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Evaluating Contracts For Customized Litigation
By The Norms Underlying Civil Procedure

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Abstract

Recent scholarship on the potential for contractual modifications of litigation procedure focuses on contractual theories of enforcement, with constraints supplied by public policy. But this approach ignores the fact that such contracts purport to bind a third-party, the court, that did not agree to change its procedures. Nor can contractual theories of enforcement fully account for the societal and institutional interests in existing procedures. These problems are resolved, however, when contractual procedures are seen primarily as procedures, rather than as contracts, and are evaluated in light of the norms underlying civil procedure.

These norms are found both in the explicit purposes of the civil procedure and in the ways that courts evaluate (and resist enforcement of) contracts to modify procedure. This article undertakes the first in-depth survey of the norms underlying courts’ decisions on a broad range of contract procedure. Four central norms are revealed: the core judicial function of decision making, a requirement of ex post adjudicative fairness, the separation of procedure and substance, and the importance of uniformity. These court-created norms are largely incompatible with most of the current proposals for contracts to modify procedure – even where those contracts will create socially beneficial efficiencies.

This article therefore proposes a compromise to satisfy the most important norms while allowing for some enforcement of useful procedural contracts. This approach allows judges remain in control of procedure, limits enforcement of procedural contracts to actual damages, and gives parties strong incentives to create procedures that are efficient and fair. As a practical matter, this approach can help parties draft contract procedure that courts may be willing to enforce.

Table of Contents

Introduction.................................................................................................................................... 1
I. Evaluating Contract Procedure by The Purposes of Civil Procedure................................... 4
II. The Explicit Purposes Of Civil Procedure ............................................................................. 7
III. The Enforcement (and Non-enforcement) of Contractual Procedure................................. 15
   A. Contractual Provisions that Act as Gatekeepers.......................................................... 16
      1. Forum selection clauses ........................................................................................... 16
      2. Jury waivers .......................................................................................................... 20
      3. Agreements not to appeal ...................................................................................... 23
   B. Changes to the Available Theories or Relief.................................................................... 33
      1. Contractual statutes of limitations ....................................................................... 33
      2. Limitations on the amount or type of damages.................................................... 37
      3. Liquidated damages ............................................................................................. 41
      4. Contractual attorneys’ fees .................................................................................. 43
   C. Contractual Limitations on a Court’s Decision-Making Process................................ 50
      1. Limitations on obtaining evidence ........................................................................ 50
INTRODUCTION

Ex ante contracts to modify litigation procedure have considerable promise to reduce the rising costs of litigation. Modern procedure is a one-size-fits-all proposition regardless of whether it is a good fit for the parties or the subject matter. And parties rarely venture beyond a small list of familiar contractual modifications to procedure, including forum selection and choice of law clauses, jury waivers, and some damages limitations. The notable exception, arbitration, has evolved a host of differing procedures in response to the creative application of unconscionability doctrines by state courts to prevent arbitration and the Supreme Court’s increasing willingness to enforce arbitration over the objections of state law.\(^1\)

Looking at the trend toward greater enforcement of arbitration, many scholars believe that “we are on the precipice of the next generation of civil procedure”\(^2\) through contracts that

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reorder litigation.³ This literature explores how parties can benefit by contractually modifying litigation procedure.⁴ Some scholars worry that contract procedure only strengthens pre-existing bargaining imbalances,⁵ but a growing number argue that parties can and should bargain for


⁴ See supra notes 2 and 3; but see Robert E. Scott & George G. Triantis, Principles of Contract Design, 115 YALE L.J. 814, 857 (2006) (“We have been hard pressed, however, to find scholarly treatises on procedure or evidence that identify the subset of these rules that are default rather than mandatory provisions”).

customization that could significantly reduce the cost of litigation.\textsuperscript{6} Virtually all of these scholars apply contractarian principles – the idea that ex ante expectations of the parties should be enforced – to determine how such contracts should be treated. Based on the Supreme Court cases on arbitration, they conclude that such contracts will be enforced.\textsuperscript{7}

This article takes a different view. It proposes that contract procedure can be usefully evaluated as procedure by using the norms underlying civil procedure. Part I discusses how contracts that alter procedure attempt to bind the court, a third-party to the contract that never agreed to change its own procedures. It shows how the interests of society and courts in the existing procedure should be at least as important as those of the parties asking the court to amend its procedures. Part II explains the aspirations of civil procedure, as exemplified in Federal Rule of Civil Procedure 1: “to secure the just, speedy, and inexpensive determination” of disputes. It also notes that individual procedures are reflected in the specific rules, in cases interpreting them, and in procedures created and enforced by precedent and tradition.

Because the cultural and institutional interests in procedure may be better seen in

\textsuperscript{6} Noyes, supra note 3 (arguing that parties can import procedures from arbitration into litigation); Michael Moffit, Customized Litigation: The Case for Making Civil Procedure Negotiable, 75 G. WASH. L. REV. 461 (2007); Dodge, 97 VA. L. REV. at 798-99; Daphna Kapeliuk and Alon Klement, Contracting Around Twombly, 60 DEPAUL L. REV. 1, 1-2 (2010) (allowing parties to “contract around the pleading standard” can “solve problems of inadequate screening and to realize both pre-and post-dispute opportunities that would be unworkable otherwise”); Scott & Triantis, supra note 4 (arguing for contractual modifications of burdens and standards of proof); Elizabeth Thornburg, Designer Trials, 2006 J. DISP. RESOL. 181 (2006) (explaining limitations to modifications to procedure).

\textsuperscript{7} Christopher R. Drahozal & Peter B. Rutledge, Contract and Procedure, 94 MARQ. L. REV. 1103, 1107 (2011) (“Viewing these developments through the lens of contract enables us to tap into the rich literature on contract theory and, thereby, facilitates systematic thinking about procedural contracts.”); see also Thornburg, supra note 6; Noyes, supra note 3; Dodge, supra note 2.
practice, Part III surveys how courts create and interpret procedural norms. Far more detailed than in previous scholarship, the survey covers most of the major types of contract procedure: forum selection clauses, jury and appeal waivers, contractual limitations periods, restrictions on the types and amount of damages, limitations on discovery, and changes to what (and how) evidence may be used. These decisions evaluating this wide spectrum of procedural contracts reveal the norms underlying the formal and informal procedures that the contracts propose to replace.

Part IV summarizes these norms: procedure should not interfere with judicial decision-making, just procedure means procedure that is fair in light of ex post facts and law, and procedure should not control the merits of the dispute. As a result of these norms, judges often refuse to enforce unjust procedural contracts even when the contracted-for procedures appeared fair from the ex ante perspective. Unfortunately, this means that the “next generation of civil procedure” is likely to be stillborn as judges refuse to enforce procedural contracts that contravene these important norms.

Part V proposes a compromise approach to satisfy the most important of these norms while allowing for continued innovation in contract procedure. Judges are given explicit power to reject contracts that directly interfere with sound judicial administration and to reform contracts that become procedurally unfair during the litigation. Because procedure should not determine the outcome, this approach also rejects specific enforcement, allowing parties to avoid procedural contracts merely by paying expectation damages. This proposed approach guides parties to create contracts that respect the norms behind the civil rules, and allows courts to

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8 Noyes, *supra* note 3, at 633, takes the opposite approach, arguing that “courts are obligated to enforce ex ante contracts to modify the rules of litigation and that the enforcement mechanism of choice is specific performance.”
enforce socially beneficial contracts that might otherwise be rejected.

I. **Evaluating Contract Procedure By the Purposes of Civil Procedure**

There are significant insights to be gained from evaluating contracts to modify litigation procedure as contracts, and other scholars have extensively catalogued the many opportunities to create efficiencies through private ordering. But these contracts to alter procedure are really joint petitions to a third party, the court, to change its own institutional practices – practices that are often prescribed by binding precedent, strong traditions, or mandatory rules. The entity asked to perform the contract, the court, never agreed to the contract – and little precedent, and only a handful of rules, makes explicit exceptions for pre-dispute contractual modifications. When considering the court as the party asked to perform the contract, such contracts lack all of the indicia of a contract: no negotiation, no consent, no consideration, and no damages are available. Just as contracts are not normally enforceable against third-parties, the only way to enforce such contracts against courts is through an appeal or special writ to a higher court.

Seen this way, contracts to modify procedure are actually joint petitions asking courts to change their own procedures. Yet the binding nature of precedent from a higher court or written rules (usually promulgated by the jurisdiction’s highest court) generally means that courts do not have the discretion or power to unilaterally modify procedures themselves. While the persuasiveness of viewing procedural contracts as petitions to the court may vary by what the parties are asking the court to do, even contracts that merely limit discovery affect the evidence before the court and court’s ability to decide the action. In this context, procedure can be broadly defined to include any contractual reordering aimed at affecting the course of litigation.

Contracts creating new litigation procedures can thus be seen as suggested amendments to the rules and precedent controlling the civil procedure for a particular dispute. This suggests
that the procedures that parties are asking the courts to adopt should be evaluated as *procedures*.

Seen in this way, the interests and purposes of society and the judicial institution in those procedures are at least as important as the interests of the parties asking to amend the procedures. And the most direct way to evaluate a proposed contract procedure is by whether it fits the purposes that underlie civil procedure.\textsuperscript{9} Not all contract procedure will directly replace or supplement a practice required by precedent or a rule of civil procedure, but the norms behind existing procedures make for a reasonable yardstick to measure the social and institutional interests in any new procedures.

This approach is not without precedent. The American Arbitration Association (AAA) refuses to enforce arbitration contracts that do not adhere to its particular norms, and its rules will override contracts asking for the opposite. If the parties do not agree to modify the contractual procedures, the AAA refuses to arbitrate the dispute. For example, parties that desire AAA arbitration of a consumer dispute must agree that the arbitrator can grant whatever relief would be available from a court, and small claims court must always be open to the consumer.\textsuperscript{10} That the AAA will not conduct arbitrations under procedures that it determines to be unfair to

\textsuperscript{9} As explained in Part III, courts already evaluate contracts to modify procedure by the norms underlying established procedure. But in most cases this has been done in a piecemeal fashion in most cases, and is usually justified by a simple reference to public policy. See, e.g., Part III.A.1.

gives the institution substantial legitimacy as an impartial and fair forum. Courts often cite this feature of the AAA when deciding whether to enforce an arbitration clause. Yet courts have the same inherent power to reject procedure they find distasteful -- and have far greater concerns about maintaining the legitimacy of their procedures.

While contract procedure can be seen a vehicle for challenging the norms inherent in current procedure, there is little to be gained from such an analysis. If contract procedure is to have significant value, it will be through clarity, efficiency, reliability, and consistency. It must fit into the normative framework surrounding the current practices and rules of civil procedure. And challenging the current norms through contractual procedure is a poor substitute for direct debates and analysis of what should be the purposes of civil procedure. Contract procedure should be evaluated by comparison to the norms underlying the procedures it will replace.

This is an essentially constructivist approach to contractual procedure. The prevailing norms and culture are a launching point for understanding how to create contract procedure that will not do violence to the interests of society and the judiciary in current rules and practices. An approach to contract procedure that fully engages with these norms is also more likely to be accepted by judges, and can influence the culture that creates those norms. Identifying and evaluating those norms may also prompt a judicial reexamination of the norms themselves, in addition to a reevaluation of the reasons why judges reject contract procedure.

II. THE EXPLICIT PURPOSES OF CIVIL PROCEDURE


12 As explained in Part III, judges find ways to get around even the most well-accepted types of contract procedure (even forum selection clauses) where a contracts appears to violate the norms underlying civil procedure.
The chief purposes of our system of procedure have remained largely intact since its inception 1938. The two most important statements of the ordering of judicial dispute resolution are in the Rules Enabling Act and Federal Rule of Civil Procedure 1. The Rules Enabling Act gives the Supreme Court “the power to prescribe general rules of practice and procedure and rules of evidence” but states that “[s]uch rules shall not abridge, enlarge or modify any substantive right.”¹³ This recognizes a distinction between procedure and substantive rights, and prevents the courts from creating rules that directly interfere with the adjudication of the merits. Federal Rule of Civil Procedure 1 provides that the rules will “govern the procedure in all civil actions and proceedings” and then gives an aspirational purpose: “They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”¹⁴ The 1993 committee notes explain that courts have an “affirmative duty . . . to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay.”

The explicit purposes and norms of the federal rules are discussed below. While I focus on the federal rules, this discussion applies equally to the civil rules in most states as well.

1. Uniformity. The first principle in the Rules Enabling Act is that the rules are “general” and apply to all “cases in the United States district courts (including proceedings before

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¹⁴ The same concerns animate the criminal rules: “These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.” Fed R. Civ. P. 2.
magistrates thereof) and courts of appeals.”

Many courts have echoed the idea that uniformity among all federal courts is one the main purposes for having rules of civil procedure that apply in all courts and all cases. Indeed, the fact that the rules could be applied to all disputes – large or small – was one of the principles behind the push for generalized rules in 1938. The widespread adoption of those rules in state courts has been a great help for practitioners and clients. While the same rule can be interpreted differently by each circuit, the major differences are confined to just a few rules. However, it is widely acknowledged in the literature that the virtues of uniformity conflict with the sprawl of detailed local rules in every district and the individual rules set by each judge.


16 United States v. Schine Chain Theatres, 1 F.R.D. 205, 207 (W.D.N.Y. 1940) (“The purpose in the adoption of the new Rules of Civil Procedure was to unify and simplify the procedure in District Courts in civil actions.”).


19 But see Stephen N. Subrin, Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits, 49 ALA. L. REV. 79, 84 (1997) (“There is not agreement on major procedural issues: Rule 23, Rule 68, pleading in civil rights cases, and Rule 11, to name a few.”)

Perhaps the clearest evidence of the strength of the norm of uniformity is the federal courts’ unwillingness to allow substantive state laws to modify the federal rules.\textsuperscript{21} Even when state courts explain why a particular law is substantive, and why that law was an attempt to cure what the legislature has determined to be unjust results under state law, some federal courts have refused to change their procedures.\textsuperscript{22} It could be argued that the uniformity concerns for local rules and state laws are different than those for contracts because they create differences across geographic regions, while contracts are limited to individual parties. But one chief purpose for promoting procedural contracts is the potential for provisions that will be tailored to and broadly applied across specific industries.

If local rules and state law are bad for uniformity, individually customizable litigation is much worse. Such contracts certainly have systemic benefits if the contract helps resolve the litigation more efficiently, all other things being equal. But courts have long believed that is rarely the case.\textsuperscript{23} Just deciding whether to enforce those contracts takes time. There will also be questions about how contract procedure interacts with other procedures. For example, if a contract changes the procedure during an appeal (waiving certain arguments or motions, limiting the size of appellate briefs, or even pre-granting consent to seek extensions), how does the

\begin{footnotesize}
\begin{enumerate}
\item Nute v. Hamilton Mut. Ins. Co., 72 Mass. (6 Gray) 174, 180, 184 (1856) (“The greatest inconvenience would be in requiring courts and juries to apply different rules of law to different cases, in the conduct of suits, in matters relating merely to the remedy, according to the stipulations of parties in framing and diversifying their contracts in regard to remedies.”).
\end{enumerate}
\end{footnotesize}
appellate court deal with a claim of duress when enforcement is sought during the appeal? Does it hold an evidentiary hearing? And in tort cases without a contract claim, it is far from clear how should the parties should seek to enforce contract procedure. Can they simply file a motion or do they need to bring a declaratory judgment on the contract at the beginning of a case (or amend the complaint or answer to include such a claim)? Truly customizable litigation would raise a host of complications, most of which will not be anticipated before the problem actually arises.

2. The separation of procedure and substance. The second principle, set forth in the Rules Enabling Act, may be the most powerful: the rules should not interfere with the adjudication of “any substantive right.” This is generally interpreted to mean that, whenever possible, procedure should not predetermine the outcome on the merits. Rule 1 confirms that where there is difficulty, the rules should be interpreted to secure a “just” determination. Professor Carrington has argued that a rule does not affect substantive rights “if its application is sufficiently broad to evoke no organized political attention of a group of litigants or prospective litigants who (reasonably) claim to be specially and adversely affected by the rule.”

But that test cannot apply to procedural contracts – they are custom-made to specific litigants. Fortunately, while the question of affecting substantive rights may be difficult in many contexts, there is more clarity to procedural contracts. The outcomes of fully-litigated cases on the merits can be taken as a baseline for what is “just” in our current system. The outcome under the standard procedures can be compared to that from application of a customized procedure to determine if the procedure affects the merits. If the contract procedure meaningfully changes the outcome, it interferes with the merits of the case to that extent. The importance placed on this

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24 Carrington, supra note 17, at 308.
principle would set a high bar for contract procedure – and could eliminate much of the purpose that parties may see in creating such procedures.

Certainly, contract procedure has great potential to create value by structuring incentives favoring performance and efficient breach, or by correcting for information asymmetries that the litigation rules cannot account for.²⁵ Many such contracts necessarily will be designed to influence the conduct of the parties by changing the potential outcomes in litigation. These laudable purposes to use procedure to affect substance – that may (or may not) be used to further society’s normative goals – conflict in many ways with the systems purposes of keeping procedure and substance as separated as possible. They can also conflict with the related principle that controversies to be decided on the merits, rather than on technical grounds.²⁶ As any practitioner knows, this principle has a strong following in the many state courts that avoid deciding cases on technical or procedural grounds whenever possible.²⁷

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²⁶ Carrington, supra note 17, at 301-02; Kuenzel v. Univ. Corloading & Distrib. Co., 29 F. Supp. 407, 410 (E.D. Pa. 1939) (the “entire spirit of all the rules as adopted is to the effect that controversies shall be decided upon the merits”); Developments--The Paths of Civil Litigation, 113 HARV. L. REV. 1752, at 1808-09 (1999-2000) (“Procedural fairness encompasses litigants’ access to the courts as well as assurances that . . . courts will evaluate claims and defenses solely on their merits.”); Rebecca S. Engrav, Relation Back of Amendments Naming Previously Unnamed Defendants Under Federal Rule of Civil Procedure 15(c), 89 CALIF. L. REV. 1549, 1568-70 (2001) (“As numerous courts and commentators have stated, one of the primary purposes of the Federal Rules of Civil Procedure is to facilitate adjudication of claims on the merits, rather than on technicalities.”).

²⁷ Nev. Rev. Stat. § 2.120 (1981) (rules are to “promot[e] the speedy determination of litigation upon its merits”); Crawford v. Crawford, 349 So. 2d 65, 66 (Ala. App. 1977) (purpose of rules “is to effect justice upon the merits of
3. **Just, Speedy, and Inexpensive.** The third main principle of civil procedure is given in Rule 1’s aspirational goal that the rules should result in “the just, speedy, and inexpensive determination of every action and proceeding.” This sentence “sets forth the basic philosophical principle for the construction of the rules,” and is often used by district courts as the key to interpreting the Federal Rules as a whole. It asks courts to balance the needs for justice, speed, and efficiency, and district courts have widely interpreted it as a source of discretion when interpreting and applying the other rules. There is some question about whether this discretion is exercised toward a stricter or more liberal (and forgiving) interpretations of the rules. But it seems clear that Rule 1 is wedded to the intention of the Rules Enabling Act that procedure should not overly interfere with the resolution on the merits.

The balancing test of “just, speedy, and inexpensive” can be directly applied to contracts to modify civil procedure. When interpreting ambiguities in such contracts, these principles can be applied to the claim and to renounce the technicality of procedure”); *Hill v. Phoenix*, 975 P.2d 700, 702 (Ariz. 1999) (purpose of rules is to “dispose of cases on the merits”).


29 Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U.L.R. 287, 297-98 (2010) ("there has been a noticeable shift over the past thirty years toward use of Rule 1 to support stricter interpretations of the Federal Rules").

30 Patrick Johnston, *Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Civil Procedure 1*, 75 B.U.L.R. 1325, 1392 (1995) (“Some courts employ the trinity to define their limits by the language of the Rules; others employ it to escape or exceed the limits sets by the Rules' language.”)

31 *Id.* at 1375-76 (“In particular, district courts still assume that the trinity mandates liberal interpretations of the Rules to facilitate resolutions on the merits.”) (collecting cases); Carrington, *supra* note 17, at 306-07 (“A major purpose of allowing for discretion in the Federal Rules of Civil Procedure is to permit the process to be forgiving and to reduce the frequency of arbitrary results from an act of negligence by a party or counsel.”).
supplement (or displace) concerns of discerning the intent of the parties, or other traditional interpretive doctrines. But it also provides useful, if vague, measuring stick to evaluate the desirability of such contracts as additions to those procedures to be enforced by a court.

4. **Purposes of individual rules.** Where procedural contracts purport to modify or replace specific rules, the explicit purposes of each rule should take precedence over the general norms outlined above. Rules are not simply defaults. Each serves an important purpose, many of which are explained in the rule itself or in the committee notes. For example, Rule 42(B) guides a district court’s discretion by listing the reasons for bifurcation: “[f]or convenience, to avoid prejudice, or to expedite and economize.” Contracts clauses controlling bifurcation that create unnecessary delay, expense, or prejudice should not be as readily enforced. Similarly, Rule 20 allows for the permissive joinder of parties to avoid the potential “for multiple trials involving many similar or identical issues.” It is meant “to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits.” So a court evaluating a contract restricting the parties from joining third-parties should do so in light of the purposes of Rule 20. Decisions discussing how district courts should exercise their discretion in the context of individual rules give guidance as to the norms that each rule is meant to endorse.

Those few rules that expressly authorize parties to stipulate to departures from the rules should be considered as more open to modification. Rule 15(a) allows parties to stipulate to

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amend the pleadings without the need for the court’s permission, and Rules 26(f) and 29 give the parties the ability to stipulate as to the discovery that will be allowed. However, each of these rules use the word “stipulate,” which connotes an agreement made by attorneys and made during litigation, and not a contract signed before the dispute. Even with contracts to modify discovery, courts should look to the well-established purposes of both discovery as a whole and to most relevant rules to the contract.

As seen in the next Part, the influence of the Rules Enabling Act and Rule 1 extend beyond the written rules. The entire judicial ecosystem, including practices predating the rules and new innovations, has been colored by their normative approach to procedure.

III. The Enforcement (and Non-enforcement) of Contractual Procedure

This Part surveys judicial enforcement of contact procedure to determine what norms actually influence courts’ decisions about the enforceability of contracts to customize litigation procedures. These cases reveal how the social and institutional purposes of procedure are


36 The purposes of discovery rules include obtaining and preserving information for trial and refining the disputed issues. Nutt v. Black Hills Stage Lines, Inc., 452 F.2d 480, 483 (8th Cir. 1971) (the discovery rules “provide each party with the fullest pre-trial knowledge of the facts and to clarify and narrow the issues”); Alimenta (U.S.A.), Inc. v. Anheuser-Busch Co., 99 F.R.D. 309, 312 (N.D. Ga. 1983) (the purpose of the discovery rules is “to disclose the real points of dispute between the parties and to afford an adequate factual basis in preparation for trial”); Woldum v. Roverud Constr., Inc., 43 F.R.D. 420, 420 (N.D. Iowa 1968) (“the overriding purpose of the federal discovery rules is to promote full disclosure of all facts to aid in the fair, prompt and inexpensive disposition of lawsuits”).

37 The survey reviews ten of the most-used types of contractual modifications to procedure. Arbitration is excluded because the Supreme Court has largely eliminated judicial discretion in enforcing arbitration clauses. For many types of contractual modifications, I included all of the cases I could find that contains a substantial analysis.
applied to various types of contractual procedure. While the importance of judicial legitimacy
and the sanctity of the decision-making have been discussed in the literature, this is the first
general survey of the reasons for the enforcement of contract procedures. General principles can
be distilled from these reasons, which should be considered in creating a theory of enforcement
for contract procedure. These principles will also serve as a practical guide for keeping theory
moored in the reality of what procedures courts may be willing to enforce.

The cases evaluating contract procedure fall into three general categories: first, contracts
that act as gatekeepers to a particular forum, such as forum selection clauses and appeal waivers;
second, contracts that place limitations on the available theories or relief, such as contractual
limitation periods and clauses limiting damages; and, third, contracts that are perceived to affects
the judge’s ability to decide merits of a case, such as limitations on discovery or the court’s
ability to consider evidence, and attempts to control the weight the court can give particular
evidence. Contractual modifications to procedure that have not previously received substantial
attention from courts and scholars are discussed at greater length than those already well-
understood. The next Part will summarize the norms found through this survey.

A. Contractual Provisions that act as Gatekeepers

The most familiar contractual modifications are those that act as gateways to a decision
maker, whether that is a particular court, a forum like arbitration, a particular set of laws, a jury,
or a court of appeals. These modifications are better accepted and receive less scrutiny.

1. Forum selection clauses

Many early cases viewed forum selection clauses with suspicion under the ‘‘ouster’’
document (the same doctrine that prevented enforcing arbitration until the Federal Arbitration
Act). Those cases argued that parties could not eliminate a court’s jurisdiction to hear a case by
private contract. The Supreme Court largely eliminated this doctrine in *The Bremen* and *Carnival Cruise*, and applied a new presumption in favor of enforcement against both consumers and a commercial party. The Court placed a “heavy” burden of proof on the party opposing enforcement based on “present-day commercial realities” and the need for certainty. Thus, a forum selection clause may only be overturned if it is unjust, a product of fraud or overreaching, if it is against a “strong public policy,” or if it would deprive a party of her day in court. More recent cases generally use the same formulation, stating that forum clauses are only rejected for “fraud or overreaching” or if the clause is otherwise “unreasonable or unjust.”

Courts often use the public policy exception to refuse to enforce clauses that should seemingly be enforceable. For example, one district court refused to enforce forum selection clause for lack of consent because the commercial party had no opportunity to object to the

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38 *But see Marcus,* * supra* note 32, at 1038; *Central Contracting Co. v. C. E. Youngdahl & Co.,* 418 Pa. 122, 133-34 (1965) (espousing the “modern view” that “[i]f the agreed upon forum is available to plaintiff and said forum can do substantial justice to the cause of action then plaintiff should be bound by his agreement”).


41 *Id.; see also Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.,* 709 F.2d 190, 202 (3rd Cir. 1983) (test for enforcement looks at “fraud or overreaching,” whether enforcement will “violate a strong policy of the forum,” or will be “so seriously inconvenient as to be unreasonable”).

42 *Preferred Capital, Inc. v. Associates in Urology,* 453 F.3d 718, 721 (6th Cir. 2006).
clause in an assignment of rights.\textsuperscript{43} Many other courts have refused to enforce choice of law clauses based on the “strong public policy” of protecting businesses or consumers of the forum of the lawsuit.\textsuperscript{44} Montana may be the most extreme example, with its supreme court refusing point-blank to enforce any forum selection clauses based on “public policy.”\textsuperscript{45}

One common public policy exception to enforcement is where a clause requires an employee to sue outside her home state. The Ninth Circuit found that an arbitration agreement was substantively unconscionable because the forum selection clause required parties in Hawaii to travel to California for the arbitration. Even though the plaintiff could afford to travel, the Court opined that other “[e]mployees will generally be in a far worse position” and struck the clause on general public policy.\textsuperscript{46} A Maryland court found that an employment contract favoring Florida was unenforceable because the manager could not be expected to have the funds “to travel to Florida for all proceedings, transport all witnesses to Florida, and transport his attorney to Florida.”\textsuperscript{47} Other courts have imposed the additional requirement that a contractual forum

\textsuperscript{43}Preferred Capital, Inc. v. Sarasota Kennel Club, No. 04-cv-2063, 2005 U.S. Dist. LEXIS 15238, *8-9 (N.D. Ohio, July 27, 2005) (assigned forum selection clause was invalid where party had no opportunity to object to the clause).

\textsuperscript{44}Nutracea v. Langley Park Investments PLC, No. 2:06-cv-201, 2007 U.S. Dist. LEXIS 6438, *7-9 (E.D. Cal. 2007) (clauses selecting New York as the governing law and forum were unenforceable because of California’s strong policy in preventing fraud on California corporations and New York’s minimal interest in the litigation).

\textsuperscript{45}State ex rel. Polaris Indus. v. District Court, 695 P.2d 471 (Mont. 1985); see id. at 472-73 (Sheehy, J., concurring) (“forum selection clauses may [not] set aside the significant growth of in personam jurisdiction law”); see also N.C.G.S. § 22B-3 (LexisNexis 2011) (“any provision in a contract entered into in North Carolina that requires the prosecution of any action [to be] heard in another state is against public policy and is void and unenforceable”).

\textsuperscript{46}Domingo v. Ameriquest Mortgage Co., 70 Fed. Appx. 919, 920 (9th Cir. 2003).

must have a “substantial relationship” to the parties or transaction.  

Seemingly contrary to *The Bremen*’s focus on international contracts, parties seeking to enforce clauses requiring suit in a foreign forum have particular trouble. One court denied a motion to dismiss based on a forum selection clause because it favored the “inconvenient” forum of Mexico despite the fact that one party was located in Mexico, because the factoring assignee of the contract did not have knowledge of the clause.  

As one commentator has summarized: “The reality of judicial decisions in this field gives rise to random discrimination against defendants advocating the foreign forum; depending upon where the plaintiff sues, the forum selection clause may or may not be honored.” Courts are often worried about the procedure and substance available in the foreign forum.

Many courts have turned to general unconscionability doctrines to invalidate forum selection clauses in consumer contracts that would otherwise be enforceable under *Carnival Cruise*. For example, a California appellate court found that the forum selection clause in an internet service provider’s membership contract was unconscionable because it required California consumers to file suit in Georgia to recover claims of about $50. Similarly, forum selection clauses are also commonly viewed as choice of law clauses for analysis under both

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unconscionability doctrines and public policy.\textsuperscript{52} In this way, courts will enforce a forum selection clause unless the substantive law of the contractual forum runs against that jurisdiction’s substantive law. Courts and scholars have criticized forum selection clauses for the inconvenience to consumer plaintiffs and the ability to choose a forum solely because of its substantive law.\textsuperscript{53}

2. \textit{Jury waivers}

The constitutional right to a jury trial in a civil case\textsuperscript{54} has led federal courts to require that contractual jury waivers be “knowing and voluntary.”\textsuperscript{55} Federal courts use a great variety of factors to determine whether a waiver is knowing and voluntary, including negotiability,

\begin{itemize}
\item \textsuperscript{52} Michael M. Karayanni, \textit{The Public Policy Exception to the Enforcement of Forum Selection Clauses}, 34 DUQ. L. REV. 1009, 1031-32 (1996) (“[T]he noncontractual forum, when considering the choice-of-law mode of the public policy exception to the enforcement of an exclusive forum selection clause, must make a choice-of-law determination . . . . If the law applicable in the selected forum is founded upon immoral or illegal standards, an American court will hold the forum selection clause invalid as against public policy.”).\textsuperscript{53}
\item \textsuperscript{54} The Seventh Amendment applies only to “suits at common law.” See Suja A. Thomas, \textit{A Limitation on Congress: “In Suits at common law”}, 71 OHIO ST. L.J. 1071 (2010) (arguing that the right to a jury trial in a civil case depends on the relief sought). No court appears to have considered the that a different test may apply to a jury trial waiver based on whether the Seventh Amendment applies or not.\textsuperscript{55}
\item \textsuperscript{55} \textit{Leasing Service Corp. v. Crane}, 804 F.2d 828, 833 (4th Cir. 1986) (consent must be “voluntary and informed.”).\textsuperscript{53}
\end{itemize}
conspicuousness, relative bargaining power, and business acumen.\textsuperscript{56} Like many other types of contractual waivers, courts will usually not imply a jury waiver and will narrowly construe any language purporting to waive the right.\textsuperscript{57} Although there is “no abstract public policy disfavors or limits contractual waivers of the right to civil jury trial,”\textsuperscript{58} many courts have use an analysis indistinguishable from unconscionability, such as whether the party opposing the waiver had no choice but to sign the waiver agreement as written for financial reasons.\textsuperscript{59}

Though different courts take slightly different approaches, the chief difference is what party bears the burden of proof regarding a waiver.\textsuperscript{60} The Supreme Court has long ago stated that courts will “indulge every reasonable presumption” that the right to a jury trial has not been


\textsuperscript{57} Jean R. Sternlight, Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial, 16 OHIO ST. J. DISP. RESOL. 669 (2001), explains the principles applied by courts: (1) jury waivers are not lightly implied; (2) courts look at many factors to determine whether the waiver was voluntary, knowing, and intentional; (3) the party seeking waiver often bears the burden of proof; (4) unsigned or uninitiated documents are suspect when used to support a jury waiver; (5) jury waivers must be narrowly construed.


\textsuperscript{59} National Equipment Rental, Ltd v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977).

\textsuperscript{60} Chester S. Chuang, Assigning the Burden of Proof in Contractual Jury Waiver Challenges: How Valuable Is Your Right to a Jury Trial?, (March 7, 2006). bepress Legal Series, Working Paper 1085. http://law.bepress.com/expreso/eps/1085 (tracing the inconsistent judicial treatment of such waivers to a disagreement over which party bears the burden of proof, and arguing that strong public policy considerations support placing the burden of proof on the party seeking to enforce the waiver).
waived. Some courts have followed this lead to create a presumption against waiver, while others have placed the burden on the party challenging the waiver. The Seventh Circuit requires jury waivers to be enforced exactly as any other contractual provision. Regardless of these differences, jury waivers are consistently enforced across the federal courts.

State courts provide more of a mixed bag. The supreme courts of California and Georgia have outlawed jury waivers in civil contracts based on the public policy underlying the state constitutional right to trial by jury. Even though the Texas Supreme Court has strongly supported jury waivers, the Texas appellate courts have not followed suit. One court

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61 Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937); see also Hodges v. Easton (1882) (“every reasonable presumption should be indulged against … waiver”).


63 IFC Credit Corp. v. United Bus. & Indus. Federal Credit Union, 512 F.3d 989, 993 (7th Cir. 2008) (reasoning that if buyers preferred juries, they would choose sellers that do not require a bench-trial clause).


65 Bank South N.A. v. Howard, 264 Ga. 339, 340 (1994) (holding that neither the Georgia constitution nor state statute provide for pre-litigation contractual waivers of jury trial); Grafton Partners, L.P. v. Superior Court of Alameda County, 36 Cal. 4th 944 (2005) (the right to trial by jury is considered so fundamental that ambiguity in the statute permitting such waivers must be “resolved in favor of according to a litigant a jury trial”).

66 In re Prudential, 148 S.W.3d 124 (Tex. 2004) (rejecting arguments that jury waivers were void as against public policy because they would grant parties the private power to fundamentally alter the civil justice system); In re GE
explained that “the right to a jury trial is so strongly favored that contractual jury waivers are strictly construed and will not be lightly inferred or extended.”68 This means that not only must the waiver be “voluntary, knowing, and intelligent,” but it must also be “done with sufficient awareness of the relevant circumstances and likely consequences.”69 Another court in a business case set up a “presumption against waiver” that could only be rebutted by an analysis of seven different factors.70 Many state courts will refuse to enforce a jury waiver that is not conspicuous.71 Others, however, broadly enforce jury trial waivers.72

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67 David F. Johnson, The Enforcement of Contractual Jury Waiver Clauses in Texas, 62 BAYLOR L. REV. 649 (2010) (“A fair reading of the Texas Supreme Court's opinions leads to the conclusion that the Court favors their use and enforceability. The same is not true in at least the Fort Worth Court of Appeals and the Houston Fourteenth District Court of Appeals. Those courts seem hostile to the enforceability of jury waiver clauses.”).


69 Id.

70 Mikey’s Houses, LLC v. Bank of Am., N.A., 232 S.W.3d 145, 150 (Tex. App. 2007); id. at 153 (requiring an analysis of “(1) the parties’ experience in negotiating the particular type of contract signed, (2) whether the parties were represented by counsel, (3) whether the waiving party’s counsel had an opportunity to examine the agreement, (4) the parties’ negotiations concerning the entire agreement, (5) the parties’ negotiations concerning the waiver provision, if any, (6) the conspicuousness of the provision, and (7) the relative bargaining power of the parties.”).


3. **Agreements not to appeal**

Courts also generally enforce appellate waivers, though almost every case involves a post-dispute waiver and courts, in dicta, appear to disfavor ex ante waivers.\(^{73}\) The only cases that altogether reject appellate waivers are very old.\(^{74}\) The basis for their rejections is closely tied to the “ouster” doctrine that justified the rejection of forum selection clauses and arbitration agreements.\(^{75}\) As one court explained, a court’s power to adjudicate disputes “depends not on the agreement of parties, but on the law” and therefore “a statement of counsel, or a promise, even, by him, that he will not take a case from a lower court to this court” is ineffective to prevent the court from exercising jurisdiction.\(^{76}\) These courts also refused to accept appellate

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\(^{73}\) See 2 AM. JUR., APPEAL AND ERROR, § 204 (2010) (“Though there are a few cases to the contrary, the rule prevailing in the great majority of the jurisdictions is that an [appellate waiver] is valid and binding, and, when properly pleaded, will constitute a bar to proceedings taken in violation of the agreement.”).

\(^{74}\) I found only one case that categorically rejected the idea of an appellate waiver. See Runnion v. Ramsay, 93 N.C. 410, syll (1885) (“4. A party can not lose the right to appeal by an agreement that the judgment of the court below shall be final, and that neither party will appeal therefrom.”).

\(^{75}\) See Home Ins. Co. v. Morse, 87 U.S. 445, 451 (1874) (“[A]ny citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.”). This doctrine did not apply to stipulations within litigation. Shutte v. Thompson, 82 U.S. 151, 159 (1873) (“A party may waive any provision, either of a contract or of a statute, intended for his benefit”);

\(^{76}\) Fahs v. Darling, 82 Ill. 142, 144-45 (1876); see also id. (“It does not comport with the solemn and permanent character of the judgment, that it shall be liable to be set aside and annulled, at however remote a period, upon parol proof, simply, that it was obtained in violation of the terms of an agreement.”); Wallace v. Evans, 109 Ga. App. 692, 693-94 (1964) (“We do not think that the stipulation [waiving appellate rights] was intended to mean that either
waivers because of the appellate court’s duty to police the judgments of the lower courts.  

Many courts have explicitly or implicitly assumed that agreements not to appeal can only be made once the parties are before the lower court. One early New York decision explained that the parties are “competent” to waive appellate rights “in the preliminary steps of the litigation” The court also described such an agreement was “a mutual stipulation, made between the parties in the court from which the appeal is taken.” This assumption has been repeated so often it may be considered a formal limitation in many courts. The paucity of pre-dispute waivers of appellate rights is probably due to the fact that most appellate waivers are

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77 Sanders v. White, 22 Ga. 103, 104 (1857) (“This Court can take no notice of the bargain between the parties, shown in the record, that if the plaintiff would allow the defendant a jury trial, he would abide the verdict, whatever it might be. The defendant's refusal to comply with his contract is no ground upon which we can refuse to determine on the case, as it properly comes up.”); Duffy v. Odell, 117 Ill. App. 336, 341 (1904) (“The promise of appellant to waive the right of appeal and the right to sue out a writ of error, was not incorporated in the record of the court. It is found in the agreement only. Such a promise does not, estop the party making it from taking the case to an appellate tribunal.”).

78 Townsend v. Masterson, Smith & Sinclair Stone Dressing Co., 15 N.Y. 587, 589 (1857) (“It is perfectly competent for the parties to determine whether they will place the question in dispute in a condition to be reviewed here.”).

79 Id. at syll.

80 Johnson v. Halley, 8 Tex. Civ. App. 137, 138 (1894) (“we see no good reason why parties should not be allowed, upon sufficient consideration, to waive their right of appeal after the judgment has been rendered and before the record has been filed”); United States Consolidated Seeded Raisin Co. v. Chaddock & Co., 173 F. 577, 579 (9th Cir. 1909) (agreement may be made “either before or after trial”); Nail v. Browning, 74 Fla. 108 (1917) (waiver must be done “before trial or judgment by express agreement” and “object being to settle their differences and terminate the litigation”); Harmina v. Shay, 101 N.J. Eq. 273, 137 A. 558 (1927) (waiver may be done “by express agreement or stipulation before trial, or judgment”).
created in a settlement agreement for parties that have already litigated substantially. Indeed, most cases with pre-dispute waivers involve a settlement of portions of the case before final judgment, with part of the consideration being that there will be no appeal from the judgment.

Outside of the arbitration context, there are therefore very few cases dealing with pre-dispute waivers of the right to appeal. Of the four truly pre-dispute (and non-arbitration) cases that I have located, two involved property settlement agreement signed in preparation for a divorce. In one, the court noted that parties cannot bar themselves from seeking redress from the courts as a matter of public policy, but could agree not to appeal the decision once the lower court approved their agreement. A more recent Virginia case relied on the special nature of a property settlement agreement, and opined that a no-appeal clause “forces the parties to realize that the litigation must end and that the ruling of the trial court is final. Given the contentious

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81 Charles Alan Wright, et al., 15A FEDERAL PRACTICE AND PROCEDURE § 3901, at 19 (2d ed. 1992) (“The most likely occasion for waiver arises from a settlement agreement that calls for resolution of some disputed matter by the district court, coupled with an explicit agreement that the district court decision shall be final . . .”).

82 In re Long, 946 S.W.2d 97, 99 (Tex. App. 1997) (“Since he has expressly agreed not to appeal from the orders in question in this appeal, we have no option but to bind him to the terms of his agreement.”); Lybarger v. Lee Wilson Eng’g Co., 793 F.2d 136, 139 (6th Cir. 1986) (case settled on the morning of trial); Speeth v. Fields, 71 N.E.2d 149 (Ohio App. 1946) (where parties agreed to “an entry in favor of plaintiff” and “defendant further agreed to waive the right of appeal for a period of three months” . . . “the proper remedy to procure the dismissal of an appeal, filed in violation of such agreement, is by motion.”); Elliott & Ten Eyck P’ship v. City of Long Beach, 67 Cal. Rptr. 2d 140 (Cal. App. 1997) (parties contracted for a bench trial with no appeal); Danheiser v. Germania Savings Bank & Trust Co., 137 Tenn. 650 (1917) (settlement during trial); Cole v. Thayer, 25 Mich. 212, 213 (1872) (contract agreeing to a new trial provided “that no steps would be taken or suffered by them for either a review thereof or for a new trial”).

nature of some of these cases, such provisions protect both parties by resolving the dispute more quickly and minimizing costs.” 84 The final case was simply a weak attempt to call a payment provision an appellate waiver, and was rejected as such. 85

Most cases involving a pre-dispute appellate waiver are in the context of the waiver of appellate review of judgments confirming arbitration awards. While courts do not generally allow parties to waive a district court’s review of an arbitration award – some redress to the courts must be allowed – they allow parties to waive their right to appeal from the confirmation or vacatur of the award. Waiver is allowed “so long as the intent to do so is clear and unequivocal.” 86 Courts, however, seldom find language that is clear enough to meet that standard. Even where parties have explicitly stated that an arbitration award is “non-appealable,” courts interpret that language to only mean the parties cannot appeal the arbitration award to another arbitrator, which they usually cannot do anyway. Even seemingly clear language is often construed as only waiving “a right to appeal the district court’s judgment confirming or vacating the arbitration decision.” 87 The words “non-appealable” in an arbitration agreement are thus usually given no meaning, because the same procedures will apply either

84 Burke v. Burke, 52 Va. App. 183, 193-94 (2008) (“We hold that public policy does not prevent the parties to a PSA from contracting away their right to appellate review of matters addressed therein.”).

85 Bischel v. Fire Ins. Exchange, 1 Cal. App. 4th 1168, 1172 (1991) (“Bischel contends the appeal should be dismissed on the basis that Exchange has waived or forfeited any appeal rights based on a policy provision that it would pay loss payments within 60 days of a court judgment. The contention is without merit.”).

86 Mactec, Inc. v. Gorelick, 427 F.3d 821, 830 (10th Cir. 2005).

87 Southco, Inc. v. Reell Precision Mfg. Corp., 331 Fed. Appx. 925, 927 (3d Cir. 2009); Rollins, Inc. v. Black, 167 Fed. Appx. 798, n.1 (11th Cir. 2006) (such language “simply means the parties have agreed to relinquish their right to appeal the merits of their dispute; it does not mean the parties relinquish their right to appeal an award resulting from an arbitrator’s abuse of authority”); Tabas v. Tabas, 47 F.3d 1280, 1288 (3d Cir. 1995) (en banc) (same).
way.

There is another small group of cases where the appellate waiver was negotiated after the dispute arose but before either party had begun litigation.\(^8\) In those cases, the parties stipulated to the facts, and then stated that the trial court’s judgment would be final.\(^9\) One case with a post-dispute but pre-litigation appellate waiver shows some of the potential problems with such waivers.\(^9\) As the dissenters point out, “[t]he real difficulty is confronted when, before the particular grievance has arisen, and the parties don’t even know what it is, or is going to be, the agreement states they will not seek redress therefrom in court.”\(^9\) This uncertainty meant that the resulting judgment might be “so totally incongruous to their rights, or the remedy sought, that it would be intolerable to either, or both of them, for that matter.”\(^9\) The dissenters wondered how the parties could have a knowing and intentional waiver of a judgment they knew nothing about.

Though appellate waivers are uncommon they are usually enforced after a review of four factors.\(^9\) The first, the “knowing and voluntary” standard, is discussed above.\(^9\) Because this is

\(^8\) *Harmina*, 101 N.J. Eq. 273; *Brown v. The Gillette Co.*, 723 F.2d 192, 192-93 (1st Cir. 1983) (dissmissing appeal from pre-litigation settlement stating that the district court’s decision would be “final and binding”).

\(^9\) *Id.*
usually interpreted that the parties must have understood what they were giving up, courts are less comfortable enforcing appellate waivers the farther removed they are from the actual appeal. The other three are discussed below.

1. **Clear language.** Like most waivers, “any waiver of the right to appeal must be clear and express” and “any doubt will be resolved against a waiver of the right to appeal.”95 In an opinion expressing some doubt about the ability to waive an appeal at all, the First Circuit affirmed that “[t]he intention to waive the right to appeal must appear clearly from the stipulation.”96 This presumption against waiver has allowed many courts to get around waiver. Courts have interpreted waiver agreements as applying only to a jury’s verdict and not to other damages awarded by the district court.97 One court construed a waiver provision calling for “exclusive jurisdiction to decide any and all issues” as not unambiguously excluding appellate review since it could be construed as a venue provision.98

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94 *McCall v. United States Postal Serv.*, 839 F.2d 664, 666-67 (Fed. Cir. 1988) (where a choice is “knowing and voluntary, the public interest against involuntary waivers of rights” does not apply).

95 *Guseinov v. Burns*, 145 Cal. App. 4th 944, 952-953 (2006); *Uhl v. Komatsu Forklift Company, Ltd.*, 512 F.3d 294, 301 (6th Cir. 2008) (there is “a high bar for the waiver of appealability”); *but see Winsor v. Schaeffer*, 224 Mo. App. 1220, 34 S.W.2d 989 (1931) (“A party may not only waive his right to appeal by express agreement, or stipulation, but a waiver may also be implied, or he may be estopped, by acts or agreements in writing entered into after the rendition of the judgment, which agreements are inconsistent with the right of appeal.”).

96 *Payne v. SS Tropic Breeze*, 423 F.2d 236, 238 (1st Cir. 1970) (“Assuming that an agreement to waive an appeal is enforceable, we cannot agree that this stipulation constitutes such an agreement.”).

97 *Vargo v. Mangus*, 94 Fed. App’x 941, 942 (3rd Cir. 2004) (noting that the defendants were appealing the award of delay damages and not the jury’s verdict, which was covered by a “high-low agreement”); *see also Rodriguez v. Villarreal*, 314 S.W.3d 636, 645-46 (Tex. App. 2010).

2. *Independent consideration and after-the-fact fairness.* Courts usually require consideration in addition to the promise not to appeal from the other side, justifying enforcement with the benefits received from the contract by the party objecting to the waiver. This is often manifested as an ex post explanation of the benefits that came from the contract containing the waiver. In one recent case, the Ninth Circuit explained that, in addition to the appellate waiver, the agreement included the waiver of a jury trial and of “the right to enforce certain local procedural rules.”99 Enforcing the waiver, the court concluded that the other party’s agreement to waive a jury trial and procedural requirements “made the action less expensive and time consuming” for the objecting party.100 In another case, the Federal Circuit gave a lengthy explanation of how the appellate waiver in that case “reflects a rational judgment” at the time of contracting.101 Noting that parties “are often forced to make difficult choices which effectively waive statutory or even constitutional rights,” it explained how the party had already “obtained a substantial benefit from the agreement” even though it precluded an appeal.102

Why would courts undertake this analysis at all, since such agreements provide their own consideration by definition? Each side tenders its promise not to appeal, so no additional consideration is needed. The modern retention of the traditional test requiring an additional item of consideration may be a response to the inability to appeal a result that may have appeared

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100 *Id.*  
101 *McCall*, 839 F.2d at 666-67.  
102 *Id.*
remote at the time of contracting.\textsuperscript{103}

3. \textit{Systemic concerns}. Regardless of when the waiver was signed, courts have expressed misgivings about the systemic problems arising from appellate waivers. Appellate courts are reticent to give up their power to correct egregious errors through appeal. Once recent case from Texas interpreted away an appellate waiver in a high/low agreement for the sole reason that, in a counter-factual and “unlikely” scenario, “the trial court [might have] rendered judgment for an arbitrary sum that was completely unrelated to the verdict or if the verdict had been subject to the high-low agreement, but the trial court rendered a judgment which failed to comport with the minimum or maximum recoveries.”\textsuperscript{104} The court refused to construe the appellate waiver as binding because it considered giving up the right to appeal such a judgment as an “absurd result.” It explained that the “waiver of the right to appeal the verdict cannot translate to waiver of the right to appeal improper rendition of judgment on the verdict.”\textsuperscript{105}

A dissent in \textit{C.G. Horman Co. v. Lloyd} elaborated on the need for appellate courts to correct judgments that are clearly wrong. In that case, the parties agreed that they could file suit within one year to determine rights under a certain agreement.\textsuperscript{106} The agreement stated that “Both parties agree to abide by the decision of the District Court and no appeal will be taken to

\textsuperscript{103} \textit{Phelps v. Blome}, 150 Neb. 547, 556 (1948) (“we conclude that plaintiff's promise to delay execution of the writ of restitution was a sufficient consideration to support defendants' promise to forego the right to appeal’’); \textit{Gramling v. Food Machinery & Chem. Corp.}, 151 F. Supp. 853, 856 (D.S.C. 1957) (“Defendant is bound by its contract to accept the award as final, and not to appeal from it. If either party could now attack the award, that contract would be meaningless.”); see \textit{United States Consol. Seeded Raisin Co.}, 173 F. at 579.

\textsuperscript{104} \textit{Rodriguez}, 314 S.W.3d at 645-46.

\textsuperscript{105} \textit{Id}.

\textsuperscript{106} \textit{C. G. Horman Co.}, 28 Utah 2d at 114.
the Supreme Court.”\textsuperscript{107} The majority ostensibly enforced the agreement: “the agreement of the parties not to appeal is valid and should prevail, and we so hold.”\textsuperscript{108}

The dissenters began by noting that parties may agree to forgo an appeal after a judgment because “each party knows what his rights and obligations are.”\textsuperscript{109} Noting that the right to appeal is established by the state constitution, the dissent found that such rights “which are expressly assured by the law” should not be taken away by private contract:

Where parties have agreed to abide by a decision of a court before they even know what it is, or will be, it is certainly within the realm of possibility that a court might render a judgment so totally incongruous to their rights, or the remedy sought, that it would be intolerable to either, or both of them, for that matter. There surely should be some safety valve to correct such a situation and this would be the right of appeal.\textsuperscript{110}

As evidence, the dissent pointed to the majority’s decision. Though the majority said it would enforce the appeal waiver, it still reversed the trial court’s improper award of $6,000 in attorney’s fees. The dissenters pointed out that if no appeal were truly available, then that award should not have been corrected – or even an improper award a hundred times the size or any other “unconscionable or ever so outrageous” decision.\textsuperscript{111} They conclude that pre-dispute appellate waivers are “inimical to the spirit and purpose of our system of justice” and “contrary to clearly expressed fundamental law.”\textsuperscript{112}

These concerns are echoed in the cases refusing to allow the contractual elimination of review over arbitration awards when looking for confirmation. The Second Circuit explained

\begin{itemize}
\item \textsuperscript{107} \textit{Id.} at 125.
\item \textsuperscript{108} \textit{Id.}
\item \textsuperscript{109} \textit{Id.} at 117 (Crockett, J., dissenting).
\item \textsuperscript{110} \textit{Id.} at 128.
\item \textsuperscript{111} \textit{Id.}
\item \textsuperscript{112} \textit{Id.} at 118-119.
\end{itemize}
that “federal courts are not rubber stamps” and cannot enforce contracts that require them to confirm an award “tainted by partiality, a lack of elementary procedural fairness, corruption, or similar misconduct.” It may be said there is a public policy that places the need for appellate supervision of severely erring lower courts over a parties’ contractual waiver of appellate rights before that judgment is known.

Even though courts lean over backwards to invalidate appellate waivers, some courts have recognized their own self-interest in enforcement: “Such agreements are upheld on the ground of public policy in encouraging litigants to accept, as final, decisions of courts of original jurisdiction.” This argument for enforcing waives is most persuasive in the context of arbitration which has the express purpose of reducing litigation costs, and where the Federal Arbitration Act already eliminates appeals from decisions enforcing arbitration.

**B. Changes to the Available Theories or Relief**

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113 *Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 64 (2d Cir. 2003); *Van Duren v. Rzasa-Ormes*, 394 N.J. Super. 254, 266 (2007) (“the complete elimination of judicial review [over arbitration awards] at the initial trial level” is against public policy); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 937 & 936 n.8 (10th Cir. 2001) (“in the absence of clear authority to the contrary, parties may not interfere with the judicial process by dictating how the federal courts operate.”) (citation omitted).

114 *Mt. Hope Dev. Assocs. v. Mt. Hope Waterpower Project, L.P.*, 154 N.J. 141, 152 (1998) (“For instance, because of this Court’s supervisory function over the courts, we may determine that an award that is confirmed, modified, or vacated by a biased court should be subject to review beyond that which is provided for in N.J.S.A. 2A:23A-18.”).

115 *Harmina*, 101 N.J. Eq. 273.

116 *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 829 (10th Cir. 2005) (noting that if the purpose of the FAA is to reduce litigation costs “it makes sense to uphold contractual provisions that support that aim while striking down provisions that subvert it”); *Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 63 (2d Cir. 2003) (judicial support for arbitration is “in part because arbitration awards are subject to minimal judicial review”).
This Section discusses contracts that change the available theories or relief. These contracts attract more scrutiny regarding the reasonableness of the limitations and the ability of the plaintiff to get some form of relief. There is often substantial judicial resistance to enforcing these types of contracts.

1. Contractual statutes of limitations

Courts have imposed their own restrictions on contractual statutes of limitations. The Supreme Court has long held that, in the absence of a statute to the contrary, a contract may limit the time for bringing an action to less than the statutory period.\(^{117}\) Many judges, however, are uncomfortable with changing statutes of limitations that they perceive as fair. As a result, courts often strain to construe contracts modifying those limits as either not covering the dispute or as imposing the statutory time periods. Some have taken less subtle routes to refuse to enforce contractual statutes of limitations. For example, Delaware courts allow parties to shorten a statute of limitation by contract, but not to extend it.\(^{118}\) They justify this position by pointing to the public policy behind a Delaware statute applying that doctrine to sales contracts, and saying there is no reason to apply that policy to statutes of limitations generally.\(^{119}\)

There is a range of practice regarding whether tolling provisions can apply to contractual limitation periods. Some find that the contractual provisions automatically supersede state law

\(^{117}\) \textit{Order of United Commercial Travelers v. Wolfe}, 331 U.S. 586, 608 (1947) (“[I]n the absence of a controlling statute to the contrary, a provision in a contract may validly limit . . . the time for bringing an action on such contract . . . provided that the shorter period itself shall be reasonable.”).


\(^{119}\) \textit{Rumsey Electric Co. v. University of Delaware}, 358 A.2d 712, 714 (Del. 1976) (“a statute of limitations does not proscribe the imposition of a shorter limitations period by contract.”); DiVincenzo, supra note 118, at 41.
tolling doctrines,\textsuperscript{120} often holding that enforcement is proper as long as the contract “affords a reasonable time within which to file suit.”\textsuperscript{121} Others prohibit the enforcement of contractual statutes of limitations in a way that would punish a plaintiff who was prevented from discovering the cause of action, or simply hold that parties cannot contract around the discovery rule.\textsuperscript{122} One court explained that “if a legislated limitations period must yield to a judicially created delayed discovery rule, how can it be argued a contractually agreed limitations period is immune from that rule and its underlying rationale?”\textsuperscript{123} Courts generally reject limitations periods that they find to be unreasonably short, based on the circumstances.\textsuperscript{124}

Interestingly, many cases view reasonableness in light of what happened in that case,


\textsuperscript{121} Goot v. Metro. Gov’t of Nashville, No. M2003-02013, 2005 Tenn. App. LEXIS 708, *40-41 (Nov. 9, 2005) (“the discovery rule cannot supercede a contractually agreed upon limitations period as along as the agreed upon period affords a reasonable time within which to file suit”).

\textsuperscript{122} Weatherly v. Universal Music Publishing Group, 23 Cal. Rptr. 3d 157, 161-62 (Cal. App. 2004) (“[n]o authority exists which sanctions a contractual provision permitting parties to opt out of the benefits of the discovery rule”); Moreno v. Sanchez, 106 Cal. App. 4th 1415, 1433 (2003) (“there exists an implicit consensus that an effective judicial remedy against professionals or skilled crafts people requires accrual occur only upon discovery”).

\textsuperscript{123} Stephan v. Goldinger, 325 F.3d 874, 877 (7th Cir. 2003) (tolling doctrines should apply to contractual limitations periods, as long as the time is not tolled beyond the statutory limitations period; this serves the public purpose of preventing stale claims). Even though they may be reversed, see New Welton Homes v. Eckman, 786 N.E.2d 1172, 1177 (Ind. App. 2003), rev’d New Welton Homes v. Eckman, 830 N.E.2d 32, 35 (Ind. 2005), many judges are very uncomfortable with applying a contractual limitations period to stop an otherwise good claim.

\textsuperscript{124} Moreno, 106 Cal. App. 4th at 1433 (a contractual provision is unreasonable “where it only gives homeowners a single year to discover their causes of action against home inspectors”).
rather than the traditional “time of bargaining” analysis. Unfortunately for those drafting such contracts, what constitutes a reasonable time will therefore depend on the circumstances – an after-the-fact review that is impossible to predict.\textsuperscript{125} In some jurisdictions, practitioners have found that forum selection clauses are only enforceable under the most ideal conditions. Some have called for the application of such ex post review in employment agreements.\textsuperscript{126}

New York courts take this one step farther, holding that a limitations period cannot be waived unless the parties know what substantive claim is being waived. They hold that the validity of an agreement to extend the statute of limitations “depends initially on the time at which it was made.”\textsuperscript{127} If the agreement to “waive” or extend the Statute of Limitations is made at the inception of liability it is unenforceable because a party cannot “in advance, make a valid promise that a statute founded in public policy shall be inoperative.” New York courts also justify this idea by stating that such a promise is necessarily “the result of ignorance . . . or was simply unintended.”\textsuperscript{128} Therefore, the statute of limitations may be extended only after accrual of the cause of action – because the parties must go into such an agreement with open eyes.\textsuperscript{129}

At least one federal court has applied this principle to ERISA to invalidate a contractual


\textsuperscript{126} Joel C. Tuoriniemi & Roger W. Reinsch, \textit{Return to Camelot: A Statutory Model for a Judicial Examination of Employment Agreements with Shortened Period of Limitations}, 35 OHIO N.U.L.R. 751 (2009) (proposing factors that a court should consider when faced with an employee’s forum selection clause, many of which require an ex post view of whether the limitations period is reasonable).


\textsuperscript{128} \textit{Id}.

\textsuperscript{129} DiVincenzo, \textit{supra} note 118, at 38.
Some states have explicitly limited the contractual extension or reduction of the statutes of limitations.\textsuperscript{130} Limitations on the amount or type of damages

Courts generally allow parties to reasonably limit the amount or type of damages available under a contract. They usually enforce clear provisions that limit the damages to a certain amount so long as the parties are still liable for willful misconduct.\textsuperscript{131} Alaska extended the public policy in a statute barring indemnity for sole negligence in construction contracts to apply to nearly any limitation of liability clauses as attempts to bargain away liability.\textsuperscript{132}

\textsuperscript{130} See White \textit{v. Sun Life Assur. Co. of Canada}, 488 F.3d 240 (4th Cir. 2007) (refusing to enforce limitations period because the ERISA plan allowed a claimant’s cause of action to accrue before the administrative process ended); \textit{but see Salisbury v. Hartford Life and Acc. Co.}, 583 F. 3d 1245 (10th Cir. 2009) (enforcing limitations period in ERISA plan but still giving the “claimant at least a reasonable time after exhaustion of administrative remedies”).

\textsuperscript{131} Mich. C.L. § 440.2725(1) (2012) (“By the original agreement the parties may reduce the period of limitation [for breach of contract] to not less than 1 year but may not extend it.”); Fla. Stat. § 95.03 (2011) (“Any provision in a contract fixing the period of time within which an action arising out of the contract may be begun at a time less than that provided by the applicable statute of limitations is void.”); \textit{Burroughs Corp. v. Suntogs of Miami, Inc.}, 472 So. 2d 1166, 1169 (Fla. 1985) (a “contractual provision shortening the period of time for filing a suit was not contrary to a strong public policy” because the statute seeming to forbid such provisions is “riddled with exceptions”); Tex. Civ. Prac. & Rem. Code § 16.070 (2012) (prohibiting shortening a limitations period to less than two years); Md. Ins. Code Ann. § 12-104 (LexisNexis 2012) (an insurance contract cannot set a shorter time to bring an action than required by the state where the insurance contract is issued or delivered).

\textsuperscript{132} Nahra \textit{v. Honeywell, Inc.}, 892 F. Supp. 962, 969-70 (N.D. Ohio 1995) ($10,000 damages limitation clause is enforceable “so long as the party invoking the provision has not committed a willful or reckless breach.”); \textit{Samson Sales, Inc. v. Honeywell, Inc.}, 12 Ohio St. 3d 27 (1984) (it is “beyond comprehension that the parties intended that damages in the amount of $50.00 should follow the negligent breach of the contract” to provide a security system).

\textsuperscript{133} \textit{City of Dillingham v. CH2M Hill Northwest, Inc.}, 873 P.2d 1271, 1277-78 (1994).
California has upheld a similar clause, explaining that there was no personal injury, there was an actual opportunity for negotiations, and that the upper limit on liability ($50,000 or the amount of his fee) was reasonably high.\(^{134}\)

It will well-established that a party cannot generally escape liability for its own fraud or intentional misconduct.\(^{135}\) But wary of encouraging even negligence, most courts hold that language absolving a party’s own negligence must be “explicit and comprehensible” and be strictly construed.\(^{136}\) Courts often parse the effect a particular clause has on public policy. Virginia courts have forbidden clauses that “extinguish one party's right to recover for future bodily injuries caused to that one party by the other party's negligence.”\(^{137}\) The court explained that the purpose of the policy is to deprive “the injured party of all possibility of recovery” and to lower “the released party’s motivation to exercise ordinary care to prevent harm.”\(^{138}\)


\(^{135}\) *Simon v. Corbetta Constr. Co.*, 391 F. Supp. 708, 709 (S.D.N.Y. 1975) (“agreements which seek to indemnify a party for future intentional misconduct are not” enforceable); *Feuer v. Menkes Feuer, Inc.*, 8 A.D.2d 294, 297 (N.Y. App. 1959) (“one may not contract for indemnification for the consequences of a criminal or illegal act to occur in the future”); *Farnham*, 60 Cal. App. 4th at 73 (directors cannot be exempted for liability for “willful” conduct); *Mankap Enter., Inc. v. Wells Fargo Alarm Servs.*, 427 So. 2d 332, 333-34 (Fla. App. 1983) (“a party cannot contract against liability for his own fraud in order to exempt him from liability for an intentional tort”).

\(^{136}\) *Powers v. Superior Court*, 196 Cal. App. 3d 318, 320 (1987) (“Release, indemnity and similar exculpatory provisions are binding on the signatories and enforceable so long as they are...clear, ‘explicit and comprehensible in each [of their] essential details.’”); *but see Levine v. Shell Oil Co.*, 28 N.Y. 2d 205, 212 (1971) (rejecting the idea that “contracts will not be construed to indemnify a person against his own [active] negligence unless such intention is expressed in unequivocal terms” in favor of a natural reading of such contracts).


distinguished pure indemnity provisions because they did not prevent the injured party from recovering.\textsuperscript{139} The indemnitee was still directly liable for the injury, noting “the existence of an indemnity provision does not guarantee reimbursement” to the indemnitor.\textsuperscript{140}

Interestingly, some courts do allow sophisticated parties to contract around intentional misconduct through indemnities – so long as the person still has the right to recover from someone.\textsuperscript{141} Parties seeking to contract around fraud in Delaware must meet three criteria: the language must be unambiguous, the parties must be sophisticated, and “a party cannot limit its liability for false statements within the contract, even though Delaware law allows total exculpation for lies outside the contract.”\textsuperscript{142} Some other courts allow contractual disclaimers to prevent parties from suing over fraudulent statements outside of the contract.\textsuperscript{143} Others follow the more traditional view that a party cannot contract around fraud, or attempt to ensure that

\textsuperscript{139} Estes, 273 Va. at 366-67.

\textsuperscript{140} Id.

\textsuperscript{141} Farnham v. Sequoia Holdings, Inc., 60 Cal. App. 4th 69, 71 (1997) (enforcing waiver of right to sue “officers, directors, employees and shareholders of his employer, only preserving claims against his employer”); Tunkl v. Regents of University of Cal., 60 Cal. 2d 92, 101 (1963) (contractual limitation on liability of directors is valid if “the injured party retains his right to seek redress from the corporation”); Northwest Bank & Trust Co. v. First Ill. Nat’l Bank, 354 F.3d 721, 725-26 (8th Cir. 2003) (applying Iowa law); Slack v. James, 614 S.E.2d 636, 640-41 (S.C. 1996); Bates v. Southgate, 31 N.E.2d 551 (Mass. 1941); see also REST. (2D) CONTRACTS § 195 (1981) (contracts waiving liability for intentional or reckless harm is unenforceable on grounds of public policy”).

\textsuperscript{142} Steven M. Haas, Contracting Around Fraud Under Delaware Law, 10 DEL. L. REV. 49, 50-51 (2008).

\textsuperscript{143} Rissman v. Rissman, 213 F.3d 381, 384 (7th Cir. 2000) (“a written anti-reliance clause precludes any claim of deceit by prior representations”); One-O-One Enters., Inc. v. Caruso, 848 F.2d 1283, 1286-87 (D.C. Cir. 1988); Harsco Corp. v. Segui, 91 F.3d 337, 343 (2d Cir. 1996).
parties knew exactly what types of fraud they were waiving during contract formation.\(^{144}\)

As important as fiduciary duties are may be, court often allow their waiver between sophisticated business parties. Under New York law, parties “can agree to waive legal claims based on the fiduciary duties that arise from their relationships.”\(^{145}\) The Second Circuit has, enforced a contractual waiver of fiduciary duty claims in a voting agreement between stockholders and the directors of the defendant corporation. It found that every plaintiff had signed an agreement that explicitly exempted the directors from “fiduciary responsibility” when exercising their votes.\(^{146}\) The same result obtains under Ohio law.\(^{147}\)

Public policy can invalidate provisions that waive specific legal theories. Courts interpret federal antitrust laws to prevent parties from contractually waiving any right that would impair their ability to seek damages under those laws.\(^{148}\) Under that policy, an agreement which confers

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\(^{146}\) *Cooper v. Parsky*, 140 F.3d 433, 439 (2d Cir. 1998).

\(^{147}\) *McConnell v. Hunt Sports Enters.*, No. 98AP-1386, 132 Ohio App. 3d 657, 687 (1999) (“an operating agreement . . . may, in essence, limit or define the scope of the fiduciary duties imposed upon its members.”).

\(^{148}\) *Kristian v. Comcast Corp.*, 446 F.3d 25, 48 (1st Cir. 2006) (contractual waiver of treble damages was invalid as a matter of public policy under the antitrust laws); *Gaines v. Carrollton Tobacco Bd. of Trade, Inc.*, 386 F.2d 757, 759
evens “a partial immunity from civil liability for future violations of the antitrust laws is inconsistent with the public interest.” 149 Actions under civil rights statutes also tend to result in the elimination of any contract clauses limiting liability. 150 Some theories of recovery, such as the covenant of good faith and fair dealing, can be waived (with clear contractual language) in some states but not others. 151

3. Liquidated damages

Provisions for liquidated damages are disfavored as penalties, and they are often invalidated even when the transaction was voluntary and the parties have equal bargaining power. 152 Courts non-enforcement based on “public policy” whenever the clause is “deemed to constitute a penalty.” 153 The purpose is to control the parties’ intentions. Parties must intend the

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149 Nat’l Supermarkets Assoc. v. Am. Express Travel Related Servs. Co., 634 F.3d 187, 197 (2d Cir. 2011) (“More than a half-century ago, the Supreme Court stated that ‘in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action.’”) (citation omitted).

150 Booker v. Robert Half Int’l, Inc., 413 F.3d 77, 83 (D.C. Cir. 2005) (refusing to enforce ban on punitive damages that were allowed under a civil rights statute); Hadnot v. Bay, Ltd., 344 F.3d 474, 478 & n.14 (5th Cir. 2003) (same as to a Title VII claim); Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 673 (6th Cir. 2003) (en banc) (same).


amount to be actual damages and not a mere penalty for breaching the contract. 154 The contractual damages must have been a reasonable estimate of the actual damages at the time of contracting and the actual damages both unknown at the time of contracting and a reasonable estimate. 155 Many courts also consider, implicitly or explicitly, whether the liquidated damages reasonably conform to the actual damages. 156 Courts often frame this inquiry as what the parties would have agreed to if they had known what would ultimately happen. 157

The enforcement of confession of judgment contracts present a strong argument that parties should be allowed to waive other procedural rights. 158 Courts require such clauses to be

154 Barrie Sch. v. Patch, 933 A.2d 382, 389 (Md. 2007) (“the decisive element is the intention of the parties—whether they intended that the sum be a penalty or an agreed-upon amount as damages in case of a breach”).

155 Id.; Permian Petroleum Co. v. Petroleos Mexicanos, 934 F.2d 635, 645 (5th Cir. 1991) (liquidated damages clauses are invalid “unless: (1) it was impossible or impractical to estimate damages with any degree of certainty at the time of the contract, and (2) the amount specified as liquidated damages was a reasonable forecast of just compensation.”); Pierce Assoc., Inc. v. Nemours Foundation, 865 F.2d 530, 546 (3d Cir. 1988) (The rule in Delaware is “the damages which the parties might reasonably anticipate to result from a breach must be difficult or impossible to prove accurately and second, the agreed upon sum must be reasonable.”).

156 Equitable Lumber Corp. v. IPA Land Dev. Corp. 344 N.E.2d 391 (N.Y. 1976); Leasing Serv. Corp. v. Justice, 673 F.2d 70, 73 (2d Cir. 1982) (liquidated damages may be enforceable if “the terms constitute a reasonable mechanism for estimating the compensation which should be paid to satisfy any loss flowing from the breach”); Sch. v. Patch, 933 A.2d 382, 388-89 (2007) (reasonableness should be judged at the time of formation).

157 Holzer Clinic, Inc. v. Simpson, No. 97CA9, 1998 Ohio App. LEXIS 2044, *23 (1998) (a disproportionate damage amount will “justify the conclusion that it does not express the true intention of the parties”).

158 Metro E. Ctr. for Conditioning & Health v. Qwest Communs. Int’l, 294 F.3d 924, 929 (7th Cir. 2002) (“One aspect of personal liberty is the entitlement to exchange statutory rights for something valued more highly. . . . A contract specifying use of the American Rule in arbitration is well short of a cognovit clause; and if the latter can be valid, why not the former?”).
conspicuous and set out from the other provisions, and absolutely clear in language. The Supreme Court upheld the constitutionality of these provisions where they are knowing, intelligent and voluntary. Courts also construe them as strictly as possible. Approximately thirty states permit such contracts so long as statutory procedure is followed. This procedure often requires that the contract be signed under oath, which will likely prevent unknowing waivers of due process. Fourteen states prohibit enforcement prior to maturity, and six appear to reject them entirely. Only a minority of states allowing confession of judgments require notice and an opportunity to be heard before the final judgment. Confession of judgment clauses fell out of favor for many years, but may be enjoying something of a renaissance in some states.

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160 D. H. Overmyer Co., 405 U.S. 174 (upholding the constitutionality of cognovit notes as used in Ohio).
161 See Huish v. Sulenta, 2002 WY 139, P14 (Wyo. 2002) (“The law does not generally favor confession of judgment. . . . The general rule constraining the power to confess judgment is that such authority must be clearly given and strictly followed . . . Any doubt as to the validity of [a] confessed judgment must be resolved against the party entering the judgment. The policy underlying this rule of strict construction against the party in whose favor the power operates is based on the severity of the summary proceeding itself.”).
163 Id. at n.79.
164 Id. at n. 76-77.
165 Id. at n.85.
166 New York trial courts, for example, are applying the New York confession of judgment statute (N.Y. Civ. Prac. L. & R. 3218) more often over the past several years. Ohio appellate courts also appear to be construing cognovits notes more often in the past several years.
4. Contractual attorneys’ fees

Contracts calling for awards of attorney’s fees present an example of how courts “know how to mouth the correct legal rules with ironic solemnity while avoiding those rules’ logical consequences.”\(^\text{167}\) The crux of that dislike is explained in the public policies behind the “American Rule.” In *Fleischmann Distilling Corp.*, the Supreme Court explained that “one should not be penalized for merely defending or prosecuting a lawsuit” because of the uncertainties of litigation.\(^\text{168}\) It also worried “that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents’ counsel.”\(^\text{169}\) The final consideration for the court’s rejection of regular awards of attorney’s fees was that “litigating the question of what constitutes reasonable attorney’s fees would pose substantial burdens for judicial administration.”\(^\text{170}\)

Despite these policies, the proliferation of statutory fee shifting in many civil rights and consumer statutes make courts’ continued aversion to contractual fee shifting is somewhat surprising. California has a statutory scheme in contract actions that allows awards fees and costs to the prevailing party. California courts therefore enforce contractual attorney’s fees more frequently because they are presumptively valid by statute.\(^\text{171}\) Many judges are also comfortable awarding significant attorney’s fees in class actions, which appears to have reversed (in that


\(^{168}\) *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717-18 (1967).

\(^{169}\) *Id.*

\(^{170}\) *Id.*

subset of cases) their previous tendency to under-award attorney’s fees. Courts conscientiously follow the many statutes that require fees awards.

But contracts are different. While courts are perfectly willing, in theory, to enforce contracts for attorney’s fees, they very often find ways to avoid enforcement by strictly construing the agreement, finding that there is no prevailing party because no party won everything it asked for, or reducing the amount of attorney’s fees to a “reasonable” level. As one practitioner summarized, “many judges really don’t like to award costs and fees even when they’re statutorily or contractually obligated to do so.” Scholars and commentators have noted juridical reluctance to award attorney’s fees in many different contexts, including in divorces, employment discrimination, and under California’s private attorney general statute. A study

172 Jill E. Fisch, Complex Litigation At The Millennium: Aggregation, Auctions, And Other Developments In The Selection Of Lead Counsel Under The PSLRA, 64 LAW & CONTEMP. PROB. 53, 94 (2001) (“judicial control over plaintiff’s attorneys’ fees, coupled with the courts’ reluctance to refuse fee requests or to deviate from traditional benchmarks, has led to excessive fee awards”).


174 See Steve Block, Attorneys’ Fees: When can you get them back? (January 1, 2007), at: www.forwarderlaw.com/library/view.php?article_id=426; Seth Leventhal, Redman v. Sinex: Judicial Resistance to Awarding Attorneys Fees? (Dec. 23, 2009), at: www.minnesota-litigator.com/2009/12/redman-v-sinex-judicial-resistance-to.html (“an unwritten rule of U.S. civil litigation is that courts, in a large number of cases in which the award of attorneys’ fees is a possibility, prefer not to award them”).

175 Richard J. Corbi, Update: Postpetition Attorney's Fees Following the Supreme Court Decision of Travelers Casualty and Surety Co. of America v. Pacific Gas and Electric Co., 17 NORTON J. BANKR. L. & PRAC. 341 (2008) (finding that some courts disallow attorneys’ fees despite a strong presumption in favor of fees); Donna M. Dean, Catalyst For Change The California Supreme Court Has Parted Ways With The U.S. Supreme Court In Preserving
of judicial interpretations of consumer fraud statutes reveals that courts were more likely to interpret statutes that are ambiguous or silent on a question of attorney’s fees in favor of limiting their availability and amount.176 Some judges may be hesitant to award attorney’s fees because they see such awards (even under a contract) as akin to a sanction for litigation misconduct because attorney’s fees are often only available in that context.178

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176 Debra P. Stark & Jessica M. Choplin, Does Fraud Pay: An Empirical Analysis Of Attorney’s Fees Provisions In Consumer Fraud Statutes,” ExpressO (2008), available at: http://works.bepress.com/debra_stark/1 (cases summarized in appendix show that courts usually interpret ambiguous or silent statutes to impose greater limitations on attorney’s fees than necessary).

177 Christopher A. Wright, What’s Good for the Goose Might Just be Good for the Gander: How Missouri’s Frivolous Claim Statute has Failed the Missouri Civil Justice System and How It Can Work in the Future, 65 UMKC L. Rev. 1053, 1055 (1997) (“It is as though state court judges refuse to impose sanctions, in the form of attorney’s fee awards, against parties for filing frivolous claims unless the claim is so egregious and unfounded so as to be considered ridiculous by the judge.”).

178 See, e.g., Christianburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412, 421 (plaintiff’s claim must be “frivolous, unreasonable, or groundless” to award fees to a prevailing defendant in a Title VII action); Bergman v. United States, 844 F.2d 353, 357 (6th Cir. 1988) (“Because an award of attorneys’ fees is extraordinary and punitive, standards for bad faith for purposes of awarding attorneys’ fees under the EAJA are
Some courts have refused outright to enforce contractual attorney’s fees. For example, the North Carolina Supreme Court held that “[e]ven in the face of a carefully drafted contractual provision . . . our courts have consistently refused to sustain such an [fee] award absent statutory authority.”\(^1\) This judicial refusal to enforce contracts for attorney’s fees was recently been modified by statute, but the judicial hostility to fee awards remains strong.\(^2\) The prohibition on attorneys’ fees was a creature of the common law. In 1892, North Carolina courts justified the refusal to enforce such a provision because fee clauses “are not only in the nature of penalties, but . . . tend to encourage litigation.”\(^3\)

As is often the case with any contractual provision that changes the status quo, most courts strictly construe attorney’s fee provisions to limit their scope and effectiveness.\(^4\) For example, most contracts only award fees to the “prevailing party.” Many courts interpret that term to require that one party clearly prevails, allowing courts to reject fees for a mixed result.\(^5\) California courts often find that where one party “receives only a part of the relief sought,” that


\(^{180}\) The statute itself includes a host of limitations, including the limitation that fees must not exceed the amount of damages actually awarded. See N.C. Gen. Stat. § 6-21.6 (2011).

\(^{181}\) Tinsley v. Hoskins, 111 N.C. 340, 341 (1892).


\(^{183}\) Trytek v. Gale Indus., 3 So. 3d 1194, 1203 (Fla. 2009) (“a trial court has the discretion to make a determination that neither party has prevailed on the significant issues in litigation”).
can justify the conclusion that there is no prevailing party. A clause that refers to a “losing party” that is responsible for paying the fees can be found inapplicable where a party prevails on something – even if it is a small part of the entire litigation. Courts also limit the definition in other ways. One recent study concluded finding that the advent of what seemed like a sea-change in attorney’s fees actually had very little impact on substantive outcomes.

This impetus towards strict construction has led courts to limit the scope of what types of attorney’s fees are actually compensable. California has expressly excluded the costs of expert witnesses, copying, and courier services from the definition of “attorney’s fees” in contracts. Similarly, Florida courts hold that attorney’s fees “are not necessarily recoverable

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184 *Hsu v. Abbara*, 891 P.2d 804, 812 (Cal. 1995); *Berkla v. Corel Corp.*, 302 F.3d 909, 919 (9th Cir. 2002) (no fees where recovery was less than 3% of what he sought before the jury trial).

185 *Boro Construction, Inc. v. Ridley School Dist.*, 992 A.2d 208, 220 (Pa. Commw. Ct. 2010) (“the trial court quite properly determined that the District was not entitled to an award of attorney fees based upon its determination that Boro had prevailed with respect to the District’s counterclaims in the instant lawsuit”)

186 *Dennis I. Spencer Contractor, Inc. v. City of Aurora*, 884 P.2d 326, 330 (Colo. 1994) (“a litigant is not considered a prevailing party for purposes of awarding attorney fees if it breached its contractual obligations, notwithstanding the fact that it was not required to pay damages for that breach”).


as to any and all litigation relating to a contract that provides for attorney’s fees.”

Perhaps more worrisome for those drafting fee provisions, courts often unjustifiably limit the types of claims covered by attorney’s fees. The Idaho Supreme Court recently reversed a fee award because it found that the plaintiff did not seek “to enforce any provision of the Agreement” as required by the clause. The plaintiff had sought dissolution of the corporation formed by the contract, but the court found this to be a statutory remedy unrelated to the contract. The parties could hardly have predicted this incredibly strict interpretation of their contract.

Many contracts refer to “reasonable” attorney’s fees, but reasonableness is not optional – it will be read into contracts where the term is absent. Of course, a contract that explicitly calls for unreasonable fees will be struck down as punitive. Trial courts are therefore granted discretion to award a reasonable portion of the total attorneys’ fees where a party has not achieved total success. Reasonableness is also generally based on the current situation and

192 Id.
193 McMullen v. Kutz, 925 A.2d 832 (Pa. Super. 2007) (an award of attorney’s fees under a contract must be evaluated for reasonableness regardless of whether it provides that the fees must be reasonable); Atlantic Cont’l. & Material Co., v. Ulico Cas. Co., 844 A.2d 460 (Md. 2004) (when a contract permits recovery of attorney’s fees and that contract is silent about reasonableness, the trial court must examine reasonableness).
facts as developed in the lawsuit – not as they looked at the time of contracting.\footnote{Rose v. Montt Assets, Inc., 723 N.Y.S.2d 592, 594 (N.Y. Sup. Ct. 2000) (approving the withholding of contractual fees “upon equitable factors or other considerations fact specific to the litigation even when attorneys’ fees are allowed under a contract.”).} It is also informed by statutory schemes limiting such clauses.\footnote{Fla. Stat. § 57.105(7) (LexisNexis 2012) (if one party to recover attorney’s fees by contract, the other party may also recover fees); Oregon Stat. § 20.096 (2011) (reciprocity of attorney fees in proceedings to enforce contract).} This makes it difficult for parties to depend on the enforcement of structured incentives in negotiated attorney’s fees provisions, because they know that they will be interpreted in light of whatever will happen in the future.

C. Contractual Limitations On A Court’s Decision-Making Process

Contracts that interfere with the evidence available to the parties, the evidence available to the court, or the court’s weighing of the evidence are far more rare and receive much more scrutiny. Many courts have refused altogether to enforce these contracts.

1. Limitations on obtaining evidence

The motivation for many scholars and practitioners to explore pre-litigation agreements is to customize and streamline discovery.\footnote{Daphna Kapeliuk & Alon Klement, \textit{Contractualizing Procedure} 2 (Dec. 31, 2008) (unpublished manuscript, available at http://ssrn.com/abstract=1323056), at 10 (contracts typically limit rather than expand discovery).} Federal Rule 29 is the cornerstone of many of those efforts. The original Rule 29 from 1938 dealt only with stipulations regarding the manner of taking depositions.\footnote{\textit{Fed. R. Civ. P.} 29, 1938 (“If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice and in any manner and when so taken may be used like other depositions.”); \textit{but see Gill v. Stolow}, 16 F.R.D. 9, 10 (S.D.N.Y. 1954) (“Although the parties have stipulated for the taking of the

reasonable attorneys’ fees pursuant to either contractual or statutory provisions, the litigational success or lack of success of the party seeking fees must naturally be considered.”).}
to use written stipulations to “modify the procedures provided by these rules for other methods of discovery.” The 1970 Committee Notes report that it was “common practice” for parties change “the procedures by which methods of discovery . . . are governed.” Following the spirit of the original rule’s attempt to expedite litigation, the 1970 rule pointedly did not allow parties to agree to extend the times to answer interrogatories, produce documents, or respond to admissions.\textsuperscript{200} The Committee Notes also explained that “[a]ny stipulation varying the procedures may be superseded by court order.”

The 1993 amendments further opened the scope of Rule 29 allow attorneys to grant each other discovery extensions. But it also changed the more limited language of “modify the procedures provided by these rules for other methods of discovery” to modify “other procedures governing or limiting discovery.”\textsuperscript{201} This was meant “to give greater opportunity for litigants to agree upon modifications to the procedures governing discovery or to limitations upon
depositions of these witnesses in Tel Aviv on written interrogatories . . . there is no reason why the Court should compel the plaintiff to take these depositions on these interrogatories if the plaintiff no longer wishes to do so.”).

\textsuperscript{200} The 1970 version of the rule states: “Unless the court orders otherwise, the parties may by written stipulation . . . modify the procedures provided by these rules for other methods of discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may be made only with the approval of the court.” Fed. R. Civ. P. 29 (1970) (amended 1993). This limitation on deadline extensions was rejected by some states. See Mass. Rule Civ. P. 29, 1973 Committee Notes (“the requirement of prior court approval seems so likely to produce unnecessary anguish to bench and bar”). Other states have retained this requirement, limiting parties to one stipulated extension per discovery response. See S.C. Civ. R. 29(1), Note to 2001 Amendment (“Extensions are limited by Rule 6(b) which allows the parties to stipulate to only one extension and for the original time provided.’’); Kansas Stat. 60-229 (2010) (stipulations to discovery responses require court approval);

discovery.” The Committee Notes also encourage counsel to “agree on less expensive and
time-consuming methods to obtain information,” and suggesting a voluntary exchange of
documents. However, the Notes reiterate that although “litigants ordinarily are not required to
obtain the court’s approval,” the court can “direct that its approval be obtained for particular
types of stipulations.” The only substantive change in the 2007 amendment was the elimination
of the requirement that the stipulations be “written.” Many state rules closely follow the 1993
amendments.

Rule 29 presents two complications for a party seeking to enforce a pre-dispute
agreement to limit discovery. The most difficult is that the rule refers only to stipulations, which
suggests an agreement made in the context of litigation and presented to the court. Some
states’ Rule 29 analogues make this more explicit, requiring that stipulations regarding “other

\[\text{[XXX]}\]

\[202\text{ FED. R. CIV. P. 29, 1993 Committee Notes.}\]

\[203\text{ Although the 2007 Committee Notes state that the changes “are intended to be stylistic only,” many courts had previously depended on the requirement that the stipulations be “written.” }\]

\[\text{Bobrosky v. Vickers, 170 F.R.D. 411, 416 (W.D. Va. 1997) (“Rule 29 allows the parties, by written stipulation, to modify the procedures for the taking and use of depositions. Thus, where the parties have agreed in writing, the requirements of Rule 32 may be waived”); }\]


\[204\text{ ARIZ. R. 29 (following 1993 rules); INDIANA CIV. R. 29(b) (same); LA. CODE CIV. P. 1436 (similar); MASS. CIV. R. 29 (same); MONT. R. 29 (same); NEB. R. 29 (same); OHIO CIV. R. 29(2) (same); TENN. CIV. R. 29 (same); Tex R. 166c (same); VT. CIV. R. 29; WA. CIV. R. 29 (same).}\]

\[205\text{ Charles Alan Wright, et al., 21 FEDERAL PRACTICE AND PROCEDURE § 5039.5, p. 857 (3d ed. 2005) (suggesting that a stipulation “can be defined as ‘a form of quick agreement, usually between lawyers, often oral and in court’”’)) (citing David Mellinkoff, DICTIONARY OF AMERICAN LEGAL USAGE, p. 618 (1992)).}\]
methods of discovery” be filed with the court. In addition, some courts explicitly forbid pre-litigation contracts to control discovery under Rule 29. The local rules for one federal district state that: “Discovery must be conducted according to limitations established at the Case Management Conference and confirmed in the Case Management Plan. Absent leave of court, the parties have no authority to modify the limitations placed on discovery by court order.”

This language has been amplified by the courts. Though the issue has not been litigated, a court would presumably enforce the local rules over Rule 29, based on the explicit carve-out: “unless the court orders otherwise.” Arkansas follows the 1993 amendment, noting that “no particular problems have arisen” from agreements to modify discovery rules. But it warns that “[s]hould agreements of counsel get out of hand, the court has the power under Rule 29 to overrule or reject any stipulation or agreement of counsel. Therefore, any problems which may arise in this area may be corrected by the court on a case by case basis.”

Though the 1993 change is nearly twenty years old, there are very few cases involving pre-dispute agreements to limit discovery. But if discovery limitations in arbitration are any guide, explicit limits on discovery will be frowned upon for anything but the most hotly

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206 MISSOURI CIV. R. 56(f) (“Unless the court orders otherwise, the parties may by written stipulation . . . modify the procedures provided by these Rules for other methods of discovery.”)

207 N.D. Ohio, LOCAL R. 26.1. Some district courts, such as the District of Nevada, have extensive rules regulating discovery (see D. Nev., LOCAL R. 26-1 to 26-8) that will likely trump any contrary agreement by the parties under Rule 29. Many individual judges have additional discovery rules that would likely also negate such a contract.

208 Klingeman v. DeChristofaro, No. 4:09-cv-00528, 2010 U.S. Dist. LEXIS 6088, *5-6 (N.D. Ohio Jan. 26, 2010). In Klingeman, however, the court also noted that “the absence of agreement on whether discovery should take place negates the possibility of the parties having stipulated to modify the procedures provided by the discovery rules.” Id.

209 ARK. CIV. R. 29, Reporter’s Notes.
negotiated and sophisticated parties. The availability of discovery has become a lynchpin of state law unconscionability, and courts have not hesitated to find arbitration agreements unconscionable that attempt to limit the amount of discovery available to plaintiffs.

There are a number of such cases holding that an agreement overly limiting the number of depositions is invalid. All of these cases involve one party attempting to obtain a substantive advantage by limiting the discovery available to the plaintiff. Limiting the number of length of depositions usually hurts plaintiffs, as a defendant often only needs to depose the plaintiff, while the plaintiff must often gather information from many witnesses. Given the general deference to arbitration, provisions limiting the number of depositions may be less enforceable that those same provisions would be in an arbitration agreement. Provisions that leave the amount of discovery to the arbitrator are generally upheld – even though there is no assurance that there will be any more than minimal discovery.

There are very few cases regarding even the most basic discovery agreements. The most typical case is where the parties stipulate during litigation to the production of particular documents. One court enforced an agreement to limit the scope of email production under

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210 Ostroff v. Alterra Healthcare Corp., 433 F. Supp. 2d 538 (E.D. Pa 2006) (nursing home arbitration contract could not limit depositions to just experts); Geiger v. Ryan’s Family Steak Houses, Inc., 134 F. Supp. 2d 985, 996 (S.D. Ind. 2001) (arbitration provision was void where it only allowed one deposition as of right); Hooters of Am., Inc. v. Phillips, 39 F. Supp. 2d 582, 614 (D.S.C. 1998) (just one deposition was a “severe discovery limitation[]”).


212 Booker v. Robert Half Inn, Inc., 315 F. Supp. 2d 94, 103 (D.D.C. 2004) (“the parties and the arbitrator have sufficient discretion to develop a discovery plan that will enable a plaintiff fairly to present his claims”).

213 Racine Education Asso. v. Racine Unified School Dist., 82 F.R.D. 461, 463 (E.D. Wis. 1979) (construing agreement to produce documents on record at deposition as a stipulation under Rule 29).
both Rule 29(b) and under “basic contract law.”\textsuperscript{214} Another court declined to issue an order approving a stipulation because the parties’ agreement was already effective under Rule 29.\textsuperscript{215} Other courts have approved agreements regarding discovery sanctions,\textsuperscript{216} agreements to produce a witness for a deposition,\textsuperscript{217} and deadlines for expert reports.\textsuperscript{218} One court explained that the purpose is to “encourage agreed-upon, lawyer-managed discovery and to eliminate the cost, effort and expense involved in court intervention in discovery through motion practice.”\textsuperscript{219} Unsurprisingly, courts uniformly reject contracts that purport to make documents immune from discovery from third-parties by way of confidentiality.\textsuperscript{220}

2. Changing the evidence that will be considered


\textsuperscript{216}\textit{Hamill v. Level}, 900 S.W.2d 457, 464 (Tex. App. 1995) (“Once agreed to, this arrangement between the parties was, in effect, a self-imposed sanction that comports with the discovery sanctions of Rule 215.”).


Courts have given a decidedly mixed reception to attempts to alter the rules of evidence by contract. Dean Wigmore was an early proponent of such contracts, supporting his analysis with four-hundred-year-old cases that enforced contractual changes to evidentiary issues. He claimed that “the occasional attitude of judicial jealousy of such contracts is distinctly modern in its origin; there appears to have been no sanction for it in earlier times.” He noted that courts had “treated some sorts of stipulations with suspicion and disparagement, while giving sanction to others; and different courts have taken opposite views of the same type of transaction,” with little coherence in their reasoning.

Taking a page from Wigmore, the Harvard Law Review argued soon afterwards that traditional rules of evidence did not often comport with the needs of modern business litigation. An early article argued that while parties can agree to admit evidence that would otherwise be barred, they cannot contract “to deprive the court of relevant testimony, or to restrict its judgment to a finding based upon incomplete facts.” This limitation “safeguards

221 John Wigmore, Contracts to Alter or Waive the Rules of Evidence, 16 Ill. L. Rev. 87, 89-91 (1921); Charles Alan Wright, et al., 21 Federal Practice & Procedure, § 5039.5, p. 859 (3d ed. 2005) (noting that Wigmore “readily conceded that courts were reluctant to enforce such contracts.”).

222 Wigmore, supra note 223, at 88.

223 John Wigmore, 1 Evidence 7a, at 563 (Peter Tillers ed. 1983).

224 Note, Contracts to Alter the Rules of Evidence, 46 Harv. L. Rev. 138 (1932) (stating that “application of the 'arbitrary' rules of evidence to litigation involving modern business has provoked widespread criticism”);

225 Id. at 142-43 (1932); see also id. at n.10 (arguing that the public policy that gave rise to a privilege, such as the doctor-patient privilege, may be used to void a contract surrendering that privilege); The Progress of the Law, 1919-1921, 35 Harv. L. Rev. 302, 306-07 (1922) (“The authorities are divided on all these clauses, but their frequent use in business contracts shows dissatisfaction with the law of Evidence . . .”)
the litigants by assuring a complete and adequate determination of the issues.”

Some commentators have opposed contractual modifications to the rules of evidence, explaining that “courts have been reluctant to treat the rules of evidence as simply another commodity to be bartered for individual profit and have refused to honor agreement that required judges to admit evidence barred by strong considerations of public policy.”

An early Michigan decision exemplifies the view that agreements to change evidence should be viewed with suspicious. On straightforward public policy grounds, it held that a policy requiring “direct and positive proof” that the death was accidental. But the court was also concerned about the effect of that contract on its “jurisdiction” – by which the court meant its ability to do justice by the parties. An Indiana case involved an insurance policy that defined the evidence admissible to prove disability. This was rejected as an impermissible attempt to alter the judicial rules of evidence because of a need for uniformity: “It is far better for the courts to make the rules for all cases, as it is only by such method that any uniformity can be attained and any degree of certainty assured.” These views were widespread. A Florida court held that parties cannot alter the rules of evidence, and “the parties to a contract may not by

226 Id.
228 Utter v. Travelers’ Ins. Co., 32 N.W. 812, 816 (Mich. 1887); Bernstein v. Metropolitan Life Ins. Co., 139 Me. 388, 408-09 (1943) (holding that an insurance policy requiring conclusive proof was void against public policy).
229 Utter, 32 N.W. at 816.
230 Id. (“If they can make this agreement, they can also stipulate that the evidence must come from certain persons, or make any agreement they see fit, controlling and directing the course of proceeding upon the trial.”).
232 Id.
the terms of their contract change the burden of going forward with the evidence from that imposed by the rules of evidence.” A Texas court rejected contractual changes to the rules of evidence as a “preposterous and dangerous” attempt to “bind the courts and interfere with judicial proceedings.”

As an influential New Jersey case noted, such decisions are often based more on “abhorrance at the substantive unfairness” in the particular case, rather “than at contracting for rules of evidence.” Yet that case rejected an integration clause in a lease precluding the consideration of “previous negotiations, arrangements, agreements and understandings.” It found that the clause was contrary to state law allowing the use of extrinsic evidence to determine intent. Fearing that the clause would interfere with its ability to reach a fair result, the court explained:

While plaintiff invokes the jurisdiction of the court to construe and enforce its contract, it would have us do so wearing judicial blinders. We are requested to conform to a private agreement mandating our performance of a judicial function in a manner which, under our precedents, is not the path to justice in arriving at the binding meaning of a contract. It would be wrong for us to do so.

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234 American Casualty Co. v. Horton, 152 S.W.2d 395, 398 (Tex. App. 1941) (“Rules of evidence are established by law . . . and are not the subject of contract.”); Berry v. Chaplin, 169 P.2d 442, 447-48 (Cal. App. 1946) (“A stipulation that only such evidence as shall be agreed upon by the parties shall be admissible will not be allowed to control the action of the court in the reception of other evidence or to determine the effect to be given to it.”).

235 Garden State Plaza Corp. v. S. S. Kresge Co., 78 N.J. Super. 485, 502 (1963); see Recent Developments: Clause Forbidding Use of Prior Negotiations in Interpretation of Contract Held Void as contrary to Public Policy, 64 COLUM. L. REV. 372, 375 (1964),

236 Garden State, 78 N.J. Super. at 489, 500.

237 Id. at 500.

238 Id. at 503.
Later courts saw this holding as not only protecting the reasonable expectations of the insured, “but also in allowing a private agreement to nullify the inherently probative effect of relevant evidence.” Integration clauses generally do limit the types of evidence available to courts, but do so by setting the bounds of what constitutes the contract. Courts are much more reluctant to allow contracts that directly interfere with the evidence they may consider.

There are very few cases regarding the rules of evidence after the 1975 adoption of the Federal Rules of Evidence (which was also readily adopted by the states). The Rules of Evidence turned a product of statutes and the common law into “mere” rules of procedure that are presumptively changeable, yet parties have nearly ceased to litigate contracts that were agreed outside of litigation to alter those rules. Perhaps the new rules need little alteration or centuries of judicial hostility simply ended the practice.

The United States Supreme Court gave its opinion on the subject in 1995 in *United States v. Mezzanatto*. It explained that the Rules of Evidence had a “presumption of waivability,” and that “[a]bsent some ‘overriding procedural consideration that prevents enforcement of the contract,’ courts have held that agreements to waive evidentiary rules are generally enforceable even over a party's subsequent objections.”

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240 John W. Strong, Consensual Modifications of the Rules of Evidence: The Limits of Party Autonomy in an Adversary System, 80 Neb. L. Rev. 159, 162 (2001) ( “The prevalent view today, by contrast, is that while the parties have wide latitude in modifying the rules for their mutual purposes, they are nonetheless constrained in this by limitations of public policy.”).


242 Id. (“at the time of the adoption of the Federal Rules of Evidence, agreements as to the admissibility of documentary evidence were routinely enforced and held to preclude subsequent objections as to authenticity”).
“[t]here may be some evidentiary provisions that are so basic to the reliability of the fact-finding process that they may never be waived without irreparably ‘discrediting the federal courts.’”\textsuperscript{243}

It recognized that the cases it cited involved stipulations on evidence entered before trial, allowing that the presumption might not apply to pre-dispute contracts that “trigger closer judicial scrutiny than stipulations made within the context of litigation.”\textsuperscript{244}

Three recent cases show contrasting judicial attitudes toward stipulations regarding what evidence may be admitted at trial. In the first, a party sought to introduce three depositions at trial that were clearly understood by all to be a trial deposition, but did not comply with Rule 32.\textsuperscript{245} The court admitted one deposition under Rule 29 that contained a stipulation that it would be used a trial, but reluctantly rejected the other two that lacked the formal stipulation.\textsuperscript{246} Another case allowed such testimony on a different basis. It did not believe that Rule 29(a)’s statement that a stipulated deposition “may be used in the same way as any other deposition” meant “that parties can waive the requirements of Rule 32.”\textsuperscript{247} The court, however, reluctantly admitted the testimony based on the parties’ stipulation, a claim of “local practice,” and the fact that “neither party will be prejudiced by the admission of the deposition testimony.”\textsuperscript{248}

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\item \textsuperscript{243} Id. (citing Charles Alan Wright, et al., 21 FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5039 (1977)).
\item \textsuperscript{244} Id.
\item \textsuperscript{245} Bobrosky v. Vickers, 170 F.R.D. 411, 416 (W.D. Va. 1997).
\item \textsuperscript{246} Id. at 416.
\item \textsuperscript{247} Owen v. Angst (In re Angst), 428 B.R. 776, 781-82 (Bankr. N.D. Ohio 2010).
\item \textsuperscript{248} Id. at 782.
\end{itemize}
court found simply that parties “are precluded from devising their own rules of evidence.”

Courts are generally willing to enforce parties’ stipulations about the use and exclusion of witnesses, but they reserve discretion to alter the deal depending on the circumstances. While a pre-dispute agreement not to call particular witnesses is theoretically enforceable, the potential for changed circumstances and judicial discretion should make parties very wary of reliance on such contracts. Following Mezzanatto’s invitation for “closer judicial scrutiny,” courts may have little concern in rejecting pre-dispute contracts.

Contracts to prevent a witness from voluntarily testifying in a different trial are often treated as against public policy. Some courts liken such contracts to witness tampering, citing ABA Model Rule 3.7(f) to hold that a “lawyer may not ethically ask a non-client witness not to

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249 See State v. Downey, 2 P.3d 191, 200 (Kan. App. 2000), citing 29 AM. JUR. 2D, EVIDENCE § 8, p. 65 (2009) ("Parties cannot by contract control or modify the law of evidence, and any attempts in that direction are invalid, and not binding upon the parties or the court.").


251 United States v. Scanland, 495 F. 2d 1104, 1106 (5th Cir. 1974) ("[T]he parties are entitled to rely on [pre-trial] agreements in the preparation of their case. Subsequent developments, of course, may make it necessary for either or both parties to be released from their Omnibus hearing agreements. We expressly refuse to diminish the sound discretion vested in the district court to grant such releases."); Tom L. Scott, Inc. v. McIlhany, 798 S.W.2d 556, 559-60 (Tex. 1990) (rejecting settlement agreement requiring the plaintiff to re-designate “testifying” expert witnesses as “consulting” witnesses, which had the effect of precluding the use of those experts by the non-settling defendants).

252 But see 21 Charles Alan Wright, FEDERAL PRACTICE AND PROCEDURE § 5032, at 161 (3d ed. 2005) ("It is left to the parties, in the first instance, to decide whether or not the rules are to be enforced. . . . It is only in rare cases that the trial judge will . . . exclude evidence they are content to see admitted").
testify or not to cooperate with the other side.”

In one case, the court imposed nearly a million-dollar sanction on a plaintiff (by cutting the amount awarded at trial in half) because the contract included a promise not to testify at the trial. It held that the plaintiff had “provided something of value in exchange for [the witness’s] decision not to testify,” depriving the defendants of a “full and fair opportunity to present their case.”

Other courts enforce such contracts against signatories so long as they do not prevent testimony compelled via subpoena or court order, or do not interfere with governmental investigations.

3. Altering presumptions and the weight of evidence

Parties have attempted to change the presumptions inherent in the law for over a century, with decidedly mixed results. Turn of the century cases held that the burden of proof to establish the receipt of the goods by the carrier in an action against the carrier for damage to goods could be altered by a “special contract.”

But just a few years later, another court rejected an insurance contract that altered the presumption of death, holding that the ability “to add or to take from a proved fact the probative force and effect to which it is otherwise naturally entitled . . .


254 Id.; see also Wendt v. Walden University, Inc., No. 4-95-467, 1996 U.S. Dist. LEXIS 1720, *5 (D. Minn. Jan. 16, 1996) (“Defendants should not be able to buy the silence of witnesses with a settlement agreement when the facts of one controversy are relevant to another.”).

255 See Yockey v. Horn, 880 F.2d 945, 950-51 (7th Cir. 1989) (enforcing settlement provision in precluding voluntarily participation in litigation because it did not preclude answering a subpoena); Cooper Tire & Rubber Co. v. Farese, 423 F.3d 446, 456-58 (5th Cir. 2005) (non-participation agreement was enforceable because it served “a valid legal purpose” and is common “where two parties terminate their employment relationship by contract”).

256 Southern Exp. Co. v. Saks, 160 Ala. 621, 625 (1909); Davis v. Donohoe-Kelly Banking Co., 152 Cal. 282, 285 (1907) (a special agreement may modify the presumption that the bailor is the owner).
. will be hedged within very narrow bounds.” A contemporary article stated that “[s]o far, the only sound limitation on the company’s power is, that the clause must not be a trap for the policyholder.” The court worried that the insurance company that had drafted the contract could use such power to “arbitrarily” restrict its liability to the detriment of policyholders.

This concern about insurance companies altering evidentiary presumptions in their favor by contract has continued to the present. Florida appellate courts are clear that parties cannot alter the rules of evidence by contract or “by the terms of their contract change the burden of going forward with the evidence.” The court was concerned about both the “orderly development of the evidence” and the possibility that an insurance company may stack the procedural deck against the policy holder. California has, by statute, placed specific burdens on insurance companies attempting to modify well-established presumptions.

Courts are very reluctant to allow parties to reverse some presumptions, including the

257 Haines v. Modern Woodmen of America, 178 N.W. 1010, 1014 (Iowa 1920).


259 Id. at 1014.

260 John W. Strong, Consensual Modifications of the Rules of Evidence: The Limits of Party Autonomy in an Adversary System, 80 NEB. L. REV. 159, 164 (2001) (“In reality, however, these agreements are best viewed not as contracts to stipulate different rules of evidence, but as problematic insurance contracts which require interpretation in light of the reasonable expectations of the insured.”).


262 Id.

presumption as to ownership of a copyright\textsuperscript{264} and the presumption of simultaneous performance in a real estate contract.\textsuperscript{265} However, courts are accustomed to allow some modifications, including the presumption of at-will employment,\textsuperscript{266} the presumptive duties of a bailee toward the bailed property,\textsuperscript{267} the burden of proof for loss of cargo,\textsuperscript{268} presumptions in favor of arbitrability in the labor context,\textsuperscript{269} and the presumptions about the obligations of a dominant tenant to maintain an easement.\textsuperscript{270} Reviewing many such cases, Professor Strong has noted that “rules which regulate the operational processes of the court, which determine who decides what and by what standards, can only be marginally modified without altering the basic character of the proceeding or, at the very least, rendering it hopelessly inefficient.”\textsuperscript{271}

\textbf{IV. THE NORMS DERIVED FROM PRACTICE}

\textsuperscript{264}In re Marvel Entertainment Group, 254 B.R. 817, 833 (D. Del. 2000) (finding that a contract was insufficient to change the underlying presumption about the ownership of the copyright of a work created by an employee).

\textsuperscript{265}Passehl Estate v. Passehl, 712 N.W.2d 408, 417-18 (Iowa 2006) (requiring contracts to pass high hurdles before allowing them to “change the presumption of simultaneous performance” in real estate contracts).


\textsuperscript{267}Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc., 254 F.3d 706, 713-14 (8th Cir. 2001) (“Absent contrary contract terms, the duty of the bailee … is to exercise ordinary care in the custody, preservation, and care of the bailed property.”) (citation removed).

\textsuperscript{268}In re Marine Sulphur Queen, 460 F.2d 89, 102 (2d Cir. 1972) (agreement could have agreed to make the Carriage of Goods by Sea Act applicable to their contract and thus changed the burden of proof).

\textsuperscript{269}Cadillac Indus., Inc. v. Amalgamated Clothing & Textile Workers Union, 775 F. Supp. 30, 32-33 (D.P.R. 1991).


This Part discusses the norms that emerge from the survey of cases in Part III that have earned little attention in the literature on contractual litigation procedure. These norms must be understood before we can move to create incorporate them into an approach to contract procedure in Part V.272 The cases show that contractual interference with judicial discretion and judicial decision-making is inconsistent with what judges see as the fundamental purposes of the system. They also demonstrate a strong adherence to the ideal of the Rules Enabling Act that contract procedure should not control the merits of the dispute. There was also surprisingly strong support for the principle that just procedure means fair procedure. Courts generally find that fairness must be assessed during litigation in light of current legal positions and presently known facts. The norm of uniformity, as discussed in Part II, was also an important reason leading many courts to reject or limit procedural contracts. Speed and efficiency, however, received little mention in the decisions.

A. Interference with Judicial Decision-making

The cases demonstrate fidelity to the norm that a contract procedure should not interfere with discretion and decision-making. Courts applied this principle regardless of the substantive result of the contract: “Agreements tending to impede the regular administration of justice are void as against public policy, regardless of the means used, the natural results, or the motive of the parties.”273 The concern about decision-making is low when a clause acts as a gateway to a particular forum, though even then clauses precluding appellate review were disfavored for

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272 Professor Bone’s article on contract procedure undertakes a similar (but much more abbreviated shorter) survey, and comes to different conclusions. Bone, supra note 3, at 1342-52. He notes the scarcity of decisions about contract procedure, that the contracts rarely alter the applicable rules, and that courts do not feel bound to enforce such contracts except where they are widely recognized. Id. at 1351.

preventing the appellate courts from their main duty of policing decisions of the lower courts. Clauses that limit the relief that a judge may impose are greatly disfavored, as are contracts that purport to change the weight that should be given to particular evidence.

This limitation is related to the old ouster doctrine that private agreements cannot alter what constitution and legislature had established. It is supported, in part, by the argument that judicial approval of contractual modifications creates separation of power problems because “altering rules of evidence or limiting discovery . . . is within the sole province of Congress to act, except to the extent that Congress has delegated rule-making power to the Supreme Court. However, even then, the Court should only engage in its deliberative rule-making function, and not redefine the procedural system by judicial decision.”

There is some appeal to the argument that the rules of civil procedure assume that the judge is exercising discretion in when to apply them, but that allowing the parties to contract around them is fundamentally different.

Perhaps it is inevitable for judges to believe that nothing should reduce their control over the litigation before the court. Indeed, some have argued that judges lack “the information and expertise to make highly complex predictions about case-specific benefits and costs,” and therefore decisions about enforcing contract should be left to the parties. But the parties often lack the same information and expertise, are blind to risks they should have known about, or are faced with unpredictable market changes. As explained below, when parties strike procedural deals that later become unfair and problematic, judges often exercise their discretion not to

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275 Taylor & Cliffe, supra note 3, at 1139; Marcus, supra note 32, at 1047 (“Second, courts may cross separation of powers boundaries if they enforce contracts that reorder areas of procedure regulated by Congress”).

276 Bone, supra note 3, at 1381.
enforce the contract. Reducing judicial decision-making reduces the effectiveness of that safety-valve. And because judges see the legitimacy of their procedures as very important, they are wary of contracts that purport to eliminate that discretion.

B. Procedure Should not Change the Outcome

In a direct application of the directive in the Rules Enabling Act, courts attempted to ensure that contract procedure did not interfere with the outcome on the merits. Even when the procedures appeared fair during the lawsuit, they were not enforced if they appeared likely to change the result. Though it is generally believed that the potential reduction in the caseload will lead judges to enforce agreements to modify procedure,\textsuperscript{277} the opposite occurs. Courts usually bend over backward to decide cases on the merits, as is witnessed by the many decisions that decide that an issue has been waived for some reason, but then go ahead and decide that issue anyway.

At least for contractual procedure, the result is even stronger than the general rule suggested by Professors Scott and Kraus, “every contract by default comes with a judicial insurance policy against formal contract terms that, in the court’s view, turn out to have ill-served the parties’ intentions.”\textsuperscript{278} But many judges gave short shrift to even the parties’ intentions. Indeed, courts regularly allow parties to avoid stipulations they make at Rule 16 conferences based on changed circumstances and fairness. More than stipulations, procedural contracts are subject to a requirement of fairness. As explained by the Supreme Court in \textit{Mezzanatto}, “extrajudicial contracts made prior to litigation trigger closer judicial scrutiny than

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\textsuperscript{277} Taylor & Cliffe, \textit{supra} note 3, at 1137; Noyes, \textit{supra} note 3, at 632;

\textsuperscript{278} Scott & Kraus, \textit{supra} note 25, at 1026-27.
\end{footnotesize}
stipulations made within the context of litigation. As this distinction persists when the parties are sophisticated and represented by counsel, it seems likely that it is due to the information differential between contacting and enforcement.

There was a clear distinction between contracts that interfered with decisions about what was right and wrong – like findings of liability, breach, and fraud – and those dealing with gatekeeping or limitations on remedies. Decisions that ultimately had a moral component were seen as the core of judicial-decision making, and the judges refused to allow contracts to interfere with such decisions. That the determination of right and wrong should be the same regardless of the procedure used during the litigation is a powerful norm. The survey of the cases shows that courts appear to believe that their normative legitimacy depends on such decisions being unaffected by procedure.

C. Contract Procedure Must be Fair from the Ex post Perspective

Most surprising about the cases dealing with contract procedure is that courts usually determined the reasonableness of the procedure by reference to the fairness of its effect in the lawsuit, rather than the ex ante fairness of the contractual bargain. Related to the idea that procedures should not change the merits outcome, judges subscribed to the norm that procedure must be fair regardless of whether the parties agreed to unfair procedure. This norm may stem from the fact that judges have little control over outcomes, which depend on the facts, but do have control over procedures. They therefore feel much more responsible for ensuring a fair process than a fair outcome.

Although the parties focus on creating outcomes, the courts are focused on creating good procedures. This dynamic implies that judges are concerned with making sure that each step in

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279 Mezzanatto, 513 U.S. at 218 (citation omitted).
the procedural forest is safe and fair, while the parties only care about moving the path so that it leads to their preferred way out of the forest. From the judicial system’s perspective, allowing the parties to dictate procedure is giving them a bulldozer instead of a map of the forest. And contract procedure allows parties to choose a path before they know where they want to be.

This norm is deeply problematic from a contract perspective. It implies that the judicial system’s (and society’s) interest in fair procedure should trump the parties’ (and society’s) ability to capture the ordering benefits of ex ante certainty. This raises important questions about the importance of the perception of legitimacy and the meaning of normative fairness in procedure. One question is whether the potential for abuse by powerful parties outweighs the potential for parties to maximizing the incentives for efficient conduct. There is certainly a long history in contract law of parties with greater bargaining power using that power to create socially inefficient contract. But such issues are seldom explicitly discussed in the cases, which are mostly concerned about enforcing the norm of fairness. Other questions include whether ex ante efficiencies should need to be proven before they can be enforced, and how to weight the importance of values like uniformity and procedural fairness in light of such efficiencies. In any case, any normative theory of how procedural contracts should be enforced must deal with this powerful and problematic norm.

D. Uniformity and Other Purposes

These three explicit purposes of civil procedure were less influential that might be guessed by their marquee placement in Rule 1. Uniformity was the most important but was mostly a default for judges’ decision to reject contractual rules of procedure out of hand. Judges worried about the confusion that would come from individualized dispute resolution. They also worried that cases decided by standards set by the parties would not be useful for later decisions.
Judges generally felt that the importance of uniformity was self-evident. Uniformity is increasingly important at a time when anyone can do business, and therefore be sued, anywhere in the country with a mouse click.

The cases repeatedly recognized that contractual procedure could bring desirable efficiencies – which would presumably lead to cost savings – likely because virtually all of the contracts in the survey eliminated procedure. But judges were not about to enforce contract procedure just for efficiency’s sake. Contrary to popular belief in the scholarship, there was little indication that judges worried about the extra work for them produced by having to evaluate or enforce procedural contracts. While the potential for increased efficiencies is the main selling point for contractual procedure, it received little recognition from the courts. Proponents of contract theory for these contracts have their work cut out for them.

Courts almost never considered whether the contracts helped move the case along faster. While given an important place in Rule 1, the ideal that litigation should be “speedy” was never mentioned as a factor in evaluating whether to enforce a contract procedure. Perhaps this is not surprising, given that procedural contracts have little prospect of improving the glacial pace of many courts, nor will they prevent litigants from getting extensions for everything. It would seem that the theoretical ability of procedural contracts to shorten litigation should create some excitement. But since procedural contracts invariably create delays when the parties do not agree on enforcement, perhaps it is no surprise that this potential was never discussed in the cases.

V. A PROPOSAL FOR EVALUATING CONTRACTUAL PROCEDURAL BY THE NORMS OF CIVIL PROCEDURE

Given the strength of the norms limiting contracts to modify procedure, there is little practical prospect for the general enforcement of such contracts in the near future. Courts have
applied these norms so strictly that innovation hardly exists in contractual procedure. But the current implementation is not the only possible or most desirable way to judge contract procedure as procedure. Because the potential for increased efficiencies through contract procedure is so high, it is worth finding ways to incorporate those norms into a useful approach for evaluating individual procedural contracts. The question of which set of norms to consider is simple because the norms emerging from practice are merely stronger versions of those explicitly set out in the federal rules.

This Part explains how procedural contracts can be usefully evaluated based on these norms, gives an example of an analysis under this approach, and then reviews its limitations.

A. A Norm-Based Approach To Evaluating Contract Procedure

In addition to deciding whether a contract to modify civil procedure is valid between the contracting parties, courts must also decide whether to act in accordance with the procedures chosen by the parties. This section presents a three-part test that a procedural contract should pass before a court should agree to modify its own procedures in accordance with the terms. Depending on the contract’s fidelity to the norms outlined above, reformation or damages may be available to ensure that enforcement is available to the extent that the contract procedures are consonant with the correct purposes.

1. Judges must remain in control. To qualify as enforceable and valid procedure, contracts to modify must allow judges to retain meaningful control of decision making. \(^{280}\) This

\(^{280}\) The concerns about congressional encroachment in *Hadix v. Johnson*, 144 F.3d 925, 943 (6th Cir. 1998), could also be applied to procedural contracts: ‘The Judiciary’s fulfillment of its Article III responsibilities requires, at its core, meaningful judicial decisionmaking. . . . The preservation of this inherent power, so fundamental to the bestowal of evenhanded justice, requires that all federal courts be permitted to analyze relevant facts and the applicable substantive law untethered by the legislative branch. . . . Moreover, unconstrained deliberation by the
is the fundamental premise of the old ouster doctrine, which courts used to justify a flat-out rejection of many types of contract procedure, but our approach need to be so extreme to accomplish the purposes of this norm. Three interrelated questions can help decide whether a contract infringes on judge’s discretion: (1) Does the contract require the judge (as opposed to the parties) to act in a different way or make a decision under a different standard? (2) Does the contract directly affect a decision about right and wrong? (3) Does the contract impose a burden on the court that is inconsistent with sound judicial administration?

If the contract does not require the judge to act differently, then, whatever its other faults, it is unlikely to interfere with the core decision making duties of a judge. It does not impinge on judicial decision making. This is a bright-line rule that parties can use to predict whether a contract will run afoul of this norm. If the contract does require the judge to act – other than simply enforcing the contract against the parties – then the issue is whether it controls a question of right and wrong. If the contract purports to redefine a moral question normally made be a judge, then it should be considered unenforceable.

Judges must also retain the discretion to reject contracts that, while otherwise unobjectionable, would impose a substantial burden on the court or on third parties. This, perhaps, need not be explicitly said because it happens every day. For example, parties preparing for a trial will often agree that the judge should decide hundreds of individual designations of deposition testimony. The judge will often refuse, and require the parties to work the questions out by themselves. In the same way, a judge can refuse to comply with a

Judiciary not only is necessary to preserve the independence of the Judiciary but also to protect due process rights of individual parties who come before the courts.”

281 See supra notes 38 and 277.
contract that moves burdens from the parties to the court.

2. *Fair adjudicative procedure*. When a court finds that a contract creates a procedure that gives a substantial advantage to one side that appears unwarranted, then reformation should be the standard alternative to unenforceability. The court could reform the procedure insofar as necessary to render it fair to each side, from an ex post perspective. The party seeking enforcement of the contract would then decide whether to accept the reformed terms or to simply abandon enforcement altogether. Judges could also encourage the parties to compromise rather than risk a decision reforming or striking the contractual procedure. Giving lower courts discretion to reform any procedural contract that turns out to be unfair in practice would both ensure that the adjudicative procedure is fair, but would also allow such contracts to be enforced as far as possible.

This represents significant change from the normal contract doctrine of reformation, which is usually only available where there is a mutual mistake or a unilateral mistake known by the other party. The purpose of reformation is to fix a contract that failed to express the actual intent of the parties. In the context of procedural contracts, this approach above assumes that the parties intended to have a procedure that is fair and enforceable. This is reasonable because adjudicative procedure that is unfair from the ex post perspective is against public policy. The availability of judicial reformation recognizes the uncertainty in knowing what will happen in litigation and what procedures will turn out to be fundamentally unfair.

3. *Procedure should not decide the merits*. Another modified contract doctrine can allow the procedural contracts to coexist with the norm that procedure should not control substance. If a judge finds that the procedure was clearly intended to use procedure change the merit determination from an ex ante perspective, then the contract will be unenforceable. If the parties
wish to change the merits, they should not do it through procedure. A bright-line rule on this will encourage parties to draft procedural contracts that do not try to pre-determine the merits, and it will discourage parties with negotiating power from drafting procedure that predetermines the outcome in their favor.

For most contracts, however, it will only be clear that the procedure will determine the merits once the litigation has begun. The common law doctrine of specific performance provides a way to enforce such contracts without violating the strong norms against having procedure determine the merits. That doctrine is usually read to state that because the goods are fungible, money damages are an adequate remedy for non-performance. In treating contracts as procedure, this article concludes that such contracts should not control the merits. Therefore, the only permissible purpose of contracts to modify litigation is to improve the speed and efficiency of litigation. If the only effect of non-performance is to increase costs and delay in the individual case, that injury that can be adequately compensated with money damages.

Under this approach, the party refusing to perform would simply compensate the party seeking enforcement in the amount of the savings lost by avoiding the contract. Damages would be calculated based on the lost expected efficiencies, though they might have to be mitigated so that payment of the damages would not prevent the litigation from being resolved on the merits. Because damages would not be available for benefits that the contract would bestow on the merits, parties would have incentives to draft and enforce contracts that prize efficiency and speed. It would encourage contracts that could greatly improve the efficiency of litigation while avoiding turning procedure into a proxy for the merits.

In applying the three factors outlined in this section, Court must take into account the purposes of the individual rules or practices that have been displaced by contract. For example, a
contract could forbid or require the consolidation of related cases under Rule 42(A). When the court is determining whether the contract interferes with sound judicial administration, it should consider the explicit purposes in the rule of avoiding unnecessary costs and delay. The court should also consider the purposes ascribed to the rule in interpreting cases.

B. Limitations of This New Approach

There are a few drawbacks to evaluating procedural contracts by the norms underlying procedure. The largest one is that not every norm is fully taken into account. While uniformity is a foundational purpose of federal and state procedure, it is largely antithetical to contractual procedure. As it would also apply equally against all such contracts, it is excluded from the analysis. The only suggestion above that potentially incorporates uniformity concerns is the idea that judges can avoid contracts that impose substantial burdens on the institution. Ignoring this powerful norm will make this approach less attractive to courts, though it is hard to see how to both enforce uniformity and allow for individualized contract procedure.

Another unavoidable problem is that many contracts that are otherwise desirable will be unenforceable. There is substantial overlap between private ordering of procedure that can produce socially and individually useful results and those that are contrary to the purposes of civil procedure. This approach is makes the normative choice to limit the contractarian ideal of the ex ante bargain in favor of the institutional and systemic concerns of judicial system. This choice is tempered by the practical likelihood that customized procedure that ignores the legal culture it must swim in will remain a dead letter. There is currently precious little innovation in contractual procedures.

This approach also gives judges substantial discretion regarding whether the contract overly burdens the court and whether the court should reform an unfair contract. While judges
are in the best position to determine whether a contract that requires them to act is in the best interests of judicial administration, Professor Bone criticizes giving the judge a role in deciding what is correct for the parties.\textsuperscript{282} But this problem only occurs where the parties themselves did not foresee how the procedure would affect the case. And judges must retain some control over what procedures are judged to be fair in their courtrooms.

A final problem in application may be defining what is procedure and what is substance. This article asserts that contracts may not modify substance by changing procedures, but contracts may surely modify substance directly (subject to well-known limitations). It may be difficult to determine whether a particular contract provision is procedural or substantive. Federal courts have been wrestling with a similar problem since \textit{Erie R.R. v. Tomkins}, but the tests that separate procedure and substance are not a good fit for contractual procedure. The policy concerns that apply between state interference with uniform federal rules of procedure are very different from those regarding individual cases. \textit{Hanna v. Plumer’s} “twin aims of Erie” prongs regarding forum-shopping and inequitable administration of the laws make little sense when applied to contracts entered into by individual parties.\textsuperscript{283}

\textbf{CONCLUSION}

Despite the modern idea that the civil rules are defaults and longstanding Supreme Court


\textsuperscript{283} Hanna, 380 U.S. at 468; see also Moss v. Associated Transport, Inc., 344 F.2d 23, 26-27 (6th Cir. 1965) ("[W]e feel that the importance of maintaining uniform procedure in federal trials calls for a clear showing of possible substantive impact before departing from the federal rules.").
approval of arbitration and forum selection clauses, contractual litigation procedure is in its infancy. Even in the well-accepted gateway procedures, courts are reluctant to enforce contracts that clash with the norms underlying civil procedure. As a result, socially beneficial contracts are under enforced and there has been little innovation in contract procedure in civil litigation over the past fifty years. This article has outlined the norms generally underlying civil procedure and proposed that contractual to modify litigation should be evaluated by those norms. The approach suggested in this article shows how courts can enforce socially beneficial contracts while adhering to most of those norms.