 888–90.

97. *Id.* at 884–85; cf. Florencia Marotta-Wurgler, “Unfair” *Dispute Resolution Clauses: Much Ado About Nothing?*, in *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS* 45, 48 (Omri Ben-Shahar ed., 2007) (six percent of EULAs contain arbitration clauses); Christopher R. Drahozal & Peter B. Rutledge, *Arbitration Clauses in Credit Card Agreements: An Empirical Study*, 9 J. EMPIRICAL LEGAL STUD. 536, 540, 558 (2012) (finding that 82.9% of credit card issuers do not use arbitration clauses in their agreements, though over ninety-five percent of total agreements included arbitration clauses); Erin O'Hara O'Connor, Kenneth J. Martin & Randall S. Thomas, *Customizing Employment Arbitration*, 98 IOWA L. REV. 133, 139 (2013) (finding about half of CEO employment contracts contain arbitration clauses).

98. Matthew D. Cain & Steven M. Davidoff, *Delaware's Competitive Reach*, 9 J. EMPIRICAL LEGAL STUD. 92, 94 (2012) (finding that sixty percent of the merger agreements in the sample selected Delaware as their choice of forum); Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1504 (2009) [hereinafter Eisenberg & Miller, *Flight*] (finding that thirty-nine percent of contracts studied contained choice of forum clauses, while all contained choice of law clauses); Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Se-*



Florenca Marotta-Wurgler, studying consumer agreements, has replicated this result,<sup>99</sup> as have others.<sup>100</sup> Different types of clauses are rarely studied and rarely found. Eisenberg's work found no class action waivers outside of the arbitration context, only a few jury trial waivers, and a trivial number of attorney fee provisions.<sup>101</sup> Marotta-Wurgler found no class action waivers in her database.<sup>102</sup>

In this Part, I examine claims about the prevalence of particular kinds of procedural contracting beyond those studied in the literature to date. In an ideal world, such an analysis might look at a contracts database that was representative of all the agreements in a particular field that might lead to litigation (say, all employment contracts). We could then search those contracts for particular terms. Next, we would locate all of the disputes that the original database of contracts resulted in, and examine differences (if any) between litigation resulting from procedurally bespoke contracts and litigation resulting from procedurally-naïve contracts. The result would be a rich sample of data, permitting descriptive and inferential statistical analysis: e.g., of *A* contracts, *B* percent had procedural causes, of which *C* were litigated and *D* were upheld.

This life-cycle analysis is not yet feasible. To start, we lack large, representative, searchable databases of contracts. That's not the same as saying there are no contracts databases extant, but, rather that the databases we do have are incomplete and biased samples. In this Article, I will use two, which illustrate this representativeness problem.

### 1. *EDGAR Filings*

The first database consists of contracts appended to public firms' regulatory filings, as found in the EDGAR database. SEC regulations govern the types of contracts that must be typically attached to registration documents, and include underwriting agreements, merger agreements, instruments defining the rights of debt or equity holders, voting

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*lection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333, 340 (2012) (finding less than 2 percent of bylaws and charters contained forum selection clauses).

99. Marotta-Wurgler, *supra* note 97, at 47–48 (seventy-five percent of EULAs contain choice of law clauses, twenty-eight percent contain forum selection clauses).

100. Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984, 999 tbl.6 (2008) (finding that in a sample of 500 internet retailers, thirty-two percent included a choice of forum clause in their terms of use contracts).

101. Eisenberg et al. *Summer Soldiers*, *supra* note 93, at 885 (noting that twenty-five percent of 138 material contracts waived jury trial rights). A later, larger dataset compiled by the same authors found jury trial waivers in twenty percent of contracts. Theodore Eisenberg & Geoffrey P. Miller, *Do Juries Add Value?: Evidence from an Empirical Study of Jury Trial Waiver Clauses in Large Corporate Contracts*, 4 J. EMPIRICAL LEGAL STUD. 539, 541 (2007) [hereinafter Eisenberg & Miller, *Do Juries Add Value?*]; Theodore Eisenberg & Geoffrey P. Miller, *The English vs. the American Rule on Attorneys Fees: An Empirical Study of Attorney Fee Clauses in Publicly-Held Companies' Contracts*, 98 CORNELL L. REV. 327, 331 (2013) (approximately forty percent of agreements were silent on attorney fees). In Mann & Siebeneicher's dataset, forty percent of clauses contained choice of law provisions, nine percent contained arbitration clauses, seven percent contained class action waivers, six percent statute of limitation provisions, and one percent jury trial waivers. Mann & Siebeneicher, *supra* note 100, at 999 tbl.6.

102. Marotta-Wurgler, *supra* note 97, at 48.

trust agreements, and other contracts “not made in the ordinary course of business which [are] material to the registrant . . . .”<sup>103</sup> I accessed these data through the EDGAR filings database on BloombergLaw.com.<sup>104</sup> That database mirrors the publicly available SEC data, but contains significantly enhanced search functionality.<sup>105</sup> At the time I searched, there were over 7.5 million exhibits to EDGAR filings in the database. A large number of such filings are contracts, as the following Table, breaking out just the last five years, illustrates:

TABLE 1: FILINGS IN THE BLOOMBERG LAW EDGAR DATABASE.  
(SOURCE: CONVERSATION WITH DALNEKOFF, JANUARY 9, 2012).

Year	Filings	Exhibits	Exhibit 10 Material Contracts
2008	704,600	522,571	60,828
2009	627,268	465,447	56,734
2010	643,817	464,207	57,373
2011	647,912	457,083	54,691
2012	636,672	437,099	47,197

## 2. Credit Card Database

The second database consists of 1281 credit card contracts, from 370 issuers, collected and maintained by the Consumer Financial Protection Bureau (CFPB).<sup>106</sup> The dataset originates in the Credit Card Accountability Responsibility and Disclosure Act of 2009, which requires issuers to provide their contracts to the Federal Reserve for publication.<sup>107</sup> I downloaded all agreements available by February 2012, removed unusable contracts, and hand-coded them for dispute resolution clauses.<sup>108</sup> The

103. 17 C.F.R. § 229.601(b)(10)(i) (2009).

104. EDGAR SEARCH, [http://www.bloomberglaw.com/edgar\\_search](http://www.bloomberglaw.com/edgar_search) (last visited Nov. 13, 2013).

105. Interview with Daniel Dalnekoff, Product Manager, Bloomberg Law (Dec. 12, 2012, Jan. 7, 2012). Bloomberg has already created a “DealMaker” database that contains material contracts. For the purposes of my research, I limited search results to EDGAR exhibits, with various date restrictions as described in the text and notes below.

106. CONSUMER FIN. PROT. BUREAU, *Credit Card Agreement Database*, CONSUMERFINANCE.GOV (Jul. 31, 2012), available at <http://www.consumerfinance.gov/credit-cards/agreements> (click on “Archived Q3-2012 Agreements”). For a further description, see Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 B.Y.U. L. Rev. 1, 14–15 (2013).

107. Credit Card Accountability Responsibility and Disclosure Act of 2009 § 204(a), 15 U.S.C. § 1632(d)(3) (2012).

108. When I downloaded the underlying set of credit card contracts, I found a number that were not included on the CFPB’s master spreadsheet. Because the filing date of such agreements could not be easily ascertained, I did not code them in my analysis. I also discarded agreements where (i) the underlying PDF was absent; (ii) where the file did not contain contract terms (i.e., it was simply an

contract issuers were banks or credit unions, and typically each contributed one or two contracts to the database—that is, issuers contribute contracts when they change them or roll old terms out to new groups. The largest issuer in the database, World Financial Network Bank, contributed seventy-seven unique agreements. The next largest contributor is Citibank NA, which contributed forty-one agreements. Credit card contract filing dates in the Database ranged from December 2009 through June 2012.<sup>109</sup>

### 3. *Comparing the Databases*

Overall, the databases I have selected offer advantages and disadvantages for analysis.

The EDGAR database contains contracts entered into by highly sophisticated parties—if they are not adopting economically efficient terms, who would be? But those contracts are not typical of all deals entered into by large firms, let alone of deals involving small firms or individuals. EDGAR exhibits will pertain to higher-stakes transactions, will be more heavily negotiated, and probably will be less likely to affect consumers directly.<sup>110</sup> More seriously, given the kind of analysis I am undertaking, I cannot easily compare rates of particular clauses contingent on the type of contract at issue.<sup>111</sup> In a sense, my search results are impressionistic, intending to provide relative rates, and they are only as good as the search logic that produced them. Given that previous scholarship has found significant variance in dispute resolution clauses turning on contract type, my approach is suboptimal as a method of comparing with past results and obtaining trend information. On the other hand, by searching across a number of different contract types and across many years, we can get a (somewhat fuzzy) sense of the overall picture, at least when comparing terms to one another.

The Credit Card Database, by contrast, contains contracts affecting almost every consumer, and consequently is not subject to the same external validity concerns as the EDGAR data.<sup>112</sup> Moreover, because I can access all contracts which were filed with the CFPB, I can establish usage

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advertisement); (iii) where the CFPB's master spreadsheet did not record an agreement's filing data; and (iv) where the agreement was not written in English.

109. Cf. Drahozal & Rutledge, *supra* note 97, at 551–53 (describing dataset of credit card agreements from Federal Reserve as of December 31, 2009). In an original draft of this paper, I assumed that the “effective” dates in the CFPB database accurately represented the time the contract was first filed. Unfortunately, this was an error: The dates represent the *latest* filed contract for each issuer, so that a firm that filed only one contract in 2010 would have a 2010 effective date, but a firm that filed every quarter from 2010 through 2012 would only have the most recent contract available.

110. See Drahozal & Ware, *supra* note 95, at 458 (arguing that EDGAR material contracts are not representative).

111. Subsequent research might seek to obtain from Bloomberg Law the entire universe of contracts for a particular date-range and then code such contracts by type, and subsequently mine such contracts for dispute resolution clauses. This method would enable comparisons across time and across contract type in a way that my first-cut search did not.

112. Indeed, repeated use of the same terms is meaningful: it suggests both greater geographic scope and practical importance.

rates for particular kinds of clauses, a project which is much more difficult with the EDGAR data.

### B. Access to Court

As described in Part II, most jurists believe that parties' contracts about service, personal jurisdiction, and choice of forum are enforceable.<sup>113</sup> And, as I have just described, the contract literature has found that forum selection clauses themselves are somewhat common—in thirty-nine percent of material contracts for publicly traded firms and in twenty-eight percent of EULA clauses for consumers.<sup>114</sup> The question is whether these trends repeat in broader searches.

They do. In the EDGAR database, I found more than 1000 contracts that used the phrase “service of process,” and a similarly large number using the phrases “personal jurisdiction,” “venue,” and “consent to jurisdiction.” There is no reason to believe that these results differ materially from the Eisenberg conclusions—i.e., a plurality of contracts choose forum, while fewer explicitly choose venue, and fewer still explicitly mention personal jurisdiction.

In the Credit Card Database, I found choice of forum clauses in ten percent of contracts, while venue clauses appeared in seven percent.<sup>115</sup> Contracts specifically providing that the defendant would consent to personal jurisdiction in addition to selecting a forum were rare—only three percent of studied contracts contained such a term.<sup>116</sup> Only a handful of contracts (under one percent) provided for particular service of process rules.<sup>117</sup>

The literature on procedural contracting to date has not examined how often parties attempted to control federal subject matter jurisdiction. I found that parties rarely contract about diversity jurisdiction, either waiving the right to remove<sup>118</sup> or stipulating to a particular citizen-

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113. Drahozal & Rutledge, *supra* note 16, at 1105.

114. Eisenberg & Miller, *Flight*, *supra* note 98, at 1504; Marotta-Wurgler, *supra* note 97, at 47–48.

115. Here and elsewhere, I will provide in the notes the rates for those contracts that did not contain an arbitration clause. Here, 12.9% of contracts without arbitration clauses contained choice of forum clauses; 10.6% contained venue clauses.

116. 3.5% in non-arbitration contracts.

117. 0.5% in non-arbitration contracts.

118. See, e.g., Ameristar Casinos, Inc., EX-10.1 Ground Lease Agreement (Form 8-K) 35 (July 20, 2012) (“In the event that either party must file suit as a result of default on the part of the other, suit shall be filed in the Fourteenth Judicial District Court, State of Louisiana, (Tenant waiving its right to invoke Federal Diversity Jurisdiction) . . . .”); Vanguard Energy Corp., EX-10.7 (Form S-1) 10 (May 13, 2011) (“ALL ACTIONS ARISING UNDER THIS AGREEMENT OR BETWEEN THE PARTIES HERETO SHALL BE DETERMINED BY COURTS OF THE COUNTY OF HARDIN, STATE OF TEXAS, IN ACCORDANCE WITH, AND GOVERNED BY, THE LAWS OF THE STATE OF TEXAS. AS A CONDITION OF, AND IN CONSIDERATION FOR, THIS AGREEMENT, VANGUARD, FOR ITSELF AND FOR ITS SUCCESSORS AND ASSIGNS, HEREBY EXPRESSLY WAIVES FEDERAL DIVERSITY JURISDICTION. ANY ATTEMPT BY VANGUARD, OR ITS SUCCESSORS OR ASSIGNS, TO INVOKE FEDERAL DIVERSITY JURISDICTION SHALL, IP SO FACTO, TERMINA IL VANGUARD’S RIGHTS UNDER THE AGREEMENT.”); Centex Corp., Stock Purchase Agreement (Form 8-K) (Feb. 6, 2007) (“Each party acknowledges that it is the intention of the parties that any Legal Proceeding of the type referred to in

ship.<sup>119</sup> As the notes explore, most often such clauses accompany choice of state fora, and the parties are essentially precommitting to waive their right to remove. It is less clear what parties seek to accomplish with their citizenship-determining clauses, as citizenship for the purposes of diversity jurisdiction is analyzed at filing, not at the time of contracting.<sup>120</sup> In the credit card database, I found no examples of such clauses.

I found even fewer examples of nonjurisdictional clauses. Consider the two examples often highlighted in the literature: (1) changes to the plaintiff's pleading structure and the standard for dismissal under Rule 12,<sup>121</sup> and (2) changes to what kinds of defenses must be pled affirmatively under Rule 8.<sup>122</sup> Notwithstanding the strong arguments in the literature that contracting parties would be well-served to modify their pleading framework to either contract into or out of heightened pleading regimes, I found no examples of this practice in either database. Indeed, I could locate only one contract explicitly discussing the applicable pleading regime.<sup>123</sup>

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paragraph (b) will be brought in the federal district court located in the Northern District of Texas, if such court has subject matter jurisdiction, and agrees that it shall not challenge the existence of diversity jurisdiction or participate with any other Person in challenging the existence of diversity jurisdiction and shall not take any action or omit to take any action that would have the effect of challenging the existence of diversity jurisdiction.”); Pedevco Corp., EX-10.2 Consulting Agreement (Form 8-K) ¶14 (Aug. 30, 2006) (“This Agreement shall be governed by and construed under the laws of the State of Oklahoma. In the event of any breach or threatened breach of this Agreement, Consulting Firm and the Company irrevocably submit and consent to the jurisdiction of a court of competent jurisdiction in Cleveland County, Oklahoma, and irrevocably agree that venue for any action or proceeding shall be in the County of Cleveland, State of Oklahoma and any higher courts within the State of Oklahoma. Both parties waive any objection, including, but not limited to, Federal diversity jurisdiction, to the jurisdiction of these courts or to venue in Cleveland County, State of Oklahoma.”).

119. See, e.g., Nationstar Mortg., LLC, EX-10.12 Subservicing Agreement (Form S-4/A) (June 21, 2011) (“For purposes of establishing diversity jurisdiction when removing state-court actions to federal court, First Tennessee is a citizen of Tennessee; MERS is a citizen of Delaware and Virginia; and BONY is a citizen of New York.”); Cellstar Corp., EX-10.8 Master Agreement for Purchase of Products (Form 10-K405) 29–30 (July 10, 1997) (“[F]or the purpose of determining federal diversity jurisdiction the parties are considered residents and domiciliaries of different states.”).

120. 28 U.S.C. § 1332(d)(7) (2006).

121. FED. R. CIV. P. 12.

122. FED. R. CIV. P. 8(c).

123. Searches included common keywords representing the changes in pleading regime—*Twombly*, *Iqbal*—words that instantiated those changes—“plausible,” “no set of facts”—and words that represented the general pleading questions—“burden of pleading” and “pleading burden,” “pleading standard,” “plead with particularity,” “allege with particularity.” Excluding documents merely discussing pending litigation, only one contract clause was even arguably responsive. See Sourcecorp, Inc., EX-2.2 Asset Purchase Agreement (Form 10-Q) 22 (Aug. 9, 2004) (“Sellers or SOURCECORP, as the case may be, shall have the burden of pleading and the burden of proving, by a preponderance of the evidence, that Buyer is not entitled to indemnification pursuant to Section 9.2 or Section 9.6 by reason of the preceding sentence.”). That is not to say that parties do not occasionally design the form of arbitral pleading. See, e.g., Film Roman, Inc., EX-10.11 Valley Corporate Center Office Building Lease (Form S-1/A) 35 (July 12, 1996) (“The party seeking arbitration of the Arbitrated Dispute shall deliver a written Notice of Demand to Resolve Dispute (the “*DEMAND*”) to the other party and to the Service. The Demand shall include a brief statement of the demanding party's claim, the amount thereof, and the name of the proposed retired judge from the Service to decide the dispute (“*ARBITRATOR*”). Within ten (10) business days after receipt of the Demand, the other party shall deliver a written response to the demanding party and the Service. Such response shall include a short and plain statement of the non-demanding party's defenses to the claim and shall also state whether such party agrees to the Arbitrator chosen by the demanding party. In the event the

Regarding defenses, I found about a dozen contracts that purported to require particular claims to be pled as affirmative defenses.<sup>124</sup> Significantly more sought to extend the time to assert the statute of limitations, or waived defenses like laches.<sup>125</sup> (Most waivers of the statute of limitations accompanied arbitration clauses.) Statute of limitation clauses were also rare in the Credit Card Database: only three percent of all contracts contained a clause limiting the limitations period.<sup>126</sup>

In sum, and complementing previous research, clauses that seek to create (or destroy) jurisdiction are common in the case law and in the raw materials, as are clauses that modify the time to bring an action. Clauses that change the content of what the rules require are significantly rarer, and clauses that would contract in or out of the applicable pleading regime are entirely absent.

### C. *Litigation Practice*

The literature generally concludes that parties have great flexibility to modify the rules governing litigation between filing and trial.<sup>127</sup> In this section, I examine four areas of practical import: choice of law, discovery, burden-shifting clauses, and class action practice.

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parties cannot agree upon an arbitrator, then the Service shall select and name an arbitrator to conduct the hearings.”).

124. See, e.g., Horizon Pharma, Inc., EX-10.1 Standard Office Lease (Form 10-Q) 22 (Nov. 14, 2011) (“Tenant shall have the burden of pleading and proving any failure to mitigate as an affirmative defense to Landlord’s claims under this Lease.”); Jos. A. Bank Clothiers, Inc., EX-10.2 Indemnification Agreement (Form 10-Q) 6 (Sept. 1, 2010) (“In any Proceeding with respect to entitlement to indemnification, the Company shall have the burden of pleading with particularity or providing a detailed writing setting forth the alleged factual basis for each defense to Indemnitee’s claim for indemnification and, without limiting the generality of the foregoing, the pleading or writing filed by the Company objecting to the granting of indemnification shall be verified and shall set forth a detailed statement of the time and place of any act, omission or statement by Indemnitee, or others, which allegedly supports any such defense.”); Restoration Hardware, Inc., EX-10.1 Lease Agreement (Form 10-Q) 25 (Dec. 13, 2007) (“Notwithstanding the foregoing, Tenant shall retain the burden of pleading mitigation of damages as an affirmative defense and retain the burden of proof.”); Molina Healthcare, Inc., EX-10.14 Indemnification Agreement (Form 10-K) 9 (Mar. 14, 2007) (“[T]he Corporation shall have the burden of pleading with particularity the alleged factual basis for each Section 145 Defense or any other defense asserted by it (each such defense must include, among other things, a detailed statement of the time and place of any statement, act or omission by Indemnitee or others which allegedly supports such defense) . . . .”); Alliance Data Sys. Corp., EX-10.20 Lease Agreement by and Between Ads Place Phase I, LLC and Ads Alliance Data Systems, Inc. (Form 10-K) 15 (Feb. 26, 2007) (“Notwithstanding the foregoing, Tenant shall retain the burden of pleading mitigation of damages as an affirmative defense and retain the burden of proof.”); Superconductive Components, Inc., EX-10 Lease Agreement (Form 10-QSB) (May 17, 2004) (“Notwithstanding the foregoing, Tenant shall retain the burden of pleading mitigation of damages as an affirmative defense and retain the burden of proof.”).

125. See, e.g., LifeCare Holdings, Inc., EX-10.2 Second Limited Waiver Agreement (Form 8-K) (Nov. 6, 2012) (“The parties hereto agree that the running of all statutes of limitation or doctrine of laches applicable to all claims or causes of action that any Waiving Noteholder may be entitled to take or bring in order to enforce its rights and remedies against the Company or any Guarantor shall be, to the fullest extent permitted by law, tolled and suspended during the Limited Waiver Period.”).

126. Two percent in contracts without arbitration clauses.

127. See, e.g., Bone, *supra* note 11, at 1345–46.

### 1. *Choice of Law*

In the EDGAR database, choice of law clauses were common: I located more than 1000 contracts per year, for each of the last three years, in which the parties attempted to choose the governing law to apply to their disputes. In the Credit Card Database, choice of law clauses were the norm—seventy-nine percent of all agreements contained such clauses.<sup>128</sup>

### 2. *Discovery*

Professor Dodge claims that in “the discovery phase, contracts typically limit rather than expand discovery . . . . Parties are also contracting to modify the decision-making process . . . [by] modifying the rules of discovery . . . .”<sup>129</sup> She’s not alone.<sup>130</sup> But, as Bone points out, “[t]he conventional wisdom repeated in treatises and commentaries is that parties have broad power to contract for discovery limits *ex ante*, but these claims rely on flimsy case law support. Most of the secondary sources rely on a single [trial court] case, *Elliott-McGowan Productions v. Republic Productions, Inc.* . . . .”<sup>131</sup> Similarly, Jay Brudz, recently listing several potential discovery-limiting clauses, notes that “no judicial decisions exist” that authorize limiting discovery, and he provides no actual examples of clauses in use.<sup>132</sup>

Wright and Miller (among others) criticize *Elliott-McGowan* for ignoring distributional concerns.<sup>133</sup> More importantly, since 1957, I found

128. 69.6% in contracts without arbitration clauses.

129. Dodge, *supra* note 3, at 746–47.

130. 2 MICHAEL C. SILBERBERG & EDWARD SPIRO, CIVIL PRACTICE IN THE SOUTHERN DISTRICT OF NEW YORK § 22:2 (2d ed. 2012) (“Parties may agree to contract away their rights to production of documents under Rule 34, much like agreements for a reduced statute of limitations, if the circumstances make such an agreement reasonable.”); 10A NAT’L L. RES. GRP., FEDERAL PROCEDURE, LAWYERS EDITION § 26:597 (2013) (“Generally speaking, the provisions of FED. R. CIV. P. 34 may be modified by contract or by stipulation. A contract restricting the right to conduct discovery under Rule 34 is enforceable if it is reasonable under the circumstances.”); KENT SINCLAIR, Contractual Limitations, PLIREF-FEDPRAC § 12:2.9 (“One court held that a preexisting contractual agreement between the requesting and responding parties that purported to limit the right of one to examine the business records of the other was enforceable if reasonable.”).

131. Bone, *supra* note 11, at 1346 (footnotes omitted) (citing *Elliott-McGowan Prods. v. Republic Prods., Inc.*, 145 F. Supp. 48 (S.D.N.Y. 1956)).

132. Brudz & Redgrave, *supra* note 2, at 14.

133. 8 CHARLES ALAN WRIGHT, ARTHUR RAPHAEL MILLER & EDWARD HAYES COOPER, FEDERAL PRACTICE AND PROCEDURE § 2005 (3d ed. 2010) (“One district court has held that a contractual provision between the parties, made prior to the time the claim arose, limiting the discovery that would be available if litigation should develop between them, will be given effect. The decision has been effectively criticized. Contractual provisions of this type are likely to be found only when there is inequality of bargaining power, and are hardly an appropriate means for disregarding rules of court devised to serve the public interest in bringing out all the facts prior to trial.” (footnotes omitted)); see also *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 979–80 (1961) (“In *Elliott-McGowan*, and in the analogies which the court there advanced, the agreements placed no burden upon the judiciary. A contract wholly restricting discovery of certain information before trial, on the other hand, would impair the court’s efficiency by postponing fact disclosure and issue formulation until the trial stage. Other agreements which burden the courts without conferring countervailing benefits on the litigants have often been struck down.”).

only three cases citing *Elliot-McGowan*, none of which addresses the ability to contract around the rules of discovery.<sup>134</sup> Indeed, I found only one brief in the entire Westlaw Database that used *Elliot-McGowan* in support of a discovery-limitation clause!<sup>135</sup>

Similarly sparse is evidence against the bespoke procedurist's position, as there is no extant empirical evidence on discovery-limiting clauses in actual contracts.<sup>136</sup> In the EDGAR database, a search for various discovery-related language ("discovery," "interrogatory," "deposition," etc.) returned large numbers of results. Putting aside the overwhelming preponderance of irrelevant contracts (such as the deposition of geological debris), only a few kinds of clauses remain.

In some employee severance contracts, for example, the employee agreed to make herself available for a later deposition<sup>137</sup> or disclaimed the right to take discovery in a later proceeding against the firm.<sup>138</sup> And in many arbitration agreements, the parties specified the particulars of

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134. The three cases citing *Elliot-McGowan* do so either in reference to a separate holding that two parties can contract to reduce the statute of limitations below two years, or that a defendant may be compelled to produce records to refresh a deponent's memory. *Elliott-McGowan Prods. v. Republic Prods., Inc.* 145 F. Supp. 48 (S.D.N.Y. 1956); see *Admiral Corp. v. Cerullo Elec. Supply Co.*, 32 F.R.D. 379, 381 (M.D. Pa. 1961) (citing *Elliot-McGowan* to support proposition that "[u]nder Illinois law the parties may define their rights and obligations independent of statute by fixing a definite period within which notice of claim or suit must be brought"); see also *Deep S. Oil Co. of Tex. v. Metro. Life Ins. Co.*, 25 F.R.D. 81, 82 (S.D.N.Y. 1959) (distinguishing *Elliot-McGowan* in regard to a witness who during oral deposition answered that he would need to consult company records to obtain requested information); *Hall Bartlett Prods., Inc. v. Republic Pictures Corp.*, 20 F.R.D. 625, 627–28 (S.D.N.Y. 1957) (citing *Elliot-McGowan* when requiring defendant to produce records to allow deponent to answer questions).

135. Appellant's Opening Brief at 28, *Harry's Cocktail Lounge v. McMahon* 103 F.3d 138 (9th Cir. 1996) (No. 95-56795) (arguing on appeal that "it is settled that the parties, by mutual agreement, may modify Fed.R.Civ.P. 34 procedures . . . . Such an agreement concerning the Defendants' production of documents was reached [but the] . . . [d]efendants reneged on their agreement." (citations omitted)). The argument proved unavailing. *Harry's Cocktail Lounge, Inc. v. McMahon*, 103 F.3d 138, No. 95-56795, 1996 WL 33488947 at \*4 (9th Cir. Nov. 26, 1996) ("After carefully considering all of the arguments made by the plaintiffs in this appeal, we conclude that the district court did not abuse its discretion in any of the challenged discovery rulings.").

136. Cf. *Brudz & Redgrave*, *supra* note 2, at 34–39 (providing sample clauses, but no actual contract terms). I used variants on the language provided by *Brudz* in the EDGAR database but found no additional relevant clauses.

137. See, e.g., *Volt Info. Scis., Inc., EX-10.1 Retirement Agreement, Waiver and General Release (Form 8-K) 6* (Nov. 19, 2012) ("Such cooperation and assistance by Employee will also include, without limitation, availability to answer questions from Company employees and attorneys, availability to provide deposition testimony and voluntary attendance at trial if called as a witness. Whenever possible, such cooperation and assistance by Employee will be provided at times which are mutually convenient to Employee and the Company, and the Company will use its best efforts to avoid a conflict with Employee's work schedule and business obligations.").

138. See, e.g., *PSB Bancorp, Inc., EX-10.1 Amended & Restated Agreement & General Release (Form 8-K) 7* (Mar. 25, 2007) ("In exchange for the mutual promises herein and intending to be legally bound, Executive hereby irrevocably and unconditionally releases and forever discharges Employer [and others from any claim] . . . including without limitation the right to take discovery with respect to any matter, transaction or occurrence existing or happening at any time before or upon his signing of this Agreement . . . ."); *Wash. Mut., Inc., EX-99.1 Global Settlement Agreement (Form 8-K) H-67* (Feb. 10, 2011) ("In addition, no Party shall seek to take discovery concerning this Agreement or admit this Agreement or any part of it into evidence against any other Party hereto.").



discovery.<sup>139</sup> I found, however, only one example of parties contractually limiting the scope of discovery in an anticipated court case—a form Mazda Dealer Agreement<sup>140</sup>—and even that agreement seeks only to control what issues are relevant in a case, not to limit the discovery of pertinent matters.

There were a few other examples of clauses that might impact discovery practices. For example, parties sometimes attempt to limit their counterparties' ability to produce documents in suits with third parties—typically, in indemnification agreements.<sup>141</sup> I also found several dozen examples where parties provided inspection rights for particular classes of documents, whether or not in formal litigation.<sup>142</sup> Parties sometimes expand document *preservation* obligations in asset purchase agreements.<sup>143</sup> Very occasionally, when contracting to particular fora that use

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139. See, e.g., Acadia Healthcare Co., EX-2.1 Acquisition Agreement (Form 8-K) 57 (Nov. 27, 2012) (“Unless the parties to such arbitration otherwise agree in writing, the arbitration shall be conducted on an expedited basis, testimony and briefing will be concluded no later than 120 days after the arbitration is initiated, each party shall be entitled to take at least one deposition, the award shall be made in writing no more than 30 days following the end of the proceeding, and all facts and circumstances relating to such arbitration, including the existence of the dispute and the ultimate resolution, shall be kept confidential in accordance with a confidentiality agreement containing customary terms to be agreed to by the parties to such arbitration.”); Wellpoint, Inc., EX-10.14 Blue Cross License Agreement (Form 10-K) 11 (Feb. 17, 2011) (“The parties will be permitted to take de bene esse deposition testimony to the fullest extent permitted by law of any witness who cannot be compelled to testify at the Arbitration Hearing. No deposition, for discovery purposes or otherwise, shall exceed three (3) hours, excluding objections and colloquy of counsel. Depositions may be recorded in any manner recognized by the Federal Rules of Civil Procedure and the parties shall specify in each notice of deposition or request for permission to take deposition testimony the manner in which such deposition shall be recorded.”).

140. See, e.g., Sunbelt Auto. Grp., Inc., EX-10.35 Mazda Dealer Agreement (Form S-1/A) 2 (Aug. 10, 1998) (“For the purposes of expediting the resolution of their dispute, the parties agree to limit the litigation and discovery to the issues of fact contained in the stipulation, and not litigate or take discovery with respect to any other factual matters.”).

141. See, e.g., Intermune, Inc., EX-2.1A Asset Purchase Agreement (Form 10-Q) 45 (Aug. 8, 2012) (“[U]nless ordered by a court to do otherwise, the Indemnified Party shall not produce documents to a Third Party until the Indemnifying Party has been provided a reasonable opportunity to review, copy and assert privileges covering such documents, (2) the transfer to the Indemnified Party by the Indemnifying Party of documents covered by the Indemnifying Party’s attorney/client or work product privileges shall not constitute a waiver of such privileges . . . .”); Nat’l. Patent Dev. Corp., EX-10.1 Separation Agreement (Form 10-Q) 4 (Aug. 6, 2010) (“The parties further agree not to voluntarily participate in, act as a witness, consultant or expert, aid or render assistance, provide information or produce documents in any action at law or proceeding in equity against the other party, unless requested to do so in writing by the other party or unless compelled to do so by force of law.”).

142. See, e.g., Skinny Nutritional Corp., EX-10.11 Agreement of Lease (Form 10-Q) 6 (Aug. 20, 2012) (“Tenant shall, upon written request to Landlord, have the right, within sixty (60) days after the end of Landlord’s fiscal year, to inspect documents and records materially related to Operating Expenses charged to Tenant, and to dispute same pursuant to subsection (j) below. Landlord shall promptly provide Tenant with such documents after receipt of Tenant’s timely request.”); AlphaMetric Managed Futures III LLC, EX-10.4 Services Agreement (Form 10-12G/A) 10 (May 28, 2010) (“The Company agrees that the Client shall have the right to review or allow its agents to review during normal business hours (i) the Client’s accounting books and records, and (ii) such information pertaining to the Company’s anti-money laundering systems and procedures as is reasonably requested by the Client to satisfy itself as to the reliability of the Company’s performance of its money laundering compliance functions on behalf of the Client; provided that such review shall not limit the reasonable access of the Client’s auditors to the Client’s accounting books and records.”).

143. There were many such clauses. See, e.g., Sina Corp., EX-4.42 Asset Purchase Agreement (Form 20-F/A) 43–44 (Sept. 18, 2009) (“In order to comply with applicable court rules and facilitate the resolution of any claims made against or incurred by the Seller prior to the Closing (including,

“rocket docket” techniques, parties feel it additionally useful to mention consent to expedited discovery.<sup>144</sup> Even fewer parties, in clauses that create rights for temporary injunctive relief, agreed to expedited discovery regardless of the courts’ preference.<sup>145</sup>

Overall, clauses that seek to vary litigation discovery options are very, very rare.<sup>146</sup>

### 3. *Burden of Proof and Production*

Robert Scott and George Triantis’ important article on litigation and contract design asserts that there is “ample evidence” that parties modify their litigation burdens through contractual clauses,<sup>147</sup> citing as proof some 200 contracts from EDGAR where parties explicitly varied the burden of proof in indemnification agreements.<sup>148</sup> Updated searches found similar examples of indemnification agreements that shifted the burden of proof and persuasion,<sup>149</sup> and others that did so outside of the

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without limitation, the Seller Shareholder Litigation), the Purchaser shall (i) for a period of seven years after the Closing retain the books and records relating to the Business, the Companies, the Subsidiaries and the Group Companies relating to periods prior to the Closing in a manner reasonably consistent with the prior practice of the Companies, the Subsidiaries and the Group Companies and (ii) upon reasonable notice, afford the officers, employees, agents and representatives of the Seller reasonable access (including the right to make, at the Seller’s expense, photocopies), during normal business hours, to such books and records and to the directors, officers and employees of the Purchaser and its Affiliates, and the Purchaser shall, and shall cause its and its Affiliates’ respective directors, officers and employees to cooperate reasonably with the Seller in connection with such claims, and (iii) in any event, comply with any document preservation obligations related to any claims made against or incurred by the Seller prior to the Closing (including, without limitation, the Seller Shareholder Litigation).”).

144. I found twenty-five documents in the EDGAR database with this kind of term. *See, e.g.*, Capital Bank Fin. Corp., EX-2.10 Agreement and Plan of Merger (Form S-4/A) 66 (May 22, 2012) (“[We] irrevocably agree to abide by the rules of procedure applied by the Federal Courts or the North Carolina Courts, as the case may be, (including the procedures for expedited pre-trial discovery) and waive any objection to any such procedure on the ground that such procedure would not be permitted in the courts of some other jurisdiction or would be contrary to the laws of some other jurisdiction.”); Nationstar Mortg. LLC, EX-10.1 Amended and Restated Residential Servicing Asset Purchase Agreement (Form 8-K) 104 (Mar. 6, 2012) (“Each Party irrevocably agrees to abide by the rules or procedure applied by the Federal courts or New York State courts (as the case may be) (including but not limited to procedures for expedited pre-trial discovery) and waive any objection to any such procedure on the ground that such procedure would not be permitted in the courts of some other jurisdiction or would be contrary to the laws of some other jurisdiction.”).

145. I found a very small number of such clauses—under a dozen. *See, e.g.*, Nucor Corp., EX-10.XIX Executive Employment Agreement (Form 10-K) 8 (Feb. 28, 2012) (“If Nucor pursues either a temporary restraining order or temporary injunctive relief, then Executive agrees to expedited discovery with respect thereto and waives any requirement that Nucor post a bond.”).

146. In the Credit Card Database, apart from a handful of clauses which permitted inspection of evidence related to insurance products accompanying credit card agreements, there were no discovery-relevant clauses.

147. Scott & Triantis, *supra* note 9, at 857–58.

148. *Id.* at 867 n.165.

149. *See, e.g.*, Celator Pharm. Inc., EX-10.5 Indemnification Agreement (Form 10-12G) 7 (Nov. 13, 2012) (“In making a determination with respect to entitlement to indemnification hereunder, the person or persons or entity making such determination shall presume that Indemnitee is entitled to indemnification under this Agreement. Anyone seeking to overcome this presumption shall have the burden of proof and the burden of persuasion by clear and convincing evidence.”).

indemnification context.<sup>150</sup> There were no such clauses in the Credit Card Database. Notably, even in the EDGAR database, there were many fewer such clauses than the forum selection and choice of law clauses which we earlier explored, and, considering earlier work, it seems unlikely that more than one percent of material contracts contained burden shifting terms.<sup>151</sup> Moreover, Scott and Triantis note that there was then no judicial authority approving burden-shifting clauses,<sup>152</sup> and, excepting insurance cases, I came to the same conclusion.<sup>153</sup>

I found only twenty-three contracts<sup>154</sup> in which the parties attempted to vary the burden of production—which is the term used for the evidence necessary to trigger summary judgment responses.<sup>155</sup> Of those, twenty were financial guarantees,<sup>156</sup> one was a security agreement,<sup>157</sup> and

150. For a classic example of such a clause in a guarantee, see, e.g., Finish Line, Inc., EX-99.1 Amended and Restated Revolving Credit Facility Credit Agreement (Form 8-K) ¶15.3 (Dec. 6, 2012); for an example in a stock proxy agreement, see, e.g., Facebook, Inc., EX-4.4 Form of “Type 2” Holder Voting Agreement (Form S-1/A) ¶6.7 (Feb. 8, 2012); for an example of a clause that modifies the standard regarding mitigation of damages in a lease, see, e.g., FusionStorm Global, Inc., EX-10.18 Office Lease (Form S-1) 24 (Aug. 12, 2011) (“To the extent that Landlord is required by applicable Law to mitigate damages, Tenant must plead and prove by clear and convincing evidence that Landlord failed to so mitigate in accordance with the provisions of this Section 19.D, and that such failure resulted in an avoidable and quantifiable detriment to Tenant.”); for an example in an employment agreement, see, e.g., Pinnacle Foods Fin. LLC, EX-10.41 Employment Offer Letter (Form 10-Q) (Aug. 9, 2010) (“For purposes of this Agreement, “Cause” shall mean . . . (C) any act on your part that constitutes a felony under the laws of the United States or any state thereof (*provided*, that if you are terminated for any action described in this clause (C) and you are never indicted in respect of such action, then the burden of establishing that such action occurred shall be on the Company in respect of any proceeding related thereto between the parties and the standard of proof shall be clear and convincing evidence (and if the Company fails to meet such standard, the Company shall reimburse you for your reasonable legal fees in connection with such proceeding)) . . .”).

151. Recall that Eisenberg and Miller found that only thirty-nine percent of the database contained choice of forum clauses. Eisenberg & Miler, *Flight*, *supra* note 98, at 1504. I limited my searches to December 2012 to approximate a ratio between clauses that choose a forum in the absence of an arbitration clause ((forum OR “shall be brought” ) /5 (court OR district or state) NOT arbitration”) and clauses that changed the burden of proof (search term: “clear and convincing NOT arbitration”). I inspected the first ten results to ensure that the clauses were relevant. In that limited search, there were 147 forum selection clauses and six burden of proof clauses, a ratio of about 25:1. See also Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 YALE L.J. 848, 922 n.148 (2010) (noting that burden of proof clauses in public acquisition agreements are “(much) less common” than attorney-fee-shifting provisions).

152. Scott & Triantis, *supra* note 9, at 857–58.

153. PSE Consulting, Inc. v. Frank Mercede & Sons, Inc., 838 A.2d 135, 145–46 (Conn. 2004) (discussing effect of prima facie evidence clauses on burdens of proof in litigation and at trial).

154. Excluding repeat contracts or those drafted by the same firm.

155. See Celotex Corp. v. Catrett, 477 U.S. 317, 330 (1986) (Brennan, J., dissenting).

156. See, e.g., Sch. Specialty, Inc., EX-10.3 Credit Agreement (Form 8-K) 118 (May 25, 2012) (“Any Person asserting that the Guarantor Obligations of such Guarantor or such Borrower are subject to Section 9.3(a) or are avoidable as referenced in Section 9.3(b) shall have the burden (including the burden of production and of persuasion) of proving (a) the extent to which such Guarantor Obligations, by operation of Section 9.3(a), are less than the Obligations of the Borrowers owed to the Secured Parties or (b) that, without giving effect to Section 9.3(b), such Guarantor’s or such Borrower’s Guarantor Obligations hereunder would be avoidable and the extent to which such Guarantor Obligations, by operation of Section 9.3(b), are less than such Obligations of the Borrowers, as the case may be.”).

157. See, e.g., Coeur D’Alene Mines Corp., EX-10.2 Second Amended and Restated Collateral Agreement (Form 8-K) 7–8 (July 22, 2010) (“Any Person asserting that such Pledgor’s obligations are so avoidable shall have the burden (including the burden of production and of persuasion) of proving

two were specialized clauses in CEO employment agreements.<sup>158</sup> I was unable to locate a single case in which these burden-of-production clauses were litigated.

#### 4. *Class Action Clauses*

Class action waivers come in several types. In EDGAR, I found 159 responses to “class action waiver,” all but five of which accompanied arbitration clauses.<sup>159</sup> Of the five remaining “pure” class action waivers, four were franchise agreements from Liberty Tax Service.<sup>160</sup>

The fifth clause appeared in a credit card merchant services agreement, and appears nowhere else in the EDGAR database.<sup>161</sup> There were also class action waivers and opt-outs contained as a part of arbitration clauses in more general releases and employment severance agreements. Speaking generally, however, there appears to be very little evidence that class action waivers in litigation are common.

In the Credit Card Database, I focused only on class action waivers that were separate from arbitration clauses (i.e., I did not count waivers which were part of an arbitration clause separately). Only five percent of all contracts contained a term waiving class action status, and all such waivers exclusively occurred in contracts that otherwise contained an arbitration clause. The class action waiver appeared intended to fill a gap in the event that the arbitration either was rejected by the consumer or by the courts.<sup>162</sup>

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(a) that, without giving effect to this Section 2.03, such Pledgor's obligations hereunder would be avoidable and (b) the extent to which such obligations are reduced by operation of this Section 2.03.”).

158. *See, e.g.*, KBW, Inc., EX-10.3 Employment Agreement (Form 8-K) 3 (Jan. 27, 2012) (“[P]rovided, however, that the burden of production and persuasion in asserting and demonstrating that the Executive is not entitled to indemnification shall be upon the Company”); Ascent Assurance, Inc., EX-10.36 Employment Agreement (Form 10-K) (Mar. 7, 2003) (“[I]n all cases both the burden of production of evidence and the ultimate burden of persuasion with respect to any allegations or claims that this Section 10.2 has been breached or violated by the Executive shall be borne by AAI and the Corporation.”).

159. A more complicated search (“class action” NOT (arbitration OR litigation OR settlement OR derivative OR securities OR complaint OR plaintiff OR defendant)) produced the same result.

160. *See, e.g.*, JTH Holding, Inc., EX-10.5 Franchise Agreement (Form S-1/A) 20 (Oct. 15, 2012) (“Class Action Waiver. You agree that any claim you may have against Liberty, including Liberty's past or present employees or agents, shall be brought individually and you shall not join such claim with claims of any other person or entity or bring, join or participate in a class action against Liberty.”).

161. SimplePons, Inc., EX-10.14 Merchant Master Services Agreement (Form S-1) 4 (Oct. 1, 2012) (“CLASS ACTION WAIVER: MERCHANT HEREBY ACKNOWLEDGES THAT ANY DISPUTE ARISING HEREUNDER MUST BE DETERMINED ON AN INDIVIDUAL BASIS AND MERCHANT MAY NOT INITIATE OR PARTICIPATE IN ANY ACTION AS A REPRESENTATIVE OR MEMBER OF A CLASS OF MERCHANTS AGAINST SIMPLEPONS. MERCHANT ACKNOWLEDGES THAT THIS AGREEMENT TO WAIVE ITS RIGHT TO A CLASS ACTION IS A MATERIAL INDUCEMENT FOR SIMPLEPONS TO ENTER INTO THIS AGREEMENT.”).

162. Class action waivers accompanying nonseverable arbitration clauses are typical. *See, e.g.*, Rutledge & Drahozal, *supra* note 106, at 40.

A related concept involves parties attempting to control the rules of joinder.<sup>163</sup> I located several dozen clauses that attempt to opt out of mandatory joinder rules, particularly in mortgage agreements:

The failure to join any such tenant or tenants of the Mortgaged Property as party defendant or defendants in any such civil action or the failure of any decree of foreclosure and sale to foreclose their rights shall not be asserted by Borrower as a defense in any civil action instituted to collect the Indebtedness, or any part thereof or any deficiency remaining unpaid after foreclosure and sale of the Mortgaged Property, any statute or rule of law at any time existing to the contrary notwithstanding.<sup>164</sup>

Overall, aside from claims about the desirability and typicality of parties' attempts to control the course of litigation post-filing and pre-trial, there was precious little supporting evidence in the surveyed databases. Apart from burden shifting terms, other likely candidates for litigation tailoring—particularly regarding class action practice and discovery—were vanishingly rare.

#### D. Trial and Post-Trial Practice

In this section, I consider evidence for the prevalence of contractual clauses governing trial and post-trial practice. To simplify the inquiry, I focus first on the rules of evidence, then look at jury-trial waivers, and finally look at attorney fees.

##### 1. Evidence

Notwithstanding the conventional wisdom that contracting around evidentiary rules is common, I have found only two classes of cases in which courts have passed on the enforceability of contractually-created evidentiary processes.<sup>165</sup> The first class involves merger clauses, which prohibit introduction of particular kinds of evidence when they contradict the written terms of a contract.<sup>166</sup> The second involves insurance policy contracts, where courts have generally found it permissible, for example, for the insurance company to require examination under oath in a

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163. Cf. Bone, *supra* note 11, at 1336.

164. Steadfast Income Reit, Inc., EX-10.7 Open-End Multifamily Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing (Form 8-K) 15 (Oct. 4, 2012); *see also* Imation Corp., EX-10.2 Trademark License Agreement (Form 8-K) 11 (Aug. 3, 2007) (providing an example of a license agreement).

165. Again, Bone astutely points out the meager evidence for the contracting around evidence position. *See* Bone, *supra* note 11, at 1349 (“There is some authority for the proposition that pretrial agreements to waive evidence objections are enforceable. Many of the cases, however, deal with stipulations during the course of litigation rather than contractual commitments entered into before litigation begins or a claim arises.”).

166. *See, e.g.*, Garden State Plaza Corp. v. S.S. Kresge Co., 189 A.2d 448, 456 (N.J. Super. Ct. App. Div. 1963) (“There are no oral agreements between the parties hereto affecting this lease, and this lease supersedes and cancels any and all previous negotiations, arrangements, agreements and understandings, if any, between the parties hereto with respect to the subject matter thereof, and none thereof shall be used to interpret or construe this lease.”).

contract.<sup>167</sup> These terms, plus contract terms waiving privilege, have been used and enforced in life, health, and accident insurance contracts as well as in fire insurance contracts for over a century.<sup>168</sup> Insurance contracts, however, are well known to be a very specialized field of contract law, governed by an interlocking set of presumptions and public policies, and it is difficult to know if and whether to generalize from them.<sup>169</sup>

There is some evidence that parties in contracts have attempted to go a bit further than the case law provides, but one must look very carefully. In the EDGAR database, I found fifty-two contracts that attempted to waive business records/hearsay/best evidence objections that would otherwise apply to the admissibility of copies instead of originals at trial.<sup>170</sup> An additional eighty-three contracts simply declared themselves to be “self-authenticating,” amounting to the same thing.<sup>171</sup> I found only a few other clauses in EDGAR that attempted to modify the hearsay rules in litigation.<sup>172</sup> What’s striking about this finding is that parties often contract to permit hearsay testimony in arbitration, making the absence of

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167. *Lucas v. State Farm Fire & Cas. Co.*, 864 F. Supp. 2d 1346 (M.D. Ga. 2012) (sanctioning contractually created requirement of examination under oath).

168. *See Adreveno v. Mut. Reserve Fund Life Ass’n*, 34 F. 870, 871 (E.D. Mo. 1888) (waiver of physician patient privilege in insurance policy); *Hickman v. London Assurance Co.*, 195 P. 45, 47–48 (Cal. 1920) (self-incrimination); *Trull v. Modern Woodmen of America*, 85 P. 1081, 1083 (Idaho 1906) (physician-patient); *Sovereign Camp, Woodmen of the World v. Farmer*, 77 So. 655, 656 (Miss. 1918) (physician-patient); *Modern Woodmen of Am. v. Angle*, 104 S. W. 297, 300 (Mo. Ct. App. 1907) (physician-patient).

169. *See generally* Dudi Schwartz, *Interpretation and Disclosure in Insurance Contracts*, 21 LOY. CONSUMER L. REV. 105 (2008).

170. *See, e.g.*, NCR Corp., EX-10.6 Purchase and Manufacturing Services Agreement (Form 10-K) 99 (June 4, 2008) (“We each agree not to contest the validity or enforceability of any Signed Document because of the electronic origination, transmission, storage, or handling of that Signed Document. We each agree that Signed Documents, if introduced on paper in any judicial, arbitration, mediation, or administrative proceeding, will be admissible to the same extent and under the same conditions as other business records originated and maintained in documentary form. Neither of us may contest the admissibility of copies of Signed Documents under either the business records exception to the hearsay rule or the best evidence rule on the basis that the Signed Documents were originated and maintained in electronic form.”).

171. *See, e.g.*, Broad. Int’l, Inc., EX-10.1 Master Lease Agreement (Form 8-K) 10 (Aug. 28, 2009) (“This Agreement and every Schedule and other document or instrument relating to it is self-authenticating within the scope and meaning of Rule 902(9), Utah Rules of Evidence, dealing with commercial paper, signatures thereon, and documents relating thereto.”).

172. An interesting set of clauses appear to attempt to control the kind of evidence that may be used to determine whether another party has performed—i.e., to limit evidence of nonperformance to the kind of evidence that would be admissible over objection at trial. *See, e.g.*, Osteotech, Inc., EX-10.57 Processing Agreement (Form 10-Q) 47 (Aug. 9, 2002) (“In furtherance of the foregoing undertaking, if Osteotech shall determine that, notwithstanding the foregoing, any such Proprietary Product processed by Osteotech shall not have been delivered to such customer, upon presentation of evidence reasonably documenting such fact (provided that no hearsay evidence will be used to make such determination), MTF shall pay Osteotech an amount equal to \*\*\* of the Suggested End User Price for each and every Proprietary Product processed by Osteotech which would have been distributed to such customer.”). A few contracts attempted to waive later objections to an advisory expert mediator report, which presumably would include hearsay objections. *See, e.g.*, Brascan Corp., EX-99.6 Asset Purchase Agreement (Form 6-K) 75 (Mar. 30, 2005) (“The parties waive any objection to the offering into evidence of the Environmental Expert’s report and opinion or related testimony in the event of any administrative or judicial proceeding or arbitration between them.”).

these clauses in litigation all the more puzzling.<sup>173</sup> Notably as well, all such evidentiary clauses are much rarer than the choice of forum and choice of law clauses discussed above. In the Credit Card Database, for instance, clauses regarding authentication were quite rare—I found only fourteen evidentiary clauses (or less than one percent of all contracts).<sup>174</sup>

Other kinds of evidentiary clauses are possible. Clauses concerning the waiver of privilege are very common—ordinarily, parties will claim that a particular kind of information sharing is not intended to waive the attorney-client privilege. A handful of contracts—around twenty in the EDGAR database—attempt to control the qualifications of testifying experts. Such clauses exclusively appeared in real estate contracts.<sup>175</sup> Parties requiring mediation before litigation often will provide that any discussions during mediation are not admissible, even for the purposes of impeaching a witness. In essence, they are contracting to replicate Rule 408 of the Federal Rules of Evidence.<sup>176</sup>

## 2. *Jury Trial Waivers*

Jury trial waivers are somewhat common: Previous research has found jury trial waivers in about twenty-percent of material contracts in the EDGAR database.<sup>177</sup> In that database, I found over a thousand contracts per year that waived jury trials and that did not include arbitration clauses. In the Credit Card Database, jury trial waivers often accompanied arbitration clauses—functioning, like class waivers, in the alternative to the arbitral forum. Approximately nine percent of all credit card contracts contained a jury trial waiver.<sup>178</sup>

173. I found over 200 results for arbitration clauses that disclaimed the hearsay rule, and several hundred more that did so in judicial reference proceedings. *See, e.g.*, *Cano Petroleum, Inc.*, EX-10.1 (Form 8-K) 4 (Feb. 16, 2011) (“Accordingly, the arbitrator may (i) dispense with any formal rules of evidence and allow hearsay testimony so as to limit the number of witnesses required . . .”).

174. The percentage for contracts without arbitration clauses is 1.4%.

175. I used the following search: (“expert opinion testimony “NOT arbitration NOT “press release” NOT “domestic violence”) in the EDGAR database. The following kinds of clauses resulted. *See, e.g.*, *ZaZa Energy Corp.*, EX-10.16 Revolving Credit Agreement (Form S-4) 9 (Oct. 12, 2011) (“[A]ny expert opinion testimony given or considered in connection with a determination of the fair market value of the property must be given by persons having at least five (5) years’ experience in appraising property similar to the property and who have conducted and prepared a complete written appraisal of the property . . .”).

176. I found forty-eight results using the following search logic: (evidence /15 impeachment NOT arbitration). For an illustrative example, *see, e.g.*, *McGraw-Hill Fin., Inc.*, EX-99.2 Limited Liability Company Agreement (Form 8-K) (July 5, 2012) (“The parties agree that all discussions, negotiations, offers, promises conduct and statements, whether oral or written, made in the course of the negotiation and mediation by any of the parties and other information exchanged between the parties during the foregoing dispute resolution and mediation proceedings . . . are confidential, privileged and inadmissible as evidence for any purpose, including but not limited to impeachment, in any subsequent Proceeding, provided that information that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the negotiation or mediation.”).

177. Eisenberg & Miller, *Do Juries Add Value?*, *supra* note 101, at 539.

178. The percentage is significantly lower in contracts that do not contain arbitration clauses—approximately one percent.

### 3. *Attorney Fees*

Attorney-fee-shifting provisions are generally assumed to be enforceable.<sup>179</sup> In the EDGAR database, terms shifting costs to the losing party in litigation are omnipresent.<sup>180</sup> Similarly, in the Credit Card Database, attorney-fee-shifting terms were the most common kind of litigation-shaping clause: ninety-three percent of all contracts contained such a term.<sup>181</sup> Almost all such clauses merely provided that collection fees (including attorney fees) would be the responsibility of the cardholder in the event of non-payment. A few contracts provided a limit (typically, twenty percent of the total amount owed) to the fees claimed.

#### *E. Summary*

Though contracts in the two databases cover very different kinds of parties, clear patterns still emerge. A few types of clauses are common. Each of the clauses listed below has more than 1000 entries in the EDGAR database.<sup>182</sup> Ranking these typical clauses from most to least typical using a mix of both the data described above and previous scholarship, we find:

1. **Choice of Law Clauses:** In the Credit Card Database, I found choice of law clauses in seventy-nine percent of all agreements. In the EDGAR database, I found choice of law clauses in essentially every contract.
2. **Choice of Venue, Forum, and Service:** In the Credit Card Database, I found forum selection clauses in ten percent of all agreements, more specific venue clauses in seven percent of agreements, and service clauses in one percent. In the EDGAR database, prior research has found around forty percent of all material contracts contain a forum selection clause, and a similar number select the specific venue.<sup>183</sup> I found approximately eight service of process clauses in the database for every one forum selection clause,

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179. See, e.g., *MRW, Inc. v. Big-O Tires, LLC*, 684 F. Supp. 2d 1197, 1203 (E.D. Cal. 2010).

180. See, e.g., *Universal Bus. Payment Solutions Acquisition Corp.*, EX-10.3 Amendment, Guarantee and Waiver Agreement (Form 8-K) ¶11 (Dec. 26, 2012) (“In the event of any dispute among the parties to this Agreement regarding its interpretation or a claim brought by a party to enforce its rights under this Agreement, the losing party in any such dispute or claim shall be responsible for the reasonable attorneys’ fees incurred by the prevailing party in connection with such dispute or claim.”).

181. 89.5% in contracts without arbitration clauses.

182. To get a better sense of relative typicality, I will again use Eisenberg and Miller’s finding that in the EDGAR database approximately forty percent of material contracts contained forum selection clauses. Eisenberg & Miller, *Flight, supra* note 98, at 1504. We can use this baseline as a very, very rough proxy to analyze the relative frequency of other kinds of clauses by looking at the prevalence of forum selection clauses in the last half of 2012. There were 903 clauses in that time period. In the analysis in the text below, I compare results for a particular clause with the forum selection baseline to estimate a rate in the EDGAR database. There are, admittedly, major problems with this method, and it should be relied on only for rough proportional frequencies.

183. *Id.*



implying that such clauses are almost as ubiquitous as choice of law clauses.

3. Statute of Limitations: In the Credit Card Database, statute of limitations clauses were rare—only three percent of all contracts. In the EDGAR database, such clauses appeared about as often as forum selection clauses.
4. Attorney fee clauses: I found attorney-fee-shifting clauses in ninety-three percent of the credit card agreements. In the EDGAR database, attorney fee provisions appear to be present in one-fourth as many contracts as choice of forum clauses are.
5. Jury Trial Waivers: In the Credit Card Database, nine percent of all contracts waived the right to a jury trial. In the EDGAR database, previous research suggests that around twenty percent of all agreements waive the right to a jury trial.<sup>184</sup>
6. Burden of Proof: Such clauses are absent in the Credit Card Database, and appear to be present in at most 1–2% of the contracts in the EDGAR database.

Then there are a number of clauses that, notwithstanding the scholarly hubbub about their commonality or potential, appear a handful or at most a dozen or so times in the EDGAR database. They are all essentially absent in the Credit Card Database. Those clauses include: (1) citizenship-determining stipulations for the purposes of federal diversity jurisdiction; (2) discovery limitations, or provisions permitting discovery at all; (3) clauses modifying the burden of production; (4) class action waivers; (5) joinder limitations; (6) expert prequalification; (7) evidentiary clauses, including authentication and hearsay tailoring; and (8) clauses about the sufficiency of the pleading.

#### IV. EVIDENCE OF ABSENCE?

At what point is the absence of evidence for a theory evidence of its descriptive failure?<sup>185</sup> Given the data described above, I think it fair to conclude the following:

*First*, there is no obvious trend in the data toward more terms in contracts that tailor the ordering of public disputes. I found no convincing evidence that such clauses are more common than they were a decade ago. There is no convincing evidence that they are less common either. The most I can say is that procedural contracting in areas like discovery, evidence, and pleadings is currently very rare.

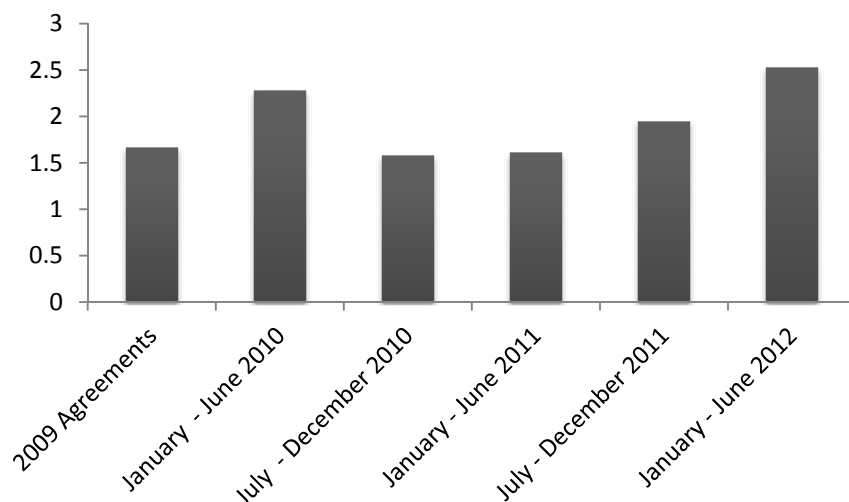
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184. Eisenberg & Miller, *Do Juries Add Value?*, *supra* note 101, at 539.

185. Compare CARL SAGAN, *THE DEMON-HAUNTED WORLD: SCIENCE AS A CANDLE IN THE DARK* 213 (1996) (claiming that the absence of evidence is not evidence of absence), with Elliott Sober, *Absence of Evidence and Evidence of Absence: Evidential Transitivity in Connection with Fossils, Fishing, Fine-tuning, and Firing Squads*, 143 *PHIL. STUD.* 63 (2009) (arguing absence of evidence in conjunction with probability laws can be evidence of absence).

The Credit Card Database may enable us to examine change over time. Figure 2 illustrates the number of litigation-shaping clauses per contract in the Credit Card Database, excluding arbitration clauses. This Figure must be contextualized. Because of how the database operates, contracts in the more recent periods are ones in which the issuer has updated its agreements more frequently—in other words, the database presents snapshots of the contracts in effect at each period rather than truly comparing one period to another. Nonetheless, the evidence suggests no positive trend respecting nonarbitration dispute resolution clauses.

FIGURE 2: NUMBER OF LITIGATION SHAPING CLAUSES PER CONTRACT IN THE CREDIT CARD DATABASE, EXCLUDING ARBITRATION CLAUSES.



The case of arbitration is more complicated. Rutledge and Drahozal cull the entire Credit Card Database (of approximately 1500 agreements) to around 300 agreements,<sup>186</sup> and conclude that by year's end, 2009, while 95.1% of all credit and “loans outstanding” contained an arbitration clause, only 17.4% of the agreements in their sample did. In 2010, to give effect to an antitrust settlement (*Ross v. Bank of America*), four of the largest issuers agreed to remove arbitration clauses from their consumer and small business credit card agreements for a period of three-and-a-half years.<sup>187</sup> Rutledge and Drahozal found that from 2009 to 2010, when looking at the same cards from the same issuers, the percentage of contracts containing arbitration provisions declined to fifteen

186. For their exclusion process, see Rutledge & Drahozal, *supra* note 106, at 15 n.42.

187. *Id.* at 19.

percent, while the percentage of total loans containing arbitration clauses declined from ninety-five percent to forty-eight percent.<sup>188</sup>

Like Rutledge and Drahozal, I find that the percentage of cards in December 2010 that contain arbitration provisions is about fifteen percent. Unlike Rutledge and Drahozal, I examine cards filed with the CFPB in 2012, and find that with respect to such recently issued cards, 320 out of 527 agreements, or around sixty percent, contain arbitration clauses. Whether this difference represents a different procedure in deciding which contracts to count or a real shift in the usage of arbitration remains to be seen.<sup>189</sup>

*Second*, confirming previous literature, I find that not all bespoke procedure is equally popular. In particular, choice of law and choice of forum clauses are relatively common, while choice of venue and jurisdiction waivers are less so. More exotic clauses are either very, very rare (like burdens of production and persuasion), almost mythical (discovery, class action waivers), or entirely absent (hearsay outside of the authentication context; pleading rules).

Overall, this is a puzzling result. Contrary to theory, parties seem to be much more attentive to controlling the legal *merits* than they are controlling legal *costs*.

In the next section, I speculate on why we find so little evidence of bespoke procedure.

#### A. *The Lamppost Problem*

One possible answer to the question of why I've found so little evidence for bespoke procedural terms is that I've looked in the wrong places. As I mentioned above, both the EDGAR database and the Credit Card Database are limited in scope.<sup>190</sup> In any empirical study, it's important not to become too seduced by the available data.<sup>191</sup> It is possible that there are industries where contracting about the rules of public procedure is common practice. I simply have not found them.

At some point, however, this missing data objection loses force. As I argued above, although EDGAR collects a specialized kind of heavily negotiated and material contract, the kinds of deals that end up in litigation are also not randomly distributed, and certainly do not skew toward small and worthless ones. While end user licenses and credit card

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188. *Id.* at 18.

189. Unlike Drahozal and Rutledge, for instance, I do not exclude non-financial institutions. *Cf. id.* at 15 n.44. I also permit agreements to repeat in my data so long as they are given separate identifying numbers by the CFPB, while Rutledge and Drahozal apparently focus on unique issuer-agreement pairs.

190. Professor Marotta-Wurgler's work on EULAs tends to support my conclusions, but, then again, that's only another example of a highly particularized field.

191. See K. N. LEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 90 (1969) ("I am a prey, as is every man who tries to work with law, to the apperceptive mass. . . . The *convenient* source of information lures. Men work with it, first, because it is there; and because they have worked with it, men build it into ideology.").

agreements are not the only kind of consumer contract, they—along with cellphone and cable contracts—are among the most important agreements regularly entered into by individuals.<sup>192</sup> Arguably, these databases should contain *exactly* the kinds of contracts where we would expect choice of procedure clauses to be common.

And *if* parties were regularly writing contracts that varied the procedure of public litigation, wouldn't we see more opinions by courts considering those terms and either approving or rejecting them? The typicality of contract clauses closely parallels their prevalence in the case law. That is, there are many decisions discussing choice of forum and law; fewer discussing service and jury trial waivers; and almost none or none discussing discovery and burden shifting.<sup>193</sup> This tends to exclude the possibility that the absence of evidence of bespoke procedure results from parties contracting so well that litigation is unnecessary.

### B. A Substitution Effect?

A second, complementary possibility is that the kinds of disputes where procedural contracting would be most attractive have been sent to arbitration, making tailoring in the public litigation system unnecessary. That is, instead of tailoring in litigation, parties are instead using arbitration as a substitute.<sup>194</sup> Arbitration is generally preferred where disputes are more likely, potential for jury bias very salient, and discovery costs especially high.<sup>195</sup> These very same incentives would support tailoring in litigation. But given that arbitration procedures are more informal, tailoring there can occur after the initiation of the dispute,<sup>196</sup> making it cheaper, on net, to contract for arbitration *ex ante*.

On the other hand, it is not obvious that arbitration *is* more efficient than litigation.<sup>197</sup> Parties may prefer litigation some of the time—such as when the governing law is very certain, or emergency relief required—and prefer arbitration in other matters.<sup>198</sup> To complicate the issue, par-

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192. See Eisenberg et al., *Summer Soldiers*, *supra* note 93, at 871.

193. See Bone, *supra* note 11, at 1343–46.

194. See *id.* at 1346–47 (“Perhaps the availability of arbitration explains the paucity of cases involving *ex ante* agreements: contracting parties might just switch to arbitration when they are concerned about excessive or abusive discovery in court.”); Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. LEGAL STUD. 549, 550–51 (2003) (describing interplay between arbitration clauses and contract design).

195. See Posner, *supra* note 1, at 1594–96.

196. Or by default, as many arbitration organizations provide model evidentiary and discovery rules that are said to be narrower in scope than those that prevail in court.

197. Compare Eisenberg & Miller, *Flight*, *supra* note 98, with Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight from Arbitration?*, 37 HOFSTRA L. REV. 71, 90–94 (2008). On the question of whether courts are superior to arbitral tribunals, see Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 31 (2008); Drahozal & Ware, *supra* note 95.

198. Drahozal & Ware, *supra* note 95, at 450 (“We expect parties to prefer litigation over arbitration, all else equal, in the following types of cases: (1) when the governing law and contract terms are well-developed and relatively certain in application; (2) in ‘bet-the-company’ cases with very high stakes; and (3) when emergency relief is likely to be important for resolving disputes.”).

ties can mix arbitration and litigation modalities within one contract.<sup>199</sup> Obviously, the ability to choose arbitration for particular types of disputes should complicate our models of the background rules against which parties' silence on procedural terms should be analyzed.

Substitution effects are notoriously difficult to examine in observational datasets. It is suggestive that in the Credit Card Database contracts containing arbitration clauses generally also contained other types of bespoke procedural clauses and that removing such contracts from the overall sample depressed rates at which bespoke procedure occurred. More precisely, contracts without arbitration clauses were less likely to be bespoke (1.9 public dispute resolution clauses per contract) than contracts with arbitration clauses (2.67 per contract). One explanation for this finding is that businesses feel freer to experiment with procedural tailoring in the arbitral context, as such clauses are more likely to be enforced. Or, perhaps, such contracts are more likely to arise in situations where tailoring is useful, or where the parties' relative bargaining positions permit it.

Importantly, if it is the case that parties are choosing arbitration rather than modifying procedure, that finding would tend to undercut those objections to bespoke procedure that rest largely on the fear that courts will simply be enforcing private parties' bargaining power disparities. Indeed, if parties are opting out entirely, it is not clear how seriously we ought to engage with the innovative default rules literature I described above.

### C. *A Fear of the Unknown (and Other Agency Costs)*

Another possible explanation for the absence of bespoke procedure is that drafters are imperfect.<sup>200</sup> This imperfection may be venal, as firms benefit from imperfectly specified contracts by charging clients to litigate them after the fact.<sup>201</sup> Alternatively, drafters may be ignorant of the potential scope of bespoke procedure, or may believe that procedural terms are unlikely to be enforced.<sup>202</sup> Where there is case law about terms, parties make some use of contracts to negotiate when it seems best to them: e.g., forum selection, authentication provisions, choice of law, attorney fees, jury trial waivers. But in the absence of case law, or where the issue of enforceability is in substantial doubt, drafters instead seek arbitration or are silent about procedure: class action waivers, discovery limitations, evidentiary procedures outside of documents, and pleading standards.

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199. O'Connor et al., *supra* note 97, at 133.

200. Cf. Drahozal & Rutledge, *supra* note 16, at 1117–18 (listing ignorance, fear of unenforceability, incomplete information, agency costs, and transaction costs as possible reasons that arbitration agreements have not become more complex).

201. *Id.* at 1118.

202. See Gilles, *supra* note 88, at 426 (speculating on absence of arbitration provisions in 2005 as a function of “some reluctance on the part of general counsel to rush into a perceived violation of applicable law”).

This explanation is at least descriptively plausible. But it does not provide a theory of why we have seen some limited evidence of attempts to shift the burdens of proof in particular contracts, nor does it explain the lack of greater diffusion of choice of forum clauses despite their obvious legal soundness. Moreover, uncertainty alone and other forms of transaction costs do not provide any testable set of predictions for when we would see greater changes in the landscape of private ordering of public disputes. Given the large claims in the literature about the meaning of a “trend” toward privatization of public disputes, a response to the landscape that merely begs the question seems inadequate.

#### D. *The Lifecycle of Contract Innovation*

How do contracts come to take on new classes of terms? Until recently, little attention was paid to this crucial question of contractual design. Many scholars intuited that lawyers, like artisans, developed new clauses when considering new kinds of problems. The clauses that were so developed would then slowly spread across an industry, ossifying in forms, and eventually fossilizing into boilerplate.<sup>203</sup> Standard form boilerplate obviously confers important benefits on the drafter, including certainty.<sup>204</sup> Change from standard terms is expensive, and thus terms are sticky.<sup>205</sup>

Sticky, but not frozen. Obviously, lawyers will often make small tweaks to contracts.<sup>206</sup> But as it turns out, the more common pattern is for the market as a whole to shift rather quickly to a new term or set of terms after a period of experimentation and innovation in different possibilities.<sup>207</sup> The insight that contract terms change seismically rather than slowly has pushed scholars to believe that contract terms are best seen as *products subject to familiar cycles of innovation*.<sup>208</sup> These cycles

203. See Stephen J. Choi, Mitu Gulati & Eric A. Posner, *The Dynamics of Contract Evolution*, 88 N.Y.U. L. REV. 1, 1–3 (2013).

204. Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or “the Economics of Boilerplate”)*, 83 VA. L. REV. 713, 720–24 (1997).

205. MITU GULATI & ROBERT E. SCOTT, *THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN* 9–12 (2013); Stephen J. Choi & G. Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129, 1157–58 (2006).

206. See Mark Weidemaier, Robert Scott & Mitu Gulati, *Origin Myths, Contracts and the Hunt for Pari Passu*, 38 L. & SOC. INQUIRY 72, 84–85 (2013).

207. See Choi et al., *supra* note 203, at 4–5.

208. See *id.* at 6–10; see also Stephen J. Choi, Mitu Gulati & Eric Posner, *The Evolution of Contractual Terms in Sovereign Bonds*, 4 J. LEGAL ANALYSIS 131, 173–75 (2012) (finding a pattern of contract innovation in response to defaults); Stephen J. Choi & G. Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 EMORY L.J. 929, 937–38 (2004) (describing how changes in contract terms occur in stages); Kevin E. Davis, *The Role of Non-profits in the Production of Boilerplate*, 104 MICH. L. REV. 1075, 1086 (2006) (discussing effect of externalities in “producing” contract terms); Zev J. Eigen, *Empirical Studies of Contract*, 8 ANN. REV. L. & SOC. SCI. 291 (2012) (noting the lack of knowledge on innovation); Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B. U. L. REV. 813, 819 (1998) (comparing contract innovation to changes in software and utilities industries); Henry T. Greely, *Contracts as Commodities: The Influence of Secondary Purchasers on the Form of Contracts*, 42 VAND. L. REV. 133, 167–68 (1989) (comparing innovation in standardized contract terms to other products); Claire A. Hill, *Why Contracts are Written in “Legalese”*, 77 CHI.-KENT. L. REV. 59, 60, 80–81 (2001) (arguing that fear of mistakes may discourage attor-

result from “shocks”—“changes in legal interpretations of terms, or technological advances.”<sup>209</sup>

As Choi, Posner and Gulati describe, innovation in products typically occurs in a three-step cycle.

*Stage one:* In the first stage, the standard form dominates. While there may be “innovations or deviations,” they are not widely accepted.<sup>210</sup> Outsiders to the industry may try to promote innovation, but the established players will resist. Existing patterns are costly to change, both because deviation may not be enforceable, and because negotiation costs are high. In the absence of “any shock,” such as a very salient judicial decision, the “pre-existing standard” will “prevail in the market.”<sup>211</sup>

*Stage two:* After a series of exogenous shocks, firms begin to experiment with new terms. “High-volume or high-status intermediaries”—like large law firms or firms that promulgate large numbers of contracts in the market—“play a key role in promulgating the innovation.”<sup>212</sup> “Approval of an innovation by official actors”—such as the Supreme Court—“might also have an impact on whether the innovation gains wide adoption.”<sup>213</sup>

*Stage three:* The innovation becomes standardized as it becomes obvious that the market prefers the new terms to the old. Choi et al. hypothesize that large law firms will lead the charge in marketing, and adopting, the new standard.<sup>214</sup>

Evidence from the financial services industry and the computer software industry tends to confirm this model of how innovation in boilerplate contract terms occurs. Thus, Choi et al. demonstrate the innovation curve with respect to collective action clauses in sovereign bond issuances.<sup>215</sup> Marotta-Wurgler and Taylor, studying end-user license clauses, similarly find more changes to boilerplate than had been expected, and find that “younger, growing, and large firms, as well as firms with legal departments, are more likely to innovate.”<sup>216</sup> They also find that as external validity increased—that is, as courts were more likely to enforce terms, they were more likely to be included in contracts.<sup>217</sup> Weidemaier shows how sovereign debt contract terms did not change materially in response to changes in legal enforcement, but did shift dra-

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neys from changing terms); Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240, 247–48 (2013) (discussing innovations in contract terms and comparing changes in terms to software development); W. Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*, 50–56 (Univ. N.C. Legal Studies Research, Paper No. 2180228), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2180228&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2180228&download=yes) (explaining cycle of shocks in sovereign bond contracts).

209. Marotta-Wurgler & Taylor, *supra* note 208, at 248.

210. Choi et al., *supra* note 203, at 9.

211. *Id.* at 10.

212. *Id.* at 9.

213. *Id.*

214. *See id.* at 29.

215. *Id.*

216. Marotta-Wurgler & Taylor, *supra* note 208, at 244.

217. *Id.* at 272–74.

matically in response to a very salient codification of the new legal regime.<sup>218</sup>

This literature has several key implications for the questions that this paper has raised. Conceptually, it suggests that contractual change is not linear, nor does it follow a model where contracts slowly evolve in response to lawyers pushing courts to consider new problems. To date, most of the papers on bespoke procedure have argued, implicitly, that the process by which contract terms germinate is essentially rational—if a term is jointly welfare-maximizing for the parties, it will be crafted, and if well-crafted it will diffuse through the market with ease.<sup>219</sup> The literature on contracts and innovation suggests that nothing could be further from the case: change will be largely responsive to highly-salient shocks, not the slow accretion of precedent.

Consequently, we should doubt that worries about legal enforceability are retarding procedural experimentation.<sup>220</sup> As Professor Weidemaier has shown, major changes in the law of foreign sovereign immunity had little impact on the terms of sovereign bonds until those changes were codified in a highly public way.<sup>221</sup> He suggests that the *salience* of major legal changes for negotiating parties is a crucial lever for change in standardized contract terms.<sup>222</sup> Or to put it differently and concretely: trial level decisions that approve of discovery waivers are unlikely to make such terms significantly more common.

Second, if and when change occurs, it is likely to happen on a clause-by-clause basis, rather than globally. Consider, in that light, the summary information produced in Part III.E. As I described, a small handful of clauses—like choice of law and forum—are relatively common. Others are significantly rarer. Why is this so? One explanation is that choice of law and forum, along with arbitration, have already entered Stage Two or Three of the innovation cycle. They are well-accepted by public intermediaries and the courts; parties consider them a normal part of the transactional toolkit; and the cost of proposing them is significantly less than the price one would pay if they were absent.

By contrast, other clauses, like discovery limitation, pleading opt-outs, evidentiary changes, and litigation mechanic reordering, are not common. There is less innovation about such clauses, and we remain in Stage One of the contractual development cycle. The dominant old paradigm reigns. Some firms—typically, younger firms seeking to increase their market share—will experiment, and we may see tinkering and attempts to draft new procedural rules. But innovation will not occur at the market leader level, nor will it typically arise from large sophisticated law firms. In representative databases, we should see some attempts to

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218. Weidemaier, *supra* note 208, at 28–30.

219. See Choi et al., *supra* note 203, at 2 (noting that scholars often assume that parties draft terms to fit their particular needs).

220. Cf. Drahozal & Rutledge, *supra* note 16, at 1118–19.

221. Weidemaier, *supra* note 208, at 42–44.

222. *Id.* at 55–56.



contract around procedure, but those innovations will not take hold. That is, if we are indeed in Stage One, claims that there is a trend toward treating the rules of procedure as defaults must be severely curtailed. There is no trend: there are, rather, experimental forays.

Third, further controlled searches for bespoke clauses should focus on young firms and on industries that are rapidly evolving. The social media industry may provide a fertile ground, especially as terms-of-use provisions are highly salient to consumers.<sup>223</sup> Another place to look might be in the cellphone market, where firms sometimes use contract terms to challenge the market standard leaders.<sup>224</sup> We might, however, temper these expectations, given evidence that firms that primarily retail online already appear to avoid using terms that occasion public controversy—like dispute resolution clauses that are very pro-seller.<sup>225</sup> Thus, even in rapidly changing industries, contract innovation around public dispute resolution may be slow in coming.

Finally, if we are in Stage One of the productive innovation cycle for these dispute resolution provisions, it would be important not to seize on evidence of particular examples of such terms—like the burden-shifting clauses described by Scott and Triantis—to imply that such terms are widespread. As theory predicts, in Stage One we would *expect* to see occasional innovations, as new entrants attempt to use contract terms to gain competitive advantages. But those terms will not be the standard, and most counterparties will not actually be permitted the opportunity to “purchase” them, even if they are otherwise welfare enhancing.

Stage Two will commence when sufficient, highly salient, exogenous shocks commence to rattle the status quo. What would such shocks look like? A Supreme Court decision making terms salient—and explicitly approving their enforceability—would be exemplary. Decisions like *AT&T v. Concepcion* (validating class-arbitration waivers)<sup>226</sup> and *Carnivale Cruise v. Shute* (validating forum selection clauses)<sup>227</sup> could have spurred attorneys to consider clauses that they previously would have left unused. The take-away from this analysis is that until a bespoke procedure clause is challenged, and approved, in a high-profile litigation before a high-profile court, or considered in the Rules Amendment process, it is unlikely that such clauses will become widespread.

We would also expect to see Stage Two marked by the adoption of national standard laws or principles that validate the use of such dispute resolution terms—such as, for example, provisions that approve of con-

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223. Doug Gross, *Instagram Backtracks After User Privacy Revolt*, CNN (Dec. 19, 2012), available at <http://www.cnn.com/2012/12/18/tech/social-media/instagram-terms-users/index.html?iref=allsearch>.

224. Press Release, T-Mobile, T-Mobile Shakes Up the Wireless Indus. by Expanding Unlimited Nationwide 4G Data to No-Annual-Contract Customers (Jan. 8, 2013), available at <http://newsroom.t-mobile.com/articles/t-mobile-expanding-unlimited-nationwide-4g-data-to-no-annual-contract-customers> (announcing an unprecedented, unlimited data plan with no annual contract in order to directly compete with industry frontrunners).

225. Mann & Siebeneicher, *supra* note 100, at 1011.

226. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

227. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991).

spicuous warranty disclaimers,<sup>228</sup> or the Restatement's Provisions on private control over choice of law.<sup>229</sup> Such public applause for dispute-shaping contract terms would be a precondition and a triggering event for the kind of transformative reshaping of the market standard that proceduralist scholars are worried has already happened. Consequently, scholars who are anxious about the privatization of procedure should consider these public credentialing moments to be a key veto point, where early lobbying could be particularly useful.

Notably, even though the Supreme Court's choice of forum decision (*Carnivale*) is now twenty years old, and many key market players have adopted forum choice of law rules in their model contracts, forum selection clauses are absent in many agreements. Studies have found a wide range of use of such clauses—from two to sixty percent of studied agreements. Choice of law clauses are more routine, but, again, contract type matters a great deal. That is, proceduralists should expect that even if the Supreme Court were to validate particular new forms of bespoke procedure, and even if they were to lose the fight to validate the clauses in the Restatement or another public credentialing body, many contracts would still remain silent about what should happen if the parties go to court.

#### IV. CONCLUSION

Many have begun to worry that civil procedure is in danger of becoming an appendage to contract law. In a world where the rules of procedure are merely defaults, what role would there be for public values like procedural justice, efficiency, transparency, and legitimacy? In this Article, I have tried to show that worries about the rapid decline of public procedure and the rise of its private, bespoke variant are vastly overstated. There is precious little evidence that parties are routinely, or even rarely, attempting to tailor public procedure to their own ends. While forum selection, choice of law, statutes of limitations, jury trial waivers, and attorney fee allocations are somewhat common, such clauses do not generally seek to vary public procedural law. There are literally only a handful of contracts, and cases, in which parties expect the court to impose their own private procedural rules.

Interpreting this absence of evidence is difficult. If this missing data highlights a data-collection problem, we should find better tools and databases so as to excavate the bespoke contracts that exist. Clearly, if there is a great deal of extant procedural contracting, policy makers would presumably want to grapple urgently with the deep questions of legitimacy and scope raised in the literature.<sup>230</sup> Indeed, that normative

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228. 15 U.S.C. § 2302 (2006).

229. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

230. So, too, would teachers of procedure, who might consider merging their course into Contracts. Given the previous proposed merger of contracts into torts, substantial labor savings seem within easy reach.

inquiry has been the preoccupation of an increasing number of civil procedure scholars.<sup>231</sup>

But if, by contrast, there is very little procedural contracting in the world, then we would want to think carefully about why that's so, and whether the change that has been promised might not come, or might arrive in an entirely unexpected way. The innovation thesis provides a useful explanatory lens. It suggests that we have been in a generations long period of stability about the relationship between procedure and contract. There is currently some ferment at the margins of this consensus, led by market risk takers with comparatively less at stake. We should study these innovators to understand and predict what the market may look like as it continues to evolve. But until bespoke procedural clauses are approved in a very salient way, they will be rare. And change, when it comes, will not be progressive, global, and linear: it will be contingent, particularized, and punctuated.

Stepping back, bespoke procedure scholarship has been framed as a problem of public law: will courts accept such bargains, and if so, how might private contracting threaten transsubstantive public procedure? The absence of evidence I have identified suggests a different, and more *private*, approach to the problem. Rather than asking whether courts should approve contracts, we should question what private value such deals unlock, how innovations in language come to parties' attention, and under what circumstances new terms will develop. Or, to put it differently, scholars of privatized procedure should spend more energy on contracts and less on procedure.

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231. Compare, e.g., Moffitt, *supra* note 9, at 478–81 (arguing that contracts that customize procedure encourage justice and fairness), with Taylor & Cliffe, *supra* note 11, at 1087 (suggesting procedural customization can promote fundamental unfairness).