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Customized Procedure in Theory and Reality

W. Mark C. Weidemaier*

Abstract

Contract theory has long posited that parties can maximize contract value by manipulating the procedural rules that will apply if there is a dispute. Beyond choosing a litigation or arbitration forum, parties can allocate costs and fees, alter pleading standards, adjust evidentiary and discovery rules, and customize nearly every aspect of the adjudication process. In time, this theoretical insight became a matter of faith. The assumption that contracts routinely alter procedural rules spawned debate over the normative implications of allowing parties to dictate procedure. Only recently have a few studies suggested that this debate may lack a firm empirical foundation.

This Article presents a comprehensive picture of dispute resolution practices in commercial contracts, one that corrects for many of the limitations of the existing research and focuses on both binding and non-binding mechanisms. Parties do exercise autonomy in structuring the rules of adjudication, but they do so within a limited domain. Contracts almost always specify the governing law and routinely designate a litigation or arbitration forum, and a substantial minority allocate responsibility for attorney fees. In arbitration, parties go further, frequently allocating costs, imposing expertise requirements, and shaping decision-making dynamics (as by requiring multiple arbitrators). In neither forum, however, do parties expressly modify governing rules of pre-trial, trial, or arbitration procedure. The findings

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imply that it is premature to debate the normative implications of allowing parties to dictate judicial procedures, for contracts rarely employ the kinds of clauses that have provoked concern. Yet, the findings also call for a more complete account of procedural contracting—one that explains why parties do not more fully exercise their procedural autonomy.

Table of Contents

I. Introduction	1867
II. The Advantages and Types of Customized Procedure	1875
A. Customized Procedure Can Improve Accuracy, Reduce Drafting and Enforcement Costs, and Reveal Information	1876
B. The Many (Potential) Forms of Customized Procedure.....	1881
III. Why Don't Parties Exercise Their Procedural Freedom?.....	1887
A. The Limited Evidence of Procedural Customization.....	1888
B. Efforts to Explain the Rarity of Customized Procedure	1892
1. Negative Signaling.....	1893
2. Contracts and the Product Innovation Cycle.....	1895
3. Procedural Contracting Is Too Costly	1897
C. The Limits of These Explanations	1900
IV. A Closer Look at Commercial Contracts	1905
A. The Dataset	1905
B. A First Look: Dispute Resolution as a Point in Negotiations.....	1909
1. Resolving Disputes Before the Filing of Formal Adversary Proceedings	1910
2. Changing the Rules of Binding Adjudication.....	1911
C. A More Detailed View: Off-the-Rack and Custom Rules.....	1914

1. Choice of Law and Forum: The Preference for New York	1914
2. Arbitration and the Dominance of the AAA and ICC	1919
3. Customizing Off-the-Rack Rules	1921
4. A Closer Look at Arbitration	1925
V. Implications	1930
A. On Negative Signals and Product Cycles.....	1932
B. Coarse, Not Granular, Procedural Tailoring	1936
VI. Conclusion.....	1942

I. Introduction

When commercial actors negotiate contracts, they understand that there is some chance of a dispute. Knowing this, their negotiations may encompass not only their primary obligations but also the rules that will govern an adjudication if one should occur. Consider an agreement in which Seller promises to supply a technologically advanced product meeting specifications that Buyer cannot or will not provide in advance.¹ Because the product is technically complex and Buyer's needs will not become clear until later, the contract cannot precisely state Seller's obligations.² But the imprecision increases the risk that, in a dispute over product quality, a court will be unable to detect

1. See, e.g., Manufacturing Agreement between Ionics EMS, Inc. and Microtune, Ltd. Partnership (May 24, 2005) (contracting to purchase electronic modules and circuit boards manufactured according to specifications made at a later date) (on file with the Washington and Lee Law Review). The example is similar to one in Daphna Kapeliuk & Alon Klement, Contractualizing Procedure 21 (Dec. 31, 2008) (unpublished manuscript) (on file with the Washington and Lee Law Review) [hereinafter *Contractualizing Procedure*].

2. See *Contractualizing Procedure*, supra note 1, at 21 (explaining how technological complexity can introduce uncertainty into negotiations); see generally Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814 (2006) (analyzing the choice of vague or precise contract terms as a trade-off between investing at the front- or back-end of the contracting process). This is a subset of the larger problem that "[t]he diversity of risks tends to prevent contractual parties from designing a complete contract *ex ante*." Eric Brousseau, Régis Coeurderoy & Camille Chaserant, *The Governance of Contracts: Empirical Evidence on Technology Licensing Agreements*, 163 J. INSTITUTIONAL & THEORETICAL ECON. 205, 209 (2007).

a breach by Seller.³ The prospect of adjudicator error may diminish Seller's incentives to perform, and Buyer, knowing this to be true, may discount the price it will pay.⁴ Under these circumstances, both Seller and Buyer should be willing to commit to a more accurate method of adjudication, if one can be found at reasonable cost.⁵

To accomplish this, the parties may modify the background rules of litigation. For example, if they want to avoid the unpredictable, ex post application of choice of law rules, they can specify the governing law in the contract.⁶ They can agree to arbitrate future disputes if they expect arbitrators to more accurately detect breach.⁷ If they prefer to go to court, they can

3. Contract theory often assumes that parties do not contract over non-verifiable factors, although this assumption is inconsistent with actual contracting practices. On the more complex role of verifiability in enforcing and drafting contracts, see generally Albert Choi & George Triantis, *Completing Contracts in the Shadow of Costly Verification*, 37 J. LEGAL STUD. 503 (2008) (exploring conditions under which parties may adopt costly-to-verify measures); Gillian K. Hadfield, *Judicial Competence and the Interpretation of Incomplete Contracts*, 23 J. LEGAL STUD. 159 (1994) (critiquing the binary model of competence in which courts either can or cannot verify compliance).

4. The buyer has other, also unpalatable, alternatives, such as investing in costly efforts to monitor Seller's performance.

5. See *Contractualizing Procedure*, *supra* note 1, at 21 (describing how increased accuracy can improve performance incentives). If a procedural arrangement disproportionately benefits one party, this may require a transfer payment or concession elsewhere in the agreement. *Id.* at 18.

6. See, e.g., ERIN A. O'HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* 68 (2009) (discussing the value of contracting for preferred state law); see also Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1153–53 (2000) (critiquing prevalent approaches and arguing that choice of law rules should facilitate party choice).

7. A more formal statement of the choice between arbitration and litigation is that parties will select the forum that offers greater governance benefits, net of dispute resolution and drafting costs. See Keith N. Hylton, *Agreements to Waive or Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 223–26 (2000) (discussing the link between adjudication forum and governance benefits); Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. LEGAL STUD. 549, 550 (2003) (analyzing choice between arbitration and litigation in franchise agreements). Other considerations also influence the choice. For example, cost-effective enforcement may allow parties to economize on drafting costs by replacing precise terms with vague (and cheaper-to-draft) ones. See Scott & Triantis, *supra* note 2, at 818 (exploring the choice between precise and vague terms). A desire for confidentiality and other considerations also may lead parties to prefer arbitration, just as competing

specify the forum and waive (or retain) the right to a jury trial.⁸ Within their chosen forum, they can change the rules allocating costs and attorney fees and can even try to dictate procedure in minute detail. Pleading standards, evidentiary and discovery rules, burdens of proof—all of these are potentially subject to party control.⁹ Because the possibilities are vast and exist in both litigation and arbitration, I will refer to such modifications generally as “customized adjudication” or “customized procedure.”

Many observers, from different theoretical perspectives, embrace the possibilities of customized procedure, especially in contracts between sophisticated commercial actors.¹⁰ But even in

considerations (such as the desire for robust appellate review) may lead them to favor litigation. *See* Thomas J. Stipanowich & J. Ryan Lamare, *Living With ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 16 (2013) (describing survey results in which corporate counsel reported reasons for selecting arbitration).

8. *See, e.g., Contractualizing Procedure, supra* note 1, at 7 (noting prevalence of choice of forum clauses, jury trial waivers, and other terms); Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1342–52 (2012) (reviewing the law on party rulemaking and noting the limited case law discussing many possible forms of procedural tailoring); Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 747 (2011) (“Parties are also contracting to modify the decision-making procedures during motion practice and trial.”); Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake Rules of Litigation in Arbitration’s Image*, 30 HARV. J.L. & PUB. POL’Y 579, 599–607 (2007) (discussing various customizations to the litigation process, including jury trial waivers).

9. *See, e.g., Contractualizing Procedure, supra* note 1, at 6–10 (listing potential modification to procedural rules); Scott & Triantis, *supra* note 2, at 856–78 (identifying benefits of party control over burdens of proof and giving examples from commercial practice); Dodge, *supra* note 8, at 746–50 (identifying potential procedural modifications); Robert J. Rhee, *Towards Procedural Optionality: Private Ordering of Public Adjudication*, 84 N.Y.U. L. REV. 514, 536–540 (2009) (favoring party control over many aspects of public adjudication and proposing a unilateral option to shift attorney fees in exchange for assuming a higher burden of proof); John W. Strong, *Consensual Modifications of the Rules of Evidence: The Limits of Party Autonomy in the Adversary System*, 80 NEB. L. REV. 159, 164 (2001) (“[P]arties are allowed wide discretion in determining what rules of evidence are to be enforced in a judicial proceeding . . .”).

10. *See generally* Scott & Triantis, *supra* note 2; *Contractualizing Procedure, supra* note 1; Daphna Kapeliuk & Alon Klement, *Changing the Litigation Game: An Ex Ante Perspective on Contractualized Procedures*, 91 TEX. L. REV. 1475 (2013) [hereinafter *Changing the Litigation Game*]; Choi & Triantis, *supra* note 3; Rhee, *supra* note 9; Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L.

that context, not everyone is ready to concede “[c]ontract law’s sovereignty over litigation procedure.”¹¹ Enthusiasm for party control is tempered by an equally rich vein of scholarship exploring the limits and normative implications of customized adjudication, especially when parties dictate procedure in public courts.¹²

Yet for all its theoretical richness, this debate may rest on a shaky empirical foundation. Transactional lawyers and their clients, it seems, do not share the enthusiasm for customized procedure.¹³ Relevant studies are scarce but find little evidence that commercial contracts routinely include custom procedural clauses.¹⁴ These studies have shifted attention to the reasons why parties do not exercise their supposed procedural autonomy. Have enthusiasts overstated the benefits, or under estimated the costs, of customized procedure?¹⁵ Or is there some other reason contracts have been slow to adopt custom procedural clauses?¹⁶

This Article makes two primary contributions to this developing field. First, it presents the most comprehensive

REV. 461 (2007); Noyes, *supra* note 8.

11. David A. Hoffman, *Whither Bespoke Procedure?*, 2014 U. ILL. L. REV. 389, 391 (2014).

12. Prominent examples include Bone, *supra* note 8; Scott Dodson, *Party Subordination in Federal Litigation*, 83 GEO. WASH. L. REV. 1 (2014); Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291 (1988); Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507 (2011); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005); Dodge, *supra* note 8; David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TULANE L. REV. 973 (2008).

13. See *infra* Part II.A (surveying existing studies, which find limited evidence of procedural customization).

14. See *infra* Part II.A (noting the lack of customized procedure in commercial agreements).

15. For example, Christopher Drahozal and Erin O’Hara O’Connor argue that the costs of producing custom clauses often exceed the benefits. See Christopher R. Drahozal & Erin O’Hara O’Connor, *Unbundling Procedure: Carve-Outs from Arbitration Clauses*, 66 FLA. L. REV. 1945, 1955–61, 1990–91 (2014) (describing procedural contracting primarily as a choice between litigation and arbitration, supplemented by an election to reserve certain claims or remedies for an alternate forum) [hereinafter *Unbundling Procedure*].

16. See *infra* Parts II.B–C (describing and critiquing three prevailing explanations).

picture to date of how commercial contracts use customized procedure in both litigation and arbitration.¹⁷ The sample, which consists of over 400 contracts entered over the past fifteen years by a range of US and non-US parties, corrects for many of the methodological limits of existing research.¹⁸ Limits of the prior studies include (i) an emphasis on lending and corporate transactions, (ii) reliance on database text searches rather than hand coding (which risks missing relevant contracts and clauses), (iii) coding for only a handful of custom terms, and (iv) taking a static snapshot of contracting practices.¹⁹

The findings reveal that parties routinely alter the background rules of litigation.²⁰ It turns out that transactional lawyers and their clients do share some of the scholarly enthusiasm for procedural autonomy.²¹ Yet they exercise autonomy only within a limited domain.²² Contracts almost uniformly specify the governing law and routinely designate a litigation or arbitration forum (sometimes with an alternate forum specified for a subset of disputes).²³ A substantial minority of contracts shifts the default rule concerning attorney fees.²⁴ In addition, contracts with arbitration clauses often modify the governing rules of the arbitration forum.²⁵ Again, however, the modifications are limited in scope.²⁶ Arbitration clauses frequently impose arbitrator expertise requirements, specify the number of arbitrators, or allocate the costs of arbitration.²⁷ Some

17. See *infra* Part III.A (detailing use of custom procedure in a sample of commercial contracts).

18. See *infra* Part III.A (describing the sample, its limits, and the limits of existing studies).

19. See *infra* Part III.A (critiquing previous studies).

20. See *infra* Figure 1 (finding only 6.5% of contracts lacked any modification to procedure, excluding choice of law agreements).

21. *Infra* Figure 1.

22. See *infra* Table 4 (demonstrating how few contracts show evidence of detailed procedural customization).

23. *Infra* Figure 1.

24. See *infra* Table 4 (finding that 23.9% of contracts adopt a loser-pays rule for attorney fees).

25. See *infra* note 280 and accompanying text (finding 92.3% of contracts with arbitration clauses specify the governing rules).

26. See *infra* Table 4 (listing potential custom procedural clauses).

27. See *infra* Table 5 (finding 25.3% of arbitration clauses impose some

also borrow well-defined rules from other contexts, as when an arbitration agreement imports the discovery provisions of the Federal Rules of Civil Procedure.²⁸

What contracts almost never do—in either arbitration or litigation—is dictate the particulars of pre-trial and trial practice.²⁹ In other words, contracts rarely modify rules of *procedure* as defined in the classic (if idealized) sense: trans-substantive rules that govern the conduct of litigation (or arbitration).³⁰ The vast majority of contracts are silent on matters of pleading, discovery, evidence, the order and burden of proof, and related topics.³¹ In consequence, these matters are governed by the procedural rules applicable by default in the forum.³²

The Article's second contribution is to situate these findings into the literature on customized adjudication. I do not dwell on the normative arguments for and against procedural autonomy. Given how rarely parties modify judicial procedures, such an inquiry seems premature.³³ Instead, I turn to the central puzzle

kind of expertise requirements, 72.8% address the number of arbitrators, and 52.4% allocate arbitration costs).

28. See *infra* Table 5 (finding arbitration agreements import the Federal Rules of Civil Procedure's discovery provisions 7.6% of the time).

29. See *infra* note 371 and accompanying text (finding little evidence that parties routinely modify rules of pre-trial and trial procedure).

30. Cf. Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975) (questioning the utility and feasibility of genuinely trans-substantive procedural rules); Carl Tobias, *The Transformation of Trans-Substantivity*, 49 WASH. & LEE L. REV. 1501, 1508 (1992) (noting, but challenging as unattainable, the goal of creating trans-substantive, uniform procedural rules).

31. See *infra* Table 4 (finding only 2.8% of all contracts expand document discovery and 1.1% address the burden of proof).

32. See *Unbundling Procedure*, *supra* note 15, at 1947 (explaining that if parties do not opt for their own procedural rules, courts will provide a default bundle).

33. Objections to procedural autonomy have little force in arbitration, which is traditionally viewed as a matter of private contract. There is reason for skepticism in some contexts, such as mass consumer and employment contracting, but a wide range of procedures should be tolerated in arbitrations between private commercial entities. As for contracts that anticipate resolving disputes in litigation, I do not mean to dismiss the objections that some authors have raised to forum selection clauses and other common modifications to the rules of litigation. See, e.g., Mullenix, *supra* note 12, at 297 (critiquing routine enforcement of forum selection and governing law clauses); Marcus, *supra* note 12, at 987 (arguing for limits on the ability to specify procedure). Nor do I take a

raised by the evidence: Why don't parties exercise their procedural autonomy?

Three explanations have been offered for the rarity of customized procedure.³⁴ One posits that parties do not bargain over procedural rules for fear of signaling litigiousness or inability to perform.³⁵ A second draws a parallel between the process of contract innovation and product markets, where innovation often occurs in punctuated bursts.³⁶ The theory here is that commercial actors will not embrace novel procedural clauses until spurred into action by an exogenous event, such as a major judicial opinion upholding the use of a novel procedural clause.³⁷ The third explanation emphasizes the costs of identifying and designing procedural rules.³⁸ Simply put, parties can capture many of the benefits of customized procedure by using forum selection and arbitration clauses to allocate disputes to their preferred forum(s).³⁹ Having done so, they may find it too costly to decide whether they have anything to gain by drafting additional custom procedures.⁴⁰

The findings detailed in this Article complicate each of these explanations.⁴¹ On the whole, the signaling explanation fares poorly.⁴² Most contracts include at least one clause related to

view on the degree to which parties should be allowed to control judicial procedure. *See, e.g.*, Dodson, *supra* note 12 (challenging the assumption that parties should be allowed to dictate litigation procedure). I simply note that the rarity of procedural customization diminishes the urgency of the normative debate.

34. These explanations are described in Parts II.B and C.

35. *See infra* note 149 and accompanying text (examining the “negative signal” theory).

36. *See* Michael L. Tushman & Philip Anderson, *Technological Discontinuities and Organizational Environments*, 31 ADMIN. SCI. Q. 439, 460 (1986) (examining patterns of technological change).

37. *See* Hoffman, *supra* note 11, at 428–29 (suggesting that a Supreme Court decision approving use of a procedural modification might prompt widespread adoption of the clause).

38. *See Unbundling Procedure*, *supra* note 15, at 1949–50 (suggesting parties should choose the arbitration provider or jurisdiction with the most beneficial bundle of procedures).

39. *Id.*

40. *Id.*

41. *See infra* Part V (evaluating these theories against the data).

42. *See infra* Part V.A (arguing that the negative signaling account is hard

dispute resolution, and the clauses vary from contract to contract in ways that suggest active negotiation.⁴³ These facts imply that dispute resolution is not a taboo subject during negotiations. The contract-as-product model fares somewhat better, though it too is hard to square with the sheer variety of dispute resolution clauses in use today.⁴⁴ As for the third explanation, the findings are generally consistent with the theory that procedural rules can be prohibitively costly to draft.⁴⁵ Yet customized adjudication is not confined, as this theory arguably implies, to the allocation of disputes to one or more preferred forums.⁴⁶ To the contrary, parties contract over a much wider range of matters, especially in arbitration.⁴⁷

The question remains, however, why parties do not embrace customized procedure more fully. Perhaps the most intriguing finding is that contracts tend towards “coarse” rather than “granular” modifications to the rules of adjudication.⁴⁸ I use these terms loosely, as a shorthand way to describe the tendency (i) to embrace clauses that shape the background or incentives of the adjudicator or broadly alter the parties’ incentives to invest in (or abuse) the adjudication process, (ii) and to eschew clauses that dictate what claims the parties may file, when they may file them, or what pre-trial or trial tactics they may employ. As an example, contracts routinely adopt a loser-pays rule with respect to attorney fees, and one consequence of this choice is to reduce incentives to abuse discovery.⁴⁹ Yet, contracts almost never

to square with the fact that contracts frequently modify at least some of the rules of litigation).

43. *Infra* Part V.A.

44. *See infra* Part V.A (questioning whether the contract-as-product model explains contracting patterns).

45. *See infra* Part V.B (“On the whole, the findings discussed in Part III are consistent with the account offered by Drahozal and O’Hara O’Connor . . .”).

46. *See infra* Part V.B (describing wider range of procedural customization).

47. *See infra* Table 6 (documenting use of additional procedural clauses in arbitration agreements).

48. *See infra* Part V.B (distinguishing coarse from granular procedural modifications).

49. *See infra* notes 374–379 and accompanying text (elaborating on the loser-pay rule).

attempt to prevent discovery abuse more directly, as by including express limits on the amount of discovery that may be taken.⁵⁰

It may be that existing theories can accommodate the relatively widespread use of “coarse” procedural clauses. Perhaps the benefits of such clauses are more readily apparent *ex ante*. That possibility remains an important area for future research. What is clear is that customized adjudication exists, but it does not take the form that many have envisioned.

This Article proceeds as follows. Part II explores the benefits that parties can, at least in theory, capture by tailoring procedural rules to their liking. Part III then surveys the limited evidence, which suggests that customized procedure exists largely in the minds of legal scholars. Part III also explores and critiques the three prevailing explanations for this apparent disjuncture between theory and reality. Part IV presents the findings, focusing primarily on clauses that address procedures in binding adjudication. However, a variety of contract terms that do not meet this definition can influence how parties behave in adjudication—for example, by providing information that narrows issues or reduces the need for discovery.⁵¹ Thus, Part IV paints a holistic picture of how commercial contracts address dispute resolution, including through non-binding mechanisms. Part V concludes by exploring the implications of these findings for the literature on customized adjudication.

II. The Advantages and Types of Customized Procedure

The debate over customized procedure has produced a rich and varied literature.⁵² Those inclined to embrace party control emphasize the benefits of tailored procedural rules,⁵³ while those inclined to a more skeptical or agnostic view caution against too-

50. See *infra* Table 4 (finding most contracts are silent in regard to discovery).

51. See *infra* note 239 and accompanying text (explaining how non-binding dispute resolution can facilitate agreement over adjudication procedure).

52. For a review, see Hoffman, *supra* note 11, at 397–402 (focusing, however, on the literature addressing party control over court proceedings, not party control over arbitration).

53. See *infra* Part II.A (explaining these benefits).

readily allowing private parties to dictate procedure.⁵⁴ Most participants in this debate take for granted that contracting parties in fact exercise their supposed procedural autonomy.⁵⁵ But recent studies have cast doubt on this assumption.⁵⁶ This Part summarizes the benefits attributed to customized procedure and the prevailing explanations for why parties rarely seem to draft their own procedural rules. It does not engage with normative objections to party control, which are muted, and perhaps absent altogether, if procedural contracting exists only in the realm of theory.⁵⁷

A. Customized Procedure Can Improve Accuracy, Reduce Drafting and Enforcement Costs, and Reveal Information

One reason parties perform contracts is because of the threat of legal enforcement.⁵⁸ But courts are not perfect, and the

54. See Bone, *supra* note 8, at 1342–52 (critiquing prevailing objections to customized procedure but cautioning against enforcement of procedural rules that interfere with traditional modes of judicial reasoning); Dodge, *supra* note 8, at 786 (proposing to deny enforcement to ex ante procedural bargains that impair substantive rights or that alter procedure in ways that would be prohibited ex post). See generally Mullenix, *supra* note 12; Davis & Helen Hershkoff, *supra* note 12; Resnik, *supra* note 12; Marcus, *supra* note 12; Dodson, *supra* note 12.

55. See, e.g., J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1167 (2012) (referring to “the systematic customization . . . of procedural mechanisms”); Dodge, *supra* note 8, at 745 (“[S]ophisticated commercial parties regularly modify the rules of civil procedure and evidence.”); Mullenix, *supra* note 12, at 296 (noting the “quiet revolution” by which contract terms have displaced “long-standing jurisdictional and conflict-of-laws rules”); Marcus, *supra* note 12, at 974–75 (referencing the “ubiquity” of customized procedural clauses); Dodson, *supra* note 12, at 3 (noting the “recent trend of customized litigation”); see also Bone, *supra* note 8, at 1342 (emphasizing the scant case law addressing many custom procedural clauses).

56. See *infra* Part III.A (reviewing studies finding limited evidence of procedural customization).

57. See *supra* note 33 and accompanying text (explaining how the rarity of procedural contracting renders this debate premature).

58. See Hylton, *supra* note 7, at 209, 217–20, 223–26 (noting that choice of dispute resolution methods can provide deterrence benefits). One should not, of course, overstate the importance of contracts, or legal enforcement, to commercial relations. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 59 (1963) (famously

prospect of error can undermine the incentive to perform.⁵⁹ Recall the example of the contract for the sale of a technologically advanced product.⁶⁰ At the time of the contract, Seller and Buyer can anticipate disputes over product quality, and both parties have reason to want these disputes resolved accurately. A precisely drafted contract would minimize the risk of error,⁶¹ but Buyer cannot provide specifications in advance, and, in any event, the product's technical complexity may make it hard for a non-specialist to tell whether Seller has performed or breached. On these assumptions, customized procedure promises improved accuracy.⁶² For example, if the parties believe an arbitrator can more accurately detect or remedy breach, they can include an arbitration clause in the contract.⁶³ If they prefer litigation but question the fact-finding ability of jurors, they might agree to waive their right to a jury trial.⁶⁴

Customized procedure can do more than increase accuracy.⁶⁵ All else equal, parties should prefer to minimize dispute resolution costs—for example, by voluntarily exchanging relevant information and foregoing unnecessary discovery—and they may

documenting that detailed planning and legal sanctions often play a relatively minor role in business relations).

59. *Contractualizing Procedure*, *supra* note 1, at 22–23. This is not to say that increased accuracy in adjudication is always valuable. *See, e.g.*, Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 312–23 (1994) (explaining how the value of accuracy is a function of the extent to which parties are informed *ex ante*). Adjudicator error, moreover, is not an either/or proposition, and the relative likelihood of error can have complicated incentive effects. *See generally* Hadfield, *supra* note 3.

60. *Supra* Part I.

61. *Contractualizing Procedure*, *supra* note 1, at 21; Scott & Triantis, *supra* note 2, at 822–23.

62. *See Contractualizing Procedure*, *supra* note 1, at 21 (noting how custom procedural can increase adjudication accuracy).

63. *See* Drahozal & Hylton, *supra* note 7, at 550 (“Contracting parties can choose, before any disputes arise, whether to resolve all or a subset of their disputes in court or through arbitration.”); Brousseau et al., *supra* note 2, at 211–12 (discussing dispute resolution mechanisms).

64. *Contractualizing Procedure*, *supra* note 1, at 21.

65. *See* Gerhard Wagner, *The Dispute Resolution Market*, 62 BUFF. L. REV. 1085, 1118–27 (2014) (identifying both increased accuracy and enforceability of judgments, and exploring the trade-off between accuracy and enforcement costs).

sacrifice some accuracy to attain this goal.⁶⁶ Once a dispute occurs, however, each has an incentive to withhold information and exploit discovery devices.⁶⁷ In our hypothetical sales contract, Seller holds most of the information relevant to its efforts to perform and may be tempted to withhold unfavorable evidence.⁶⁸ For its part, Buyer may try to gain an edge by using discovery devices to increase Seller's litigation costs.⁶⁹ Lawyers can mitigate these tendencies but also exacerbate them.⁷⁰ Again, customized procedure promises a solution. To reduce the risk of discovery abuse, the parties might agree to limit their access to discovery.⁷¹ The literature gives few concrete suggestions for how they might do so,⁷² but one can imagine firm limits on the

66. See *id.* (exploring the trade-off between accuracy and enforcement costs).

67. See *Contractualizing Procedure*, *supra* note 1, at 13 (“[A]t the post-dispute stage a litigant may exercise her procedural rights to impose risks and costs on her counterparty, even though both would have preferred to forgo such opportunities at the time of contracting.”); Scott & Triantis, *supra* note 2, at 828–29 (“At the time of the trial, the parties are engaged in splitting a fixed gain or loss with little, if any prospective efficiency value.”); Bruce L. Hay, *Procedural Justice—Ex Ante vs. Ex Post*, 44 UCLA L. REV. 1803, 1811–39 (1997) (explaining post-dispute incentive structure).

68. On the difficulties in securing cooperation between litigants and the circumstances in which lawyers and law firms might enable cooperation, see Ronald J. Gilson and Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 512 (1994).

69. *Contractualizing Procedure*, *supra* note 1, at 16; see also Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 603 (2001) (“[T]he bigger the expense to be borne by the opponent, the bigger the incentive to make the request.”).

70. See, e.g., Gilson & Mnookin, *supra* note 68, at 511–12 (exploring lawyers as potentially aggressive or cooperative agents of a client); see also Rachel Croson & Robert H. Mnookin, *Does Disputing Through Agents Enhance Cooperation?: Experimental Evidence*, 26 J. LEGAL STUD. 331, 342 (1997) (presenting experimental evidence consistent with the claim that lawyers can mitigate conflict between litigants); Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 170–73 (1996) (using the framing theory of litigation to explore the potential role of lawyers in reducing litigation costs).

71. See, e.g., *Contractualizing Procedure*, *supra* note 1, at 17–18 (“Litigants can lower their costs by cooperatively . . . refraining from discovery abuse . . .”); Dodge, *supra* note 8 at 746–47 (“[C]ontracts typically limit rather than expand discovery, using the shared ex ante preference for minimized litigation costs to prevent ex post defection and escalation of resource investment.”).

72. Kapeliuk and Klement identify contracts that include discovery

number of depositions⁷³ or restrictions on discovery of electronically stored information.⁷⁴

Customized procedure also allows parties to capture benefits during contract formation. This is so for at least two reasons. First, parties who trust the adjudicator to reach an accurate result may formulate their primary obligations less precisely, thereby economizing on drafting costs.⁷⁵ Assume Seller and Buyer expect to arbitrate before an industry expert. Given the arbitrator's familiarity with industry practices, the parties may forego elaborate contract drafting and instead simply require Seller to use "commercially reasonable efforts." Second, some parties may use customized procedure to send credible negotiating signals about reliability, propensity for litigation, or other matters.⁷⁶ For instance, Seller may be a new entrant to a market populated by established companies. With no reputation for reliability, how can Seller convince Buyer to trust it? Conceivably, Seller could signal confidence in its product by offering to bear the burden of proof in any lawsuit for breach.⁷⁷

restrictions in arbitration, but they acknowledge finding no examples of contracts that limit discovery in the absence of an arbitration clause. *Contractualizing Procedure*, *supra* note 1, at 10.

73. Federal procedural rules allow ten per side, although the court may alter this limit. FED. R. CIV. P. 30(a).

74. For example, parties might specify *ex ante* that a particular kind of electronically-stored information is not reasonably accessible. FED. R. CIV. P. 26(b)(2)(B).

75. See Scott & Triantis, *supra* note 2 at 856–57 (discussing this trade-off between front-end and back-end contracting costs).

76. See *Contractualizing Procedure*, *supra* note 1, at 24–25 (suggesting that parties can signal private information by agreeing to custom procedural clauses). The insight relates to the familiar contracts literature on default rules, much of which has been occupied by the question of whether and when the law should adopt defaults designed to promote pre-contractual disclosure. See generally Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615 (1990); Barry E. Adler, *The Questionable Ascent of Hadley v. Baxendale*, 51 STAN. L. REV. 1547 (1999); Omri Ben-Shahar & Lisa Bernstein, *The Secrecy Interest in Contract Law*, 109 YALE L.J. 1885 (2000).

77. Section 2-607(4) of the Uniform Commercial Code assigns to the buyer the burden of proving breach with respect to goods accepted. U.C.C. § 2-607(4) (AM. LAW INST. & UNIF. LAW COMM'N 1977). On the context-dependent incentive effects of burden of proof assignments, see generally Scott & Triantis, *supra* note 2, at 860–66.

Or, to borrow an example from another context, Daphna Kapeliuk and Alon Klement suggest that a prospective tenant might signal reliability by agreeing to let the landlord quickly obtain provisional relief in the event of a default.⁷⁸

Customized procedure offers benefits beyond those noted above,⁷⁹ including greater privacy and confidentiality.⁸⁰ It bears repeating that the literature is concerned with the ability to capture these benefits by ex ante agreement.⁸¹ Ideally, parties would wait for a dispute to arise before negotiating appropriate procedures. If no dispute happens, they will save negotiating time and expense. If there is a dispute, they will understand its parameters and be better positioned to identify cost-effective procedures. The problem with deferred negotiations, however, is that the parties' interests diverge ex post.⁸² At least between sophisticated parties, then, courts arguably should be receptive to

78. *Contractualizing Procedure*, *supra* note 1, at 24–25.

79. The magnitude of these benefits will vary by context. For instance, parties to international contracts may assign greater value to the ability to control procedure. See S.I. Strong, *Limits of Procedural Choice of Law*, 39 BROOK. J. INT'L L. 1027, 1039–48 (2014).

80. Privacy and confidentiality are often cited as benefits of arbitration. See Sarah Rudolph Cole & Kristen M. Blankley, *Arbitration*, in THE HANDBOOK OF DISPUTE RESOLUTION 318, 318–19 (Michael L. Moffitt & Robert C. Bordone eds., 2005). This is not to say that arbitration guarantees confidentiality or that there is no public interest in what happens in arbitration. See, e.g., Amy Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1211 (2006) (clarifying the distinction between privacy and confidentiality); Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1257 (2006) (exploring the discoverability and admissibility of communications made in arbitration); Jack J. Coe, Jr., *Transparency in the Resolution of Investor-State Disputes-Adoption, Adaptation and NAFTA Leadership*, 54 U. KAN. L. REV. 1339, 1340 (2006) (discussing evolution of transparency policies in arbitration under the North American Free Trade Agreement); Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301, 1302 (2006) (exploring transparency in international commercial arbitration); see also S.I. Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources*, 20 AM. REV. INT'L ARB. 119, 142–45, 150–56 (2009) (discussing confidentiality of arbitral proceedings and awards in international commercial arbitration and explaining the relevance of awards and scholarship as sources of law).

81. See *Contractualizing Procedure*, *supra* note 1, at 16–19 (discussing barriers to contracting over procedure ex post).

82. See *Contractualizing Procedure*, *supra* note 1, at 16–19 (explaining that removal of uncertainty post-dispute makes cooperation less likely).

ex ante procedural bargains, as it may be difficult for parties to agree on optimal procedures once a dispute has arisen.⁸³

B. The Many (Potential) Forms of Customized Procedure

Parties rarely need to design a dispute resolution process from scratch:

[C]ourts and arbitration institutions provide bundles of services to their customers—in this case, bundles of dispute resolution procedures to the parties in a dispute. Courts provide the default bundle, but parties can opt instead for arbitral procedural bundles that vary according to the applicable arbitration rules chosen by the parties.⁸⁴

The concept is straightforward. Parties who do not predesignate the forum will wind up in court if they have a dispute, and their silence constitutes an implicit acceptance of the bundled rules applicable in the relevant jurisdiction(s).⁸⁵ Those who prefer the rules of a particular litigation or arbitration forum can agree to resolve disputes there.⁸⁶ If they do not like all of the designated

83. *Changing the Litigation Game*, *supra* note 10, at 1483–84; Wagner, *supra* note 65, at 1101. *But see* Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 526–29 (2003) (critiquing overly sharp distinctions between ex ante and ex post agreements over litigation process). A similar barrier may impede ex post procedural contracting in consumer and employment relationships. *See, e.g.*, Scott Baker, *A Risk-Based Approach to Mandatory Arbitration*, 83 OR. L. REV. 861, 895–96 (2004) (explaining difficulties of agreeing to arbitration ex post); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Pre-dispute Employment Arbitration Agreements*, 16 OHIO ST. J. DISP. RESOL. 559, 567–68 (2001) (same). Of course, courts more actively regulate such contracts under unconscionability and other doctrines. The argument for procedural customization assumes that the parties' bargain is otherwise enforceable. Even then, mass consumer and employment contracts may merit different treatment. *See generally* Dodge, *supra* note 8, at 754–64.

84. *Unbundling Procedure*, *supra* note 15, at 1947.

85. Without an exclusive forum selection clause, parties cannot be sure of the forum in advance. Case-filing decisions are constrained, of course, by rules governing jurisdiction and venue and are subject to a host of other rules allocating decision-making authority across jurisdictional lines. For example, courts faced with duplicative lawsuits often defer to the first-filed action. *See, e.g.*, *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1102–03 (2d Cir. 1970) (recognizing the priority afforded to the suit filed first).

86. *See* Dodge, *supra* note 8, at 739–43 (discussing forum selection);

forum's rules, the parties can tailor them further by drafting additional, customized procedures, much like the buyer of an off-the-rack suit can improve the fit by paying for minor alterations. (Of course, parties *can* design dispute resolution mechanisms from scratch, or pay lawyers to do so, just as people can sew their own suit or visit bespoke Saville Row tailors.)

For example, a forum selection clause requiring litigation in New York incorporates a bundle of rules that includes (for state law causes of action) that state's conflict of laws rules.⁸⁷ These can be uncertain in application, so the parties might clarify the law governing their primary obligations with a choice of law clause.⁸⁸ They might also alter forum rules allocating fact-finding duties between judge and jury—say, by waiving the right to a jury trial.⁸⁹ If they deem a subset of disputes more suitable for arbitration, they might further add a limited arbitration clause designating their preferred arbitration forum for this subset. Clauses that send a limited subset of disputes to arbitration are sometimes called “carve-ins.”⁹⁰

Alternatively, assume that contracting parties want to arbitrate most disputes. Rather than draft their own code of arbitration procedure, they designate an off-the-rack set of rules, such as the Commercial Arbitration Rules of the American Arbitration Association (AAA).⁹¹ If the AAA rules are inadequate in some respect—for example, by not requiring the arbitrator to have relevant industry expertise—the parties can add a clause

Unbundling Procedure, *supra* note 15, at 1–2 (same). This assumes subject matter jurisdiction in the case of judicial forums.

87. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 2 (AM. LAW INST. 1971); *see also* *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (requiring federal courts to apply the conflicts of laws rules of the state where they sit in diversity cases).

88. *See generally* Juliet P. Kostritsky, *What Lawyers Say Determines Choice of Law in Merger Agreements: A Complex Truth* (Case Res. Paper Series in Legal Stud., Working Paper 2014–10 (rev), 2014) (surveying lawyers concerning choice of law in merger agreements).

89. The source and content of these rules will depend on whether the litigation is in state or federal court.

90. *Unbundling Procedure*, *supra* note 15, at 1950 n.23.

91. *Commercial Arbitration Rules and Mediation Procedures*, AM. ARB. ASS'N (Oct. 1, 2013), https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103 (last visited Nov. 11, 2015) [hereinafter *Commercial Arbitration Rules*] (on file with the Washington and Lee Law Review).

imposing this requirement.⁹² The parties also might want to litigate a subset of disputes, such as demands for preliminary injunctions or other provisional remedies. They can accomplish this with a so-called “carve-out” exempting such questions from arbitration.⁹³

Conceptually, it may help to group custom procedural clauses according to function. Some designate a preferred set of bundled rules for some or all disputes. These include forum selection clauses, arbitration clauses that designate an off-the-rack set of institutional rules,⁹⁴ and clauses that specify the governing law.⁹⁵ Carve-outs and carve-ins also fall into this group, as these clauses designate a forum for a subset of claims or remedies.⁹⁶

Other clauses target the adjudicator’s identity, expertise, or incentives. Here, parties who expect to litigate have relatively little freedom. Courts typically enforce jury trial waivers⁹⁷ and often agree to various non-traditional forms of judicial involvement, such as the entry of consent decrees.⁹⁸ But courts

92. AAA rules create a process for selecting an arbitrator but do not generally require arbitrators to have industry expertise. *See id.* at 15 (providing procedures for appointing an arbitrator in the event the parties cannot agree).

93. *See Unbundling Procedure, supra* note 15, at 1957–59. Here is a carve-out: “Any dispute, except a dispute involving infringement of Third Party intellectual property rights or any intellectual property rights owned or controlled by a party, shall be submitted to arbitration . . .” License, Development, Supply, and Distribution Agreement dated Dec. 11, 2006 between Immunicon Corporation and Diagnostic Hybrids, Inc. ¶ 14 (Dec. 11, 2006) (on file with author).

94. If parties do not specify (or create) procedures to govern the arbitration, then the arbitrator will have nearly unfettered discretion to determine appropriate procedure.

95. *See, e.g., Contractualizing Procedure, supra* note 1, at 7 (noting prevalence of clauses designating the governing law); Noyes, *supra* note 8, at 599–601 (discussing forum selection clauses).

96. Drahozal & O’Hara O’Connor refer to carve-outs and carve-ins as “unbundled” procedure. Drahozal & O’Hara O’Connor, *Supra* note 15, at 1991. In a sense this is right, for these clauses exempt claims or remedies from the bundled rules that would otherwise apply. Yet, for this subset, carve-outs and carve-ins simply replace the default bundle with different bundled rules. I do not believe anything turns on the distinction, as Drahozal and O’Hara O’Connor are interested primarily in whether parties who have designated a forum engage in further customization.

97. *Contractualizing Procedure, supra* note 1, at 7; Dodge, *supra* note 8, at 747; Bone, *supra* note 8, at 1348–49.

98. *See, e.g., Sarah Rudolph Cole, Managerial Litigants? The Overlooked*

are public institutions; litigants cannot instruct public officials how to act⁹⁹ or demand a judge with desirable characteristics.¹⁰⁰

Parties who agree to arbitrate have more freedom.¹⁰¹ By definition, arbitration involves a private adjudicator selected and paid by the parties. Because arbitrators are market actors who compete for business, their incentives necessarily differ from those of judges.¹⁰² Arbitration also differs from litigation in that the parties can specify arbitrator characteristics and create custom incentive structures. For example, parties can insist on an arbitrator with industry expertise.¹⁰³ They can require a three-arbitrator panel, thereby forcing each member not only to reach a decision but to persuade at least one other panelist.¹⁰⁴ Parties can

Problem of Party Autonomy in Dispute Resolution, 51 HASTINGS L.J. 1199, 1207–20 (2000) (exploring judicial treatment of consent decrees).

99. See Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (noting that judges do not derive their authority from private contractual agreements).

100. Judges on a court may share attributes or follow consistent case-management practices. If these differ across jurisdictions, a forum selection clause allows parties (indirectly) to select between judicial models. But parties still cannot specify the judge's background or easily adjust the judge's incentives. See *Contractualizing Procedure*, *supra* note 1, at 29–34 (explaining that the incentives facing judges are shaped by institutional mandates and not market pressures). Arbitration offers much greater flexibility. See, e.g., Distribution Agreement dated Aug. 12, 2009 between MaxLinear, Inc. and Lestina, Int'l Ltd., at ¶ 15.8 (“The arbitrator will have at least 15 years of appropriate experience in the semiconductor industry and be independent of the parties.”) (on file with author).

101. See Bone, *supra* note 8, at 1386 (discussing the wide latitude parties have in shaping the arbitration process).

102. See, e.g., Orley Ashenfelter, *Arbitration and the Negotiation Process*, 77 AM. ECON. REV., May 1987, at 343 (suggesting that a successful arbitrator must “provide decisions that are forecasts of the decisions *other* arbitrators will make in similar situations”). This is not to say that judges do not try to accommodate lawyers who make case-filing decisions or otherwise behave as if competing for business, only that judges are insulated from market forces to a greater extent than arbitrators. See, e.g., Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 4–7 (1993) (exploring the incentive structure of federal judges).

103. See *Contractualizing Procedure*, *supra* note 1, at 26 (noting that parties may choose expert arbitrators when disputes require scientific or technical expertise).

104. On panel dynamics in arbitration, see, e.g., Daphna Kapeliuk, *Collegial Games: Analyzing the Effect of Panel Composition on Outcome in Investment Arbitration*, 31 REV. LITIG. 267, 292–97 (2012) (focusing on investment arbitration); Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV.

even dictate the method of reaching a decision. For example, in “final offer arbitration”—sometimes called “baseball arbitration” due to its association with salary disputes in professional baseball—the arbitrator must choose between resolutions proposed by the parties.¹⁰⁵

Other clauses directly alter litigation costs and payouts. Examples include clauses that allocate responsibility for attorney fees,¹⁰⁶ litigation costs, and arbitration-specific costs such as administrative fees, facility rental charges, and arbitrator compensation.¹⁰⁷ Finally, some clauses specify the manner and timing of initiating a claim, the rules of discovery and other pre-trial processes, and the rules of procedure and evidence at trial (or the merits hearing in arbitration).¹⁰⁸ Examples include clauses that reduce or expand the time for filing claims,¹⁰⁹ establish a method for serving process,¹¹⁰ specify alternate pleading standards,¹¹¹ restrict or expand discovery,¹¹² allocate burdens of

485, 497–98 (1997) (discussing the process of compromise resulting from party-appointed arbitrators on a three-arbitrator panel—at least where party appointees are not required to be neutral).

105. See, e.g., Michael Carrell & Richard Bales, *Considering Final Offer Arbitration to Resolve Public Sector Impasses in Times of Concession Bargaining*, 28 OHIO ST. J. DISP. RESOL. 1, 17–22 (2013) (discussing salary arbitration in Major League Baseball).

106. See *Contractualizing Procedure*, *supra* note 1, at 8 (discussing symmetric and asymmetric approaches to allocating attorney fees); Dodge, *supra* note 8, at 748 (same).

107. See Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 736–42 (2006) (discussing the AAA’s fee structure).

108. Again, and in keeping with the literature, I use the term “procedural” to refer to a wide range of clauses that alter traditional rules governing litigation.

109. See *Contractualizing Procedure*, *supra* note 1, at 7 (describing how parties can waive statute of limitations defenses); Dodge, *supra* note 8, at 746 (same).

110. *Contractualizing Procedure*, *supra* note 1, at 7.

111. See, e.g., Daphna Kapeliuk & Alon Klement, *Contracting Around Twombly*, 60 DEPAUL L. REV. 1 (2010) (exploring the possibility that contracting parties might adopt the pre-*Twombly* pleading standard).

112. See, e.g., Moffitt, *supra* note 10, at 469–72 (exploring customized discovery procedures); Dodge, *supra* note 8, at 746–47 (same); Bone, *supra* note 8, at 1346–47 (same); *Contractualizing Procedure*, *supra* note 1, at 17–18 (same).

proof,¹¹³ or adjust evidentiary rules.¹¹⁴ For instance, parties might agree to waive hearsay objections¹¹⁵ or objections as to the authenticity of a document.¹¹⁶ Clauses in this category tend to modify rules that are procedural in the classic, trans-substantive sense.¹¹⁷

These categories are stylized and overlapping, but they usefully highlight the central function of each clause. For example, parties who agree to arbitrate may expect this choice to reduce the expense of discovery¹¹⁸ and to do away with the hearsay rule.¹¹⁹ However, the decision to arbitrate may or may not produce these incidental benefits.¹²⁰ Likewise, parties who agree to a loser-pays rule with respect to attorney fees may expect this to reduce discovery costs, but this may not prove true in all cases. The categories emphasize the functions necessarily accomplished by each clause.

113. Scott & Triantis, *supra* note 2, at 857–58, n.129.

114. Bone, *supra* note 8, at 1349; Noyes, *supra* note 8, at 607–08; Moffitt, *supra* note 10, at 472–75.

115. Noyes, *supra* note 8, at 607–08.

116. See Hoffman, *supra* note 11, at 417 (discussing self-authenticating contracts).

117. See *supra* note 30 and accompanying text (noting rarity of clauses modifying procedural rules).

118. *Unbundling Procedure*, *supra* note 15, at 1953–54.

119. The presumption is that the rules of evidence do not apply in arbitration, although institutional rules often leave this to the arbitrator's discretion. See, e.g., *Commercial Arbitration Rules*, *supra* note 91, at 23 (“Conformity to the legal rules of evidence shall not be necessary.”).

120. See *id.* (“The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered.”).

Table 1. Categories of Customized Procedure, by Function, with Examples
1. Selects Bundled Rules
<ul style="list-style-type: none"> • Forum Selection • Arbitration • Choice of Law • Carve-out • Carve-in
2. Adjusts Adjudicator Identity and Incentives
<ul style="list-style-type: none"> • Jury Trial Waiver • Arbitrator Expertise • Arbitrator Number • Decision Method (e.g., Final Offer Arbitration)
3. Alters Adjudication Costs/Payouts
<ul style="list-style-type: none"> • Allocates Attorney Fees • Allocates Litigation or Arbitration Costs
4. Addresses Timing, Procedure, or Evidence
<ul style="list-style-type: none"> • Alters Statute of Limitations • Specifies Pleading Standard • Allocates Burden of Proof • Service of Process Method • Restricts or Expands Discovery • Alters Evidentiary Rules

III. Why Don't Parties Exercise Their Procedural Freedom?

The discussion thus far has emphasized the benefits attributed to customized procedure. As noted, however, many view with skepticism the prospect that parties might dictate adjudication procedure.¹²¹ This is especially so for mass consumer and employment contracts, which present the risk that businesses will draft one-sided procedures that effectively bestow immunity from liability.¹²² But skepticism about customized

121. See *supra* note 12 and accompanying text (noting skeptical views about party-controlled procedure).

122. See, e.g., Dodge, *supra* note 8 at 757–64 (emphasizing information asymmetries and other bargaining defects in form contracts with individuals); Moffitt, *supra* note 10, at 517–18 (expressing similar concerns). A voluminous literature critically examines party control over the arbitration process.

procedure also extends to arms-length contracts between commercial parties.¹²³ At the extreme, some argue, party control over litigation procedure may “create[] risks to the institution of adjudication itself.”¹²⁴ For present purposes, however, normative questions about customized procedure must take a back seat to descriptive ones. There is a consensus that customized procedure is widespread.¹²⁵ But the limited available evidence suggests that this is not so.¹²⁶ As David Hoffman notes, the “grand cathedral of privatized civil procedure” may have a flimsy foundation in fact.¹²⁷

A. *The Limited Evidence of Procedural Customization*

Most contracts are private documents.¹²⁸ Researchers interested in contract terms therefore tend to rely on a limited number of publicly available contracts repositories, including

Examples include David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 460–68 (2011); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1640–42 (2005) (identifying problems with the manner in which many consumer and employment arbitration agreements are formed and with the terms of the resulting arbitration process).

123. See, e.g., Bone, *supra* note 8, at 1362–68 (discounting many common objections to party control); Dodge, *supra* note 8, at 754–63 (exploring separately procedural autonomy in commercial and consumer contracts); Mullenix, *supra* note 12, at 339–47 (objecting to elevating contract rules over jurisdictional and other principles); Moffitt, *supra* note 10, at 513–19 (exploring objections to customized litigation). For a related inquiry into the normative questions raised by party control over judicial procedures, see generally Cole, *supra* note 98 (discussing managerial litigants who demand non-traditional forms of judicial involvement).

124. Bone, *supra* note 8, at 1398. The concern is that radical departures from normal judicial processes might compromise the commitment of judges to traditional forms of judicial reasoning. On other normative objections to party control, see *infra* Part V.

125. See Hoffman, *supra* note 11, at 392–93 (stating the common perception that customized procedure “is on the verge of being ‘systematic’”).

126. See *id.* at 393–94 (noting there is little evidence of widespread procedural customization).

127. *Id.* at 394.

128. There is nevertheless a growing empirical literature studying contracts, how they are produced, and how they are viewed and implemented by parties. For a literature review, see generally Zev J. Eigen, *Empirical Studies of Contract*, 8 ANN. REV. L. & SOC. SCI. 291 (2012).

material contracts included with Securities and Exchange Commission (SEC)¹²⁹ and franchise agreements filed with state regulators.¹³⁰

Despite these limits, the evidence suggests that even sophisticated commercial actors rarely customize the adjudication process in any detail. Some clauses are relatively common. Most notably, several studies document near-ubiquitous use of choice of law clauses, although these studies tend to involve merger agreements—high-value transactions in which lawyers are particularly attentive to the governing law.¹³¹ Other studies find forum selection clauses in at least a substantial minority of contracts.¹³² The same is true for

129. See, e.g., *Unbundling Procedure*, *supra* note 15, at 1972 (compiling a sample of a variety of contracts filed with the SEC); Hoffman, *supra* note 11, at 403–16 (same); Erin O’Hara O’Connor et al., *Customizing Employment Arbitration*, 98 IOWA L. REV. 133, 136–37 (2012) (studying CEO employment contracts); Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. DISP. RESOL. 433, 449–67 (2010) (analyzing material contracts filed with the SEC); Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335 (2007) [hereinafter *The Flight from Arbitration*] (same); Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1975, 983–94 (2006) [hereinafter, *Ex Ante Choices*] (analyzing merger agreements filed with the SEC).

130. See, e.g., Peter B. Rutledge & Christopher R. Drahozal, “Sticky” *Arbitration Clauses?: The Use of Arbitration Clauses After Concepcion and Amex*, 67 VAND. L. REV. 955, 987–1011 (2014); Drahozal & Hylton, *supra* note 7, at 550. Other studies use survey methods to identify contracting practices. See, e.g., Brousseau et al., *supra* note 2 (2007). Additional studies focus on credit card agreements or other consumer contracts, but these are outside the scope of this project. See, e.g., Christopher R. Drahozal & Peter B. Rutledge, *Arbitration Clauses in Credit Card Agreements: An Empirical Study*, 9 J. EMPIRICAL LEGAL STUD. 536, 539 (2012).

131. See, e.g., *Ex Ante Choices*, *supra* note 129, at 1987 tbl.2 (all merger agreements in sample designate governing law); Matthew D. Cain & Stephen M. Davidoff, *Delaware’s Competitive Reach*, 9 J. EMPIRICAL LEGAL STUD. 92, 105 Panel C (2012) (same); see also Hoffman, *supra* note 11, at 410 (finding over 1,000 contracts each year in text-based search of SEC material contracts); Giles Cuniberti, *The International Market for Contracts* (University of Luxembourg Law Working Paper No. 2014-12, 2014) (studying commercial contracts used by parties to ICC arbitrations and finding that over 80% of contracts included a choice of law clause).

132. See, e.g., Cain & Davidoff, *supra* note 131, at 105, Panel C (2012) (finding that 87.3% of a sample of merger agreements included forum selection

arbitration clauses,¹³³ many of which include “carve-outs” allowing the parties to go to court to litigate a subset of claims, such as requests for preliminary injunctive relief.¹³⁴ Finally—although the evidence is scant here—recent studies suggest that commercial contracts often adopt a loser-pays rule regarding attorney fees¹³⁵

clause); Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1504 tbl.11 (2009) [hereinafter, *The Flight to NY*] (finding that 38.9% of a sample of commercial contracts included choice of forum clause); *Ex Ante Choices*, *supra* note 129, at 1987 (finding that 52.5% of a sample of merger agreements included choice of forum clause); *see also* Hoffman, *supra* note 11, at 407–08 (concluding based on text search of SEC filings that “a plurality of contracts choose forum”).

133. *See, e.g.*, O'Hara O'Connor et al., *supra* note 129, at 161 tbl.1 (2012) (finding that 51.5% of a sample of CEO employment contracts required arbitration of some or all disputes); *Unbundling Procedure*, *supra* note 15, at 1973 (finding that 47.5% of a sample of technology contracts included an arbitration clause, again with substantial variation across contract type); Drahozal & Ware, *supra* note 129, at 465–66 tbl.4 (reporting arbitration usage of 47.6% and 71%, respectively, in domestic and international joint venture agreements); Drahozal & Hylton, *supra* note 7, at 566 (reporting that 34 of 75 franchisors included arbitration clauses in their contracts); Drahozal & Rutledge, *supra* note 130, at 29–32 (finding more widespread use of arbitration in two samples of franchise contracts—e.g., in a sample of agreements filed by 68 franchisors between 1999 and 2013, arbitration clauses appeared between 39.7% and 45.6% of the time); Brousseau et al., *supra* note 2, at 218 (finding that 62% of a sample of technology licensing agreements implement an alternative dispute mechanism, primarily arbitration). Eisenberg and Miller find much lower rates of arbitration overall; only around 11% of their sample of commercial contracts included an arbitration clause. *See The Flight From Arbitration*, *supra* note 129, at 351 tbl.2. For a variety of reasons, however, their sample may understate the prevalence of arbitration clauses. *See* Drahozal & Ware, *supra* note 129, at 449–67 (noting that Eisenberg and Miller did not sample joint venture agreements, which are contracts more likely to contain arbitration agreements).

134. For example, O'Hara O'Connor et al. found such carve-outs in nearly half of a sample of CEO employment contracts. O'Hara O'Connor et al., *supra* note 129, at 167–68. Likewise, Drahozal and O'Hara O'Connor found routine use of carve-outs in arbitration clauses in samples of joint venture, technology, and franchise agreements. *Unbundling Procedure*, *supra* note 15, at 21–31; *see also* Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight from Arbitration?*, 37 HOFSTRA L. REV. 71, 113–15 (2008) (finding frequent use of carve outs in franchise agreements).

135. Under the default rule—the so-called “American rule”—each side pays its own lawyer's fees. *See, e.g.*, Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 651 (1982). The so-called “English rule” requires the losing party to pay the winner's reasonable attorney fees. Eisenberg and Miller find no preference between the rules in a

and (much more rarely) agree to waive the right to a jury trial.¹³⁶

This brief summary obscures a great deal of variance across different types of commercial contract (e.g., domestic or international). For example, arbitration clauses appear more frequently when the contract involves an international transaction.¹³⁷ The prevalence of jury trial waivers likewise varies dramatically across contract type.¹³⁸ Nevertheless, the broad patterns are clear. Except for the clauses listed above, commercial contracts rarely include custom procedural clauses.¹³⁹ For example, in a study of arbitration clauses in CEO employment contracts, O'Hara O'Connor et al. found that most contracts selected a set of institutional arbitration rules and addressed the question of arbitration costs.¹⁴⁰ But relatively few contracts—typically between 1–10%—addressed aspects of the arbitration, such as discovery rights, the availability of punitive

large sample of commercial contracts. See Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 350–52 (2013) (finding that 37.1% of the contracts in their sample adopted the American rule, while 36.4% adopted the English rule). Because they include contracts that do not mention attorney fees in their count of contracts that adopt the default American rule, it is not clear what proportion of contracts in their sample expressly addresses the subject of attorney fees. Nevertheless, their data make clear that it is at least a substantial minority, and probably a clear majority.

136. Theodore Eisenberg & Geoffrey P. Miller, *Do Juries Add Value?: Evidence from an Empirical Study of Jury Trial Waiver Clauses in Large Corporate Contracts*, (2006) CORNELL L. FAC. PUBL'NS paper 67, at 3 (finding that only about 20% of 2,800 commercial contracts contained jury trial waivers, although also finding substantial variance across contract type, ranging from 1.9% to 64.5%).

137. See, e.g., *The Flight From Arbitration*, *supra* note 129, at 350–53 (finding that arbitration clauses appear nearly twice as often when the contract includes an international party).

138. See Eisenberg & Miller, *supra* note 136, at 17 tbl.2 (contrasting the low prevalence of jury trial waivers in employment and bond indenture contracts with the high prevalence of jury trial waivers in credit commitments and security agreements).

139. See O'Hara O'Connor et al., *supra* note 129, at 137 (noting that, beyond basic clauses determining the governing rules and arbitration association, customization is relatively rare).

140. See *id.* at 162–66 (finding that over half of the CEO employment contracts in the sample expressly allocated arbitration costs).

damages, or the right to appeal the arbitrator's award.¹⁴¹ Likewise, using broad text searches of material contracts filed with the SEC, David Hoffman looked for evidence of procedural customization, focusing on contracts without arbitration clauses.¹⁴² Except for the relatively common clauses noted above, he found little evidence of customized procedure.¹⁴³ In his estimate, for example, clauses allocating the burden of proof appear in no more than 1–2% of contracts in the EDGAR database.¹⁴⁴

These should be understood as preliminary, tentative findings. The number of relevant studies is quite small, and most report the prevalence of only one or two custom terms. As described below, moreover, the studies are subject to a variety of methodological limits.¹⁴⁵ Nevertheless, the apparent rarity of customized procedure has shifted the terms of debate. The important question, it seems, is why sophisticated commercial actors do not exploit their freedom to adjust procedural rules. What explains the disjuncture between the theory and the (apparent) reality of customized procedure?

B. Efforts to Explain the Rarity of Customized Procedure

The theoretical and empirical study of contract innovation is a relatively new field.¹⁴⁶ Even when limited to commercial transactions between sophisticated actors—and ignoring the definitional questions associated with these terms—the story of how contracts are produced and evolve is a complex one. The

141. *Id.* at 166–67 tbl.5.

142. *See Hoffman, supra* note 11, at 395 (noting the analytical difference between dictating judicial procedures and opting out of litigation altogether).

143. *See id.* (summarizing findings).

144. *Id.* at 420.

145. *See infra* Part III.C (discussing methodological limits).

146. For just a few recent examples of the genre, see generally Stephen J. Choi, Mitu Gulati & Eric Posner, *The Dynamics of Contract Evolution*, 88 N.Y.U. L. REV. 1 (2013); Kevin E. Davis, *Contracts as Technology*, 88 N.Y.U. L. REV. 83 (2013); Barak Richman, *Contracts Meet Henry Ford*, 40 HOFSTRA L. REV. 77 (2011); Omri Ben-Shahar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651 (2006); Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or “The Economics of Boilerplate”)*, 83 VA. L. REV. 713 (1997).

nature of the transaction; the identity, resources, and expertise of the parties and their agents; the background legal regime—these and other factors will shape the process of contract production.¹⁴⁷ Thus, explanations for the seeming rarity of customized procedure are tentative and varied.¹⁴⁸ Three accounts are especially prominent.

1. Negative Signaling

One possibility is that bargaining over adjudication procedures sends a negative signal about the bargaining party's ability to perform or propensity for litigation.¹⁴⁹ In our hypothetical technology sale, assume Seller's past experience with litigation has made it concerned about discovery costs. It would prefer a contract that limits access to discovery and would accept, if necessary, a somewhat lower price in exchange for the restriction. But Buyer might misinterpret Seller's request for a discovery limitation as a sign that Seller doubts its ability to perform. This risk may deter Seller from making the request.¹⁵⁰

The negative signaling account thus posits that parties avoid bargaining over the rules of adjudication because they do not

147. For a recent summary of some of the relevant literature, see John F. Coyle & Joseph M. Green, *Contractual Innovation in Venture Capital*, 66 HASTINGS L.J. 133, 138–44 (2014) (discussing the obstacles and conditions conducive to innovation in contract formation).

148. See *id.* at 139 (identifying factors that hamper contractual innovation).

149. See Eisenberg & Miller, *supra* note 136, at 122 (“[B]usiness parties may be reluctant to demand arbitration because the demand might be taken as signaling a propensity to breach.”); cf. Rutledge & Drahozal, *supra* note 130, at 20 (noting that signaling may deter change to dispute resolution provisions); Robert H. Gertner & Geoffrey P. Miller, *Settlement Escrows*, 24 J. LEGAL STUD. 87, 119 (1995) (“[B]ringing up dispute resolution procedures when negotiating a contract may be a signal . . . of the likelihood that a claim will arise through breach of contract.”).

150. See generally Kathryn E. Spier, *Incomplete Contracts and Signaling*, 23 RAND J. ECON. 432 (1992) (modeling how signaling concerns may deter parties from proposing surplus-maximizing terms); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615 (1990) (explaining how signaling concerns may leave parties stuck with an inefficient default); Scott Baker & Kimberly D. Krawiec, *Incomplete Contracts in a Complete Contract World*, 33 FLA. ST. U. L. REV. 725, 754 (2006) (noting that concerns over signaling may deter parties from contracting over required levels of investment).

want to signal they are likely to breach or to sue. What hypotheses follow from this account? One possibility is that contracts will not address dispute resolution at all—i.e., will simply accept the default rules. But this need not be the case. Transactional lawyers begin not with a blank sheet of paper but with a form: the contract used in a prior deal.¹⁵¹ They then modify this template to suit the present transaction.¹⁵² Standard dispute resolution clauses, such as forum selection and arbitration clauses, may be incorporated into contract boilerplate and spread throughout the market even if parties do not explicitly bargain over them. For example, a large firm with market power can insist on a custom procedural clause without worrying about sending a negative signal; it is in a position to dictate terms.¹⁵³ Likewise, a prominent law firm might introduce a change into the template it offers its many clients.¹⁵⁴ If adopted

151. See Choi et al., *supra* note 146, at 2–3 (describing the majority of contracts as “modifications of existing templates”).

152. James C. Freund’s *Anatomy of a Merger* offers an amusing (hypothetical) example in which a senior partner chastises a junior lawyer for starting with the final contract from a prior transaction, thereby incorporating a variety of concessions extracted by the other party after fierce bargaining. See James C. Freund, ANATOMY OF A MERGER: STRATEGIES AND TECHNIQUES FOR NEGOTIATING CORPORATE ACQUISITIONS 500–01 (1975).

153. This is one explanation for the apparently greater use of custom procedural clauses in contracts of adhesion. Cf. *Unbundling Procedure*, *supra* note 15, at 1991–92 (also noting that drafters can spread costs over many contracts).

154. For analogous findings from the corporate and sovereign debt markets, see Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or “The Economics of Boilerplate”)*, 83 VA. L. REV. 713, 753–60 (1997) (finding that underwriters played a role in disseminating new corporate debt terms); Stephen J. Choi & Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Debt Contracts*, 53 EMORY L.J. 929, 971–76 (2004) (making a similar finding for high volume law firms). Other actors can prompt changes to contract templates, including non-profits, trade associations, and academics. See Kevin E. Davis, *Contracts as Technology*, 88 N.Y.U. L. REV. 83, 112–22 (2013) (discussing possible sources of contractual innovation). In some contexts, moreover, small firms without a vested interest in the status quo may also introduce changes, although these are not likely to spread as widely. See generally W. Mark C. Weidemaier, Robert E. Scott, & Mitu Gulati, *Contracts, Origin Myths, and the Hunt for Pari Passu*, 78 LAW & SOC. INQUIRY 72 (2013); Anna Gelpern & Mitu Gulati, *Innovation After the Revolution: Foreign Sovereign Bond Changes Since 2003*, 4 CAP. MKTS. L.J. 85 (2009); W. Mark C. Weidemaier, *Disputing Boilerplate*, 82 TEMP. L. REV. 1, 50–53 (2009); cf. Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change*

by other parties, these templates may spread through the market.

Thus, the most plausible prediction of the negative signaling account is that dispute resolution clauses will exhibit low variance, both across and within firms. There will be a relatively small number of standard clauses in the market, but few contracts will exhibit signs of individualized bargaining over procedural rules.¹⁵⁵ In a given transaction, the choice among these standard templates will be determined largely by the party that provides the drafting template for the deal.¹⁵⁶ Individual firms, moreover, will typically use the same clause, although firms with substantial bargaining power may occasionally amend their preferred template.¹⁵⁷

2. *Contracts and the Product Innovation Cycle*

A second possibility draws on literature likening contracts to products, where innovation often occurs in punctuated bursts.¹⁵⁸ Change occurs incrementally until some technological advance or exogenous shock disrupts the status quo.¹⁵⁹ To use an example from the cement industry, from approximately 1910 to 1960, the production capacity of cement kilns improved only incrementally.¹⁶⁰ Then, in the 1960s, computers transformed the

and Innovation in Consumer Standard-Form Contracts, 88 N.Y.U. L. REV. 240, 244 (2013) (studying end user license agreements and finding greater innovation by younger, growing, large firms, and firms with legal departments).

155. For the reasons discussed in the text, the relatively common use of custom terms such as carve-outs, see *Unbundling Procedure*, *supra* note 15, at 1991, does not necessarily undercut negative signaling theory. Contract terms can spread throughout a market, even without explicit bargaining.

156. See *supra* notes 151–154 and accompanying text (discussing the significance of contract boilerplate).

157. See *supra* note 153 and accompanying text (noting that firms with market power may dictate terms).

158. See, e.g., Tushman & Anderson, *supra* note 36, at 460 (discussing patterns of technological change in a number of markets). For extensions of this literature into the field of commercial contracts, see generally Choi et al., *supra* note 146; Richman, *supra* note 146.

159. See Tushman & Anderson, *supra* note 36, at 440–44 (examining patterns of technological change).

160. See *id.* at 452 fig.1a (showing production capacity).

industry by allowing the construction of enormous, computer-controlled kilns with radically increased capacity.¹⁶¹ To compete, existing producers had to invest in the new technology.¹⁶² Similar patterns of innovation have been observed in mass-produced, tradable contracts such as securities. Examining sovereign bonds, for instance, Choi et al. demonstrate a broad shift in the contract template in the wake of financial crises.¹⁶³ In prior work, I document a similar shift after the United States and United Kingdom enacted statutes that enhanced the ability of private creditors to sue foreign governments.¹⁶⁴

Extending this literature, David Hoffman argues that procedural tailoring will not become widespread until a shock disrupts entrenched contracting practices.¹⁶⁵ He suggests that a few relatively minor players, such as new market entrants, might adopt atypical procedural clauses, but that these will not become “a normal part of the transactional toolkit” until such a shock occurs.¹⁶⁶ As an example of a sufficiently disruptive event, he proposes that a high-profile court decision approving use of a rare procedural clause might prompt widespread use of the clause.¹⁶⁷

161. See *id.* at 451–52 (explaining how technology transformed the industry).

162. See *id.* at 450–52 (noting that leading firms benefited from the shift but that large new investments were required); see also William J. Abernathy & Kim B. Clark, *Innovation: Mapping the Winds of Creative Destruction*, 14 RES. POLY 3, 12–13 (1985) (discussing the impact of the development of the closed steel auto body).

163. See Choi et al., *supra* note 146, at 17, 20–27, 31–35 (documenting changes in the sovereign bond template).

164. See generally W. Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*, 2014 U. ILL. L. REV. 67, 69 (2014) (exploring the impact on sovereign bonds of changes in the law of foreign sovereign immunity).

165. See Hoffman, *supra* note 11, at 425–29 (analyzing the lifecycle of contract innovation).

166. *Id.* at 427. The prediction that minor players will experiment first is based on the insight that “marginal players believe that they can best compete with established players by innovating, while established players have no reason to risk negative outcomes from contractual innovation if they can rely on returning customers or their reputation for satisfactory legal work.” Choi et al., *supra* note 146, at 8–9. See generally Gelpern & Gulati, *supra* note 154 (presenting evidence of innovation by minor players); Weidemaier, *supra* note 154 (same).

167. See Hoffman, *supra* note 11, at 428–29 (“What would such shocks look like? A Supreme Court decision making terms salient—and explicitly approving their enforceability—would be exemplary.”); see also Rutledge & Drahozal,

Hoffman's core prediction is that new procedural clauses will not become widespread until after a highly salient, disruptive event.¹⁶⁸ The most direct way to refute this hypothesis would be to identify clauses that gained wide acceptance without such a shift. None of the clauses coded for this Article meet that description.¹⁶⁹ Nevertheless, there are other reasons—explored more fully below—to question how closely this model captures the process of innovation in commercial contracts.¹⁷⁰

3. Procedural Contracting Is Too Costly

Chris Drahozal and Erin O'Hara O'Connor offer an alternative explanation. They suggest that parties can capture many of the benefits of customized procedure by making an initial choice of arbitration or litigation, selecting the jurisdiction or arbitration provider that offers the most desirable bundle of procedures.¹⁷¹ By hypothesis, parties will choose the forum and rules that offer the greatest net benefit across all future disputes.¹⁷² If the designated forum is not suitable for some claims or remedies, parties can use carve-outs or carve-ins to select a more appropriate set of bundled rules for this subset.¹⁷³ Recall that a carve-out allows parties who have chosen

supra note 130, at 955 (finding a modest increase in the use of class action waivers in franchise agreements after the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)).

168. See Hoffman, *supra* note 11, at 427–28 (arguing that change is responsive to exogenous shocks, “not the slow accretion of precedent”).

169. See *infra* note 357 and accompanying text (leaving open the possibility that a salient shock could prompt adoption of new procedural clauses).

170. See *infra* notes 174–182 and accompanying text (questioning the contract-as-product model as applied to commercial contracts).

171. See *Unbundling Procedure*, *supra* note 15, at 1949–50 (noting that studies show a “surprisingly little use of customized procedural rules in contracts between sophisticated parties”).

172. See *id.* at 1954 (making this assumption); see also Hylton, *supra* note 7, at 218 (emphasizing potential deterrence benefits of adjudication). These benefits are offset by dispute resolution costs in the designated forum and, in the case of arbitration, by the need to identify and draft an appropriate arbitration clause. See *Unbundling Procedure*, *supra* note 15, at 1954–55 (discussing these costs).

173. See *Unbundling Procedure*, *supra* note 15, at 1955–61 (discussing carve-outs and carve-ins).

arbitration as the default method of dispute resolution to send a subset of disputes to litigation; with a carve-in, parties who will litigate most disputes send a subset to arbitration.

Drahozal and O'Hara O'Connor argue that, having made such a choice, parties will often find it prohibitively costly to engage in further customization.¹⁷⁴ To make this argument concrete, assume that Seller and Buyer agree to the following arbitration clause, which is based on a model promulgated by the AAA:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association (AAA) in accordance with its Commercial Arbitration Rules. Either party also may, without waiving any remedy under this agreement, seek a temporary restraining order and/or a preliminary injunction from any court having jurisdiction, to preserve the rights or property of that party pending the institution of the arbitration process or the deliberation and award of the arbitrator(s).¹⁷⁵

Arbitration has certain intrinsic characteristics that distinguish it from litigation.¹⁷⁶ The list can be debated,¹⁷⁷ but the

174. See *id.* at 1963–65 (emphasizing the difficulty of identifying procedures appropriate for all potential disputes). This is familiar terrain for the economic analysis of contracts, which recognizes that contracts are necessarily incomplete. See generally Oliver E. Williamson, *Transaction Cost Economics*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 41, 46 (Claude Ménard & Mary M. Shirley eds., 2005); Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 846 (2003). One reason for incompleteness is that some subjects are noncontractible, meaning “the direct costs of drafting an effective state-contingent contract plus the cost of error would be prohibitive.” Michael Klausner, *The Contractarian Theory of Corporate Law: A Generation Later*, 31 J. CORP. L. 779, 785 (2006). Drahozal and O'Hara O'Connor argue that this is true for many custom procedural rules.

175. AM. ARBITRATION ASS'N, DRAFTING DISPUTE RESOLUTION CLAUSES: A PRACTICAL GUIDE at 10 (2013). The first sentence of this clause is a modified version of the AAA's model arbitration clause for commercial disputes. See *id.* (providing examples of arbitration clauses). The second sentence includes a carve-out for claims seeking preliminary injunctive relief. *Id.*

176. On the choice between litigation and arbitration, see Hylton, *supra* note 7, at 213 (discussing the considerations that influence this choice); Bruce L. Benson, *To Arbitrate or To Litigate: That is the Question*, 8 EUR. J. L. & ECON. 91 (1999) (discussing potential benefits of arbitration); Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 2–9 (1995) (same).

primary distinction is that the arbitrator is the parties' agent, not a public servant,¹⁷⁸ and operates subject to market constraints.¹⁷⁹ Many parties also expect arbitration to involve less extensive discovery.¹⁸⁰ By hypothesis, then, Seller and Buyer choose arbitration over litigation because they expect this choice to yield more accurate results and fewer opportunities for discovery abuse.¹⁸¹ They designate their preferred arbitration provider and rule set from among a variety of market choices.¹⁸² They also use a carve-out to preserve the right to go to court when a party seeks temporary or preliminary injunctive relief, which may be difficult to obtain in arbitration.¹⁸³

177. For a more complete discussion of the advantages and limitation of arbitration, see 1 IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW* §§ 3.1–3.2.9 (1999).

178. See, e.g., *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 580–81 (7th Cir. 2001) (describing the arbitrator as the parties' agent); Paul F. Kirgis, *The Contractarian Model of Arbitration and Its Implications for Judicial Review of Arbitral Awards*, 85 OR. L. REV. 1, 26–31 (2006) (discussing the contractarian model of arbitration); see also Tom Ginsburg, *The Arbitrator As Agent: Why Deferential Review Is Not Always Pro-Arbitration*, 77 U. CHI. L. REV. 1013, 1018–19 (2010) (noting limits on the ability of arbitrators to act as pure agents for the parties).

179. See Ashenfelter, *supra* note 102, at 342–46 (discussing how market forces influence arbitrators).

180. See Stipanowich & Lamare, *supra* note 7, at 24 (presenting survey data on the reasons for embracing alternative dispute resolution methods). Arbitration also offers somewhat greater privacy and confidentiality than litigation in public courts. Again, this expectation is not absolute. On privacy and confidentiality in arbitration, see generally Cole & Blankley, *supra* note 80, at 318–19; Schmitz, *supra* note 80; Reuben, *supra* note 80. In exchange for these benefits, parties to an arbitration agreement give up the procedural protections of litigation, including judicial review. See 9 U.S.C. § 10 (2012) (providing limited grounds for vacatur of an arbitration award); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 589–90 (2008) (determining that, under the Federal Arbitration Act, parties cannot contract for de novo judicial review).

181. In Drahozal and O'Hara O'Connor's terms, parties will choose to arbitrate when the deterrence benefits of arbitration (net of dispute resolution costs and specification costs—i.e., the cost of identifying and drafting an appropriate arbitration clause) exceed the deterrence benefits of litigation (net of litigation costs). *Unbundling Procedure*, *supra* note 15, at 1955.

182. The AAA provides administrative services (roughly akin to those provided by the clerk of court) and not simply rules. See generally 3 IAN R. MACNEIL, RICHARD E. SPEIDEL, & THOMAS J. STIPANOWICH, *FEDERAL ARBITRATION LAW* § 26.2.3 (1994) (discussing administered arbitration).

183. See Drahozal & Ware, *supra* note 129, at 456–57 (noting that courts have the ability to provide immediate injunctive relief while arbitration must

Having allocated claims and remedies to the forum with the most appropriate bundled rules, the parties may find that additional tailoring is not worth the trouble. For example, a clause requiring an arbitrator to have industry expertise will increase dispute resolution costs across the board (experts charge more) but will only sometimes increase accuracy.¹⁸⁴ Likewise, a firm discovery limit might prove appropriate in some cases but deny the adjudicator needed procedural flexibility in others.¹⁸⁵ The specification costs associated with identifying and drafting a clause that offers net benefits across all foreseeable states might exceed any potential benefits.¹⁸⁶ Drahozal and O'Hara O'Connor remain somewhat agnostic, but their analysis suggests that, except for carve-outs and (perhaps) carve-ins, specification costs will be prohibitive for most procedural modifications.¹⁸⁷ Reviewing evidence from a variety of commercial contexts, they show that parties who agree to arbitrate routinely use carve-outs,¹⁸⁸ but they find no evidence supporting the routine use of carve-ins.¹⁸⁹

C. The Limits of These Explanations

As suggested above, each of these explanations has limits. The signaling explanation, for example, is hard to square with

wait until an arbitrator is appointed).

184. For example, if the parties disagreed about whether Seller designed the product in accordance with industry standards, they might prefer an expert. Otherwise, they might have to put on expensive evidentiary presentations to educate the non-expert about industry practices and requirements. On the other hand, many disputes would not require industry expertise, and in these disputes, an expert adjudicator would only increase costs.

185. See *Unbundling Procedure*, *supra* note 15, at 1963–64 (noting that ex ante specification may deny the arbitrator valuable flexibility to tailor discovery).

186. See *id.* at 1964 (“[T]he cost of anticipating the universe of possible disputes and ensuring that the customization provides a net benefit to the parties could be quite significant.”).

187. See *id.* at 1989–92 (arguing that the lack of specialization in contracts between sophisticated parties may be the result of prohibitive costs).

188. See *id.* at 1966–87 (analyzing contracts across industries).

189. *Id.* at 1949 n.18. By contrast, I find relatively frequent use of carve-ins. See *infra* Table 4 (noting that 19%—35 of 184—of contracts that do not provide for arbitration as the default nevertheless include a carve-in).

the fact that parties frequently do contract over dispute resolution procedures.¹⁹⁰ Although not widespread, arbitration clauses, forum selection clauses, attorney fee-shifting clauses, and even jury trial waivers appear with some frequency in commercial contracts.¹⁹¹ What is needed is a plausible explanation for why parties who are already contracting over such matters do not also address other aspects of the adjudication process.

One possibility—consistent with the signaling account—invokes the power of standard contract templates.¹⁹² As I have explained, it is possible for a contract term to enter widespread use even though it is rarely the subject of negotiations.¹⁹³ A clause introduced by a high-volume law firm—say, an arbitration clause—might spread relatively unnoticed through the market.¹⁹⁴ Contracting parties might then hesitate to change or augment this clause for fear of signaling an increased likelihood of a dispute.¹⁹⁵ In other words, relatively invariant contracting practices—such as widespread use of a relatively small number of standard dispute resolution templates—would be consistent with the signaling account. By contrast, if contracts address dispute resolution in varied ways that suggest active negotiation, then we may have to look elsewhere to explain the infrequent use of many custom terms. Unfortunately, studies rarely examine contracting practices in this manner, leaving the signaling account relatively unexplored.

The contract-as-product model raises an additional, more fundamental question. It is not clear how closely this model corresponds to the way in which most commercial contracts are produced. Contracts often share certain features of mass-

190. See *supra* Part II.B.1 (discussing negative signaling).

191. See *supra* Part III.A (discussing evidence of procedural customization).

192. See *supra* note 154 and accompanying text (discussing how firms with substantial market power influence standard contract templates).

193. See *supra* notes 153–154 and accompanying text (discussing the diffusion of standard terms).

194. See *supra* note 154 and accompanying text (discussing how law firms can disseminate contract terms).

195. Cf. Gertner & Miller, *supra* note 149, at 119 (“[B]ringing up dispute resolution procedures when negotiating a contract might be a signal, not of the value of the ultimate claim, but of the likelihood that a claim will arise through breach of contract.”).

produced goods.¹⁹⁶ Like other producers, law firms and corporate counsel engage in many similar transactions and develop routines to ensure the predictable and efficient delivery of their products (i.e., contracts).¹⁹⁷ This explains the prevalence of form contracts and implies that lawyers do not introduce changes without good reason.¹⁹⁸ But the pressure to leave well enough alone—to use a standard clause despite its imperfections—is stronger in some contexts than others.¹⁹⁹

The empirical foundation for the contract-as-product model is based on studies of tradable financial contracts²⁰⁰ or adhesive form contracts.²⁰¹ Financial contracts are traded on secondary markets, which encourages standardization and facilitates the pricing of contract terms.²⁰² Adhesive forms are produced by one

196. See Richman, *supra* note 146, at 82 (noting that “basic organizational economics suggests that when a law firm, like any firm, has to produce large numbers of similar products, it constructs routines that are dedicated to the mass production of homogeneous goods”); D. Gordon Smith & Brayden G. King, *Contracts as Organizations*, 51 ARIZ. L. REV. 1, 31 (2009) (noting that the routinization of contracts may make them resistant to change).

197. See Richman, *supra* note 146, at 79–83; cf. Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B.U. L. REV. 813, 819 (1998) (noting that inertia of contract terms can be reinforced by managerial biases against innovation).

198. The insistence that contracts are produced according to routine also may explain why lawyers sometimes attribute changes in the contract template to a mistake, even when the evidence clearly suggests the contrary. See W. Mark C. Weidemaier & Mitu Gulati, *How Markets Work: The Lawyer’s Version*, 62 STUD. LAW, POL. & SOC’Y 107, 128 (2013) (discussing lawyer accounts of contract production).

199. See *infra* notes 200–221 and accompanying text (noting that patterns of innovation may differ across contract types).

200. See Choi, Gulati & Posner, *supra* note 146 at 59–60 (examining sovereign bonds); Weidemaier, *supra* note 164, at 107–11 (same); see also Kahan & Klausner, *supra* note 154, at 740–42 (noting—without invoking the product innovation literature—the sudden and widespread adoption of event risk covenants in corporate bonds shortly after the “watershed” buyout of RJR Nabisco).

201. See, e.g., Marotta-Wurgler & Taylor, *supra* note 154, at 247–48 (studying end user license agreements).

202. See Henry T. Greely, *Contracts as Commodities: The Influence of Secondary Purchasers on the Form of Contracts*, 42 VAND. L. REV. 133, 135–40 (1989) (discussing pressures towards standardization, including the impact of secondary market purchasers); Michael Bradley, James D. Cox, & Mitu Gulati, *The Market Reaction to Legal Shocks and Their Antidotes: Lessons From the Sovereign Debt Market*, 39 J. LEGAL STUD. 289, 312–17 (2010) (examining impact of market shock on sovereign bond prices and finding that some formulations of

party, which need not negotiate and can spread drafting costs across hundreds or thousands of transactions.²⁰³ Commercial contracts often lack these attributes, which means patterns of innovation may differ.²⁰⁴ It is reasonable to suppose that pharmaceutical industry development and distribution agreements, say, will be less standardized than corporate bonds. This may be as true of their dispute resolution clauses as it is of clauses that memorialize primary obligations.

Finally, it is surely true that some procedural modifications entail high specification costs.²⁰⁵ Nevertheless, if customized procedure is indeed a rare phenomenon, this remains puzzling. Despite competition in the market for arbitral (and judicial) services,²⁰⁶ parties have only limited options in the choice of “bundled” procedure. Rules differ across courts and arbitration institutions, but the differences are often minor,²⁰⁷ and the available rules do not address many areas of interest. Changes to the default rules concerning attorney fees, statutes of limitation, litigation or arbitration costs, pleading, discovery, or evidence—none of these predictably result from a forum selection or arbitration clause.²⁰⁸ Parties who want to tailor these and many other rules to their liking must do so directly in the contract.

a common contract clause were associated with a pricing penalty).

203. See *Unbundling Procedure*, *supra* note 15, at 1990–91 (noting that customization may be more common in contracts of adhesion).

204. After a disruptive event, for example, secondary market trading may enable market participants to quickly identify and price superior terms in financial contracts. When thick secondary markets exist, contracts may transition much more quickly into a new, dominant standard. But such markets do not exist for most types of commercial contract.

205. See *supra* Part II.B.3 (discussing high specification costs in commercial contracts).

206. See Wagner, *supra* note 65, at 1092–98 (exploring role of competition in market for dispute resolution).

207. See, e.g., Stephen J. Choi, *The Problem with Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1233, 1236–38 (2003) (discussing reasons why “market forces work to keep arbitration choices limited”); Richard E. Speidel, *International Commercial Arbitration: Implementing the New York Convention*, in ARBITRATION LAW IN AMERICA at 189 (Cambridge University Press 2006) (noting that, in the context of international commercial arbitration, provider rules “do not vary dramatically in content from institution to institution”).

208. Arbitration offers some of these benefits in a rough and unpredictable form. For example, arbitrators need not observe most evidentiary rules, although they may choose to do so. See e.g., *Commercial Arbitration Rules*,

Ex ante, it might border on the impossible to predict the net impact of an agreement to take no more than two depositions. But it is not clear why sophisticated commercial actors—by hypothesis, able to compare the benefits and costs of arbitration and litigation over all possible future disputes²⁰⁹—could not make a similar judgment about many other procedural modifications. Return to the example of arbitrator expertise. An expert arbitrator would lower dispute resolution costs and increase accuracy in at least some potential disputes.²¹⁰ On the other hand, experts cost more, and the parties will incur this extra cost in every dispute, even those where expertise is of no value.²¹¹ To weigh the costs and benefits, parties must (in theory) anticipate the universe of possible disputes, the probability of each, and the impact of an expertise requirement in each case.²¹² But this daunting-sounding task may be easy in context. This is because, in many commercial transactions, the contract value is so large that even a minor increase in accuracy will provide deterrence benefits that dwarf the expected costs of arbitrator expertise.²¹³

In some settings, moreover, the costs of procedural customization are markedly lower. Consider the cost of enforcement uncertainty. It is not certain that courts will enforce

supra note 91, at 22 (granting broad power to arbitrators in determining relevant evidence). And although some arbitration rules now explicitly authorize arbitrators to rule on dispositive motions, *see id.* at 22 (granting this authority), arbitrators are reluctant to do so, which effectively renders pleading standards irrelevant. Unless explicitly addressed in the contract, these matters will be left to the arbitrator's ex post discretion.

209. *See Unbundling Procedure*, *supra* note 15, at 1954 (making this assumption).

210. *See id.* at 1963 (noting that an expert arbiter will eliminate the need to “engage in costly proof exercises”).

211. *Id.*

212. *See id.* at 1962–63 (noting the potentially-significant costs of estimating the value of arbitrator expertise).

213. This assumes, reasonably, that an arbitrator with industry expertise is no less accurate for any category of dispute. As a simplified example, assume *A* stands to gain \$10 million if its contract with *B* is performed or enforced, \$0 otherwise; that experts add value in ten percent of disputes; and that, in this subset, an expert is ten percent more likely to detect and remedy *B*'s breach. The value of an expertise requirement to *A* is \$100,000 (\$10 million x .1 x .1). Unless expert arbitrators cost \$100,000 more than non-experts, *A* should prefer an expertise requirement. As *A*'s valuation of the contract increases, this conclusion becomes increasingly certain regardless of other assumptions.

some procedural clauses, including novel pleading standards²¹⁴ and strict discovery limits.²¹⁵ This uncertainty reduces the expected value of these clauses.²¹⁶ Parties who are willing to arbitrate, however, effectively reduce enforcement uncertainty to zero.²¹⁷ For that reason, it is reasonable to suppose that we will find more procedural customization when the contract also includes an arbitration clause.

Because of these open questions, it is hard to evaluate the prevailing explanations for the rarity of customized procedure. The evidence, moreover, remains incomplete. To do more than speculate, we need a holistic picture of how commercial contracts address the subject of dispute resolution.

IV. A Closer Look at Commercial Contracts

A. The Dataset

This section analyzes a sample of material contracts that were attached as exhibits to corporate SEC filings between

214. See Hoffman, *supra* note 11, at 398 (noting uncertainty of enforcement).

215. See Bone, *supra* note 8, at 1346 (noting doubts about enforceability of discovery agreements).

216. Kapeliuk & Klement, *see Contractualizing Procedure, supra* note 1, at 18, give the example of a discovery limit that will save each party five in litigation costs without predictably working to either party's advantage. Ex ante, the parties will agree to the clause. Enforcement uncertainty, however, reduces the expected value. For example, if there is only a fifty percent chance that the clause will be enforced, the expected savings to each is only 2.5. Uncertainty also introduces unwarranted variance. This is because the amount actually saved will be either zero or five (many commercial transactions do not recur often enough to average out the risk), and the uncertainty may complicate decisions about how much to invest in performance.

217. By and large, commercial parties may structure the arbitration process however they please. *Cf.* 9 U.S.C. § 10 (2012) (providing only limited grounds for vacatur of an arbitration award). To qualify for this lenient treatment, a dispute resolution process must be considered "arbitration," but the definition of that term imposes few procedural limits. *Cf.* Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 382 (2002) (noting that the traditional definition of arbitration requires only that the parties "choose a judge to render a final and binding decision on the merits of the controversy and on the basis of proofs presented by the parties") (quoting 1 I. MACNEIL, R. SPEIDEL, & T. STIPANOWICH, FEDERAL ARBITRATION LAW § 2.1.1 (1995)).

January 1, 2000 and December 31, 2012.²¹⁸ By definition, material contracts are not representative of all contracts.²¹⁹ But the factors that make them unrepresentative—high stakes, sophisticated parties—mean that the barriers to procedural contracting are relatively low.²²⁰ If parties do not adopt custom procedural rules when the stakes are high, they are unlikely to do so in other commercial settings.²²¹ Furthermore, because most of the relevant studies also focus (at least in part) on material contracts, the sample facilitates comparison with existing research.²²²

The sample was drawn from the EDGAR database on Bloomberg Law.²²³ It emphasizes commercial agreements, including manufacturing and supply agreements, distribution agreements, licensing and development agreements, and marketing and other services agreements.²²⁴ Excluding

218. Two research assistants performed the initial coding. Each received a coding book and, after a training period, one-half of the contracts. I spot-checked contracts that were coded as having no custom procedural clauses (other than a choice of law clause). For contracts coded as having one or more custom procedural clauses, I re-checked the coding in its entirety.

219. Material contracts include, among others, those “not made in the ordinary course of business which is material to the registrant and is to be performed in whole or in part at or after the filing of the registration statement or report or was entered into not more than two years before such filing.” 17 C.F.R. § 229.601(b)(10)(i) (2014).

220. For example, parties to material contracts can more easily justify the investments necessary to identify and provide for efficient dispute resolution procedures. See *The Flight to NY*, *supra* note 132, at 1487 (noting that material contracts “receive some degree of care and attention during the negotiation and drafting phase”).

221. See Hoffman, *supra* note 11, at 406 (noting that large firms are more likely to adopt efficient contract terms).

222. See *supra* note 129 (noting studies relying on samples of material contracts).

223. I am indebted to Daniel Dalnekoff and Andrew Gilman at Bloomberg for their assistance with the EDGAR database and for helpful discussions of Bloomberg’s “DealMaker” database of material contracts.

224. As noted, other studies include a greater percentage of merger and lending contracts. Among other differences, commercial contracts may be more likely than merger and lending contracts to involve hard-to-specify performance obligations. As an example, consider a development agreement in which parties agree to “cooperate...in performing an investigation regarding the manufacturing of clinical samples and later commercial supplies” of a product that cannot be sold without regulatory approval, with the agreement to last (subject to termination rights) until the product has been approved and the

duplicates and a handful of contracts that were too heavily redacted to be useful, the sample includes 402 contracts. Approximately 60% (239) involve domestic transactions between U.S. parties, 34% involve cross-border transactions, and another 6% involve transactions between non-U.S. parties located in the same country. Table 2 provides more detail about the nature of the contracts and the location of the parties.²²⁵

parties have negotiated a separate manufacturing agreement. Process Development Agreement dated Feb. 8, 2008 Between BioDelivery Scis. Int'l. and LTS Lohmann Therapie-Systeme AG (on file with author). Parties to such under-specified contracts may assign particular value to custom procedure. Thus, the sample was designed to emphasize commercial transactions.

I identified contracts using the following query: "(supply n/2 agreement) OR (develop! n/2 agreement) OR (distribut! n/2 agreement) OR (manufactur! n/2 agreement) OR (export! n/2 agreement) OR (import! n/2 agreement) OR (market! n/2 agreement) OR (resell! n/2 agreement)". This search typically identified between 400 and 700 relevant contracts each year. Each contract had a 10% chance of inclusion in the data set, with the caveat that, because of time and resource constraints, we coded a maximum of forty contracts for a given year. This limitation means that contracts attached to SEC filings made earlier in the year had a greater chance of inclusion. (There is no reason to think filing date is correlated with the use of custom procedural clauses.)

225. Occasionally, it was not possible to code all relevant variables, often because information was redacted from the document filed with the SEC. Unless the contract was too heavily redacted to yield useful information, I included it in the dataset. Thus, although the dataset includes 402 total contracts, the numbers reported in Table 1 and elsewhere do not always add up to this amount.

Table 2. Proportion of Contracts, by Transaction Type and Party Location (Number of Contracts in Parentheses)	
Total Contracts in Dataset	402
Type of Transaction:	
Development Agreement	14.7% (59)
Distribution Agreement	21.9% (88)
Manufacturing/Supply Agreement	55.7% (224)
Marketing/Other Services Agreement	7.7% (31)
Location of the Parties:	
U.S. Parties Only	59.9% (239)
Cross-Border, U.S. and Non-U.S. Parties	29.1% (116)
Cross-Border, Non-U.S. Parties Only	5.0% (20)
Non-U.S. Parties from the Same Country	6.0% (24)

The sample overcomes some of the limitations present (to varying degrees) in other studies. First, many studies focus on only a small number of custom terms. Recall that the literature posits that parties can benefit by adjusting burdens of proof, pleading requirements, evidentiary rules, and many other details of adjudication procedure.²²⁶ Many of the relevant studies simply do not code for these variables.²²⁷ Those that do, such as Hoffman’s study of material contracts filed with the SEC, have sometimes relied on broad text searches of the relevant

226. See *supra* notes 6–9 and accompanying text (discussing types of procedural customization).

227. This is not a criticism. Often researchers are interested in different questions. Two of the relevant Eisenberg and Miller studies, for example, explore forum selection, choice of law, and the role of state competition in shaping these choices. See *Ex Ante Choices*, *supra* note 129, at 1988–99, 2001–11 (studying forum selection and choice of law); *The Flight to NY*, *supra* note 132, at 154 (noting the possibility that competition for corporate charters may lead “to adoption of state corporation law that maximizes the value of companies incorporated in those states”). Given these questions, coding for procedural tailoring would have made little sense. Likewise, O’Hara O’Connor et al., *supra* note 129, code for a range of custom procedural terms, but the authors were focused on customization in arbitration, and the sample included only CEO employment contracts.

database.²²⁸ Searches like this are valuable and can support inferences about the relative prevalence of particular terms, but the results are necessarily impressionistic.²²⁹ Finally, studies often do not examine contracting practices over time and thus cannot easily detect behavioral shifts.²³⁰ Such shifts might be caused by disruptive events such as major court decisions²³¹ or by changes in party attitudes towards particular adjudication “products.” For example, surveys of corporate counsel suggest that “arbitration usage [is] contracting in most conflict settings,” including commercial contract disputes.²³²

B. A First Look: Dispute Resolution as a Point in Negotiations

If parties worry that bargaining over dispute resolution procedures will signal negative information,²³³ that concern is not evident in the contracts. To the contrary, almost every contract alters the default rules of adjudication in one or more ways, and many establish detailed procedures to be followed both before and after the filing of a formal claim.²³⁴

228. See Hoffman, *supra* note 11, at 407–09 (using broad text searches in the EDGAR database).

229. See *id.* at 406 (noting that text searches are impressionistic but can provide information about the relative rates of contract terms).

230. Drahozal and Rutledge study franchise contracts over an extended period of time but focus on arbitration clauses and waivers of the right to bring a class action. See generally Rutledge & Drahozal, *supra* note 130.

231. See Hoffman, *supra* note 11, 426 (noting the potential impact of major judicial decisions); Choi et al., *supra* note 146, at 1–3 (discussing the effect of disruptive events on contracts).

232. See Stipanowich & Lamare, *supra* note 7, at 32, 45 chart G (reporting survey results).

233. See *supra* Part II.B.1 (acknowledging and attempting to explain the rarity of customized procedure).

234. See *Unbundling Procedure*, *supra* note 15, at 1952–61 (discussing the many options parties have when considering dispute resolution procedure in their contracts).

1. Resolving Disputes Before the Filing of Formal Adversary Proceedings

A significant minority of the contracts include detailed, multi-tier dispute resolution procedures. In the event of a dispute, these clauses first require informal, non-binding dispute resolution processes, such as negotiation and mediation, and only then allow formal proceedings in arbitration or litigation.²³⁵ Some of these clauses are perfunctory, but others are elaborate. As an example, one contract establishes this multi-tier process:

- After notice of a dispute, parties have ten days to begin successive rounds of negotiation. If negotiators do not reach agreement within fifteen days, responsibility for negotiations passes to the next rung in the corporate hierarchy.
- If there is no resolution after 45 days, the parties must attend mediation conducted by a mediator with industry expertise.
- If the parties still cannot resolve the dispute, either may initiate litigation.²³⁶

Most contracts are not so detailed, and multi-tier ADR mechanisms like this are comparatively rare. As Table 3 indicates, the most common clause simply obliges the parties to negotiate before initiating arbitration or litigation. Nevertheless, over 40% of contracts in the dataset include some form of non-binding ADR requirement.

235. On the (sometimes overstated) differences between mediation and arbitration and the many variants of mediation, see Nancy A. Welsh and Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, 18 HARV. NEG. L. REV. 71, 105–15 (2013).

236. Manufacturing, Sales & Marketing Agreement dated April 26, 2002 between Nomaco, Inc. and RBX Industries, Inc., ¶ 15(g). This contract, admittedly one of the more elaborate examples, also specifies the location of the mediation, explicitly obliges the parties to negotiate in good faith, allocates the costs of mediation, identifies the preferred mediator by name, and creates exceptions where parties may bypass the ADR process.

Negotiation Only	36.1% (145)
Mediation Only	3.0% (12)
Multi-Tier	5.2% (21)
No Requirement	55.7% (224)

Because negotiation and mediation requirements involve non-binding dispute resolution, they tend to escape the notice of scholars interested in the ability to modify judicial or arbitral procedures.²³⁷ In at least two respects, however, negotiation and mediation requirements are relevant to debates over customized procedure. First, widespread use of these clauses suggests that dispute resolution is not a taboo subject during the contract formation stage.²³⁸ Second, parties potentially can use negotiation and mediation to gather information, narrow the substantive issues in dispute, or even agree to modify otherwise applicable procedural rules.²³⁹ To the extent this happens, negotiation and mediation requirements serve as (incomplete) substitutes for ex ante contracts over adjudication procedure.

2. Changing the Rules of Binding Adjudication

Turning our attention to binding adjudication, virtually every contract alters at least one default rule, even if we do not consider choice of law clauses (by far the most common custom term, discussed in the next section).²⁴⁰ More than three-quarters (76.1%) of contracts include an arbitration or forum selection clause incorporating the bundled rules of the designated court or

237. See, e.g., *Contractualizing Procedure*, *supra* note 1, at 14 (defining procedural clauses to include only those that affect the way disputes will be litigated or condition payments on litigation behavior).

238. See *infra* Part V.A (noting that signaling theories are hard to square with frequent and varied use of clauses addressing dispute resolution).

239. Cf. Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WISC. L. REV. 831, 849 (2001) (noting possibility that mediation can facilitate discussion of procedures for dispute resolution).

240. See *infra* Figure 1 (showing the cumulative proportion of contracts with at least one procedural modification, exclusive of choice of law clauses).

arbitral institution.²⁴¹ Note that the arbitration count includes only contracts that select arbitration as the default method of adjudicating most claims (subject to litigation carve-outs).²⁴² It thus excludes contracts that send narrow questions, such as those involving scientific or financial matters, for binding resolution by private experts.²⁴³ Although courts might treat these as arbitration agreements,²⁴⁴ I report them separately because they are so narrow in scope; the parties must litigate most disputes. These clauses are analogous to the carve-ins discussed by Drahozal and O’Hara O’Connor,²⁴⁵ and I will adopt that term.²⁴⁶

Of the remaining contracts—those without arbitration or forum selection clauses—most include at least one other

241. *Infra* Figure 1.

242. *Infra* Figure 1.

243. *See* Stipanowich, *supra* note 239, at 844–47 (discussing judicial treatment of such clauses).

244. *See id.* (explaining how certain agreements may “bear some or all of the earmarks of ‘binding arbitration’ and may even be identified by the agreement as ‘arbitration’”). *Compare* *Evanston Ins. Co. v. Cogswell Props., LLC*, 683 F.3d 684, 693–94 (6th Cir. 2012) (appraisal process did not constitute arbitration), *and* *Salt Lake Tribune Pub. Co. v. Mgmt. Planning, Inc.*, 390 F.3d 684, 689–92 (10th Cir. 2004) (same) *with* *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 7–8 (1st Cir. 2004) (noting a clause providing for “final determination” of certain valuation issues by accounting firm constituted arbitration); *cf.* *Ne. Fin. Corp. v. Ins. Corp. of N. Am.*, 757 F. Supp. 381, 383–84 (D. Del. 1991) (discussing Delaware law distinguishing arbitration from appraisal).

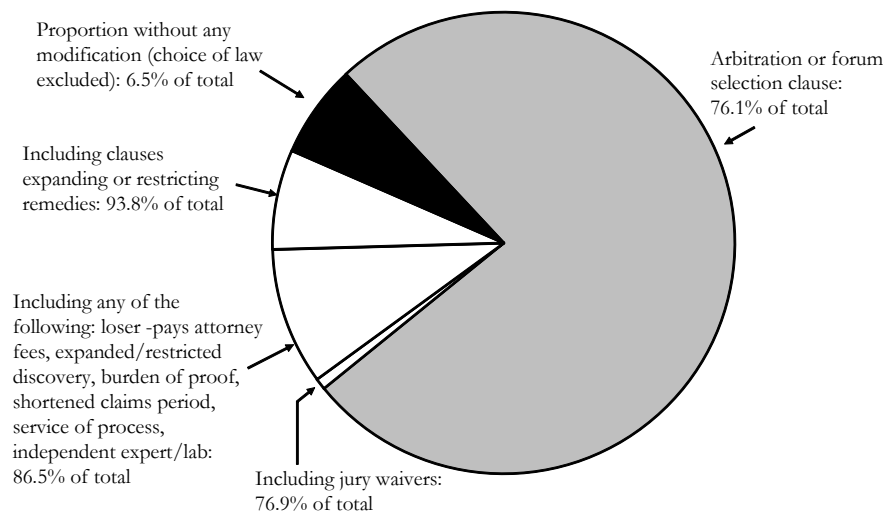
The distinction can be important. Federal law entitles parties to what amounts to an order of specific performance enforcing an arbitration agreement. 9 U.S.C. § 4 (2012); *see* *Necchi S.P.A. v. Necchi Sewing Mach. Sales Corp.*, 348 F.2d 693, 696 (2d Cir. 1965) (“An order under the Federal Arbitration Act compelling a party to arbitrate is simply an order granting specific performance of an arbitration provision . . .”). That remedy may or may not be available in cases where the clause does not qualify as arbitration under federal (or state) law. *See, e.g.*, N.Y. C.P.L.R. 7601 (MCKINNEY 2012) (authorizing specific performance of agreements “that a question of valuation, appraisal or other issue or controversy be determined by a person named or to be selected”).

245. *See* Drahozal & O’Connor, *supra* note 10, at 1950 (exploring use of carve-outs to unbundle forum procedural rules).

246. Assuming courts defer to the third party’s decision, these clauses modify the rules of litigation by shifting primary fact-finding responsibility to a private party. *See, e.g.*, *State Room, Inc. v. MA-60 State Assocs., LLC*, 995 N.E.2d 807, 811–13 (Mass. Ct. App. 2013) (distinguishing appraisal from arbitration and explaining limited judicial review of appraisal conducted pursuant to commercial lease).

procedural modification.²⁴⁷ The list includes clauses that waive the right to jury trial, entitle the prevailing party to attorney fees, shorten the statute of limitations, expand or restrict depositions or document discovery, provide a method for serving process, allocate burdens of proof, waive hearsay objections,²⁴⁸ or send limited questions to third-party neutrals (i.e., carve-ins).²⁴⁹ Taking these modifications into account, almost 90% of contracts modify the background rules of litigation in some way.²⁵⁰ If we add clauses that expand or limit remedies for breach, only 6.5% of contracts contain no modification at all, except for any choice of law clause.²⁵¹

Figure 1. Cumulative Proportion of Contracts with at Least One Procedural Modification



247. See *infra* Figure 1 (reporting the proportion of contracts with at least one procedural modification).

248. A contract was counted as waiving hearsay objections if it included a blanket waiver of all objections. A few contracts may have included narrow waivers of best evidence and hearsay objections to the admissibility of copies instead of originals. See Hoffman, *supra* note 11, at 417 (finding only a few such contracts in a broad text-based search of EDGAR).

249. *Infra* Figure 1.

250. *Infra* Figure 1.

251. *Infra* Figure 1.

C. A More Detailed View: Off-the-Rack and Custom Rules

Figure 1 shows that most contracts include an arbitration or forum selection clause, and many include additional (or alternative) custom terms. This Section provides details, beginning with the choice of bundled arbitration or court procedures. Unless otherwise noted, only contracts that involve at least one U.S. party are included in the results.²⁵²

1. Choice of Law and Forum: The Preference for New York

Prior research has found a marked preference for New York law and New York courts, although the research samples consisted entirely or predominately of corporate and lending transactions.²⁵³ That preference is also apparent in the present sample of manufacturing, licensing, and other commercial contracts.²⁵⁴ Almost every contract in the dataset (95.7%) includes a choice of law clause, thereby incorporating off-the-rack rules to govern the parties' primary obligations.²⁵⁵ In domestic transactions, contracts most often designate New York law, followed by California and Delaware.²⁵⁶ Cross-border contracts

252. Contracts between non-United States parties are of course less likely to select the law of a United States state. *See* Cuniberti, *supra* note 131, at 14–17 (studying international contracts—only a subset of which involved any United States party—and finding a preference for English and Swiss law over the law of a state of the United States).

253. *See, e.g., The Flight to NY*, *supra* note 133, 1488 (using mostly financial contracts and contracts related to mergers or asset sales, but including several other agreement types); *Ex Ante Choices*, *supra* note 129 (using merger agreements). For evidence of how lawyers describe the selection of governing law, see Kostitsky, *supra* note 88.

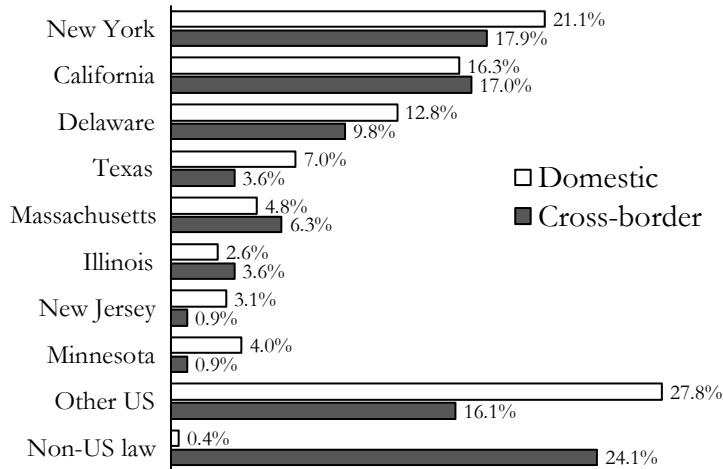
254. The dataset includes 355 contracts involving at least one United States party, 340 of which have a choice of law clause. Three of these were excluded because the choice of law clause was redacted.

255. This is consistent with the results of other studies. *See supra* note 131.

256. Although Eisenberg and Miller report more frequent use of New York law, their dataset includes a greater proportion of financial and corporate transactions for which New York law may have greater appeal. *See The Flight to NY*, *supra* note 133, at 1492 (noting that licensing, employment, and settlement agreements do not “fall[] within the core areas for which New York and Delaware have campaigned”). For the subset of licensing agreements, they report 20.4% of contracts choose New York law, 16.3% choose California law, and 10.2% choose Delaware law. *Id.* at 1491 tbl.3. These figures correspond

exhibit the same pattern, except that a greater proportion selects the law of a foreign jurisdiction.²⁵⁷

Figure 2. Governing Law, by Transaction Type



Although only around one in five contracts calls for the application of New York law, the appeal of that state’s law becomes more apparent when we recognize that most transactions are negotiated or performed in a state where at least one party has its principal place of business.²⁵⁸ For that reason, there is likely to be a strong association between the law selected in the contract and the location of the parties.²⁵⁹ There may also be a lesser association between choice of law and place of incorporation, although that seems unlikely in commercial transactions (as opposed to, say, merger agreements).²⁶⁰

One way to test the appeal of a state’s law is to examine how frequently contracts designate that law when neither party is

closely to those reported in the main text. *Infra* Figure 2.

257. See *infra* Figure 2 (reporting choice of law clauses).

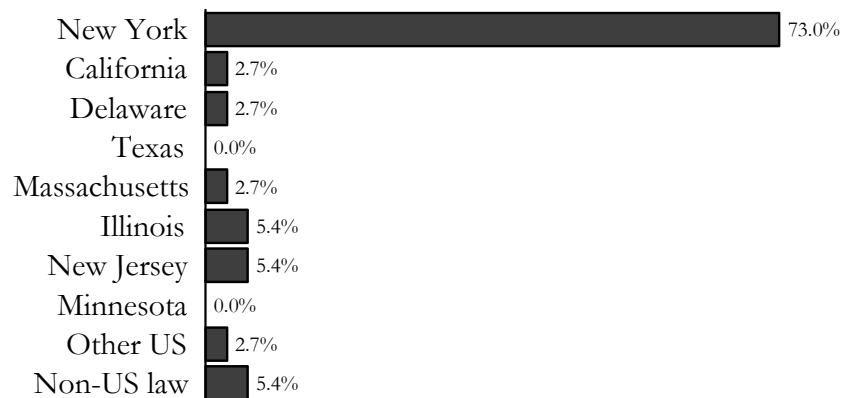
258. See *The Flight to NY*, *supra* note 133, at 1479 (“A party’s business location often relates to where events under a contract occur.”).

259. See *The Flight to NY*, *supra* note 133, at 1479 (noting a link between place of business and events relevant to the contract).

260. See *id.* at 1495–96 tbl.6 (reporting an association between place of incorporation and choice of law).

incorporated or principally located in the state.²⁶¹ Figure 3 shows New York's dominance on this measure in domestic transactions.²⁶² When the chosen law does not correspond to party location or place of incorporation, the choice is almost always New York.²⁶³ Parties to cross-border transactions showed a similar preference for New York law, although many also designated the law of a foreign country.²⁶⁴

Figure 3. Choice of Law When No Party Is Principally Located or Incorporated in the Designated State



261. See *id.* at 1499–1500 (reporting that, in their sample of contracts, New York had “the highest rate of contracts specifying its law that lack a measurable contact with the state”).

262. The dataset includes 325 contracts for which it was possible to code the choice-of-law variable as well as information related to the principal place of business and place of incorporation of the parties. For similar findings in the domestic context, see *The Flight to NY*, *supra* note 133, at 1499 tbl.9 (finding that contracts without a core contact with New York—defined as a match between the chosen law and (i) either party’s principal place of business or state of incorporation or (ii) the attorney’s locale—frequently designated that state’s as the governing law).

263. See *infra* Figure 3 (showing that, when no party is principally located or incorporated in the designated state, New York is designated 73% of the time).

264. In domestic transactions, 20.1% involved a mismatch between the designated law and the parties’ principal places of business and states of incorporation. Such mismatches occurred more frequently (32.4%) in cross-border transactions. Here, too, New York law dominated, although not quite to the same degree. Of this subset of cross-border contracts, 55.9% chose New York law and 20.6% chose the law of a foreign country with no apparent connection to either party.

The preference for New York law also manifests in forum selection decisions.²⁶⁵ Nearly forty percent (39.7%) of the contracts include a forum selection clause.²⁶⁶ Parties generally prefer to litigate in the state whose law governs the transaction,²⁶⁷ so not surprisingly, New York is the most frequently designated forum.²⁶⁸ Given the preferred status of New York law, this also means that, when a contract calls for litigation in a jurisdiction with no obvious connection to the parties, that jurisdiction is almost always New York.²⁶⁹

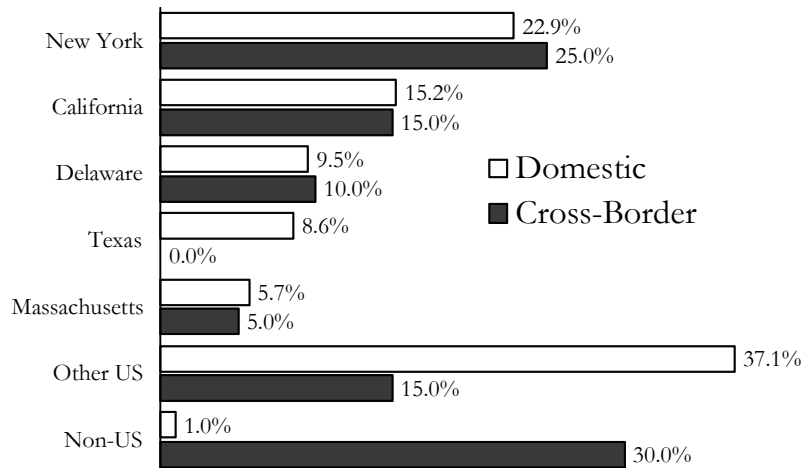
265. See *infra* Figure 4 (showing how in forum selection clauses New York is often the preferred forum in either domestic or cross-border contracts).

266. Some contracts include both arbitration and forum selection clauses. The count in the text includes only those where a judicial forum is designated to enforce at least some of the parties' primary obligations. It includes contracts that allow for litigation on the merits or let parties to go to court for preliminary injunctive relief, but excludes contracts that only designate a forum for enforcing the arbitration agreement or award.

267. In the sample studied here, 93.3% of contracts that designated both a governing law and a litigation forum designated the same state for both. See also *The Flight to NY*, *supra* note 133, at 1503 ("When a forum is specified, it overwhelmingly corresponds with a contract's choice of law.").

268. See *infra* Figure 4 (reporting choice of forum by transaction type).

269. Twenty-eight contracts involve such a mismatch; twenty-one of these provide for litigation in New York. I do not mean to express a firm view on the direction of causation. For example, it is possible that parties generally prefer New York courts, and select New York law because that is the law those courts are accustomed to applying.

Figure 4. Forum Choice by Transaction Type

Courts generally enforce forum selection clauses but sometimes interpret them as permissive rather than mandatory.²⁷⁰ A clause open to this interpretation lets parties sue and be sued in the designated court (assuming subject matter jurisdiction) but leaves open the possibility of litigation elsewhere.²⁷¹ Parties who want to litigate only in the designated forum must state this expressly.²⁷² About three-quarters of the contracts with forum selection clauses (73.2%) do so.²⁷³

270. 7 WILLISTON ON CONTRACTS § 15.15 (4th ed.).

271. *See id.* (explaining how forum selection clauses may be interpreted as permissive when the parties' intent to litigate in a particular forum is not clear).

272. *See id.* (explaining how an exclusive forum selection clause will be enforced so long as the parties "clearly express their intent to limit litigation to that particular forum").

273. I treated a forum selection clause as exclusive only if it used "exclusive" or similar words (e.g., "only", "waives all other jurisdictions," etc.) to describe the designated forum. Courts sometimes interpret less direct language (such as "jurisdiction and venue shall be . . .") as providing for exclusive jurisdiction, but parties who use such language cannot be certain of its effect. *See ASM Commc'ns, Inc. v. Allen*, 656 F. Supp. 838, 839–40 (S.D.N.Y. 1987) (interpreting the quoted phrase to designate an exclusive forum).

2. Arbitration and the Dominance of the AAA and ICC

Nearly half of the contracts (48.2%) include an arbitration clause.²⁷⁴ As noted, this excludes contracts that call for binding, third-party resolution only of narrow technical or scientific questions.²⁷⁵ As expected, arbitration clauses appear more frequently (61.0%) in contracts involving cross-border transactions,²⁷⁶ where arbitration has enforcement and other advantages over litigation in national courts.²⁷⁷

Although surveys of corporate counsel suggest a decrease in the use of arbitration since the late 1990s,²⁷⁸ no such decrease is apparent in this sample. Given the limited size of the dataset, there is expected, year-to-year variance in the proportion of contracts with arbitration clauses. This includes a seemingly sharp drop for contracts with an initial term beginning in 2012, although this is likely due to the small number of contracts (ten) for that year.²⁷⁹ (For this reason, Figure 5 depicts 2012 contracts separately.) Despite the variance, there is no indication that arbitration has fallen seriously out of favor. In domestic transactions, the proportion of contracts with arbitration clauses

274. *Infra* Table 4.

275. *See supra* note 242 and accompanying text (distinguishing such carve-ins from contracts providing for arbitration as the default method of dispute resolution).

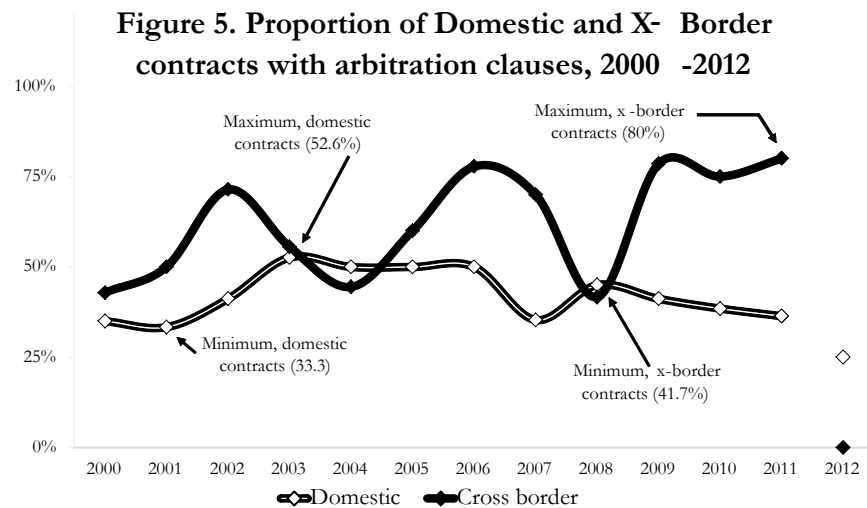
276. For comparative results, *see, e.g., Unbundling Procedure, supra* note 15, at 23–24 tbl.5 (excluding contracts between two non-US parties from the same country, reporting arbitration clauses in 35.7% of domestic contracts and 42.9% of contracts between companies from different countries); *The Flight from Arbitration, supra* note 129, at 353 tbl.4 (finding only 20% overall incidence of arbitration in contracts involving a non-United States party, but significant variance by contract type—e.g., 63.4% of licensing agreements); Drahozal & Ware, *supra* note 129, at 465–66 tbl.4 (reporting arbitration usage of 47.6% and 71%, respectively, in domestic and international joint venture agreements).

277. *See* Peter B. Rutledge, *Convergence and Divergence in International Dispute Resolution*, 2012 J. DISP. RESOL. 49, 52–58 (2012) (discussing these advantages and the possibility that they may be eroded by developments in international civil litigation).

278. *See* Stipanowich & Lamare, *supra* note 7, at 8–10 (reporting survey results describing a trend towards non-binding forms of alternative dispute resolution).

279. Contracts were collected from SEC filings through December 31, 2012. Material contracts pre-date a company's SEC filings, often by a number of years.

declines after a peak in 2003 but remains higher, in each subsequent year, than in 2001—the low point in the sample.



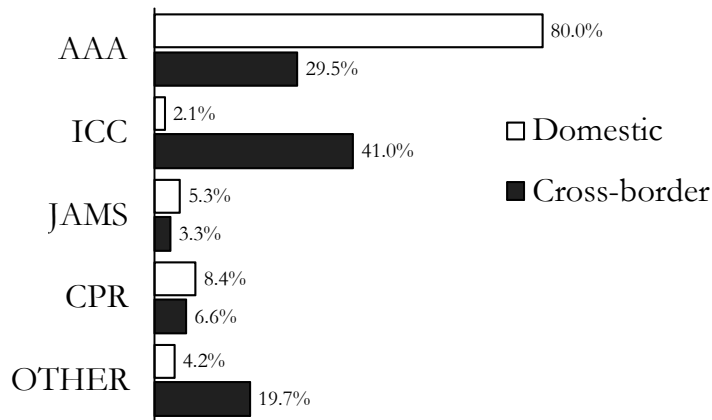
More than ninety percent (92.3%) of contracts that provide for arbitration specify the provider whose rules will govern the process.²⁸⁰ In domestic transactions, the AAA dominates; over 80% of contracts call for arbitration under its rules.²⁸¹ In cross-border transactions, the ICC and AAA share the dominant role.²⁸²

280. This is consistent with studies of other contract types. See O'Hara O'Connor et al., *supra* note 129, at 162 (reporting that 93% of contracts with arbitration clauses in a sample of CEO employment contracts chose an arbitration association). Many contracts, however, designate the rules imperfectly or incompletely. For example, some contracts provide for arbitration under "AAA rules," or language to that effect, without identifying which of the AAA's many rules the parties want to apply.

281. The AAA also appears to dominate the domestic arbitration market in joint venture and executive employment contracts. See Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1126–27 (2011) (finding the AAA was the designated provider in 85.7% of a 2007 sample of franchise agreements and 88.9% of a 2008 sample of domestic joint venture agreements); O'Hara O'Connor et al., *supra* note 129 at 162–64 (finding that 90% of a sample of CEO employment contracts specified AAA arbitration).

282. See *infra* Figure 6 (reporting choice of arbitration provider in domestic and cross-border contracts).

Figure 6. Choice of Arbitration Provider in Domestic and Crossborder Contracts



3. Customizing Off-the-Rack Rules

The discussion thus far has shown that most commercial contracts use forum selection and arbitration clauses to allocate disputes to a preferred forum, and also that some forums dominate these markets. As noted, parties also can draft custom procedural clauses to supplement or replace the bundled rules of their chosen forum.²⁸³ Most contracts, however, contain relatively few custom clauses.²⁸⁴

Table 4 divides the dataset into contracts with arbitration clauses, contracts with forum selection (but not arbitration) clauses, and contracts that do not explicitly incorporate bundled procedural rules. Within these categories, it reports the frequency of twelve modifications to rules of procedure and evidence. Excluding choice of law clauses, the maximum number of modifications in any contract is five; the median number is zero.²⁸⁵ This means that most contracts do not include any of these twelve custom clauses.²⁸⁶ For the sake of comparison—and

283. See *supra* Part II.B (discussing the option to select and supplement bundled forum procedural rules).

284. See *infra* Table 4 (showing relatively few custom clauses aside from arbitration and forum selection clauses).

285. *Infra* Table 4.

286. Some modifications are relevant to only one category, so care should be

to demonstrate that parties routinely *do* alter non-procedural rules—Table 4 also reports the frequency of five modifications to the rules governing remedies. The fact that most contracts alter the background law of remedies highlights the puzzle: Why are procedural modifications so rare?

	All Contracts	Arbitration Clause	Forum Selection Clause, No Arbitration	No Designated Procedural Bundle
Total Contracts	355	171	99	85
<u>Additional Procedural Clauses</u>				
Jury Waiver	8.2% (29)	6.4% (11)	15.2% (15)	3.5% (3)
Carve-in	n/a	n/a	23.2% (23)	14.1% (12)
Carve-out from Arbitration	n/a	48.5% (83)	n/a	n/a
Forum Selection (for Carved-out Claims or Arbitration Enforcement)	n/a	24.6% (42)	n/a	n/a
Loser Pays Attorney Fees	23.9% (85)	25.7% (44)	26.3% (26)	17.6% (15)
Shortens Statute of Limitations	2.8% (10)	2.3% (4)	2.0% (2)	4.7% (4)
Expands Deposition Rights	2.8% (10)	5.3% (9)	1.0% (1)	0%
Limits Deposition Rights	2.2% (8)	4.7% (8)	0%	0%
Expands Document Discovery	2.8% (10)	4.7% (8)	2.0% (2)	0%
Waives Hearsay Objections	0%	0%	0%	0%
Provides for Service of Process	5.9% (21)	5.3% (9)	12.1% (12)	0%

taken in making comparisons. For example, carve-outs by definition exist only when the contract includes an arbitration agreement. There is also a separate forum selection category relevant only to contracts with arbitration agreements. These forum selection clauses designate the forum for carved out claims, litigation to enforce the arbitration agreement or award, or both.

Addresses Burden of Proof	1.1% (4)	1.2% (2)	1.0% (1)	1.2% (1)
<i>Additional Clauses Per Contract</i> ²⁸⁷				
<i>Mean</i>	0.71	0.82	0.83	0.41
<i>Median</i>	0.0	0.0	1.0	0.0
<i>Standard Deviation</i>	0.93	1.07	0.89	0.56
<i>Range</i>	0–5	0–5	0–3	0–2
<u>Remedies</u>				
Imposes Any Remedy Limitation	71.5% (254)	74.9% (128)	73.7% (73)	62.4% (53)
Forbids Punitive Damages	40.8% (145)	44.4% (76)	42.4% (42)	31.8% (27)
No Consequential Damages	69.9% (248)	71.9% (123)	72.7% (72)	62.4% (53)
Forbids Multiple Damages	2.2% (8)	4.1% (7)	1.0% (1)	0%
Sets Damages Maximum	19.2% (68)	18.7% (32)	21.2% (21)	17.6% (15)
Liquidated Damages	6.5% (23)	4.1% (7)	10.1% (10)	7.1% (6)

Given these findings, it is fair to say that procedural contracting consists primarily of the parties’ choice of their preferred set of off-the-rack rules in arbitration or litigation.²⁸⁸ Parties are not indifferent to dispute resolution or unwilling to inject the prospect of breach into negotiations. So much is clear from the prevalence of

287. The totals are for additional procedural modifications and thus exclude any initial choice of arbitration or forum. Choice of law clauses are also excluded.

288. For simplicity, the table combines all contracts involving at least one U.S. party, whether or not the contract involves a cross-border transaction. Parties to cross-border transactions arguably require more procedural autonomy than parties to purely domestic transactions. See Strong, *supra* note 79, at 13 (suggesting that “the desire for procedural autonomy may be heightened in international matters”). But this is not reflected in the contracts. In every category, parties to cross-border transactions engaged in less tailoring than parties to domestic transactions. Across all domestic transactions, the mean number of additional modifications was 0.76. In cross-border transactions, the mean was 0.62.

arbitration, forum selection, and remedy-modifying clauses.²⁸⁹ Likewise, carve-outs, carve-ins, and attorney fee-shifting clauses each appear in a substantial minority of contracts.²⁹⁰ But few contracts show evidence of detailed procedural customization. In particular, few contracts address the routine details of adjudication procedure, such as the rules of evidence and discovery.²⁹¹

In relative terms, however, some clauses are fairly common. These include carve-outs from arbitration (48.5% of arbitration agreements), loser-pays attorney fee clauses (23.9% of all contracts),²⁹² carve-ins sending discrete issues to third-party experts (19% of contracts without an arbitration clause), and jury trial waivers (8.2%).²⁹³ Moreover, the fact that arbitration agreements more often address the details of discovery is consistent with the hypothesis that arbitration agreements may

289. See *supra* Table 4 (identifying arbitration, forum selection, and remedial modification clauses as the most frequently used in contracts that choose procedure).

290. *Supra* Table 4.

291. Nor did any contracts explicitly adopt a different pleading standard, such as the pre-*Twombly* standard. See Kapeliuk & Klement, *Contracting Around Twombly*, *supra* note 121, at 11, 15–22 (suggesting that parties might adopt a less demanding pleading standard).

292. This proportion requires the loser pay the winner's attorney fees. A greater proportion (38.5%) allows but does not require fee-shifting. Such clauses also change the default rule, which does not typically grant this discretion to the adjudicator. Some observers suggest that arbitrators have discretion to award fees in the absence of express authorization. O'Hara O'Connor et al., *supra* note 129, at 166. This may be technically correct; some courts, for example, interpret AAA arbitration rules this way. See 2 DOMKE ON COMMERCIAL ARBITRATION § 48.1 (2014). But it seems unlikely that arbitrators will routinely depart from background legal rules without express authorization. Arbitrators typically act as if parties want them to apply background legal rules, even when not technically required. See W. Mark C. Weidemaier, *Judging Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1092, 1124–35 (2012) (demonstrating that arbitrators rarely cite other arbitration awards and that arbitration awards and judicial opinions exhibit relatively similar citation practices).

293. Some contracts with arbitration clauses also waive the right to jury trial. These waivers are relevant in several scenarios. First, but for the waiver, a party might demand a jury trial in litigation over the enforceability of the arbitration clause. See 9 U.S.C. § 4 (2012) (providing for a jury trial when demanded by the party opposing a petition to compel arbitration). Second, but for the waiver, a party might demand a jury trial in cases where the arbitration clause is unenforceable or inapplicable. *Id.*

involve somewhat greater procedural tailoring.²⁹⁴ When we turn to procedural modifications unique to arbitration, the support for that hypothesis grows much stronger.

4. A Closer Look at Arbitration

Some procedural modifications can appear only in contracts with arbitration agreements. Table 5 reports the frequency of use of sixteen such clauses,²⁹⁵ which can be grouped according to function:

Scope of arbitration: If parties disagree about the scope of their agreement to arbitrate, arbitration law supplies presumptions to resolve the disagreement.²⁹⁶ These are default rules that the parties can expressly override by contract. Carve-outs (also reported in Table 4) narrow the presumptive scope of arbitration by allowing or requiring litigation of a subset of disputes.²⁹⁷ So-called “arbitrability clauses”²⁹⁸ expand the presumptive scope of arbitration by letting the arbitrator resolve disputes over the enforceability and scope of the arbitration clause itself.²⁹⁹

294. Contracts with arbitration clauses were significantly more likely to include one of the three custom, discovery-related clauses ($\chi^2(1, N=355)=14.9$, $p < .001$). These include clauses that expand or limit deposition rights and clauses that expand document discovery rights. Express limits on document discovery were not explicitly coded, but few, if any, contracts included one.

295. Because a few contracts had the relevant portions redacted, the number of contracts ranges from 164 to 171, depending on the clause.

296. For example, “doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983).

297. See *supra* notes 90–93 and accompanying text (describing carve-ins and carve-outs).

298. See, e.g., *Societe Generale de Surveillance, S.A. v. Raytheon European Mgmt. Sys. Co.*, 643 F.2d 863, 869 (1st Cir. 1981) (noting that ICC arbitration rules permit the arbitrator to resolve questions of the arbitrator’s “jurisdiction”).

299. See generally Alan S. Rau, *Everything You Really Need to Know About “Separability” in Seventeen Simple Propositions*, 14 AM. REV. INT’L ARB. 1 (2003). Only contracts that explicitly assigned such questions to the arbitrator were coded as having an arbitrability clause. Many contracts implicitly assign them to arbitrators by incorporating provider rules with that effect. Some courts, however, require more express language. Compare *Shaw Grp. Inc. v. Triplefine Int’l Corp.*, 322 F.3d 115, 124–25 (2d Cir. 2003) (holding that incorporation of ICC rules evidenced intent to arbitrate questions of arbitrability), with *Burlington Res. Oil & Gas Co. v. San Juan Basin Royalty Tr.*, 249 S.W.3d 34,

Arbitration costs: Arbitration involves substantial costs not present in litigation, including administrative fees, facility rental charges, and arbitrator compensation.³⁰⁰ These can substantially reduce the prevailing party's net recovery. Coding captured whether the parties addressed arbitration costs at all and whether they adopted a loser-pays rule.

Arbitrator qualifications: Arbitration "folklore" has it that arbitrators have special expertise that ensures efficient, accurate results.³⁰¹ In terms of professional background and experience, however, a legally trained arbitrator will probably look much like a state or federal judge assigned to preside over commercial disputes.³⁰² Thus, if parties want an arbitrator with particular expertise or training, they must contract for it directly. Otherwise, the administering institution (if the contract designates one) will decide these matters. Coding captured whether the parties (i) imposed any expertise requirement, (ii) required industry expertise, or (iii) required legal training.

Number of arbitrators: Changing the number of arbitrators can alter decision-making dynamics.³⁰³ For example, an arbitrator on a three-member panel must not only reach a

41–42 (Tex. App. 2007) (reaching the opposite conclusion with respect to AAA rules).

300. See Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 736–42 (2006) (discussing arbitration costs and the AAA fee structure).

301. See Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 40–43 (1999) (noting this widespread but potentially inaccurate view of arbitration).

302. For example, AAA arbitrators need at least ten years of senior-level professional or legal experience, among other qualifications, but the eligibility criteria do not mention industry or transactional expertise (or even legal training). See *Commercial Arbitration Rules*, *supra* note 91, at 15 (noting that, unless the parties agree otherwise, arbitrators are appointed from the AAA national roster); see also *Qualification Criteria for Admittance to the AAA National Roster of Arbitrators*, AM. ARBITRATION ASS'N 1–2 (listing the qualification criteria for admittance to the national roster of arbitrators). I do not know of data on the average age or professional experience of AAA arbitrators. As of 2008, the mean age of federal judges at the time of first commission was just over fifty, and the mean number of years between the start of a career and the commission was approximately twenty-four. See Monique Renée Pournet, Kyle C. Kopko, Dana Wittmer & Lawrence Baum, *Evolution of Judicial Careers in the Federal Courts, 1789-2008*, 93 JUDICATURE 62, 66–67 (2009) (reporting the appointment age of federal judges over time).

303. See Kapeliuk, *supra* note 104, at 270 (discussing dynamics on multi-arbitrator panels).

decision but attempt to persuade fellow panelists, and this may require compromise.³⁰⁴ Institutional rules may give an administering institution discretion as to the number of arbitrators.³⁰⁵ Thus, if parties have a preference, they may need to express it in the contract. Coding captured whether the parties adopted any clause addressing arbitrator number and whether they adopted a clause requiring three arbitrators.

Regulating merits discretion: Arbitrators have broad discretion to decide issues within the scope of the arbitration clause.³⁰⁶ If the result is one that the parties could have adopted by settlement, a court will probably uphold it, even if the court could not have ordered similar relief.³⁰⁷ Parties who want to limit this discretion must do so expressly in the contract.³⁰⁸ Contracts were coded for three methods of limiting discretion: (i) prohibiting relief that a court could not award,³⁰⁹ (ii) establishing an appellate arbitration process,³¹⁰ and (iii) final offer arbitration, which forces the arbitrator to choose between resolutions proposed by the parties.³¹¹

304. See *id.* at 292–97 (studying panel dynamics in investment arbitration).

305. See American Arbitration Association Commercial Arbitration Rule R-16 and Procedures for Large, Complex Commercial Disputes Rule L-2 (providing for one arbitrator in cases involving less than \$1 million and three arbitrators in cases over \$1 million, but giving AAA discretion to vary the number); International Chamber of Commerce, Rules of Arbitration, Article 12(1–(2) (defining a default of one, but International Court of Arbitration of the ICC may appoint three).

306. See, *e.g.*, *Advanced Micro Devices, Inc. v. Intel Corp.*, 885 P.2d 994, 1007 (Cal. 1994) (holding that, unless expressly limited by the contract, arbitrators may “fashion relief they consider just and fair under the circumstances . . . so long as the remedy may be rationally derived from the contract and the breach”).

307. See *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2001) (ruling that an arbitrator manifestly disregards the law only by directing the parties to violate the law or by awarding relief forbidden by the contract).

308. See *supra* note 306 and accompanying text (noting that parties must expressly limit arbitrator discretion).

309. See, *e.g.*, *O’Flaherty v. Belgum*, 9 Cal. Rptr. 3d 286, 328 (Cal. Ct. App. 2004) (vacating award where contract forbade arbitrator to award relief “not available in a court of law”).

310. For example, the AAA offers separate appellate rules that parties may incorporate by reference. American Arbitration Association, *Optional Appellate Arbitration Rules* (2013).

311. See *supra* note 105 and accompanying text (describing final offer arbitration).

Procedural details before and during the hearing: Finally, contracts were coded for clauses addressing procedural matters that might arise before or during the hearing, including clauses that (i) specify the hearing location, (ii) authorize the arbitrator to rule on dispositive motions,³¹² (iii) expand discovery rights by incorporating the relevant provisions of the Federal Rules of Civil Procedure or related state rules,³¹³ and (iv) allow the arbitrator to issue subpoenas.³¹⁴

312. See Alfred G. Ferris & W. Lee Biddle, *The Use of Dispositive Motions in Arbitration*, 62 DISP. RESOL. J. 17, 18 (2007) (discussing arbitrator authority to consider such motions; note that AAA Commercial Arbitration rule R-33 now explicitly authorizes dispositive motions).

313. See, e.g., PECO II, Inc., Supply Agreement § 18.5.4 (Form 8-K) (Oct. 2, 2008) (“[E]ach party shall be entitled to conduct discovery in accordance with the Federal Rules of Civil Procedure . . .”). These clauses expand discovery rights because the rules applicable in federal court usually permit more than arbitration rules. For example, AAA rules do not explicitly authorize depositions in many commercial disputes, while the Federal Rules of Civil Procedure allow ten by default. Compare *Commercial Arbitration Rules*, supra note 91, at 19 (providing, in R-22, for pre-hearing exchange of information but not explicitly authorizing depositions), with FED. R. CIV. P. 30(a)(2)(A)(i) (requiring leave of court to take more than ten depositions).

314. The contract cannot bestow subpoena power on the arbitrator, but the applicable law may authorize the arbitrator to subpoena a witness for trial or for discovery purposes. See, e.g., 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE CIVIL § 2455.1 (3d ed. 2014) (reviewing power to issue discovery subpoenas under federal law); UNIFORM ARBITRATION ACT § 17(d) (2000), 7 U.L.A. (2009) (authorizing subpoenas, including for discovery purposes). Contract terms authorizing subpoenas make clear that the parties have agreed to the arbitrator’s exercise of this authority.

Table 5. Proportion of Arbitration Agreements with Additional Custom Terms

Scope of Arbitration:	
Carve-out	48.5% (83/171)
Arbitrability Clause	7.6% (13/170)
Arbitration Costs:	
Contract Allocates Costs	52.4% (89/170)
Loser Pays Costs	18.3% (31/169)
Arbitrator Number and Qualifications:	
Addresses Number of Arbitrators	72.8% (123/169)
Requires Three Arbitrators	38.4% (63/164)
Imposes Any Expertise Requirement	25.3% (43/170)
Requires Industry Expertise	18.8% (32/170)
Requires Legal Training/Experience	10.0% (17/170)
Regulating Arbitrator Discretion	
Only Relief Available in Court	1.2% (2/170)
Final Offer Arbitration	4.7% (8/170)
Appellate Arbitration Process	0.6% (1/170)
Hearing Location and Procedure	
Specifies Hearing Location	85.7% (144/168)
Authorizes Dispositive Motions	1.8% (3/170)
Incorporates Rules of Civil Procedure	7.6% (13/170)
Allows Subpoenas	0.6% (1/170)

Table 5 shows that parties who agree to arbitrate routinely customize at least some aspects of the process. Taking these arbitration-specific clauses into account, parties who agree to arbitrate adopt, on average, significantly more additional customized procedures (3.4) than parties who designate a judicial forum as the default setting for resolving disputes (0.83).³¹⁵ Clauses that specify the hearing location, allocate arbitration costs, and specify the number of arbitrators appear in over half of the contracts.³¹⁶ Carve-outs appear in nearly half.³¹⁷ A

315. *Supra* Table 5. The arbitration mean collapses some coding categories to avoid double counting, including the coding for clauses addressing arbitration costs, arbitrator expertise, and the number of arbitrators. As an example, any contract that addresses arbitration costs was counted as having one additional custom term, whether or not the contract adopts a loser-pays rule. Nevertheless, contracts with arbitration clauses had, on average, significantly more additional custom procedural clauses (M=3.4, SD=1.9) than contracts with forum selection clauses (M=0.8, SD=0.9); $t(263)=34.5$, $p<.001$.

316. *Supra* Table 5.

317. *Supra* Table 5.

substantial minority of contracts impose arbitrator expertise requirements or require the loser to pay arbitration costs.³¹⁸ Once again, however, relatively few contracts address routine procedural matters such as discovery, pleading, or evidence.³¹⁹ Notably, of the clauses addressing such matters, the most common simply elects an alternative bundle of discovery rules: those applicable in court.³²⁰

V. Implications

Normatively, the contracting practices described in Part III seem relatively unobjectionable. One potential objection to customized procedure is that parties might adopt rules that undermine the legitimacy of courts.³²¹ For example, if parties dispense with the need for judicial impartiality, this might erode public perceptions of the judiciary and, over time, the quality of judicial decisions.³²² Another objection is that parties might adopt procedures that impair the interests of non-parties.³²³ For example, they might adopt a clause that forbids third parties to intervene in their lawsuit.³²⁴ A third is that unfamiliar, party-designed

318. *Supra* Table 5. Cost-shifting clauses are almost as common as loser-pays attorney fee clauses, which appear in 23.9% of all contracts and 25.7% of contracts with arbitration clauses. *Supra* Table 5.

319. *Supra* Tables 4, 5. Combining Tables 4 and 5, none of the following appeared in more than 5.3% of contracts: clauses that (i) shorten the statute of limitations, (ii) authorize more depositions than the relevant default, (iii) limit the ability to take depositions, (iv) authorize more document discovery than the relevant default, (v) waive hearsay objections, (vi) specify a method of serving process, (vii) expressly allocate the burden of proof, (viii) authorize an arbitrator to consider dispositive motions, or (ix) authorize an arbitrator to issue subpoenas (background law permitting).

320. Under the Federal Rules of Civil Procedure or analogous state rules, 7.6% of arbitration agreements authorize discovery.

321. *See* Bone, *supra* note 8, at 1388 (suggesting that procedural modifications should not be enforced if they undermine the capacity of judges to engage in principled reasoning).

322. Robert Bone uses this example, although he does not suggest that such clauses are common. *Id.* at 1393 n.261.

323. *Id.* at 1373.

324. This is Michael Moffitt's example, *supra* note 10, at 511, although he also does not suggest such clauses are common.

procedures might increase the expense of judicial proceedings, to the detriment of taxpayers.³²⁵

These objections, of course, presume that parties actually modify judicial procedures. Yet, aside from forum selection and choice of law clauses, this rarely happens.³²⁶ When parties do change the rules, moreover, it is primarily to require the loser to pay attorney fees.³²⁷ This may impact the parties' own incentives, but it hardly alters the judicial function or implicates third-party interests.³²⁸

Parties more frequently customize the rules in arbitration.³²⁹ This raises few normative objections in commercial contracts,³³⁰ but it does complicate existing accounts of customized procedure by suggesting that the phenomenon is not as uncommon as many suppose. The findings here are generally consistent with those reported by O'Hara O'Connor et al. in their study of executive employment agreements, although they did not discuss some clauses (such as arbitrator expertise requirements) that appeared with some frequency in the present sample.³³¹ On the whole, the findings also match those reported by Drahozal and O'Hara O'Connor and support their hypothesis that procedural customization consists primarily of allocating claims and remedies to an appropriate forum.³³² But while few parties drafted extensive sets of custom rules, a handful of other

325. See Moffitt, *supra* note 10, at 514 (questioning whether disputes over custom procedural clauses might burden courts).

326. See *supra* Table 4 (documenting the rare use of custom procedural clauses).

327. See *supra* Table 4 (calculating that 23.9% of contracts require the loser to pay the winner's attorney fees).

328. See, e.g., A. Mitchell Polinsky & Daniel L. Rubinfeld, *Does the English Rule Discourage Low-Probability-of-Prevailing Plaintiffs?*, 27 J. LEGAL STUD. 141, 531 (1998) (exploring the incentive effects of fee-shifting).

329. See *supra* Table 5 (reporting use of custom procedure in contracts with arbitration clauses).

330. See Bone, *supra* note 8, at 1385–87 (exploring why party choice is more problematic in litigation than in arbitration).

331. See O'Hara O'Connor et al., *supra* note 129, at 162–69 (reviewing arbitration clauses in CEO employment contracts).

332. See *Unbundling Procedure*, *supra* note 15, at 1991–92 (arguing that procedural customization consists mainly of the selection of bundled rules). So does the relatively common appearance of carve-ins—another mechanism for allocating claims and remedies to a preferred forum (in this case, arbitration).

procedural clauses made relatively frequent appearances.³³³ The question is what these findings imply for the debate over customized procedure.³³⁴

A. On Negative Signals and Product Cycles

The negative signaling account cannot easily accommodate the contracting practices described in Part III. This is not to say that negotiating parties never forego procedural modifications that might raise suspicions about their litigiousness or ability to perform.³³⁵ But the fact that nearly every contract alters the default rules of litigation in some way implies that such concerns are relatively muted.³³⁶ Moreover, recall that the most plausible hypothesis generated by the negative signaling account is that contracting practices will be relatively invariant when it comes to dispute resolution.³³⁷ There might be a few contract templates, but we should not see contracts vary in ways that suggest active negotiation.

The sheer variety of approaches to dispute resolution, however, suggests that parties do not unreflectively adopt whatever dispute resolution clause appears in the initial drafting

333. See generally *supra* Tables 4, 5.

334. Given time and resource constraints, it was not possible to code for every conceivable form of procedural tailoring. For example, Table 4 may undercount clauses that shift the burden of proof because coding did not encompass some mechanisms by which parties can accomplish this, such as expansive termination rights. See Scott & Triantis, *supra* note 2, at 873–78 (discussing impact of termination rights). Table 4 also may understate the prevalence of loser-pays attorney fee clauses. This is because some contracts include indemnity clauses that require one party to pay the indemnitee’s attorney fees, and these are not included in the fee-shifting count. This makes sense in most cases, as the indemnity covers only litigation brought by third parties and therefore does not shift fees in a dispute between the parties themselves. But some contracts also require “indemnification” for a party’s breach of contract.

335. See *supra* notes 149–150 and accompanying text (discussing how signaling concerns might deter bargaining over procedure).

336. See *supra* Figures 1, 4 (demonstrating that, although contracts do not extensively tailor procedural rules, nearly all contracts alter the background rules of litigation).

337. See *supra* notes 151–157 and accompanying text (discussing how custom procedural clauses might spread even if parties were generally reluctant to bargain over procedural rules).

template. Consider just two pieces of evidence. First, the data set includes multiple contracts for a number of companies, and these almost always include different dispute resolution provisions.³³⁸ Second, arbitration clauses varied wildly in their structure and content; literally no two clauses were identical.³³⁹ The implication is that dispute resolution clauses are not mere boilerplate, migrating from contract to contract. Perhaps parties occasionally hesitate to negotiate procedural rules. But it is hard to imagine how so many templates could exist if signaling concerns were a serious deterrent to negotiation.

There is also reason to question the contract-as-product account, which posits that novel procedural innovations will not take hold until an exogenous shock disrupts current drafting templates.³⁴⁰ One reason a shock might be necessary is that parties and their lawyers may doubt the enforceability of a new procedural clause.³⁴¹ If the clause is not obviously superior to alternatives—for instance, because a court may not enforce it³⁴²—there is little reason to adopt it.³⁴³ But if this were the

338. *Compare, e.g.*, Supply Agreement dated Jan. 1, 2000, between Simcala, Inc. and UCAR Carbon Company, Inc. (bare-bones arbitration clause) (on file with the author), *with* Amended and Restated Supply Agreement dated Jan. 1, 2001, between Simcala, Inc. and Dow Corning Corp. (mechanism for negotiation and a different arbitration clause) (on file with the author); *compare* Manufacturing and Supply Agreement dated March 12, 2003, between SkinMedica, Inc. and Smith & Nephew Wound Management (La Jolla) (requiring negotiation before arbitration) (on file with the author), *with* Manufacturing and Supply Agreement dated June 30, 2002, between Enhanced Derm Technologies, Inc. and SkinMedica, Inc. (no negotiation requirement; different arbitration clause) (on file with the author).

339. For example, contracts devoted an average of 311 words to the arbitration clause, but this figure ranged from a bare-bones arbitration clause of only nineteen words to a multi-page clause totaling 1,671 words.

340. *See supra* notes 158–170 and accompanying text (discussing the contract-as-product account).

341. *Cf. Marotta-Wurgler & Taylor, supra* note 154, at 272–74 (finding terms in end user license agreements became more common as judicial enforcement became more certain).

342. Recall that enforcement uncertainty both reduces the expected value of a clause and introduces variance that the parties would (by hypothesis) prefer to avoid. *See supra* note 216 and accompanying text (addressing the cost of enforcement uncertainty).

343. David Hoffman doubts that enforcement uncertainty retards experimentation in this context, and he may be right. *See Hoffman, supra* note 11, at 427 (suggesting that a significant shock, rather than doubts about legal

explanation, it is odd that we do not find more custom procedural clauses in arbitration, where enforcement is assured.³⁴⁴ True, parties who agreed to arbitrate were more likely to include a custom term addressing discovery, and this suggests that enforcement uncertainty may deter some parties from adopting novel clauses.³⁴⁵ Many procedural clauses, however, were extremely rare even in contracts that provided for arbitration.³⁴⁶

Still, the contract-as-product account may be apt even if enforcement uncertainty does not suppress innovation.³⁴⁷ In many respects, it is curious that patterns of commercial contract innovation sometimes follow those observed in product markets. In the latter, transformative innovations can be obvious. Recall how computers transformed the cement industry by allowing the construction of vast, computer-controlled kilns.³⁴⁸ The value of a huge jump in production capacity is apparent.³⁴⁹ Producers that could invest in the new technology gained a dramatic competitive advantage; those that could not risked getting left behind.³⁵⁰

enforceability, motivates changes to contracts). But enforcement uncertainty is at least one reason a shock might be necessary. Technological discontinuities prompt product innovation because the new technology offers “sharp price-performance improvements over existing technologies.” Tushman & Anderson, *supra* note 158, at 441. If contracts follow this product innovation cycle, then a new clause will be adopted only if at least one party (or its lawyers) perceives it as an improvement over the old. This is unlikely if the clause cannot be enforced. For this reason, enforceability may be necessary to widespread adoption. Hoffman is surely right, however, that enforceability does not assure adoption, even for surplus-maximizing clauses. *See infra* notes 354–356 and accompanying text (discussing inertia in contracting practices and the relevance of external shocks).

344. *See supra* 217 and accompanying text (noting that modifications to arbitration procedures will almost always be enforced).

345. *See supra* note 294 and accompanying text (noting greater prevalence of discovery modifications in contracts with arbitration clauses).

346. *See supra* Table 4 (reporting prevalence of custom procedure in litigation and arbitration).

347. *See Hoffman, supra* note 11, at 427 (expressing doubt that enforcement uncertainty deters the adoption of new terms).

348. *See supra* notes 158–162 and accompanying text (describing technological discontinuities in the cement industry).

349. *See Tushman & Anderson, supra* note 158, at 443 (documenting significant gains in efficiency resulting from computer-controlled kilns).

350. *See supra* notes 158–162 and accompanying text (noting the effects of the introduction of computers on the cement industry in the 1960s).

It is much harder to assign value to a clause in a commercial contract, especially when there is no secondary market to supply pricing information about contracts with and without the clause. Because drafters often have little solid evidence of the likely impact of a new clause, contract production is as much a social practice as an economic one.³⁵¹ Transactional lawyers create or amend clauses because they believe the change adds value,³⁵² because they want to appear creative to clients and other lawyers, or simply because this is what transactional lawyers are supposed to do.³⁵³ Likewise, lawyers sometimes fail to make even beneficial changes to contracts.³⁵⁴ When this happens, there is evidence that external shocks, including salient legal developments, can provide impetus for change.³⁵⁵ If nothing else, the perception that the development requires a response may result in new contract language.³⁵⁶

If a new clause became commonplace without a precipitating shock, this would present a more serious challenge to the contract-as-product account. But that did not happen for any of the clauses described in Part III. Thus, it remains possible that a

351. See Weidemaier & Gulati, *supra* note 198, at 127–30 (discussing how lawyers explain patterns of innovation in contracts).

352. See, e.g., Coyle & Green, *supra* note 147, at 180–81 (recounting lawyer explanations for innovation in venture finance).

353. For a classic, if somewhat plaintive, description of the classic model of transactional lawyering, see Weidemaier et al., *supra* note 154, at 97–98 (recounting a junior lawyer’s story—likely apocryphal—of watching a senior lawyer draft sovereign bond clauses from scratch, with a fountain pen).

354. See MITU GULATI & ROBERT E. SCOTT, *THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN* (2013) (exploring why lawyers failed to modify sovereign bonds in the wake of a major, unexpected court decision); Weidemaier et al., *supra* note 154, at 98 (hypothesizing that lawyers might fail to make changes to contracts in an effort “not to be *seen* as making changes to documents that are supposed to be standardized”).

355. For example, statutory developments with respect to sovereign immunity prompted lawyers to revise sovereign bond contracts, even though the statutes largely codified existing law. See Weidemaier, *supra* note 164, at 74 (discussing the impact of changes in sovereign immunity law on sovereign bonds).

356. Cf. Hoffman, *supra* note 11, at 427 (“[C]hange will be largely responsive to highly-salient shocks, not the slow accretion of precedent.”).

high profile judicial opinion or other salient event would cause the widespread adoption of new procedural clauses.³⁵⁷

B. Coarse, Not Granular, Procedural Tailoring

On the whole, the findings discussed in Part III are consistent with the account offered by Drahozal and O’Hara O’Connor, which stresses that many procedural clauses entail high specification costs.³⁵⁸ Yet, their account does not fully capture the diversity of customized adjudication, which includes more than simply an election of bundled litigation or arbitration rules, supplemented as necessary by a carve-out.³⁵⁹ Recall that some clauses, by definition, cannot appear in both litigation and arbitration.³⁶⁰ Parties cannot adopt a carve-in, for example, without first choosing litigation as the default option.³⁶¹ If we consider only the relevant contracts—such as the subset in which it is possible to find each procedural clause—ten different clauses appear in roughly 20% or more of contracts.³⁶²

357. See Hoffman, *supra* note 11, at 428 (suggesting that high profile court decisions may constitute “sufficient, highly salient, exogenous shocks” that help new clauses to become widespread).

358. See *supra* Part III.B.3 (discussing this account of procedural customization).

359. Cf. *Unbundling Procedure*, *supra* note 15, at 1991 (positing that customization primarily takes the form of a choice of bundled rules supplemented, in arbitration, by litigation carve-outs).

360. See *supra* notes 296–314 and accompanying text (discussing custom clauses specific to arbitration).

361. See *infra* Table 6 (showing that 19% of contracts contain a carve-in provision).

362. I am omitting arbitration, forum selection, and choice of law clauses.

Table 6 Clause	Prevalence
Arbitration Location	85.7%
Arbitrator Number (Any Clause)	72.8%
Arbitration Costs (Any Clause)	52.4%
Carve-out (<u>from</u> Arbitration)	48.5%
Arbitrator Number (Panel of Three)	38.4%
Arbitrator Expertise (Any Requirement)	25.3%
Attorney Fees (loser pays)	23.9% ³⁶³
Carve-in (<u>to</u> arbitration)	19.0%
Arbitrator Expertise (Industry Knowledge)	18.8%
Arbitration Costs (Loser Pays)	18.3%

The relatively common use of these clauses shows that commercial actors do more than allocate claims and remedies to their preferred forum and its bundled rules. But the list also reveals that customized adjudication occurs within a limited domain. With the (irrelevant) exception of clauses that specify the place of arbitration,³⁶⁴ each clause falls into one of the first three functional categories described in Table 1.³⁶⁵ The three categories encompass clauses that (1) designate a different bundle of procedural rules for a subset of disputes (carve-outs and carve-ins), (2) regulate arbitrator characteristics and incentives (number and expertise requirements), or (3) allocate adjudication costs and payouts (attorney fee-shifting and arbitration cost allocation).³⁶⁶

The fourth category consists of clauses that alter timing rules, address service of process, specify pleading or discovery

363 An even greater proportion (38.5%) authorizes, but does not require, fee-shifting. *See supra* note 292 and accompanying text (discussing need to explicitly authorize fee-shifting, even in arbitration).

364 In a sense, this is not an exception at all because a clause specifying the place of arbitration can also incorporate bundled rules. For example, in international arbitration, the law of the situs typically governs the arbitration proceeding and any action to set aside the award. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1)(e), June 10, 1958, 330 U.N.T.S. 38 (allowing an award to be set aside “by a competent authority of the country in which, or under the law of which,” it was made).

365 *Supra* Table 1.

366 The relatively frequent use of clauses that allocate arbitration costs is consistent with the findings of O’Hara O’Connor et al. in CEO employment contracts. O’Hara O’Connor et al., *supra* note 129.

rules, or dictate the rules of evidence or proof.³⁶⁷ Without exception, clauses in this category are extremely rare.³⁶⁸ The most common, which instructs an arbitrator to replace the designated arbitration institution's discovery rules with those found in the Federal Rules of Civil Procedure, appears in only 7.6% of relevant contracts.³⁶⁹ That this is the most common clause in the fourth category only highlights the apparent reluctance of parties to specify the particulars of the adjudication process. After all, the clause simply replaces one set of bundled rules (arbitral discovery) with another that is equally, if not more, familiar (the federal discovery rules). This is, in effect, a modular approach to building procedure in which parties assemble a procedural regime from discrete portions of available off-the-rack rules.³⁷⁰

What parties almost never do is write contracts that dictate procedure at the granular level of pre-trial and trial practice.³⁷¹ Instead, they allocate disputes to one or more forums and then make relatively "coarse" modifications to the forum's bundled rules. I use the term as a shorthand way to describe clauses that alter adjudicator incentives or expertise or party incentives to invest in (or abuse) the process of adjudication. As an example, return to our hypothetical sales contract. Anticipating disagreements over product quality, Seller may worry that Buyer will file frivolous claims, hoping to use the threat of expensive discovery to extract concessions.³⁷² Even if the claim has merit, Seller may fear that Buyer will abuse the discovery process.³⁷³

367 See *supra* Table 1 (describing types of procedural customization).

368 See *supra* Table 4 (reporting prevalence of custom procedure).

369 *Supra* Table 5.

370 Cf. Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1188 (2006) (discussing boilerplate as modular contract component).

371 Except for clauses that specify a method for serving process (5.9%), not a single clause in the fourth category appears in more than 2.8% of contracts. Some, such as clauses that adopt alternate pleading standards, do not appear at all. *Supra* Table 4.

372 See, e.g., Bruce L. Hay, *Civil Discovery: Its Effects and Optimal Scope*, 23 J. LEGAL STUD. 481, 500–01 (1994) (discussing how plaintiffs may use discovery strategically to impose costs on the defendant).

373 By discovery abuse, I refer to the use of discovery to impose unjustified costs on an adversary, such as costs that are not likely to increase the accuracy of the adjudicator's decision.

To mitigate these risks, the parties might agree to a clause imposing a loser-pays rule for attorney fees.³⁷⁴ Fee-shifting clauses have complex implications.³⁷⁵ However, the parties might reasonably expect a loser-pays rule to discourage the filing of frivolous and low-probability claims,³⁷⁶ reduce incentives to abuse discovery,³⁷⁷ increase litigation expenditures (and perhaps accuracy),³⁷⁸ and more fully compensate the injured party.³⁷⁹ The

374 Although background law sometimes authorizes fees to prevailing parties, this is rare. Thus, parties who want to impose a fee-shifting rule must do so expressly in the contract. See *supra* note 292 and accompanying text (discussing need to expressly provide for fee-shifting).

375 For different perspectives on the impact of fee-allocation rules on settlement behavior (assuming a lawsuit has been filed), compare Polinsky & Rubinfeld, *supra* note 328, at 143 (modeling the decision between going to trial and settling and demonstrating that, under a loser-pays rule, more low-probability plaintiffs go to trial), and Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 161 (1996) (“[B]y raising the stakes at trial, the loser pays system makes litigation itself more valuable and can discourage settlement.”), with Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139, 159 (1984) (expressing uncertainty but suggesting that a loser-pays rule applied “against individual litigants relying on their own resources might well result in a greater tendency to settle claims”); see also Rhee, *supra* note 9, at 535 (explaining that a loser-pays rule produces more variable outcomes and, on the assumption that most litigants are risk-averse, may “work at the margin to systematically push cases towards settlement”).

376 See Rhee, *supra* note 9, at 555–56 (assessing the potential for fee-shifting to deter frivolous suits); Gideon Parchomovsky & Alex Stein, *The Relational Contingency of Rights*, 98 VA. L. REV. 1313, 1364 (2012) (discussing the potential for fee-shifting to deter strategic lawsuits).

377 See Thomas D. Rowe, Jr., *Background Paper: American Law Institute Study on Paths to a “Better Way”: Litigation, Alternatives, and Accommodation*, 1989 DUKE L.J. 824, 891 (1989) (noting that fee-shifting for discovery abuse “reduce[s] one side’s ability to weaken the other’s settlement position (based on the merits) by forcing the adversary to incur substantial unreimbursable litigation costs”); see also David Rosenberg & Steven Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT’L REV. L. & ECON. 3, 10 (1985) (noting that without fee-shifting, parties in position to impose litigation costs on the other, as through discovery, may be able to extract favorable settlements).

378 See Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule of Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 335–37 (2013) (noting that under a fee-shifting regime, parties might spend more on litigation and the possibility that this would increase accuracy).

379 See, e.g., Keith N. Hylton, *Welfare Implications of Costly Litigation Under Strict Liability*, 4 AM. L. & ECON. REV. 18, 28–30 (2002) (exploring deterrence benefits of shifting the plaintiff’s cost of litigation); Thomas D. Rowe,

prospect of fee-shifting also may give Seller some assurance that Buyer will not abuse the discovery process.³⁸⁰ But the clause does not dictate what claims the parties may file or how they may employ pre-trial or trial procedures.³⁸¹

Or consider an arbitrator expertise requirement. Compared to a non-expert, an expert arbitrator can more easily evaluate the Seller's performance.³⁸² This changes the parties' incentives in deciding what claims to bring and how much to invest in proving claims once they have been asserted.³⁸³ For example, parties who expect to arbitrate before an expert may be deterred from bringing frivolous claims but more willing to challenge performance defects that might escape the notice of a non-expert.³⁸⁴ Again, however, the expertise requirement does not dictate any aspect of pre-trial or trial practice.

The prevalence of modifications like these suggests that procedural contracting is less costly than is sometimes

Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 657 (1982) (noting argument that, without fee shifting, injured parties may be denied full compensation). A fee-shifting regime may also encourage litigants to invest more heavily in proving claims once filed, and the parties may (or may not) value this effect ex ante. See Clinton F. Beckner III & Avery Katz, *The Incentive Effects of Litigation Fee Shifting when Legal Standards Are Uncertain*, 15 INT'L REV. L. & ECON. 205, 206 (1995) (suggesting that fee shifting "encourages litigants to spend more in cases that they do bring").

380. See Rosenberg & Shavell, *supra* note 377, at 10 (noting potential for fee-shifting to deter parties from using discovery rules to impose costs on an adversary).

381. Clauses allocating arbitration costs perform a similar function. Loser-pays clauses appear in 18.3% of arbitration agreements, and a much greater proportion of contracts expressly give the arbitrator discretion to shift costs. Institutional arbitration rules may allow this as well. See, e.g., *Commercial Arbitration Rules*, *supra* note 91, at 28 (providing, in R-47, that the scope of an award may include the assessment of fees, expenses, and compensation).

382. See *supra* note 184 and accompanying text (discussing accuracy benefits of arbitrator expertise, at least in some cases).

383. For example, parties may need to educate a non-expert arbitrator about the commercial setting; they may decide to dispense with such proof if the arbitrator knows the industry.

384. This is one reason parties may choose arbitration over litigation, and it applies equally to the choice of expert versus non-expert arbitrators. See Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 2 (1995) (noting that expert arbitrators might more accurately detect substandard performance).

assumed.³⁸⁵ Parties do not seem to find it prohibitively difficult to decide their preferred number of arbitrators or whether to require an arbitrator with industry expertise.³⁸⁶ Likewise, they have no obvious difficulty contracting over attorney fees or cost allocation rules.³⁸⁷ Indeed, most contracts go further, directly addressing the payouts available in any dispute.³⁸⁸ As Table 4 shows, contracts routinely include waivers of consequential (69.9%) and punitive (40.8%) damages, and a surprisingly large percentage (19.2%) explicitly caps recoverable damages.³⁸⁹ If parties can decide *ex ante* that a consequential damages waiver offers net benefits across all future disputes, it should not surprise us that they can make similar judgments about how to allocate the lawyer fees and adjudication costs.

The customized adjudication literature must develop an account of why clauses like these occur so frequently, while clauses that address pre-trial and trial procedure are so rare. This account may flow naturally from existing theory. Perhaps clauses that address costs and payouts, adjudicator number and identity, and similar matters offer greater benefits—in terms of improved performance incentives—than clauses that regulate granular aspects of adjudication procedure.

Or perhaps these clauses appear more frequently because parties have enough information at the time of the contract to make an informed guess as to their value. It is noteworthy that contracts rarely restrict adjudicator discretion over discovery or fact-finding.³⁹⁰ An attorney fee-shifting clause, for example, diminishes party incentives to abuse discovery rules, but it does not prevent any party from seeking or receiving discovery in any

385. See *Unbundling Procedure*, *supra* note 15, at 1961–66 (discussing cost of specifying forum rules à la carte and suggesting that specification costs will often be prohibitive).

386. See *supra* Table 5 (noting that 72.8% of arbitration clauses designate the number of arbitrators and 25.3% impose an expertise requirement).

387. See *supra* Tables 4, 5 (finding that 23.9% of contracts require the loser to pay attorney fees and that 52.4% of arbitration clauses allocate arbitration costs).

388. See *supra* Table 4 (noting that 71.5% of contracts limit remedies).

389. *Supra* Table 4.

390. See *supra* Tables 4, 5 (reporting very infrequent use of clauses that regulate discovery or hearing procedures, with most appearing less than 5% of the time).

particular instance.³⁹¹ By omitting strict rules from the contract, the parties both delegate the discovery question to the adjudicator and defer its resolution until a dispute actually happens.³⁹² At that time, the adjudicator will have better information about the nature of the dispute and the evidence necessary to resolve it.³⁹³ One implication is that customized procedure will be rare when (i) deferring the decision offers significant informational advantages and (ii) parties have confidence in the adjudicator.

This explanation, unlike the contract-as-product account, posits that contracts result from an essentially rational process. At the time of contracting, parties weigh the costs and benefits of up-front drafting precision against those of “back-end” adjudicator discretion.³⁹⁴ Most accounts focus on how parties can expressly vary procedural rules to facilitate this trade-off.³⁹⁵ But parties cannot select a procedural rule without making a similar trade-off.³⁹⁶ In some cases, it may be less efficient to specify procedure up front than to let the adjudicator create and apply procedure when the need arises.³⁹⁷

VI. Conclusion

Commercial actors do customize the rules of the adjudication game, in both litigation and arbitration.³⁹⁸ But they do not do this

391. See *supra* note 374 and accompanying text (discussing the effects of loser-pays rules).

392. Forum procedural rules typically allow substantial discretion in such matters. See, e.g., Charles J. Moxley, Jr., *Discovery in Commercial Arbitration: How Arbitrators Think*, 63 DISP. RESOL. J. 36, 36 (2008) (discussing discretion over discovery in arbitration); *United States v. Ortho Biotech Prods., L.P.*, 719 F.3d 31, 37 (1st Cir. 2013) (noting judicial discretion over discovery).

393. See *Unbundling Procedure*, *supra* note 15, at 1963–64 (noting that customization can inhibit arbitrator’s flexibility to tailor discovery *ex post*).

394. See Scott & Triantis, *supra* note 2, at 822 (discussing contracting as a trade-off between back- and front-end costs).

395. See *id.* at 817 (exploring the relationship between litigation and contract design).

396. See *supra* Part III.B.2 (discussing the difficulty in identifying optimal procedure and how procedural contracts can impair adjudicator flexibility).

397. *Supra* Part III.B.2.

398. See *supra* Part IV (demonstrating how parties change the background

as often, or as precisely, as one might expect from the theoretical literature on customized procedure. After choosing default rules, allocating costs and payouts, and (in arbitration) adjusting adjudicator incentives, parties seem content to let the process play out.³⁹⁹ The result is that judges and arbitrators retain their traditional discretion to control pre-trial and trial procedure in light of the information available at the time of the dispute.

These findings suggest the need for a new direction in customized procedure theory. For one thing, they imply that normative debates over party-controlled procedure have little urgency.⁴⁰⁰ The more immediate implication is for matters of contract theory and design. Perhaps enthusiasts have overstated the benefits, or understated the costs, of many procedural clauses. Or perhaps contract markets remain stuck in some dominant paradigm, awaiting a major shock to catalyze procedural innovation. These and other hypotheses represent the next phase of research into customized procedure.

rules of litigation).

399. *See supra* Part IV.C.3–4 (describing how parties tailor procedure beyond simply choosing a forum).

400. *See supra* notes 321–328 and accompanying text (noting that the rarity of procedural modification implies that normative debates are premature).