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## Limits of Procedural Choice of Law

S.I. Strong

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**LIMITS OF PROCEDURAL CHOICE OF  
LAW**

*S.I. Strong\**

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## INTRODUCTION

Commercial actors have long been allowed to exercise a significant amount of autonomy over the substantive law that governs their legal controversies.<sup>1</sup> Not only can parties choose to have the law of a particular state apply to their dis-

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1. See LAWRENCE COLLINS ET AL., DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS ¶¶ 32-004, 32-044, 32R-061 (14th ed. 2006). Party autonomy regarding substantive choice of law appears to be higher in North America and Europe than in Latin America. See Symeon C. Symeonides, *The Hague*

pute,<sup>2</sup> they can also in a growing number of cases choose to adopt one of several forms of non-state law<sup>3</sup> ranging from the International Institute for the Unification of Private Law (“UNIDROIT”) Principles of International Commercial Contracts<sup>4</sup> to the United Nations Commission on International Trade Law (“UNCITRAL”) Convention on the International Sale of Goods (“CISG”)<sup>5</sup> to the *lex mercatoria*.<sup>6</sup>

Parties’ procedural options are much more limited.<sup>7</sup> Although international commercial actors can exercise a limited amount of discretion by deciding to take their disputes to arbitration or

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*Principles on Choice of Law for International Contracts: Some Preliminary Comments*, 61 AM. J. COMP. L. 873, 875–76 (2013).

2. The law does not necessarily need to have a connection to one of the parties or the dispute. See GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 169 (4th ed. 2013) [hereinafter BORN, DRAFTING].

3. The ability to choose the substantive law that governs a dispute is somewhat wider in arbitration than in litigation, although that phenomenon may be changing. See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2243–44 (2009) [hereinafter BORN, ICA]; see also Permanent Bureau, Hague Conference on Private International Law, Draft Commentary on the Draft Hague Principles on Choice of Law in International Contracts 14–17 (Nov. 2013), available at [http://www.hcch.net/upload/wop/princ\\_com.pdf](http://www.hcch.net/upload/wop/princ_com.pdf); Permanent Bureau, Hague Conference on Private International Law, Choice of Law in International Contracts: Draft Hague Principles and Future Planning, Annex I, art. 2 (Feb. 2013), available at <http://www.hcch.net/upload/wop/gap2013pd06en.pdf> [hereinafter Draft Hague Principles].

4. See UNIDROIT, Principles of International Commercial Contracts, <http://www.unidroit.org/news> (select “Instruments”; then select “Commercial Contracts”; then follow links to access the various versions from 1994, 2004, and 2010) (last visited Apr. 5, 2014).

5. See United Nations Convention on Contracts for the International Sale of Goods, opened for signature Apr. 11, 1980, 1489 U.N.T.S. 3.

6. See BORN, ICA, *supra* note 3, at 2232–37. The term *lex mercatoria* is typically used to refer to various uncoded principles of international commercial law, although there is a wide-ranging debate about the content, scope, and existence of *lex mercatoria*. See KLAUS PETER BERGER, THE CREEPING CODIFICATION OF THE NEW LEX MERCATORIA (2d ed. 2010); MATTI S. KURKELA & SANTTU TURUNEN, DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION 6–7 (2d ed. 2010) (suggesting the UNIDROIT Principles of International Commercial Contracts constitute a codified version of the *lex mercatoria*); Abul F.M. Maniruzzaman, *The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?*, 14 AM. U. INT’L L. REV. 657, 665 (1999).

7. See David A. Hoffman, *Whither Bespoke Procedure?* 2014 U. ILL. L. REV. 389, 392–95, 402–25 (2014).

to a particular forum,<sup>8</sup> once a matter is in litigation, the case is typically heard pursuant to the procedural norms of the forum court.<sup>9</sup>

For many years, this practice was explained in terms of “a ‘State sovereignty prerogative’” that was rooted in the fact that “judicial power is one of the three main . . . branches” of government.<sup>10</sup> However, the procedural hegemony of the state has arguably begun to break down,<sup>11</sup> and some commentators have suggested that it may now be possible to view judicial procedures as “sticky default” rules<sup>12</sup> rather than as immutable and “non-negotiable parameters.”<sup>13</sup>

Although many domestic litigants would likely welcome an increased ability to choose the procedural law that governs their disputes, the desire for procedural autonomy may be heightened in international matters, since discrepancies in national practice can make it difficult for parties not only to pursue their claims<sup>14</sup> but also to have confidence in the legitimacy

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8. See BORN, DRAFTING, *supra* note 2, at 4–14.

9. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971); COLLINS ET AL., *supra* note 1, ¶¶ 7-002, 32-054, 32-060; Erin A. O'Hara O'Connor & Christopher R. Drahozal, *Carve-Outs and Contractual Procedure* (Vanderbilt Univ. Law Sch., Pub. Law & Legal Theory Working Paper No. 13-29, Law & Econ. Working Paper No. 13-16, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2279520](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2279520) (noting little actual individualization).

10. Jorge A. Sánchez-Cordero Dávila, *Preface to AMERICAN LAW INSTITUTE (ALI) & UNIDROIT, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE* xxix, xxxiii (2006) (citation omitted); see also Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 780, 859 (2012) [hereinafter Born, *Adjudication*] (discussing the longstanding presumption that parties appearing in national court are subject to a single, uniform set of mandatory procedures established by the state).

11. Commentary is split on this point, and empirical research focuses primarily on the domestic realm. See Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 517 (2011); Hoffman, *supra* note 7, at 392–93, 394–95, 403, 425; O'Connor & Drahozal, *supra* note 9 (considering some international matters); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 667–68 (2005).

12. Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1155, 1165 (2013).

13. Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 462 (2007).

14. Transnational litigation gives rise to a number of procedural problems not seen in domestic suits, including unusual difficulties relating to jurisdiction and the enforcement of judgments. See Hannah L. Buxbaum, *Transna-*

of the proceedings themselves.<sup>15</sup> Furthermore, one party will often have a significant “home court” advantage in national litigation<sup>16</sup> unless the action has been brought in a neutral (unaffiliated) jurisdiction.<sup>17</sup>

Concerns about procedural diversity in international disputes have typically led to calls for procedural harmonization.<sup>18</sup> Per-

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*tional Regulatory Litigation*, 46 VA. J. INT'L L. 251, 272–93 (2006); Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 19–41 (2009); S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. (forthcoming 2014) [hereinafter Strong, *Judgments*].

15. For example, civil law lawyers typically regard U.S.-style discovery with “horror,” while U.S. lawyers find the absence of discovery to be akin to a denial of justice. See Javier H. Rubinstein, *International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions*, 5 CHI. J. INT'L L. 303, 304 (2004); see also Jalal El Ahdab & Amal Bouchenaki, *Discovery in International Arbitration: A Foreign Creature for Civil Lawyers?*, in ARBITRATION ADVOCACY IN CHANGING TIMES, XV ICCA CONG. SER. (2010 Rio) 65, 73 (Albert Jan van den Berg ed., 2011); Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1694 (1998) [hereinafter Hazard, *Secrets*].

16. Not only will one party typically be more familiar with the procedures used in the forum court, it will also have structured its business dealings so as to comply with the underlying expectations of that national legal system. This phenomenon is perhaps most apparent in terms of evidentiary privileges. A U.S. corporation will likely structure its internal communications so as to take full advantage of U.S. principles concerning the attorney-client and work product privilege. Other countries do not protect legal communications in the same manner, which means that a foreign company's internal documents may be discoverable simply because that company was not in the habit of framing its communications to comply with U.S. law. See JEFF WAINCYMER, *PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION* 800–15 (2012); Klaus Peter Berger, *Evidentiary Privileges: Best Practice Standards Versus/and Arbitral Discretion*, 22 ARB. INT'L 501, 517–18 (2006) [hereinafter Berger, *Privileges*]. Though courts make some efforts to address these issues, such initiatives are often unsatisfactory. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 (1971); WAINCYMER, *supra*, at 805.

17. See BORN, *DRAFTING*, *supra* note 2, at 3. However, not every legal system is willing to accept jurisdiction over every dispute involving foreign parties. See *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010) (concerning “foreign-cubed” actions).

18. See Simona Grossi, *Rethinking the Harmonization of Jurisdictional Rules*, 86 TUL. L. REV. 623, 625 (2012); Burkhard Hess, *Procedural Harmonization in a European Context*, in CIVIL LITIGATION IN A GLOBALISING WORLD 159 (X.E. Kramer & C.H. van Rhee eds., 2012); Thomas O. Main, Book Review, 61 AM. J. COMP. L. 467, 467 (2013) [hereinafter Main, *Review*] (reviewing CIVIL LITIGATION IN A GLOBALISING WORLD, *supra*); Richard Marcus, *Bomb*

haps the most notable initiative in this regard involves the American Law Institute ("ALI") and UNIDROIT Principles of Transnational Civil Procedure, which attempt "to overcome fundamental differences between common-law and civil-law systems and, among common-law systems, to cope with the peculiarities of the U.S. system."<sup>19</sup> However, the sometimes significant disparities in national procedures and the vehemence with which such practices are defended have acted as significant obstacles to harmonization.<sup>20</sup>

As a result, some reformers have shifted their focus from harmonization to privatization.<sup>21</sup> Some success has been

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*Throwing, Democratic Theory, and Basic Values—A New Path to Procedural Harmonization?*, 107 NW. U. L. REV. 475, 486 (2013) [hereinafter Marcus, *Bomb*].

19. Geoffrey C. Hazard, Jr. et al., *Reporters' Preface* to ALI & UNIDROIT, *supra* note 10, xxvii, xxvii; *see also* E. Bruce Leonard, *Preface* to ALI & UNIDROIT, *supra* note 10, at xxix, xxx. However, even the ALI and UNIDROIT take the view that "[t]he procedural law of the forum applies in matters not addressed in these Principles." *See* ALI & UNIDROIT, *supra* note 10, at 16.

20. *See* RICHARD GARNETT, *SUBSTANCE AND PROCEDURE IN PRIVATE INTERNATIONAL LAW* 67–70 (2012) (noting limited successes); Marcus, *Bomb*, *supra* note 18, at 477; Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 836 (2010) [hereinafter Main, *Substantive*] (noting that many states "may be more likely to consider abandoning their own substantive regimes of commercial law . . . than they would surrender their own procedure"). Thus, the ALI/UNIDROIT Principles of Transnational Civil Procedure have not yet been adopted by any national legal system. *See* ALI & UNIDROIT, *supra* note 10, at xxix, xxxviii–xxxix (noting effect of the ALI/UNIDROIT Principles in Mexico); OSCAR G. CHASE ET AL., *CIVIL LITIGATION IN COMPARATIVE CONTEXT* 574–75 (Oscar G. Chase & Helen Hershkoff eds., 2007); Scott Dodson & James M. Klebba, *Global Civil Procedure Trends in the Twenty-First Century*, 34 B.C. INT'L & COMP. L. REV. 1, 23 (2011). However, the European Law Institute (ELI) has recently announced its intention to adapt the ALI/UNIDROIT Principles of Transnational Civil Procedure for use in the European Union. *See* ALI & UNIDROIT, *supra* note 10; European Law Institute, *Meeting of ELI Representative and Secretary-General of UNIDROIT*, [http://www.europeanlawinstitute.eu/news-events/news-contd/article/discussions-underway-for-eliunidroit-joint-conference-in-](http://www.europeanlawinstitute.eu/news-events/news-contd/article/discussions-underway-for-eliunidroit-joint-conference-in-au-)

[au-tumn/?tx\\_ttnews%5BbackPid%5D=132848&cHash=dde59166ad7d6019d15947f19e5e7327](http://www.europeanlawinstitute.eu/news-events/news-contd/article/discussions-underway-for-eliunidroit-joint-conference-in-au-tumn/?tx_ttnews%5BbackPid%5D=132848&cHash=dde59166ad7d6019d15947f19e5e7327) (last visited Apr. 6, 2014).

21. *See* ALI & UNIDROIT, *supra* note 10, at 3; H. Patrick Glenn, *Prospects for Transnational Civil Procedure in the Americas*, 8 REVUE DE DROIT UNIFORME [UNIFORM L. REV.] 485, 489–90 (2003). Procedural privatization

achieved in this regard, most notably in the form of the Convention on Choice of Court Agreements (“COCA”), which increases the ability of private commercial parties to choose the forum that will be used to resolve their disputes.<sup>22</sup> Because choice of forum has traditionally dictated choice of procedure,<sup>23</sup> parties can use forum selection provisions as a means of exercising a limited amount of procedural autonomy. However, as useful as COCA may be, it still does not permit parties to adopt individual procedures *a la carte*.<sup>24</sup>

For years, this holistic approach to procedure was unquestioned. However, a number of recent developments have suggested a possible shift in thinking about procedural autonomy.<sup>25</sup> For example, “some distinguished scholars now argue that parties’ greater ability to contract out of federal and state procedure [through arbitration agreements] entails the lesser power to modify it.”<sup>26</sup> Other commentators have suggested that the high degree of judicial respect for freedom of contract and

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relates to autonomous procedural choices by individual parties, as opposed to procedural harmonization, which takes place at the state level. *See* Sánchez-Cordero, *supra* note 10, at xxxiii.

22. *See* Hague Conference on Private International Law, Convention on Choice of Court Agreements, June 30, 2005, *reprinted in* 44 I.L.M. 1294, *available at* [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=98](http://www.hcch.net/index_en.php?act=conventions.text&cid=98) [hereinafter COCA]. Although COCA has been finalized, it has not yet come into force. *See id.* Ratification in the United States has been delayed pending debate about the nature of the implementing legislation. *See* U.S. Department of State Advisory Committee on Private International Law: Notice of Public Meeting of the Study Group on the Hague Convention on Choice of Court Agreements, 77 FED. REG. 72,904 (Nov. 29, 2012); Memorandum of the Legal Adviser Regarding U.S. Implementation of the Hague Convention on Choice of Courts Agreements (Jan. 19, 2013), *available at* <http://www.state.gov/s/l/releases/2013/206657.htm>.

23. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 & cmt. a (1971) (stating that “[a] court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case”); COLLINS ET AL., *supra* note 1, ¶¶ 7-002, 32-054, 32-060.

24. *See* COCA, *supra* note 22.

25. *See* Colter L. Paulson, *Evaluating Contracts for Customized Litigation by the Norms Underlying Civil Procedure*, 45 ARIZ. ST. L.J. 471, 473 (2013); *see also* Glenn, *supra* note 21, at 490 (“There is thus a disguised or hidden rule of party autonomy within domestic procedural law.”).

26. Hoffman, *supra* note 7, at 391.



procedural waivers provides a sufficiently strong foundation for private procedural contracts.<sup>27</sup>

However, some boundaries to procedural autonomy must necessarily exist, either as a matter of prudence, policy, or practice.<sup>28</sup> Indeed, one need look no farther than arbitration to see that there are limits to what courts will allow in terms of procedural autonomy, even in jurisdictions that grant broad respect to arbitration.<sup>29</sup>

The debate about the propriety of private procedural contracts in the domestic context is extensive and ongoing.<sup>30</sup> How-

27. See *Shutte v. Thompson*, 82 U.S. (15 Wall.) 151, 159 (1872) (noting that “[a] party may waive any provision, either of a contract or of a statute, intended for his benefit”); Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration’s Image*, 30 HARV. J.L. & PUB. POL’Y 579, 595 (2007); G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 433 (1993).

28. For example, transactional costs may make individualized procedures too expensive to pursue. See O’Connor & Drahozal, *supra* note 9. Alternatively, unbounded procedural autonomy could create situations that are procedurally unfair. See Davis & Hershkoff, *supra* note 11, at 551 (noting “contract procedure could produce a court system in which the rules of the game reflect a set of narrow interests and not the overall welfare”).

29. See *Hall St. Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008) (striking a provision purporting to expand the grounds of judicial review of an arbitral award); *In re Wal-Mart Wage & Hours Emp’t Practices Litig.*, 737 F.3d 1262, 1267–68 (9th Cir. 2013) (striking a contractual provision allegedly waiving the parties’ right to judicial review of an arbitral award); see also *infra* notes 262–386 and accompanying text.

30. An impressive body of literature already exists. See Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1362–67 (2012); Davis & Hershkoff, *supra* note 11, at 520–64; Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 776–83 (2011); Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103 (2011); Hoffman, *supra* note 7, at 426–28; David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 607–08 (2010); Daphna Kapeliuk & Alon Klement, *Contractualizing Procedure* (Dec. 31, 2008) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1323056](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323056); Daphna Kapeliuk & Alon Klement, *Changing the Litigation Game: An Ex Ante Perspective on Contractualized Procedures*, 91 TEX. L. REV. 1475, 1475–77 (2013) [hereinafter Kapeliuk & Klement, *Ex Ante*]; David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 974–75 (2008); Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 293–96 (1988); Paulson, *supra* note 25, at 471; Resnik, *supra* note 11, at 609–22; Robert J. Rhee, *Toward Procedural*

ever, no one appears to have yet considered the special case of international commercial litigation. This lacuna is somewhat surprising, since the United States Supreme Court has indicated on numerous occasions that the unique nature of international commerce requires courts to give an increased amount of respect to existing forms of procedural contracts (i.e., forum selection provisions and arbitration agreements).<sup>31</sup>

To some extent, the absence of academic interest in cross-border disputes may be explained by the overwhelming popularity of international commercial arbitration.<sup>32</sup> If parties can achieve the desired degree of procedural autonomy in arbitration, then there may be little need to develop similar principles in litigation.

However, it is by no means clear that international commercial arbitration is going to retain its status as the preferred means of resolving cross-border business disputes.<sup>33</sup> Recent

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*Optionality: Private Ordering of Public Adjudication*, 84 N.Y.U. L. REV. 514, 516–17 (2009); Moffitt, *supra* note 13, at 462; Noyes, *supra* note 27, at 581; Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 856–69 (2006); John W. Strong, *Consensual Modifications of the Rules of Evidence: The Limits of Party Autonomy in an Adversary System*, 80 NEB. L. REV. 159, 160–61 (2001) [hereinafter Strong, *Consensual*]; David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convolved Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1085–86 (2002); Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181, 183 (2006).

31. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516–17 (1974); *M/S Bremen v. Zapata Off-Shore Co. (The Bremen)*, 407 U.S. 1, 13–15 (1972).

32. International commercial arbitration is the preferred means resolving disputes arising out of international business transactions. See S.I. STRONG, *INTERNATIONAL COMMERCIAL ARBITRATION: A GUIDE FOR U.S. JUDGES* 6 (2012) [hereinafter STRONG, *GUIDE*], available at [http://www.fjc.gov/public/pdf.nsf/lookup/strongarbit.pdf/\\$file/strongarbit.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/strongarbit.pdf/$file/strongarbit.pdf). Procedural autonomy is one of the primary reasons parties arbitrate their disputes, although arbitration provides a number of other benefits as well. See BORN, *ICA*, *supra* note 3, at 1748; JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* ¶ 21-3 (2003).

33. See WILLIAM W. PARK, *ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE* 3–27 (2012); Loukas Mistelis, *International Arbitration—Corporate Attitudes and Practices—12 Perceptions Tested: Myths, Data and Analysis Research Report*, 15 AM. REV. INT’L ARB. 525, 584 (2004); Jacqueline Nolan-Haley, *Mediation: The “New Arbitration,”* 17 HARV. NEGOT. L. REV. 61, 66–67 (2012); S.I. Strong, *Increasing Legalism in*

concerns about arbitration's rising costs and increased formalities have led many multinational companies to explore other dispute resolution options.<sup>34</sup> One possibility involves so-called "bespoke" litigation, where parties can customize the procedures used in court so as to lessen or eliminate any "home court" advantages and avoid any procedural practices that pose problems for domestic or foreign litigants.<sup>35</sup>

The interest in customized litigation processes goes beyond individual commercial parties. A number of institutional and industry groups have also indicated their support for private procedural contracts, thereby signaling the possibility that significant change is afoot.<sup>36</sup> For example, the International Institute for Conflict Prevention and Resolution ("CPR") has recently created an Economical Litigation Agreement (known colloquially as the Model Civil Litigation Prenup)<sup>37</sup> that allows parties to individualize their dispute resolution procedures.<sup>38</sup> Somewhat similarly, the international construction industry (often an innovator in dispute resolution procedures) has proposed a process known as "guided choice," whereby a neutral third party, similar to a mediator, helps parties create an indi-

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*International Commercial Arbitration: A New Theory of Causes, A New Approach to Cures*, 7 WORLD ARB. & MEDIATION REV. 117, 117 (2013).

34. See Noyes, *supra* note 27, at 591. International commercial mediation has been touted as a promising alternative to arbitration, but there are a number of potential problems with that proposition. See Nolan-Haley, *supra* note 33, at 63–64; S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 42 WASH. U. J.L. & POL'Y (forthcoming 2014).

35. U.S.-style discovery is one of the most often-mentioned concerns. See Rubinstein, *supra* note 15, at 304 (noting foreign litigants react to U.S. discovery "with horror"); Joanna C. Schwartz, *Gateways and Pathways in Civil Procedure*, 60 UCLA L. REV. 1652, 1657, 1671 (2013) (noting, with others, that discovery abuse leads even domestic parties to opt out of litigation).

36. Hoffman, *supra* note 7, at 389. Institutional support may be critical to the success of a particular procedural innovation. See *id.* at 429 (discussing "public credentialing moments").

37. See *Introduction: Economical Litigation Agreement*, INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION, <http://www.cpradr.org/Resources/ADRTTools/EconomicalLitigationAgreement.aspx> (last visited Apr. 6, 2014) [hereinafter CPR Economical Litigation Agreement].

38. *Id.*

vidualized dispute resolution procedure that is then used to resolve the underlying substantive concerns.<sup>39</sup>

As useful as these and other initiatives may be, it is unknown whether and to what extent they will be embraced by U.S. and other courts.<sup>40</sup> Furthermore, at this point there is no clear consensus regarding how these sorts of agreements should be analyzed. For example, some commentators claim that analytical priority should be given to contract law, while other observers suggest that procedural law constitutes the proper conceptual paradigm.<sup>41</sup> Finding an appropriate balance between the two disciplines can be difficult, given the hybrid nature of procedural contracts.<sup>42</sup>

Another issue that arises in the international realm involves the variations in how different jurisdictions approach procedural and contract law.<sup>43</sup> While detailed consideration of a single nation's law may be sufficient in the domestic setting, a broader focus is necessary in cross-border conflicts.

Given these concerns, this Article adopts a new analytical paradigm that emphasizes structural and substantive issues rather than more narrow questions of contract or procedural law. In so doing, the Article overcomes the contract law-

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39. See Paul M. Lurie, *Guided Choice: Early Mediated Settlements and/or Customized Arbitrations*, 7 J. AM. C. CONSTR. LAW. 167, 169 (2013).

40. The propriety of a procedural contract may need to be considered from a variety of national perspectives, including that of the parties, the forum, and the place where the judgment will be enforced.

41. Compare Hoffman, *supra* note 7, at 430 (suggesting that “scholars of privatized procedure should spend more energy on contracts and less on procedure”), with Paulson, *supra* note 25, at 474 (suggesting that “contract procedure can be usefully evaluated by the norms underlying civil procedure”). Other commentators emphasize potential differences that may arise depending on whether the dispute is heard in federal court, state court, or regulatory proceedings. See Resnik, *supra* note 11, at 597–98; Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1516 (2005).

42. Of course, the two lines of discussion reflect some overlap. For example, contract-based discussions often focus on the limits of party autonomy in the face of institutional concerns about judicial administration while procedure-oriented debates typically focus on due process considerations. See Hoffman, *supra* note 7, at 401–02; Davis & Hershkoff, *supra* note 11, at 551.

43. See E. Allan Farnsworth, *Comparative Contract Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 899, 905–34 (Mathias Reimann & Reinhard Zimmermann eds., 2008); Joachim Zekoll, *Comparative Civil Procedure*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra*, at 1327, 1327–61.

procedural law dichotomy and provides a more internationally oriented approach to procedural privatization.

The discussion begins in Part I with a brief discussion of why parties may have a heightened need or desire for procedural contracts in international commercial disputes. This section also considers whether and to what extent parties will actually begin to adopt private procedural agreements if those agreements are held to be enforceable.

The Article continues in Part II with an introduction to various structural concerns relating to private procedural contracts. Structural issues arise as a result of state interests in preserving the constitutionally mandated role of public institutions such as the courts.<sup>44</sup> Although the concept of “regulation”—which could be said to include questions relating to civil procedure—appears to be shifting away from a formal command-and-control model to a mixed public-private approach,<sup>45</sup> there still may be some elements of litigation that must remain immune from private contract. This section therefore provides both a theoretical and a practical evaluation of the structural limits on party autonomy in litigation and includes both consequentialist and deontological analyses.

Substantive issues are addressed in Part III. Substantive—meaning content based—concerns are triggered by the “substantial state interest” in preserving the fairness of trial.<sup>46</sup> If individualized procedures are to be allowed, courts must be assured that due process and procedural fairness are properly

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44. See Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1444, 1447 (2013).

45. For example, “[t]here is no consensus in policy or academic circles as to what exactly is connoted by the term regulation.” Colin Scott, *Privatization and Regulatory Regimes*, in THE OXFORD HANDBOOK OF PUBLIC POLICY, 651, 653 (Michael Moran et al. eds., 2006). One classic definition states that regulation involves “sustained and focused control exercised by a public agency over activities that are socially valued,” although modern critics have expanded the scope of application to include regulatory activity undertaken by private actors and other decentralized entities. *Id.* (citation omitted). Many of the changes come as a result of “new governance” theory. See *id.* at 651 (describing the privatization of regulatory regimes); Peer Zumbansen, *Sustaining Paradox Boundaries: Perspectives on Internal Affairs in Domestic and International Law*, 15 EUR. J. INT’L L. 197, 201 (2004).

46. See *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1076 (1991); *NCALJ Panel Discussion, ALJ Decisions—Final or Fallible?*, 25 J. NAT’L ASS’N ADMIN. L. JUDGES 191, 199 (2005).

respected and protected. Although this subject could be analyzed from a variety of perspectives, this Article attempts to identify the outer bounds of procedural autonomy in litigation through comparisons to international commercial arbitration. This analogy appears appropriate not only because international commercial arbitration addresses precisely those types of disputes that are at issue in this Article but also because various scholars have linked the expansion of procedural autonomy in litigation to procedural autonomy in arbitration.<sup>47</sup>

Part IV takes the analysis one step further by addressing various logistical concerns facing parties who wish to customize their litigation procedures. This discussion also analyzes several proposed models for private procedural contracts.

Finally, the Article concludes by tying together the various strands of analysis and offering a number of observations regarding the future of private procedural contracts in the international commercial realm. Notably, although this Article focuses primarily on international commercial disputes, a number of the analyses and conclusions reflected herein apply equally to domestic matters.

## I. THE NEED (OR DESIRE) FOR PROCEDURAL AUTONOMY IN INTERNATIONAL COMMERCIAL RELATIONSHIPS

### *A. Rationales Supporting Procedural Autonomy in International Commercial Relationships*

This Article takes as its starting point the notion that there is something about international commercial disputes that leads to a heightened need or desire for procedural autonomy. Although there are a variety of ways of proving this hypothesis, the most commonly enunciated rationale for party autonomy in commercial affairs involves concerns about predictability. This principle can be illustrated by a series of decisions rendered by the United States Supreme Court in the late twentieth century, although the need for certainty in cross-border business transactions has been recognized by numerous other authorities.<sup>48</sup>

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47. See Bone, *supra* note 30, at 1331, 1334; Dodge, *supra* note 30, at 736; Hoffman, *supra* note 7, at 390–91.

48. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974); *M/S Bremen v. Zapata Off-Shore Co. (The Bremen)*, 407 U.S. 1, 11, 13–15 (1972) (noting England enforces forum selection provisions); *Premium Nafta Prods.*

The U.S. Supreme Court first considered procedural autonomy in international commercial disputes in 1972, in *M/S Bremen v. Zapata Off-Shore Co. (The Bremen)*.<sup>49</sup> Although the Court had already upheld the validity of forum selection clauses in the domestic context,<sup>50</sup> *The Bremen* was the first case to address such provisions in the international realm.<sup>51</sup>

In its decision, the Supreme Court not only upheld the parties' agreement despite a historical antipathy to forum selection provisions,<sup>52</sup> but the Court also recognized the special status of international forum selection provisions, stating that

[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.<sup>53</sup>

Because "agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting,"<sup>54</sup> the Court "eschewed a provincial solicitude for the jurisdiction of domestic forums" and upheld the forum selection provision.<sup>55</sup>

A key element of the Court's analysis involved the link between autonomy and predictability or, in the Court's words, "certainty."<sup>56</sup> According to the Court, procedural autonomy exists so as to increase predictability in transnational com-

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Ltd. v. Fili Shipping Co., [2007] UKHL 40, [26] (appeal taken from Eng.), *aff'g* Fiona Trust & Holding Corp. v. Privalov, [2007] EWCA (Civ) 20 (Eng.) (discussing enforcement of forum selection clauses and arbitration agreements); BORN, DRAFTING, *supra* note 2, at 1.

49. See *The Bremen*, 407 U.S. at 1; Main, Review, *supra* note 18, at 475 (citing the desire for procedural certainty as reflected in empirical studies).

50. See *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964).

51. See *id.*; see also *The Bremen*, 407 U.S. at 9.

52. See *The Bremen*, 407 U.S. at 9-10.

53. *Id.* at 9.

54. *Id.* at 13-14, as quoted in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 630 (1985).

55. *Mitsubishi Motors Corp.*, 473 U.S. at 630 (construing *The Bremen*, 407 U.S. at 1).

56. *The Bremen*, 407 U.S. at 13-14, 17.



merce.<sup>57</sup> However, there are several different types of predictability.

First, predictability can involve issues of substantive law. Interestingly, although *The Bremen* is often cited as support for procedural autonomy, the decision also discussed how forum selection provisions ensure predictability in the substantive law.<sup>58</sup> This link between procedural and substantive law could be important to the current debate about customized procedural contracts.<sup>59</sup>

Second, predictability can refer to the place where the dispute will be heard. This is the feature that is most commonly associated with forum selection clauses and was at the heart of the decision in *The Bremen*.<sup>60</sup> Choice of court agreements facilitate a certain amount of procedural predictability because the law of the forum is presumed to control most, if not all, procedural matters.<sup>61</sup>

Third, predictability can relate to the enforceability of the judgment arising out of the chosen venue. This issue was not discussed in *The Bremen*, since that dispute involved the initial enforcement of a forum selection provision.<sup>62</sup> However, forum selection clauses have not traditionally provided any assurances regarding the enforcement of a judgment resulting from litigation in the preferred venue.<sup>63</sup> Instead, judgments arising out of a forum selection provision are subject to the same complicated, confusing, and often unpredictable process that applies to the recognition and enforcement of foreign judgments in other contexts.<sup>64</sup> This feature is relevant to the debate about pro-

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57. *See id.* at 17.

58. *See id.* at 13 n.15 (noting that “[i]t is . . . reasonable to conclude that the forum clause was also an effort to obtain certainty as to the applicable substantive law”).

59. *See infra* notes 86–95 and accompanying text.

60. *See The Bremen*, 407 U.S. at 13–14.

61. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971); COLLINS ET AL., *supra* note 1, ¶ 7-002. However, this rule is not always as clear cut as it seems. *See infra* notes 86–95 and accompanying text.

62. *See The Bremen*, 407 U.S. at 10.

63. *See* BORN, DRAFTING, *supra* note 2, at 19, 151–52.

64. The problem is linked to the absence of any multinational treaty concerning the recognition and enforcement of foreign judgments. *See id.* at 19, 151–52; Strong, *Judgments*, *supra* note 14. Although COCA may eventually provide some limited assistance in this regard, COCA is not yet in force. *See* COCA, *supra* note 22, arts. 1–2, 8–9; *see also supra* note 22.



cedural contracts because some of the difficulties associated with the recognition and enforcement of foreign judgments arise because of concerns about the legitimacy of other states' procedural practices.<sup>65</sup> Thus, any process (including, perhaps, the use of a private procedural agreement) that helps harmonize some of the differences associated with national procedural practices could increase the international enforceability of civil judgments.<sup>66</sup>

Fourth and finally, predictability may refer to the actual procedures that are used to resolve the dispute at hand. This issue was also not discussed in *The Bremen*.<sup>67</sup> However, the common understanding, both then and now, is that the parties will adhere to the procedural rules applied by the forum court.<sup>68</sup> Although this approach may be defensible on policy grounds,<sup>69</sup> it is important to recognize as a factual matter that application of the forum's procedural law may not lead to the kind of predictability that commercial actors require. For example, there is no guarantee that a court designated by the parties can or will accept jurisdiction over any particular matter.<sup>70</sup> Furthermore, research has shown that procedures in the United States can

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65. See Strong, *Judgments*, *supra* note 14 (discussing systemic and individual due process concerns).

66. See Main, Review, *supra* note 18, at 471.

67. See *The Bremen*, 407 U.S. at 13–14.

68. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 & cmt. a (1971); COLLINS ET AL., *supra* note 1, ¶ 7-002.

69. Judicial efficiency and convenience appear to be the primary policy rationales, although uniformity can also play a role in some contexts. See GARNETT, *supra* note 20, at 10–15 (also discussing rationales based on natural justice, public law, and territorial sovereignty); Brainerd Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 268, 271 n.179 (1959); Michael Steven Green, *Horizontal Erie and the Presumption of Forum Law*, 109 MICH. L. REV. 1237, 1245 (2011); James R. Pielemeier, *Constitutional Limitations on Choice of Law: The Special Case of Multistate Defamation*, 133 U. PA. L. REV. 381, 432 (1985).

70. For example, parties cannot contract around the requirement of subject matter jurisdiction in U.S. federal courts. See *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). It is also possible for courts to set aside a forum selection provision. See *The Bremen*, 407 U.S. at 16–17. Certain commentators have suggested that U.S. courts set aside foreign forum selection clauses with some frequency. See Paulson, *supra* note 25, at 487–88.

differ significantly between individual state courts,<sup>71</sup> between state courts and federal courts,<sup>72</sup> and even between and within different federal courts.<sup>73</sup> Litigation in the United States is also said to be subject to a number of unwritten rules of procedure that makes it difficult for parties, particularly foreign parties, to anticipate how a dispute will be resolved.<sup>74</sup> Differences between the procedural rules of different countries are often even more extreme.<sup>75</sup>

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71. See Bone, *supra* note 30, at 1339; Catherine T. Struve, *Institutional Practice, Procedural Uniformity, and As-Applied Challenges Under the Rules Enabling Act*, 86 NOTRE DAME L. REV. 1181, 1218–29 (2011).

72. See Bone, *supra* note 30, at 1339; Struve, *supra* note 71, at 1218–29.

73. Parties proceeding in federal court are subject not only to the Federal Rules of Civil Procedure but also to the local rules of that particular court as well as the rules of the particular judge who hears the case. See FED. R. CIV. P. Sometimes these rules can vary significantly. Compare Local Rules of United States District Courts for the Southern and Eastern Districts of New York, <http://www.nysd.uscourts.gov/courtrules.php>, with Local Rules of Practice for the United States District Court for the Northern District of New York, <http://www.nynd.uscourts.gov/news/nynd-2014-local-rules-effective-112014>; compare also Individual Rules and Procedures for Judge Shira A. Scheindlin of the District Court of the Southern District of New York, <http://www.nysd.uscourts.gov/judge/Scheindlin>, with Individual Rules and Procedures for Judge Lewis A. Kaplan of the District Court of the Southern District of New York, <http://www.nysd.uscourts.gov/judge/Kaplan>. These individual rules can sometimes be outcome-determinative. See *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), 2013 WL 5548913, \*1–3 (S.D.N.Y. Oct. 7, 2013); BORN, DRAFTING, *supra* note 2, at 1.

74. See Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*, 79 NOTRE DAME L. REV. 1981, 1983 (2004) (discussing an informal procedural system that “has no procedural rulebook, is largely ignored in law schools, and is seldom mentioned by judges. Yet it is a methodical and logical system that civil litigators are aware of and, increasingly, rely upon as a necessary complement to the formal system”). Judges are also given a great deal of discretion in how they decide certain matters, which further compounds the litigants’ procedural uncertainty. See Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1963 (2007) (“If we were not so accustomed to broad trial judge discretion over procedure, we would probably think it a rather strange way to manage the litigation environment.”); Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853, 854–55 (1989) (noting excessive judicial discretion can violate the rule of law); S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 WASH. & LEE L. REV. 489, 530–32 (2010) [hereinafter Strong, *Discovery*].

75. See Main, Review, *supra* note 18, at 468.

Together, these features suggest that the rules of civil procedure may not be as uniform—and hence predictable—as is commonly believed to be the case.<sup>76</sup> Indeed, Professor Judith Resnik has suggested that a variety of “mini-codes of civil procedure are being created by [U.S.] courts, agencies, and a multitude of private providers.”<sup>77</sup> As a result, “[t]he aspiration for a trans-substantive procedural regime embedded in the Federal Rules has been supplanted by an array of contextualized processes.”<sup>78</sup>

Although forum selection provisions were the first type of international procedural contracts contemplated by the United States Supreme Court, they were not the last. The Court has also considered the validity of arbitration agreements as “specialized kind[s] of forum-selection clause[s].”<sup>79</sup> Predictability also figures largely in discussions relating to these types of agreements.

For example, one of the earliest cases on international commercial arbitration, *Scherk v. Alberto-Culver Co.*, stated that

uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.

A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate

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76. See David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 373 (2010) [hereinafter Marcus, *Past*].

77. Resnik, *supra* note 11, at 597–98.

78. *Id.* at 597. Some scholars have questioned whether it is even appropriate to aspire to a trans-substantive approach to procedural law. See Robert M. Cover, *For James Wm. Moore: Reflections on a Reading of the Rules*, 84 YALE L. J. 718, 732–39 (1975). But see Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244–47 (1989) (defending trans-substantivity in procedural law).

79. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.<sup>80</sup>

*Scherk* therefore reinforced the principle enunciated in *The Bremen* that parties need predictability (and hence autonomy) with respect to both the place where a dispute will be heard and the substantive law that will apply.<sup>81</sup> However, *Scherk* went one step further and also protected the parties' ability to choose the procedures by which their dispute is resolved.<sup>82</sup> In reaching its decision, the Court held that arbitration agreements are enforceable to the same extent and for the same reasons as forum selection clauses, particularly in the international realm.<sup>83</sup>

The Supreme Court's support for predictability in dispute resolution processes reached its zenith in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, which stated that

concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, *even assuming that a contrary result would be forthcoming in a domestic context.*<sup>84</sup>

These decisions show how respect for procedural autonomy has evolved in the United States over time. In each of these cases, the Supreme Court has overcome a tradition of judicial hostility to the various practices due to the need to encourage

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80. *Id.* at 516–17 (footnote omitted).

81. *See id.* at 518; *see also* *M/S Bremen v. Zapata Off-Shore Co.* (The *Bremen*), 407 U.S. 1 (1972).

82. *See Scherk*, 417 U.S. at 519 (noting that an arbitration agreement “posits not only the situs of suit but also the procedure to be used in resolving the dispute”). The final type of predictability involves enforcement of the decision arising out of the arbitration or litigation. Arbitration is clearly the better process in this regard, since parties can take advantage of one of the numerous international treaties facilitating the recognition and enforcement of foreign arbitral awards. *See* BORN, ICA, *supra* note 3, at 68–71. However, this principle was not discussed in *Scherk*, since the Court was addressing the enforcement of an arbitration agreement, not an arbitral award. *See Scherk*, 417 U.S. at 519–20.

83. *See Scherk*, 417 U.S. at 518–19 (citing *The Bremen*, 407 U.S. at 9, 13–14).

84. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (emphasis added).

predictability in international commerce.<sup>85</sup> As a result, private procedural contracts stand a good chance of being upheld if they can be shown to promote predictability in international commercial transactions.

When making this argument, parties would be well-advised to demonstrate how private procedural contracts increase predictability in the interpretation and application of substantive law, since the U.S. Supreme Court has consistently focused on substantive concerns in its discussions of procedural autonomy. As it turns out, there are several ways to tie procedural contracts to matters involving substantive law. For example, the notion that procedure is neutral with respect to outcome has come under increased attack in recent years,<sup>86</sup> and parties are increasingly engaging in “forum shopping for jurisdictions in which procedural law has a likelihood of affecting the favourable resolution of a dispute when those transactions or relationships sour.”<sup>87</sup> As a result, it appears increasingly likely that parties in an international transaction will use both a forum selection provision and a choice of law agreement, which could mean that the court chosen to resolve a particular dispute is

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85. See *id.* at 625; *Scherk*, 417 U.S. at 516; *The Bremen*, 407 U.S. at 9–10. Some of this antipathy was based on the influence of “Joseph Beale, the reporter for the First Restatement of Conflicts of Laws, who condemned choice-of-law clauses as conferring the equivalent of legislative power on the contracting parties” and noting judicial “hostility towards choice-of-law clauses was [based on] the sense that they represented an impermissible usurpation of state power.” Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2076 (2009); see also Joseph H. Beale, *What Law Governs the Validity of a Contract: III. Theoretical and Practical Criticisms of the Authorities*, 23 HARV. L. REV. 260, 261 (1910). However, these sentiments have been rejected not only with respect to substantive choice of law provisions but also with respect to forum selection clauses and arbitration agreements. See Miller & Eisenberg, *supra*, at 2076; see also *The Bremen*, 407 U.S. at 12 (discussing ouster of judicial jurisdiction through forum selection clauses); PETER B. RUTLEDGE, *ARBITRATION AND THE CONSTITUTION* 16–17 (2013) (discussing the concept that arbitration ousts the jurisdiction of the courts).

86. See GARNETT, *supra* note 20, at 15–43; Sagi Peari, Book Review, 14 MELB. J. INT'L L. 304, 309–10 (2013) (reviewing GARNETT, *supra* note 20) (discussing how damages calculations can be affected by the substantive-procedural divide).

87. Donald K. Anton, Book Review, 60 NETH. INT'L L. REV. 489, 490 (2013) (reviewing GARNETT, *supra* note 20).

not an expert in the substantive principles that apply.<sup>88</sup> However, some parties could want to have their disputes heard by a court that is expert in the substantive law that has been chosen but not want to expose themselves to a particular procedure, such as U.S.-style discovery. Since it is highly improbable at this point that states will curtail parties' ability to choose the substantive law that governs their contracts,<sup>89</sup> other steps must be taken to minimize the effect that procedural disparities have on substantive outcomes. Individualized procedural contracts may be one way to address that issue.

Another time-honored axiom that has recently come under fire involves the purported distinction between substance and procedure. Not only have numerous authorities recognized the impossibility of drawing strict lines between substance and procedure,<sup>90</sup> but several scholars have noted how the substantive law is often built on certain assumptions regarding the shape of the applicable procedural law.<sup>91</sup> As a result, it could very well be argued that claims made under foreign law should be decided under the procedural laws of that jurisdiction, at least in some regards, so as to take into account the legal environment that generated that particular substantive right and minimize the possibility of either underregulating or overregulating certain behaviors through the use of foreign procedural mechanisms.<sup>92</sup> A more liberal approach to procedural autonomy

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88. See Anton, *supra* note 87, at 490 (noting that the "internationally disparate procedural advantages and disadvantages tied to traditional *lex fori* rule can undermine the 'uniformity' of result of cases arising outside of the forum").

89. Indeed, it appears as if states are moving toward increased autonomy in choice of substantive law. See Draft Hague Principles, *supra* note 3; Symeonides, *supra* note 1, at 875–76.

90. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 & cmt. b (1971); COLLINS ET AL., *supra* note 1, ¶ 7-004; Anton, *supra* note 87, at 489.

91. See Main, *Substantive*, *supra* note 20, at 802; see also Peari, *supra* note 86, at 305. For example, a party might not be able to prove all the elements of a fraud claim arising under U.S. law unless U.S.-style discovery is permitted. Most civil law nations use adverse inferences and shifts in the burden of proof to avoid the need for discovery in these types of scenarios. See Hazard, *Secrets*, *supra* note 15, at 1682. However, it is unclear whether adverse inferences and burden-shifting would lead to the same substantive outcome as U.S.-style discovery or vice versa.

92. At this point, international commercial arbitration appears to be superior to litigation because arbitration permits an increased amount of jurisprudential consistency between substantive and procedural law while never-

might increase consistency between substantive and procedural law.

Finally, parties seeking to find a link between procedural contracts and predictability could attempt to demonstrate that the use of harmonized procedures could increase the enforceability of civil judgments across national borders.<sup>93</sup> Although predictability of enforcement is not precisely the same as predictability of substantive choice of law, the two goals are mutually consistent, since an unenforceable judgment is as bad as (or worse than) a judgment rendered pursuant to the wrong substantive law.<sup>94</sup> Therefore, courts could view any mechanism that increases the international enforceability of civil judgments as an effective means of promoting international commercial activity.<sup>95</sup>

### *B. Frequency of Procedural Contracts in Practice*

Although private procedural contracts would appear to increase predictability in international commercial litigation, it is unclear whether and to what extent parties are actually at-

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theless allowing the parties to exercise procedural autonomy in other regards. This phenomenon does not arise as a result of any formal requirement that parties and arbitrators choose procedures that align with the substantive law governing the dispute. Instead, the alignment of procedure and substance occurs as a result of international arbitration's core values of procedural flexibility and harmonization of common law and civil law practices. Because arbitrators are allowed to adopt procedures that are tailored to the dispute and the parties, arbitral awards may be more consistent with judgments of the courts whose law has been chosen to control the substance of the dispute than judgments from foreign courts, since judges are at this point unable or unwilling to adopt procedures akin to those used in the country whose law controls the substance of the dispute.

93. See *supra* notes 67–75 and accompanying text.

94. A judgment rendered pursuant to the wrong substantive law might still reach the same outcome as would have occurred under the law chosen by the parties. However, “[a]n unenforceable judgment is at best valueless; at worst a source of additional loss.” Alexander Hansebout, *The International Dimension of the Attachment of Debts*, 4 DISP. RESOL. INT’L 219, 219 (2010).

95. Notably, a procedural contract could increase international enforcement in two ways. First, a procedural contract may make a party more amenable to suit in a jurisdiction where assets are located, thereby removing the need to seek international enforcement of the resulting judgment. Second, a procedural contract may make the litigation process more familiar to a foreign court that will then be more inclined to recognize and enforce the resulting judgment. See Strong, *Judgments*, *supra* note 14 (discussing systemic and individual due process concerns).

tempting to adopt such contracts in practice.<sup>96</sup> Indeed, there are a number of reasons why parties may be disinclined to adopt these sorts of provisions.

For example, some parties may worry about the enforceability of individualized procedural contracts.<sup>97</sup> Other parties may prefer to use arbitration, particularly in international disputes, because arbitration offers various benefits—such as the easy enforceability of foreign awards—in addition to the possibility of customized procedures.<sup>98</sup> Still other parties may simply be unaware that individualized court procedures are possible. Finally, some parties may be influenced by inertia, or what might be called “the norm-creating power of the factual.”<sup>99</sup>

This final proposition is particularly intriguing because it can be tied to the notion of defaults, a concept that is of some interest in the area of procedural contracts.<sup>100</sup> For example, some theorists believe that

when lawmakers anoint a contract term [or legislative provision as] the default, the substantive preferences of contracting parties shift—that term becomes more desirable, and other competing terms becoming less desirable. Put another way, contracting parties view default terms as part of the status quo, and they prefer the status quo to alternative states, all other things equal.<sup>101</sup>

Although parties may prefer to retain the status quo, research suggests that individuals will begin to exercise their right (or, in more innovative contexts, test their right) to opt out of a default provision if and when the default becomes undesirable under a standard cost-benefit analysis.<sup>102</sup> This phe-

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96. See Bone, *supra* note 30, at 1346; Hoffman, *supra* note 7, at 393–94.

97. See BORN, DRAFTING, *supra* note 2, at 161; Hoffman, *supra* note 7, at 424–25.

98. See Bone, *supra* note 30, at 1351–52; Hoffman, *supra* note 7, at 423–24; S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. INT’L L. 1, 70–81 (2008) [hereinafter Strong, *Due Process*].

99. Gunnar Beck, *Legitimation Crisis, Reifying Human Rights and the Norm-Creating Power of the Factual: Reply to “Reifying Law: Let Them Be Lions,”* 26 PENN. ST. INT’L L. REV. 565, 568 (2008) (citation omitted).

100. *Id.*

101. Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 611–12 (1998).

102. See Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 STAN. L. REV. 1325, 1329 (2013). An interesting notion relates to how



nomenon is illustrated in the procedural realm through the rise in national<sup>103</sup> and international<sup>104</sup> arbitration as satisfaction with similar forms of litigation fell.

Conventional wisdom holds that legal developments take place steadily and incrementally.<sup>105</sup> However, empirical research suggests that innovation occurs “when sufficient, highly salient, exogenous shocks commence to rattle the status quo.”<sup>106</sup> Interestingly, the world of procedural law seems to have recently experienced two of these types of “shocks.”<sup>107</sup>

First, the United States Supreme Court’s recent decisions concerning class arbitration have caused numerous commentators to question the limits of procedural autonomy in both arbitration and litigation.<sup>108</sup> For years, observers had believed that parties would be unable to waive class proceedings in arbitration because such actions were assumed to be impermissible in the judicial realm.<sup>109</sup> However, scholars are now wondering whether the Supreme Court’s decision to uphold various types

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hard it is to contract out of a default provision. See Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. REV. 383, 390 (2007); see also *infra* notes 106–07 and accompanying text.

103. For example, the increase in domestic arbitration in the United States can be tied to corporations’ desire to limit the possibility of class action litigation, which was seen as both expensive and risky. See S.I. STRONG, CLASS, MASS, AND COLLECTIVE ARBITRATION IN NATIONAL AND INTERNATIONAL LAW ¶ 1.16 (2013) [hereinafter STRONG, CLASS].

104. The increased use of international commercial arbitration can be linked to parties’ desire to reduce the unpredictability and expense of transnational litigation. See BORN, ICA, *supra* note 3, at 76–78, 85–86.

105. See Hoffman, *supra* note 7, at 425, 428; see also Stephen J. Choi & G. Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 EMORY L.J. 929, 929 (2004).

106. Hoffman, *supra* note 7, at 428; see also *id.* at 425 (suggesting the “more common pattern is for the market as a whole to shift rather quickly to a new term or set of terms after a period of experimentation and innovation in different possibilities” rather than through slow, incremental change).

107. *Id.* at 428; see also Dodge, *supra* note 30, at 729; Paulson, *supra* note 25, at 473.

108. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751–53 (2011); STRONG, CLASS, *supra* note 103, ¶¶ 4.76–4.121; Bone, *supra* note 30, at 1362–67; Davis & Hershkoff, *supra* note 11, at 520–64; Dodge, *supra* note 30, at 776–83; Drahozal & Rutledge, *supra* note 30, at 1103; Hoffman, *supra* note 7, at 428; Paulson, *supra* note 25, at 471; Resnik, *supra* note 11, at 609–22.

109. See Hans Smit, *Class Actions and Their Waiver in Arbitration*, 15 AM. REV. INT’L ARB. 199, 203 (2004).

of class waivers in arbitration can be read as supporting an expansive view of procedural autonomy that extends beyond the arbitral context.<sup>110</sup>

Second, globalization has led to an ever-increasing amount of transnational litigation,<sup>111</sup> thereby generating a “growing need for legal certainty in a world where people and corporations have seemingly unfettered mobility.”<sup>112</sup> Up until this point, international commercial actors’ desire for both predictability and familiarity has been met through arbitration. However, a growing dissatisfaction with the cost and formality of international commercial arbitration could drive parties to consider the use of individualized procedural contracts.<sup>113</sup> Modified forms of litigation may be particularly attractive to the ever-increasing number of small and medium sized enterprises (“SMEs”) that are now engaged in transnational commerce, since many of these smaller entities either may be unaware of the benefits of international commercial arbitration or may find the costs associated with arbitration to be prohibitively high.<sup>114</sup>

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110. See Bone, *supra* note 30, at 1333; Dodge, *supra* note 30, at 781; Drahozal & Rutledge, *supra* note 30, at 1106–07; Hoffman, *supra* note 7, at 428; Resnik, *supra* note 11, at 599.

111. See Katy Dowell, *International Litigants in London Rise by a Third in Three Years*, LAWYER (May 7, 2013), <http://www.thelawyer.com/news-and-analysis/practice-areas/litigation/international-litigants-in-london-rise-by-a-third-in-three-years/3004520.article> (noting rise of U.S. litigants in English courts); Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT’L L. 31, 37 (2011); William F. Sullivan et al., *A Global Concern: The Rise of International Securities Litigation*, BLOOMBERG L. (Apr. 8, 2013), <http://about.bloomberglaw.com/practitioner-contributions/a-global-concern-the-rise-of-international-securities-litigation/>.

112. Sánchez-Cordero, *supra* note 10, at xxxiv; see also Grossi, *supra* note 18, at 627.

113. See Sánchez-Cordero, *supra* note 10, at xxxv (noting the need for “efficiency, transparency, predictability, and procedural economy” in transnational litigation); *supra* notes 33–34 and accompanying text.

114. See Giuseppe de Palo & Linda Costabile, *Promotion of International Commercial Arbitration and Other Alternative Dispute Resolution Techniques in Ten Southern Mediterranean Countries*, 7 CARDOZO J. CONFLICT RESOL. 303, 303–04 (2006); Mistelis, *supra* note 33, at 582 (concluding “international [commercial] arbitration is at least as expensive as litigation for middle and smaller sized cases”). While international transactions were at one time conducted almost entirely by large, multinational corporations, improvements in technology and communication have opened global markets to a wide variety

## II. STRUCTURAL CONCERNS ABOUT PROCEDURAL AUTONOMY IN INTERNATIONAL COMMERCIAL LITIGATION

Having described how and why parties in international commercial transactions have a heightened need or desire for procedural autonomy, it is now time to consider various structural concerns relating to the exercise of that autonomy through contracts creating individualized litigation procedures. Although the relevant issues can be viewed from a variety of perspectives,<sup>115</sup> perhaps the most compelling way of framing structural concerns is in terms of a presumption that national rules of civil procedure are non-derogable as a result of "a 'State sovereignty prerogative.'"<sup>116</sup> This approach holds that states are the only entities entitled to identify procedural norms in litigation because states are the only bodies that have the right and the responsibility of ensuring procedural fairness in national courts.<sup>117</sup> Under this model, private attempts to customize procedural rules are presumptively improper because such efforts necessarily conflict with the state's conception of procedural justice.<sup>118</sup>

Although the notion of a state procedural prerogative dominated the jurisprudential landscape for many years, commentators have recently identified a possible distinction between the law relating to litigation procedures and the law relating to judicial organization.<sup>119</sup> Under this model, some matters (such as those involving the relationship between the parties *inter se*) might be amenable to private procedural agreements even though other issues (such as those involving judicial admin-

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of participants, including SMEs. See Michael B. Carsella, *Payment Methods in International Trade*, in *DOING BUSINESS WORLDWIDE: THE FOURTH ANNUAL INTERNATIONAL LAW FORUM FOR THE PRACTITIONER AND INTERNATIONAL BUSINESS EXECUTIVE* sec. G, 1, 2 (1998).

115. For example, it is possible to describe structural concerns in terms of threats to democratic values. See Davis & Hershkoff, *supra* note 11, at 551.

116. Sánchez-Cordero, *supra* note 10, at xxxiii; see also Born, *Adjudication*, *supra* note 10, at 780, 859.

117. See Resnik, *supra* note 11, at 595–98. States may also have other interests (such as institutional or judicial efficiency) that they wish to further in litigation. See Andrew Le Sueur, *Access to Justice Rights in the United Kingdom*, 5 EUR. HUM. RTS. L. REV. 457, 473 (2000).

118. See Resnik, *supra* note 11, at 596; see also Hoffman, *supra* note 7, at 392.

119. See Sánchez-Cordero, *supra* note 10, at xxxiii (citing authorities).

istration or the relationship between the parties and the court) remained within the exclusive control of the state.<sup>120</sup>

Distinguishing between those procedures that are amenable to privatization and those that are not can be a difficult task. In considering these matters, it is useful to adopt both a theoretical and practical methodology, as in the discussion below.

### *A. Theoretical Perspectives*

Structural concerns relating to procedural contracts are particularly well-suited to theoretical analyses, since constitutional and political philosophers have considered questions relating to institutional design at length and in a variety of contexts. As a result, matters relating to the privatization of litigation can be addressed from several different theoretical perspectives.

For example, some commentators have analyzed procedural contracts through the lens of law and economics.<sup>121</sup> This approach suggests “rethink[ing] the rules of procedure as a set of defaults. To set such defaults, scholars suggest that we look not simply at typical public law goals, such as distributive fairness and efficiency, but dynamically, focusing on parties’ strategy, and consequently on the role of information exchange through rulemaking.”<sup>122</sup>

Default rules provide the means of

fill[ing] a gap in a contract where the parties have not selected a different rule. Default rules can be contracted around if the parties make an explicit choice to do so. . . . On the other

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120. *See id.* Some sources define “judicial administration” as including matters relating to “the proper form of action, service of process, pleading, rules of discovery, mode of trial and execution and costs.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS §122 & cmt. a (1971). However, other authorities use “judicial administration” to describe matters relating to internal organization and institutional design. *See* Zoltán Fleck, *A Comparative Analysis of Judicial Power, Organisational Issues in Judicature and the Administration of Courts*, 27 IUS GENTIUM 3, 11–23 (2014); Russell R. Wheeler, *Roscoe Pound and the Evolution of Judicial Administration*, 48 S. TEX. L. REV. 943, 943 (2007). This Article will adopt the latter convention unless otherwise indicated.

121. *See* Bone, *supra* note 30, at 1391; Dodge, *supra* note 30, at 755; Hoffman, *supra* note 7, at 394 Kapeliuk & Klement, *Ex Ante*, *supra* note 30, at 1492; *see also* PROCEDURAL LAW AND ECONOMICS (Chris William Sanchirico ed., 2012).

122. Hoffman, *supra* note 7, at 394; *see also* Glenn, *supra* note 21, at 490.

hand, a mandatory or immutable rule is one that the parties cannot contract around. . . .

Efficiency theory, in general, supports the use of default rules, not mandatory rules. Indeed, law and economics scholars have long fought against the use of “immutable rules, including those based on public policy.”<sup>123</sup>

Therefore, proponents of a law and economics approach would permit parties to adopt individualized procedural contracts so long as the parties can adequately protect their interests.<sup>124</sup> Since no evidence yet exists suggesting that procedural contracts result in an abuse of rights, proponents of law and economics would permit parties to engage in these sorts of private contracts.

This model doubtless will be persuasive to some observers. However, a pure law and economics approach to procedural contracts gives rise to several concerns. First, efficiency-based arguments have been said to be problematic in cases involving procedural rights because “[i]n many private relations, . . . courts and other decisionmakers have not allowed what would be the most efficient ‘Coasean’ result.”<sup>125</sup>

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123. Wendy Netter Epstein, *Contract Theory and the Failure of Public-Private Contracting*, 34 CARDOZO L. REV. 2211, 2232 (2013) (citation omitted).

124. See Robert Gertner & Ian Ayres, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 88 (1989) (“Immutability is justified only if unregulated contracting would be socially deleterious because parties internal or external to the contract cannot adequately protect themselves.”).

125. Michael I. Swygert & Katherine Earle Yanes, *A Unified Theory of Justice: The Integration of Fairness into Efficiency*, 73 WASH. L. REV. 249, 261 (1998); see also Paulson, *supra* note 25, at 526. Indeed, litigation currently reflects a multitude of inefficient practices that have been adopted for various reasons, including those relating to procedural fairness. See Janet Cooper Alexander, *Judges’ Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647, 647 (1994); Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 723 (2010); Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 627 (1994). Furthermore, one of the United States’ most hallowed procedural practices, U.S.-style discovery, is extremely inefficient. See Martin H. Redish, *Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure*, 64 FLA. L. REV. 845, 849 (2012); Schwartz, *supra* note 35, at 1690. Other jurisdictions achieve similar ends without the same degree of inefficiency. See Strong, *Discovery*, *supra* note 74, at 509–12.

Second, using law and economics to consider the propriety of procedural contracts seems inappropriate to many observers, given the type of issues that are at stake.<sup>126</sup> For example, proponents of law and economics have suggested that “the focus of civil procedure rules should be to minimize transaction costs, not to maximize procedural justice.”<sup>127</sup> Although there is value in trying to find ways to rationalize various fields of law, many people would be hesitant to set aside procedural fairness in favor of transactional efficiency.

However, law and economics is not the only theory available. It is also possible to analyze private procedural contracts from a deontological perspective.<sup>128</sup> One potential model involves John Rawls’s concept of “justice as fairness,” which has been said to constitute the strongest and most popular response to consequentialist legal theories such as law and economics.<sup>129</sup> Rawls’s work also provides a useful response to the preceding analysis because he “has, on the whole, provided a much more penetrating account of our basic constitutional liberties than the law and economics movement has been able to articulate.”<sup>130</sup>

Rawls’s work is also particularly relevant here because the method by which he constructs his theory of justice as fairness is highly analogous to the way in which procedural contracts are most likely to arise. For example, his concept of “justice as fairness” is based on the concept of the “veil of ignorance,” which involves

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126. See Robin Bradley Kar, *Contract Law and the Second-Person Standpoint: Why Efficiency-Maximization Principles Can Neither Explain Nor Justify the Expectation Damages Remedy*, 40 LOY. L.A. L. REV. 977, 980 (2007).

127. Hoffman, *supra* note 7, at 402.

128. See Beck, *supra* note 99, at 579–80.

129. Compare JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (2001) [hereinafter RAWLS, RESTATEMENT], and JOHN RAWLS, A THEORY OF JUSTICE (1971) [hereinafter RAWLS, THEORY], with RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 1.2 (7th ed. 2007), and Beck, *supra* note 99, at 579–80 (noting law and economics constitutes a consequentialist theory). Rawls’s work has also been described as contractarian, which would correspond nicely with the types of issues at stake in this discussion. See Swygert & Yanes, *supra* note 125, at 300; see also Jeremy N. Sheff, *Marks, Morals, and Markets*, 65 STAN. L. REV. 761, 775 (2013) (discussing Rawls’s place among social contract theorists).

130. Kar, *supra* note 126, at 979 n.10.



what agreement the parties would reach if they were able to bargain costlessly and *ex ante*, assuming that they have full knowledge of all of the costs, benefits, and alternatives available to each of them, but that they do not know which party to the agreement they will be. Any agreement that the parties would reach under these assumptions is one that will resolve the distortions caused by disparities in bargaining power within non-competitive markets. Any consequent agreement will be mutually accommodative in attempting to preserve each party's original utility gain. In short, it will be based on a hypothetical consensus involving a condition of hidden identity and a principle of constructive empathy, together with the influence of the social norms of risk aversion and perceived fairness.<sup>131</sup>

Although this passage was written with Rawls's work in mind, the text also describes the type of bargaining that goes on when commercial parties are deciding what kind of dispute resolution mechanism to include in their transactional documents.<sup>132</sup> Since it is extremely difficult to anticipate at the time of contracting precisely what kinds of disputes might eventually arise, commercial actors have to identify a mechanism that will be fair regardless of how the parties are eventually situated to one another.<sup>133</sup>

The methodological similarities between the construction of justice as fairness and individualized procedural contracts sug-

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131. Swygert & Yanes, *supra* note 125, at 264–65; *see also* RAWLS, *RESTATEMENT*, *supra* note 129, at 15–18; RAWLS, *THEORY*, *supra* note 129, pt. 1, ch. III, § 24. Although this passage focuses on justice as “empathy,” the concept of empathy is simply a more particularized means of describing justice as fairness. *See* Swygert & Yanes, *supra* note 125, at 291–95. Fairness can also be framed in the terms described herein (i.e., as synonymous with the principles of equality of arms and the ability to present one's case). *See infra* notes 338–40 and accompanying text.

132. *See* BORN, *DRAFTING*, *supra* note 2, at 13–14.

133. *See id.* Some commentators suggest that the lack of knowledge can be problematic. *See* Paulson, *supra* note 25, at 525; Thomas Schultz, *Human Rights: A Speed Bump for Arbitral Procedures? An Exploration of Safeguards in the Acceleration of Justice*, 9 INT'L ARB. L. REV. 1, 14 (2006) (suggesting pre-dispute waivers of procedural rights may only be possible if there is “true informed consent” or if special circumstances exist). However, the rules committee of the Judicial Conference operated in a similar type of information vacuum when it created trans-substantive rules of procedure, so there is litigation-oriented precedent for allowing pre-dispute agreements relating to procedure to stand. *See supra* note 78 (discussing propriety of trans-substantive approach to Federal Rules of Civil Procedure).

gest that Rawls would be in favor of these types of private agreements. However, the fit between Rawls's theory and procedural contracts is not perfect. For example, some people might object to using justice as fairness as a means of legitimizing procedural contracts because

[t]he conventional view of Rawlsian political philosophy is that the private law lies outside the scope of the two principles of justice—it is not part of the “basic structure” of society, which, in this view, is limited to basic constitutional liberties and the state's system of tax and transfer.<sup>134</sup>

Of course, this sort of public law-oriented approach may be precisely what makes Rawls's work so appropriate in the current context, since questions of procedure have traditionally been treated as public law concerns falling within the sovereign prerogative.<sup>135</sup>

Problems and possibilities therefore exist at both ends of the ideological spectrum. However, the two theories do not necessarily have to be viewed as polar opposites, at least in this context.<sup>136</sup> Instead, it may be possible to identify a third approach to procedural contracts based on “a unified theory of justice in which a concept of fairness . . . is integrated into an efficiency

134. Kevin A. Kordana & David H. Tabachnick, *Rawls and Contract Law*, 73 GEO. WASH. L. REV. 598, 598, 632 (2005); see also Swygert & Yanes, *supra* note 125, at 258. Interestingly, the law and economics approach has met with similar criticisms about its suitability in certain areas of law, including private law. See Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 830 (2003) (“[T]he economic approach does not explain the current system of contract law, nor does it provide a solid basis for criticizing and reforming contract law.”).

135. See Sánchez-Cordero, *supra* note 10, at xxxiii; see also Born, *Adjudication*, *supra* note 10, at 780. There are also ways in which contract law can be brought within the Rawlsian fold, although such analyses are beyond the scope of the current Article. See Kordana & Tabachnick, *supra* note 134, at 600 (suggesting that “private ordering, specifically contract law, must be viewed as subject to the demands of the two principles of justice” and that “Rawlsian political philosophy, properly understood, is not neutral over conceptions of private ordering. For Rawlsianism, contract law is properly understood as one of the many loci of distributive justice”); Swygert & Yanes, *supra* note 125, at 258 (noting that “[a]lthough Rawls never applied his thesis to allocations of private rights and entitlements, two UCLA professors, Wesley Liebeler (law) and Armen Alchian (economics), have done so by developing a Hobbsean-Rawlsean ex ante contractarian rationale”).

136. See Swygert & Yanes, *supra* note 125, at 255–57.



construct that acknowledges and responds to influences of social norms.”<sup>137</sup> Thus, for example,

Rawls’s assumption that the parties to a consensus have limited knowledge about themselves under a “veil of ignorance” provides a theoretical way to create constructive empathy. Although Rawls primarily applied this restrictive knowledge assumption to the derivation of principles for public law, . . . by adding to the Coase Theorem a condition of “hidden identity,” both efficiency and fairness considerations can be integrated into the realm of private law.<sup>138</sup>

This blended approach seems to resolve a number of the problems associated with each of the two theories in their pure form and provides a useful theoretical justification for privatized procedural contracts. Not only does this third model explain past behavior in this area of law (i.e., why courts have allowed procedural autonomy in cases involving forum selection clauses and international commercial arbitration), it also provides a useful analytical paradigm describing how parties can overcome various structural obstacles relating to the proper roles of public and private actors. Thus, there appears to be a sufficient amount of theoretical support for private parties to create their own procedural contracts, since such agreements not only allow individuals to maximize their own procedural efficiency but also allow the state to assert its institutional role in protecting certain fundamental notions of procedural fairness.<sup>139</sup>

### *B. Practical Perspectives*

As useful as theoretical models can be, problems can arise when those theories are put into practice, since reality may generate the need to make certain distinctions and exceptions to the original construct.<sup>140</sup> Therefore, it is useful to consider procedural contracts in practical context.<sup>141</sup>

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137. *Id.* at 251.

138. *Id.* at 264.

139. See *infra* notes 330–53 and accompanying text (describing the standards of procedural fairness).

140. See Ronald J. Allen & Ross M. Rosenberg, *Legal Phenomena, Knowledge, and Theory: A Cautionary Tale of Hedgehogs and Foxes*, 77 CHL-KENT L. REV. 683, 693 (2002) (concluding that “judges . . . are looking for answers to discrete questions, not solutions grounded in grand theory”); Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General Theory and Varied Con-*

## 1. Unbundling the Analysis

One of the problems in this area of law is the tendency to consider all procedural practices as analytically similar when in fact different procedural rules serve different structural purposes. For example, some procedures govern matters of judicial administration while others dictate the relationship between the litigants and the court.<sup>142</sup> Still other rules can be interpreted as involving no one but the parties themselves.<sup>143</sup> Therefore, it is necessary to deconstruct the analysis so as to understand precisely what is at stake in any individual situation.<sup>144</sup>

Interestingly, it has only recently become necessary to make these sorts of fine distinctions, since the earliest forms of procedural contracts (i.e., forum selection clauses) were made on a holistic basis, with parties simply choosing a particular forum and accepting that court's procedural requirements *in toto*.<sup>145</sup>

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*texts*, 2003 J. DISP. RESOL. 319, 329 (2003); Jordan M. Steiker, "Post" Liberalism, 74 TEX. L. REV. 1059, 1063 (1996) (reviewing ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995)) (discussing problems of overgeneralization in grand theory); Jane Stapleton, *Comparative Economic Loss: Lessons from Case-Law-Focused "Middle Theory"*, 50 UCLA L. REV. 531, 532 (2002) (suggesting "middle theory" is more persuasive to judges).

141. Some commentators believe there is a relative paucity of available case law in this field, although that view is not universally held. Compare Hoffman, *supra* note 7 at 393 (suggesting there is little case law in this field) with Noyes, *supra* note 27, at 599 (stating that "[c]ourts have enforced ex ante contracts that modify a broad array of litigation rights and rules," including those involving "constitutional rights, statutory rights, rights set forth in the Federal Rules of Civil Procedure, and rights set forth in the Federal Rules of Evidence").

142. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 & cmt. a (1971); Sánchez-Cordero, *supra* note 10, at xxxiii.

143. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 & cmt. a (1971); Sánchez-Cordero, *supra* note 10, at xxxiii.

144. See Menkel-Meadow, *supra* note 140, at 329 (suggesting the usefulness of narrower analyses).

145. See *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 134 S.Ct. 568, 579–80 (2013); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595–97 (1991); *M/S Bremen v. Zapata Off-Shore Co. (The Bremen)*, 407 U.S. 1, 17–18 (1972). The Restatement reflects this type of approach to the extent it contemplates the selection of one public procedural system over another rather than the choice of a private system of procedure over a public set of rules. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §122 & cmts. a, b (1971); Dodge, *supra* note 30, at 739, 744.

However, the question now is whether and to what extent parties can bypass the kind of "bundled" procedural choices inherent in choice of forum provisions (i.e., an undifferentiated combination of "forum, decision maker, and procedural rules") and instead opt for an "unbundled" approach that allows the selection of "individual procedures to create a customized 'mini-code of civil procedure.'"<sup>146</sup> Under the latter model, parties would be permitted to dispose of the rules set out by the forum and "agree to a different pleading standard, different timing and other conditions for raising defenses, limitations on joinder of additional parties, limitations on discovery, different summary judgment standards, shortened time for the pretrial stage, and so on."<sup>147</sup>

Critics of procedural contracts have claimed that "[t]he conversion of procedural rules from publicly created, mandatory guarantors of procedural justice to default rules subject to market forces" is problematic from a structural standpoint, since such measures could "alter[] the nature and function of civil procedure at a basic level."<sup>148</sup> However, there may be a way to differentiate between various procedures so as to identify those rules that may be amenable to customization.

#### *a. Public Versus Private Concerns*

The first way to separate permissible from impermissible procedural contracts is to focus on whether the procedure in question is private in nature (i.e., only implicating the relationship between the parties *inter se*) or whether it is public (i.e., affecting the court in some way).<sup>149</sup> Structurally, there can be few concerns if the agreement is entirely private.<sup>150</sup>

The problem of course is that distinctions between public and private concerns are far easier to make in the abstract than in

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146. Dodge, *supra* note 30, at 732.

147. Bone, *supra* note 30, at 1345; *see also* Dodge, *supra* note 30, at 746. Parties in the United States can also agree to waive the constitutional right to a jury or agree not to enter objections to the introduction of certain types of evidence. *See* Bone, *supra* note 30, at 1348–49; *see also* U.S. CONST. art. III, § 2; *Town of Newton v. Rumery*, 480 U.S. 386, 391–98 (1987).

148. Dodge, *supra* note 30, at 725; *see also* Hoffman, *supra* note 7, at 401–02.

149. *See supra* notes 119–20 and accompanying text.

150. Of course, various substantive concerns could arise, as discussed below. *See infra* notes 262–386 and accompanying text.

practice. Indeed, almost every procedural matter can be framed in terms of both public and private concerns.<sup>151</sup>

For example, procedural contracts purporting to modify the rules of pleading could be characterized as entirely private in nature. Under this perspective, parties could be seen as simply expressing a desire to clarify the type of information that must be provided to each other at the time of filing in a post-*Iqbal*, post-*Twombly* world.<sup>152</sup> Private agreements regarding pleading issues might even be seen as economically prudent because such agreements can decrease costly litigation about pleading standards<sup>153</sup> and increase the likelihood of settlement by providing more or better information about the facts underlying a particular claim or defense at the time of filing.<sup>154</sup>

However, pleading issues can also be framed as affecting public rights or interests.<sup>155</sup> For example, making pleading standards more lenient could affect institutional design issues by allowing parties to bring cases that might otherwise be facially insufficient as a matter of law, thereby clogging judicial dockets.<sup>156</sup> Making pleading standards more rigorous could affect other institutional design concerns by limiting parties' ability to assert particular claims or defenses, thereby affecting the substantive rights of the parties and perhaps even leaving

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151. Some commentators have suggested that matters relating to timing of various procedures, class action status, bonds relating to injunctions, burdens of proof, discovery, and the introduction of evidence might be considered purely private procedures. See Hoffman, *supra* note 7, at 398–400; Strong, *Consensual*, *supra* note 30, at 161. However, other commentators have opposed this view. See Kapeliuk & Klement, *Ex Ante*, *supra* note 30, at 1493–94; Paulson, *supra* note 25, at 511–22 (arguing that rules relating to evidence are public in nature).

152. See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

153. There is some confusion about how the Supreme Court decisions in *Iqbal* and *Twombly* are to be applied. See *Iqbal*, 556 U.S. at 662; *Twombly*, 550 U.S. at 544; Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 339 (2013).

154. See Miller, *supra* note 153, at 358.

155. See Hoffman, *supra* note 7, at 398–402; Miller, *supra* note 153, at 365–67.

156. See Paulson, *supra* note 25, at 528. Alternatively, customizing the pleading standard could be framed as “impracticable.” BORN, DRAFTING, *supra* note 2, at 161.

them without a remedy.<sup>157</sup> While a defensible compromise position does exist (i.e., parties may agree to make their individual pleading standard more rigorous than that established as a matter of law but may not agree to a more lenient standard), this exercise demonstrates the kinds of matters that must be considered before a court can determine whether a particular procedure is amenable to customization as a structural matter.

When attempting to determine whether a particular procedure is public or private in nature, it may be helpful to ask whether “the contract require[s] the judge (as opposed to the parties) to act in a different way or make a decision under a different standard” and whether “the contract impose[s] a burden on the court that is inconsistent with sound judicial administration.”<sup>158</sup> These two questions address the two main structural concerns associated with procedural contracts, namely procedures that affect the relationship between the court and the parties and procedures that affect judicial administration.

Another way to frame these types of structural analyses is to consider whether the procedural contract in question somehow affects certain core values of public adjudication.<sup>159</sup> Professor Robert Bone has suggested that this inquiry could be carried out through a functional comparison of litigation and arbitration.<sup>160</sup>

In Bone’s view, litigation involves the quintessentially public task of enforcing the substantive law while arbitration focuses

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157. Some commentators have suggested that procedural contracts should not change the outcome of a dispute. *See* Paulson, *supra* note 25, at 524, 529. However, this perspective seems somewhat anomalous, since parties are able to choose the substantive law that governs their dispute, regardless of the fact that such decisions will often have a bearing on the outcome of the matter. *See* Bakalar v. Vavra, 619 F.3d 136, 143–44 (2d. Cir. 2010) (noting difference of outcome under New York versus Swiss law).

158. Paulson, *supra* note 25, at 528.

159. For example, some commentators claim that the core duties of a judge are restricted by procedural contracts because the court is a necessary third party participant in the contract. *See id.* at 475–76. Other authors dispute this characterization. *See* Noyes, *supra* note 27, at 632. However, the analogy to third party contracts may be relevant to some types of contracts (i.e., those that affect matters of institutional design) but not others (i.e., those that affect the relationship between the parties *inter se*).

160. *See* Bone, *supra* note 30, at 1386–88; *see also* Ralf Michaels, *The Functional Method of Comparative Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW*, *supra* note 43, at 339, 342, 357 (describing equivalence functionalism).

solely on the resolution of a particular dispute.<sup>161</sup> However, the “core distinctiveness” of litigation

lies in its commitment to reasoning from general principle and doing so in a way that engages the facts of particular cases. Although respecting precedent does not follow inevitably from this commitment, it is closely linked to it either pragmatically (e.g., following precedent limits cognitive error, saves decision costs, or protects reliance interests) or morally (e.g., following precedent is required by equal concern and respect or a norm of integrity, which also supports the core commitment to principled reasoning).<sup>162</sup>

Bone’s observations “point[] us in a productive direction for thinking about party rulemaking. If parties choose procedural rules that undermine the capacity of judges, and perhaps even juries, to engage in principled reasoning of the right sort, then perhaps their choices should not be honored.”<sup>163</sup> However, Bone admits that this approach “is just a beginning, . . . for we must explain how procedure is connected to principled reasoning and why parties to a particular case should be constrained if they bear the risks and costs of their own choices.”<sup>164</sup>

These commentators appear to suggest the need to conduct case-by-case analyses of various procedures to determine whether and to what extent those practices affect public versus private concerns. Although this process may appear labor-intensive, courts have already begun to address these issues, as discussed in the practical analysis below.

#### *b. Efficiency*

Another structural issue that courts and commentators may wish to consider when evaluating the propriety of individualized judicial procedures involves efficiency and the associated

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161. See Bone, *supra* note 30, at 1386–88.

162. *Id.* at 1388 (citation omitted). Because Bone is writing from the U.S. perspective, his analysis is largely rooted in principles associated with the common law tradition. Translating his hypothesis into a civil law context would require judges to keep faith with the relevant statutes. Interestingly, some people believe that U.S. law is becoming more like the civil law, due to the increased incidence of statutory and regulatory law. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 5–7 (1982).

163. Bone, *supra* note 30, at 1388.

164. *Id.*

need for uniformity.<sup>165</sup> While this Article's foray into legal theory has suggested that procedural contracts should not be evaluated solely in light of efficiency rationales, a hybrid approach that takes efficiency concerns into account does appear appropriate.<sup>166</sup>

The traditional conflict of law rule regarding procedure (i.e., that the procedural law of the forum court prevails on a holistic basis) is based in large part on the assumption that uniformity in procedural matters is necessary because it promotes efficiency in the courts.<sup>167</sup> Because most jurisdictions assert a state interest in judicial efficiency,<sup>168</sup> the longstanding assumption appears to have been that there must necessarily be a state interest in procedural uniformity.<sup>169</sup>

However, this analysis reflects a type of syllogistic fallacy that fails as a matter of logic.<sup>170</sup> Furthermore, the underlying assumptions demonstrate a number of factual errors.

First and foremost, the current rules of civil procedure are not as uniform as some people appear to believe. For example,

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165. See Paulson, *supra* note 25, at 479–84; see also Main, Review, *supra* note 18, at 471–74 (discussing the rationales underlying the desire for uniformity).

166. See *supra* notes 121–39 and accompanying text.

167. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 & cmt. a (1971); Edward J. Janger, *Universal Proceduralism*, 32 BROOK. J. INT'L L. 819, 819 (2007); Keeton, *supra* note 74, at 854, 860 (noting consistency also promotes justice by avoiding arbitrariness); Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1250 (2005).

168. See Le Sueur, *supra* note 117, at 473.

169. While it is possible that a need for uniformity could exist as a substantive matter, that issue should be considered separately from structural considerations. See *infra* notes 262–386 and accompanying text. Indeed, an excessive wish for uniformity could, like an excessive desire for efficiency, lead to unjust ends. See Adam A. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 651–52 (2006) (discussing Robert Dworkin and the possibility of diminishing returns in terms of procedural processes). Furthermore, scholars have questioned the wisdom of a fully trans-substantive procedural regime as well as the extent to which trans-substantivity currently exists in the United States. See *supra* note 78.

170. See IRVING M. COPI & CARL COHEN, INTRODUCTION TO LOGIC 189 (13th ed. 2008) (discussing the problem of the undistributed middle term); Stephen M. Rice, *Indiscernible Logic: Using the Logical Fallacies of the Illicit Major Term and the Illicit Minor Term as Litigation Tools*, 47 WILLAMETTE L. REV. 101, 116–20 (2010).



not only do many jurisdictions “delegate broad discretion to trial judges to tailor procedures to case-specific circumstances,”<sup>171</sup> but many countries also allow a significant amount of diversity between and within different courts operating within the same legal system.<sup>172</sup> This lack of commitment to uniformity by public institutions and actors suggests that procedural contracts cannot be considered jurisprudentially suspect simply because they result in a certain degree of procedural variation.<sup>173</sup>

Second, existing rules of civil procedure are not always efficient.<sup>174</sup> A number of these inefficiencies can be explained by a need to take other concerns, such as procedural fairness, into account.<sup>175</sup> However, some inefficiencies arise as a result of other, more questionable influences.<sup>176</sup> These latter practices give rise to doubts about whether the state has a defensible interest in efficiency such that private parties should not be able to customize their litigation procedures.

Third and finally, there does not appear to be any demonstrable link between efficiency and uniformity. While procedural diversity could very well create logistical problems (and therefore adjudicatory inefficiencies) when parties attempt to affect the relationship between the parties and the court, it is difficult to identify any efficiency-related concerns in cases where the parties want to alter the relationship between the parties *inter se*. Indeed, some commentators have claimed that individualized procedures can actually promote efficiency for both the parties and the courts.<sup>177</sup> For example,

terms that specify the location in which disputes will be resolved can allow parties to minimize travel costs. Contractual provisions to curtail discovery might make sense . . . in disputes that are expected to turn on a court’s interpretation of a

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171. Bone, *supra* note 30, at 1371 (citation omitted).

172. See Resnik, *supra* note 11, at 597–98; see also *supra* notes 71–73 and accompanying text.

173. See Bone, *supra* note 30, at 1371–72.

174. See Alexander, *supra* note 125, at 647; Gensler, *supra* note 125, at 723.

175. See *supra* note 125 and accompanying text.

176. For example, it has been said that “the rules of procedure are formulated by judges. If the self-interest of those judges conflicts with the efficiency criterion, it would seem plausible that the judges will formulate procedural rules that further their own interests rather than the interests of efficiency.” Macey, *supra* note 125, at 627; see also Samaha, *supra* note 169, at 665–66.

177. See Davis & Hershkoff, *supra* note 11, at 526–29, 531–32; see also Dodge, *supra* note 30, at 746.

limited number of documents. . . . Terms that designate a bench trial allow parties to choose adjudicators with professional expertise and avoid any additional delay or uncertainty associated with jury trials. Terms that provide for confidential proceedings allow parties to protect sensitive trade secrets. Terms that restrict class actions allow parties to forestall frivolous litigation initiated by self-interested attorneys.<sup>178</sup>

These types of savings inure primarily to the parties. However, the public can also benefit from efficiencies relating to individualized litigation procedures.<sup>179</sup> For example,

[s]uppose A and B agree to a strict pleading rule that screens frivolous suits. If the presence of frivolous suits in litigation makes it more difficult for parties to settle meritorious suits, as is likely, a strict pleading rule in a case between A and B should make it easier for parties to settle and thereby save the public cost of a trial.<sup>180</sup>

The possibility that private procedural contracts can result in public savings may be particularly relevant in light of the budget constraints currently facing the U.S. and other judicial systems.<sup>181</sup> Indeed, many courts are now under an explicit or implicit duty to consider and encourage appropriate cost-saving mechanisms.<sup>182</sup>

However, some caution must be exercised when considering questions of efficiency because there is not always a direct correlation between public and private costs. In fact, some party-

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178. Davis & Hershkoff, *supra* note 11, at 526–27.

179. See Bone, *supra* note 30, at 1356–57.

180. *Id.* at 1356 (citations omitted).

181. See *Federal Judiciary Braces for Broad Impact of Budget Sequestration*, THIRD BRANCH NEWS (Mar. 12, 2013), <http://news.uscourts.gov/federal-judiciary-braces-broad-impact-budget-sequestration>.

182. See Neil Andrews, *Relations Between the Court and the Parties in the Managerial Age*, in *THE CULTURE OF JUDICIAL INDEPENDENCE: RULE OF LAW AND WORLD PEACE* (Shimon Shetreet ed., forthcoming 2014); Máximo Langer & Joseph W. Doherty, *Managerial Judging Goes International, but Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms*, 36 YALE J. INT'L L. 241, 242 n.2, 296–97 (2011); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 422–24 (1982); see also Glenn, *supra* note 21, at 490 (suggesting that managerial judging supports the concept of private procedural contracts).

made rules that would initially appear to limit public costs could have the opposite effect.<sup>183</sup> For instance,

an agreement to limit discovery could increase public costs if the expectation of a less onerous discovery burden and limited access to information reduced the size of the settlement surplus and with it the likelihood of settlement, thereby increasing the risk of trial. Also, by restricting access to information, discovery limits could generate trial or settlement outcomes with a higher-than-optimal error risk, thereby undermining deterrence goals. To be sure, parties will take account of private costs when they negotiate their contract, but there is no reason for them to take account of public costs like these.<sup>184</sup>

However, “[i]t is extremely difficult to identify cases where party rulemaking generates costs substantially in excess of those already created by the current system.”<sup>185</sup> Therefore, this issue should not prove fatal to individualized procedures, at least as a general matter.

### *c. Timing*

The third structural concern that courts and commentators should consider involves timing.<sup>186</sup> Some commentators believe that most examples of procedural individualization arise in the context of pre-trial stipulations, which could suggest that parties are not able to create procedural contracts until the nature of the dispute is known.<sup>187</sup>

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183. See Bone, *supra* note 30, at 1357, 1374.

184. *Id.* at 1357 (citations omitted).

185. *Id.* at 1374 (citation omitted).

186. See Hoffman, *supra* note 7, at 396; Kapeliuk & Klement, *Ex Ante*, *supra* note 30, at 1493–94; Paulson, *supra* note 25, at 491; see also RUTLEDGE, *supra* note 85, at 184–89; Schultz, *supra* note 133, at 10–12; *infra* notes 390–94 and accompanying text.

187. See Dodge, *supra* note 30, at 767; Hoffman, *supra* note 7, at 398–99; Noyes, *supra* note 27, at 603; Paulson, *supra* note 25, at 514. This approach may be the result of the presumption of flexibility, with the attendant opportunity for procedural individualization, inherent in certain aspects of the Federal Rules of Civil Procedure. See FED. R. CIV. P. 16, 26, 29; Hoffman, *supra* note 7, at 396; see also FED. R. CIV. P. 6, 23, 65 (implying, rather than stating, the possibility of procedural amendments); Hoffman, *supra* note 7, at 398–99. Parties may also agree to limit enforcement of a judgment to a particular jurisdiction or curtail the type of remedies that are available. See

If true, this requirement could create some problems, since past experience with forum selection clauses and international commercial arbitration suggests that business entities may be most likely to enter into individualized procedural contracts before the dispute arises, when the "veil of ignorance" encourages parties to agree to mutually beneficial procedures free from the kind of tactical constraints that arise once the conflict has begun.<sup>188</sup>

To some extent, forum selection provisions and arbitration agreements support the notion that procedural contracts may be entered into on a pre-dispute basis, since forum selection provisions and arbitration agreements involve more comprehensive procedural variations than would likely be the case with private procedural contracts.<sup>189</sup> However, forum selection clauses and arbitration agreements could be distinguished from customized procedural contracts on the grounds that the first two types of agreements involve the withdrawal from a particular legal system rather than the alteration of that legal system's procedural norms.

Although concerns about timing may arise in particular circumstances, there are examples of courts upholding the parties' right to alter litigation procedures through contracts created prior to the time of the dispute. Perhaps the most prominent of these decisions comes from the U.S. Supreme Court, when it upheld a *cognovit* note contained in a pre-dispute contract and noted that the defendant "may not have been able to predict

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Bone, *supra* note 30, at 1350; Dodge, *supra* note 30, at 727. Other procedural alterations may also be possible. See Moffitt, *supra* note 13, at 467–78.

188. See BORN, DRAFTING, *supra* note 2, at 13–14; Hoffman, *supra* note 7, at 396–97 (identifying four types of dispute provisions and noting that most recent literature has focused on "Type 1" provisions, which involve pre-dispute, arms-length bargains); see also RAWLS, RESTATEMENT, *supra* note 129, at 15–18; RAWLS, THEORY, *supra* note 129, pt. 1, ch. III, § 24; *supra* notes 131–33 and accompanying text. Some commentators find pre-dispute agreements to be more jurisprudentially challenging than post-dispute agreements, although there is little discussion as to why that is so. See Hoffman, *supra* note 7, at 397.

189. See *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 134 S.Ct. 568, 579–80 (2013); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595–97 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516–17 (1974); *M/S Bremen v. Zapata Off-Shore Co. (The Bremen)*, 407 U.S. 1, 17–18 (1972); RUTLEDGE, *supra* note 85, at 182–89; Hoffman, *supra* note 7, at 398.

with accuracy just how or when [the plaintiff] would proceed under the confession clause if further default by [the defendant] occurred, . . . but this inability does not in itself militate against effective waiver” of the defendant’s procedural rights.<sup>190</sup> Other judicial decisions can also be interpreted as supporting pre-dispute agreements concerning procedural matters, as the following discussion shows.

## 2. Putting Theory into Practice

At this point, most of the commentary concerning individualized procedural contracts has focused on theoretical rather than practical concerns, largely because of an alleged shortage of case law considering private agreements relating to litigation procedure.<sup>191</sup> This phenomenon is potentially problematic, since courts are often more interested in practical applications of particular principles than in theoretical analyses.<sup>192</sup>

This is not to say that theory and practice cannot be mutually re-enforcing. Indeed, the recent case of *Delaware Coalition for Open Government v. Strine* may be particularly helpful in this regard.<sup>193</sup> Although *Strine* does not discuss procedural contracts per se, both the District Court of Delaware and the Court of Appeals for the Third Circuit considered a number of matters that are commonly associated with these types of agreements and demonstrate some of the analytical techniques discussed in the previous subsections.<sup>194</sup>

The facts of the case are relatively straightforward. The dispute arose out of a constitutional challenge to a statute enacted

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190. D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 187 (1972).

191. There is some debate on this issue. Compare Hoffman, *supra* note 7, at 393 (suggesting there is little case law in this field), with Noyes, *supra* note 27, at 599 (stating that “[c]ourts have enforced ex ante contracts that modify a broad array of litigation rights and rules,” including those involving “constitutional rights, statutory rights, rights set forth in the Federal Rules of Civil Procedure, and rights set forth in the Federal Rules of Evidence”).

192. See Allen & Rosenberg, *supra* note 140, at 693; Stapleton, *supra* note 140, at 533.

193. See Del. Coal. for Open Gov’t v. Strine, 894 F. Supp. 2d 493 (D. Del. 2012), *aff’d*, 733 F.3d 510 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014).

194. See *Strine*, 733 F.3d at 510; *Strine*, 894 F. Supp. 2d at 493. For a detailed discussion of the lower court decision and the propositions asserted in the appeal, see Thomas J. Stipanowich, *In Quest of the Arbitration Trifecta, or Closed Door Litigation?: The Delaware Arbitration Program*, 6 J. BUS. ENTREPRENEURSHIP & L. 349, 357–60 (2013).

by the Delaware legislature that attempted to create a judicially supported form of arbitration in the Delaware state courts.<sup>195</sup> The law only contemplated arbitration of commercial matters "by agreement or by stipulation" of the parties and with the participation of all parties in the arbitral hearing.<sup>196</sup>

The procedure itself was largely innocuous. Arbitrations were to be initiated through the filing of a petition that outlined "the nature of the dispute, the claims made, and the remedies sought," and the arbitrator was to hold a preliminary conference within ten days of the initial filing.<sup>197</sup> The preliminary conference was to be followed by a preliminary hearing to identify "the claims of the case, damages, defenses asserted, legal authorities to be relied upon, the scope of discovery, and the timing, length, and evidence to be presented at the arbitration hearing" as well as "the possibility of mediation or other non-adjudicative methods of dispute resolution."<sup>198</sup> The law also required the merits hearing to take place within ninety days of the filing of the petition.<sup>199</sup>

The statute explicitly allowed the use of a number of procedures, including U.S.-style discovery, that are more common in litigation than in arbitration.<sup>200</sup> For example,

[p]rior to the arbitration hearing, the parties exchange "information necessary and appropriate for the parties to prepare for the arbitration hearing and to enable the Arbitrator to understand the dispute." The parties can agree to the scope of information to be exchanged or can have the arbitrator decide the scope of discovery. Court of Chancery Rules 26 through 37, which govern depositions and discovery in all Chancery Court matters, apply to the arbitration proceeding

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195. The law was intended to "preserve Delaware's pre-eminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters." Del. H.B. No. 49, 145th Gen. Assembl., at 4 (2009), as quoted in *Strine*, 733 F.3d at 512.

196. *Strine*, 733 F.3d at 512.

197. *Strine*, 894 F. Supp. 2d at 495.

198. *Id.* (citation omitted).

199. See *id.* Although this type of expedited timeline is not unheard-of in arbitration, it is unusual in litigation, even in Delaware, where court proceedings are considered relatively speedy. See William B. Chandler III & Anthony A. Rickey, *Manufacturing Mystery: A Response to Professors Carey and Shepherd's "The Mystery of Delaware Law's Continuing Success,"* 2009 U. ILL. L. REV. 95, 127-28 (2009).

200. See *Strine*, 894 F. Supp. 2d at 495.

unless the parties and arbitrator together agree to different rules. Some discovery matters, such as the procedure for issuing subpoenas, must be created by the parties and the arbitrator.<sup>201</sup>

The importation of judicial rules of discovery is remarkable in a proceeding that purports to establish a new form of arbitration, since one of the primary benefits of arbitration is the elimination (or at least the curtailment) of discovery.<sup>202</sup> However, the Delaware approach is less problematic if the proceeding is characterized as a type of customized litigation, with judicial rules of procedure existing as a default mechanism.<sup>203</sup>

The Delaware statute granted arbitrators broad but relatively standard powers, including “the power to issue a final award and to make interim, interlocutory, or partial rulings during the course of the proceeding.”<sup>204</sup> The final award, which could “be enforced as any other judgment or decree,” was required to include the basis for the arbitrator’s decision.<sup>205</sup> The statute allowed arbitral awards to be stayed or vacated, but only in accordance with the terms set forth in the Federal Arbitration Act (FAA).<sup>206</sup>

All of these elements passed judicial scrutiny.<sup>207</sup> However, some aspects of the Delaware statute were more problematic. Three items—the confidentiality of the proceedings, the method by which the arbitrators were appointed, and the possible infringement on mandatory judicial duties—give rise to particular concerns.

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201. *Id.* (citations omitted).

202. Although arbitration often contemplates a limited exchange of documents, the scope of such disclosures is usually much narrower than in litigation. *See* BORN, ICA, *supra* note 3, at 1877–78, 1893–1905. Furthermore, it is rare to see judicial rules on discovery explicitly imported into arbitration. *See id.* at 1887, 1921; LEW ET AL., *supra* note 32, ¶ 21-11; STRONG, GUIDE, *supra* note 32, at 77–78.

203. *See supra* notes 12–13, 121–24 and accompanying text.

204. *Strine*, 894 F. Supp. 2d at 495–96.

205. *Id.* at 496 (noting final awards should “include ‘any remedy or relief that the Arbitrator deems just and equitable and within the scope of any applicable agreement of the parties’”).

206. *See* 9 U.S.C. §§ 1–16 (2013); *Strine*, 894 F. Supp. 2d at 496.

207. *See* Del. Coal. for Open Gov’t v. *Strine*, 733 F.3d 510, 522 (3d Cir. 2013) (Fuentes, J., concurring) (“Nothing in [the] decision should be construed to prevent sitting Judges of the Court of Chancery from engaging in arbitrations without those confidentiality provisions.”).



*a. Confidentiality of the Proceedings*

According to the Delaware legislature, the new form of statutory arbitration was to be “considered confidential and not of public record until such time, if any, as the proceedings are the subject of an appeal. In the case of an appeal, the record shall be filed by the parties with the Supreme Court in accordance with its rules.”<sup>208</sup> This language provided the basis for the underlying legal challenge, which involved a number of journalists claiming that their First Amendment right of access to legal proceedings had been infringed upon as a result of the statute.<sup>209</sup>

Although both the district and circuit courts agreed that the confidential nature of the Delaware proceedings invalidated that aspect of the law,<sup>210</sup> the requirement that procedures be public rather than private does not create any real problems for proponents of individualized procedural contracts. So long as parties agree to have their dispute heard publicly, they can avoid this particular obstacle.<sup>211</sup> However, the debate about confidentiality in *Strine* provides several insights into other issues relating to private procedural contracts.

First, the majority opinion by Judge Sloviter reinforces the notion that litigation and arbitration are very similar in terms of functionality.<sup>212</sup> Although the discussion was meant to iden-

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208. 10 Del. C. § 349(b); *see also Strine*, 733 F.3d at 513. The scope of confidentiality was quite broad and encompassed “all parts of the proceeding, including all filings and all contacts between the arbitrator and any party.” *Strine*, 894 F. Supp. 2d at 496 (quoting Del. Ch. Ct. R. 97(a)(4), 98(b)). “Only parties [were] allowed to attend the arbitration hearing unless they agree[d] otherwise,” and “[a]ll ‘memoranda and work product contained in the case files of an Arbitrator’ and ‘[a]ny communication made in or in connection with the arbitration that relates to the controversy being arbitrated’ [were] likewise confidential.” *Id.* (citations omitted). Although the statute required the court to enter a judgment in conformity with the arbitrator’s final award, the award itself was not to be made public, and details about the parties were not to be included in the judgment. *See id.* at 496–97 (noting the judgments are available on an electronic database under the title “arbitration judgments”).

209. *See Strine*, 733 F.3d at 521.

210. *See id.* at 513–21; *Strine*, 894 F. Supp. 2d at 502, 504. Judge Fuentes noted that “[n]othing in [the] decision should be construed to prevent sitting Judges of the Court of Chancery from engaging in arbitrations without those confidentiality provisions.” *Strine*, 733 F.3d at 522 (Fuentes, J., concurring).

211. Some proceedings may still be heard “under seal.” FED. R. CIV. P. 5.2.

212. *See Strine*, 733 F.3d at 513–21; *see supra* note 160 and accompanying text.

tify any differences between judicial and arbitral actions so as to determine whether the Delaware procedure must be open to the public, the analysis instead demonstrated the numerous ways in which litigation and arbitration overlap in terms of purpose and procedure.<sup>213</sup> This observation is not only important as a structural matter,<sup>214</sup> it is also relevant to the substantive analyses that are conducted below.<sup>215</sup>

Second, several of the judges hearing this case suggested that states may allow parties to adopt procedures that are very different from standard litigation, so long as the requisite consent exists.<sup>216</sup> While a number of the procedural elements in *Strine* were initially devised by the state rather than by the parties themselves, the Delaware arbitration scheme nevertheless required the parties' consent to implement those procedures.<sup>217</sup> Furthermore, the statute appeared to give the parties and the arbitrators a great deal of discretion in adapting the procedure by which the dispute was to be heard.<sup>218</sup> Finally, there is no indication that the parties' consent had to arise post-dispute, which suggests that pre-dispute agreements regarding customized procedures are enforceable.<sup>219</sup> As a result, *Strine* can be read as providing structural support for individualized proce-

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213. See *Strine*, 733 F.3d at 513–21.

214. See *supra* note 160 and accompanying text. For example, it could be argued that any procedure that may be made subject to arbitration can also be made subject to a private procedural contract, since the two procedures are functional equivalents. See Hoffman, *supra* note 7, at 391 (noting that “some distinguished scholars now argue that parties’ greater ability to contract out of federal and state procedural rules [through arbitration agreements] entails the lesser power to modify them”); see also Michaels, *supra* note 160, at 342, 357 (discussing equivalence functionalism). While a full exploration of this subject is beyond the scope of the current Article, the issue is nevertheless intriguing.

215. See *infra* note 317 and accompanying text (suggesting the limits between litigation and arbitration are semi-permeable).

216. This principle is most clearly enunciated by Judge Fuentes in his concurrence and by the district court. See *Strine*, 733 F.3d at 522 (Fuentes, J., concurring); Del. Coal. for Open Gov’t v. *Strine*, 894 F. Supp. 2d 493, 495 (D. Del. 2012), *aff’d*, 733 F.3d 510 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014).

217. *Strine*, 733 F.3d at 512.

218. See *Strine*, 894 F. Supp. 2d at 495.

219. See *supra* notes 186–190, 390–394 and accompanying text.

dural contracts, so long as the procedure is public<sup>220</sup> and consensual.<sup>221</sup>

*b. Appointment of Arbitrators*

The second area of concern involves the means by which arbitrators are appointed under the Delaware statute. Although neither the district court nor the circuit court discussed this feature at length, the Delaware legislature indicated that proceedings were to be presided over by “a member of the Court of Chancery, or such other person as may be authorized under rules of the Court.”<sup>222</sup>

If the proceedings are to be considered as some form of arbitration, then this provision is highly problematic, since “virtually all authorities . . . accept that arbitration is a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties.”<sup>223</sup> Furthermore, the district court noted that while “[t]he Alternative Dispute Resolution Act, which creates court-annexed arbitration in the federal courts, seems to allow magistrate judges to serve as arbitrators[,] . . . neither the parties nor [the] Court could find evidence of that practice.”<sup>224</sup> Of course, the appointment of a judge to hear the dispute is not at all problematic if the proceedings constitute a form of customized litigation, which is how the Delaware courts eventually framed the procedure.<sup>225</sup>

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220. See *Strine*, 733 F.3d at 513–21.

221. *Id.* at 512.

222. *Strine*, 894 F. Supp. 2d at 494 (quoting 10 Del. C. §349(a)); see also *Strine*, 733 F.3d at 512.

223. BORN, ICA, *supra* note 3, at 217.

224. *Strine*, 894 F. Supp. 2d at 502 (citing 28 U.S.C. §653(b) (2013)); see also *DDI Seamless Cylinder Int'l, Inc. v. Gen. Fire Extinguisher Corp.*, 14 F.3d 1163, 1165–66 (7th Cir. 1994); *Brandt v. MIT Development Corp.*, 552 F. Supp. 2d 304, 315 (D. Conn. 2008); *Hameli v. Nazario*, 930 F. Supp. 171, 182 (D. Del. 1996); *Ovadia v. New York Ass'n for New Americans*, Nos. 95 Civ. 10523 (SS), 96 Civ. 330 (SS), 1997 WL 342411, at \*3–4 (S.D.N.Y. June 23, 1997); *Heenan v. Sobati*, 96 Cal. App. 4th 995, 1000–03 (2002); *Elliott & Ten Eyck P'ship v. City of Long Beach*, 57 Cal. App. 4th 495, 503–04 (1997); Charles H. Smith, *When Is an "Arbitration" Not an Arbitration? When a Sitting Judge Serves as a Private Arbitrator*, 60 DISP. RESOL. J. 29, 33 n.23 (2005); *Stipanowich*, *supra* note 194, at 359; *infra* notes 241–45 and accompanying text.

225. While some questions might arise as to whether the procedures permitted under the Delaware statute infringed upon the judge's core adjudica-

The Delaware statute also indicated that the arbitrator-judge was to be appointed by the Chancellor of the Court rather than by the parties.<sup>226</sup> This element could appear to create difficulties at first glance because parties in arbitration are usually entitled to choose their decision-maker themselves.<sup>227</sup> However, it is possible for parties to delegate selection of the arbitrator to an arbitral institution or court, so this mechanism passes muster.<sup>228</sup>

### *c. Mandatory Judicial Duties*

The third and perhaps most intriguing aspect of *Strine* involves the district court's distinction between adjudicators who are judges and adjudicators who are private citizens (i.e., arbitrators).<sup>229</sup> According to the court, "[a] judge bears a special responsibility to serve the public interest. That obligation, and the public role of that job, is undermined when a judge acts as an arbitrator bound only by the parties' agreement."<sup>230</sup> Furthermore, "the judge's obligation in his public role as a judicial officer" cannot be altered, even with the parties' consent.<sup>231</sup>

This aspect of *Strine* is extremely useful, since it reinforces theoretical notions regarding the sanctity of judges' core adjudicative duties.<sup>232</sup> Unfortunately, the court does not go on to explain precisely what is encompassed within a judge's "public role as a judicial officer," as opposed to the responsibilities of "an arbitrator bound only by the parties' agreement."<sup>233</sup> Com-

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tive or public duties, those issues are less problematic if the procedure is approved by the legislature, since the state is generally considered competent to define proper litigation procedures as a structural matter.

226. See *Strine*, 733 F.3d at 512.

227. See BORN, ICA, *supra* note 3, at 217.

228. See *id.*; LEW ET AL., *supra* note 32, ¶¶ 16-11 to 16-29.

229. See *Strine*, 733 F.3d at 500. This issue has been addressed by commentators as well. See BORN, ICA, *supra* note 3, at 217; RENÉ DAVID, ARBITRATION IN INTERNATIONAL TRADE 5 (1985); EMMANUEL GAILLARD & JOHN SAVAGE, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 7 (1999).

230. Del. Coal. for Open Gov't v. *Strine*, 894 F. Supp. 2d 493, 502 (D. Del. 2012), *aff'd*, 733 F.3d 510 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014).

231. *Id.* at 503.

232. For example, this aspect of *Strine* is reminiscent of discussion relating to the core values of public adjudication and the distinction between matters of public and private concern. See *supra* notes 149-64 and accompanying text.

233. *Strine*, 894 F. Supp. 2d. at 502-03.

mentary provides scant assistance on this point, since there is little scholarship comparing the nature of arbitration and litigation<sup>234</sup> outside of some limited inquiries involving the differences between judges' and arbitrators' duties of independence and impartiality<sup>235</sup> and the ways in which judges and arbitrators can or should apply public policy.<sup>236</sup>

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234. See LARRY E. EDMONSON, DOMKE ON COMMERCIAL ARBITRATION § 1:1, at 1–3 (2010) (noting arbitration coexists with litigation as “part of the American system of administering justice”); *id.* § 1:3, at 1–8 to 1–9 (indicating that early precedent distinguished between commercial arbitration as a substitute for litigation and labor arbitration as a substitute for avoiding industrial strife, but suggesting that these distinctions may no longer apply); Cindy G. Buys, *The Arbitrators’ Duty to Respect the Parties’ Choice of Law in Commercial Arbitration*, 79 ST. JOHN’S L. REV. 59, 93–94 (2005) (noting differences between arbitration and litigation); Pierre Mayer, *Comparative Analysis of Power of Arbitrators to Determine Procedures in Civil and Common Law Systems*, in PLANNING EFFICIENT ARBITRATION PROCEEDINGS: THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION, XII ICCA CONG. SER. (1994 Vienna) 24, 25–26 (Albert Jan van den Berg ed., 1996) (noting arbitration is sometimes considered “a substitute for State justice, albeit of a private nature, but nevertheless pursuing the same ends”); Jeffrey W. Stempel, *Keeping Arbitrations From Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 260 (2007) (noting “arbitration is a substitute for adjudication by litigation”); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1673 (2005) (concluding arbitration is not the same as litigation); S.I. Strong, *Does Class Arbitration “Change the Nature” of Arbitration?* Stolt-Nielsen, AT&T and a Return to First Principles, 17 HARV. NEGOT. L. REV. 201, 241–45 (2012) [hereinafter Strong, *First Principles*] (discussing the nature of arbitration); see also Elliott & Ten Eyck P’ship v. City of Long Beach, 57 Cal. App. 4th 495, 503 (1997).

235. Although arbitrators are expected to behave in an independent, impartial, and (in the international context) neutral manner, arbitrators are not always held to precisely the same standard as judges, since arbitrators are expected to be part of the business world. Compare *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 148–49 (1968), with *AT&T Corp. v. Saudi Cable Co.*, [2000] 2 Lloyd’s Rep. 127 (appeal taken from Eng.) (Ct. App.).

236. Some commentators believe that arbitrators are either more willing or more able than judges to take the public policies of foreign states into account. See Stefan Michael Kröll, *The “Arbitrability” of Disputes Arising from Commercial Representation*, in ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 317, ¶¶ 16–57 to 16–65 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009). However, problems can arise if an arbitrator is too reliant on public policy, since arbitral tribunals are not empowered to act like common law courts. See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 673–74 (2010); Strong, *First Principles*, *supra* note 234, at 240. This principle can be taken too far, however, since some courts

Although *Strine* does not discuss the nature of judicial adjudication directly, careful reading of the two opinions nevertheless yields some useful information.<sup>237</sup> For example, both the district and circuit courts appeared to suggest that the procedural innovations proposed by the Delaware legislature did not infringe on the judge's public duties in any way, once the confidentiality provisions were struck.<sup>238</sup> Thus, expedited timelines and customized methods of taking and presenting evidence do not appear to violate the judge's "public role as a judicial officer."<sup>239</sup>

This reading of *Strine* is consistent with a Seventh Circuit decision concerning a purported attempt to have a federal magistrate preside over a private arbitration.<sup>240</sup> In an opinion written by Judge Richard Posner, the Court concluded that "arbitration is not in the job description of a federal judge, including . . . a magistrate judge. . . . Federal statutes authorizing arbitration . . . do not appear to authorize or envisage the appointment of judges or magistrate judges as arbitrators."<sup>241</sup> As a result, the magistrate judge would have been acting beyond his judicial capacity if his actions were construed as arbitration.<sup>242</sup>

However, the Seventh Circuit did not stop there. Instead, Judge Posner wrote that

[a]n alternative characterization to *ultra vires* of what the magistrate judge did is possible. It is that the parties stipulated to an abbreviated, informal procedure for his deciding

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have suggested that arbitrators not only have the ability but in some cases the duty to consider the application of public policy and mandatory law. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985); see also *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42–44 (1987) (indicating that public policy that can be ascertained by reference to the relevant law can and should be considered in arbitral context, lest the award be rendered unenforceable); BORN, ICA, *supra* note 3, at 2181; Strong, *First Principles*, *supra* note 234, at 240.

237. See *Del. Coal. for Open Gov't v. Strine*, 733 F.3d 510, 512 (3d Cir. 2013); *Strine*, 894 F. Supp. 2d. at 502–03.

238. See *Strine*, 733 F. 3d at 521–23 (Fuentes, J., concurring).

239. *Strine*, 894 F. Supp. 2d. at 503; see also *id.* at 495.

240. See *DDI Seamless Cylinder Int'l, Inc. v. Gen. Fire Extinguisher Corp.*, 14 F.3d 1163 (7th Cir. 1994); Stipanowich, *supra* note 194, at 366.

241. *DDI Seamless Cylinder*, 14 F.3d at 1165.

242. *Id.* Framing a matter as "arbitration" carries several benefits, including a strictly limited form of judicial review rather than appeal on the merits. See *id.* at 1166; see also Strong, *First Principles*, *supra* note 234, at 218.

the case in his judicial capacity. Parties are free within broad limits to agree on simplified procedures for the decision of their case. They can agree for example to waive the right to present oral testimony and instead to treat the summary judgment proceeding as the trial on the merits. They can agree that the hearing on a preliminary injunction shall be deemed the trial on the merits as well. They can agree to a trial on stipulated facts. They can, of course, agree to binding arbitration, albeit before an arbitrator rather than a judge. They can agree to waive appeal: that is possible even in criminal cases, by a plea agreement. One way to describe what the parties and the judge did in this case is that they agreed that the judge would make a decision on a record consisting of the auditor's report plus the parties' objections, after oral argument by the parties conducted (as is increasingly common in federal district courts) over the telephone, and that they would not appeal the decision. So viewed, the procedure was not improper. Of course the parties should have avoided reference to "arbitration," a mode of dispute settlement distinct from adjudication. They should simply have said that this was the procedure they had agreed upon.<sup>243</sup>

Both the Third and the Seventh Circuits therefore appear to agree that parties may contractually agree to amend standard rules of procedure relating to a variety of issues, including discovery.<sup>244</sup> This view is consistent with that taken by commentators who consider discovery to be one of the easiest practices to regulate by private procedural contract.<sup>245</sup>

Not everyone agrees that matters relating to the taking and presentation of evidence can be made subject to private procedural contracts. Indeed, some scholars have argued that limiting discovery can negatively affect certain core judicial duties.<sup>246</sup> This claim appears to be based on the common law notion that judges need "to understand the *whole* case" before making a decision, in contrast to civil law judges, who only need to know "[w]hat evidence is required to reach a justifiable decision."<sup>247</sup> However, it is not clear that broad, U.S.-style discovery and long, drawn-out trials can or should be considered a

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243. *DDI Seamless Cylinder*, 14 F.3d at 1166 (citations omitted).

244. *See id.*; *Strine*, 894 F. Supp. 2d at 503.

245. *See* Bone, *supra* note 30, at 1331; Dodge, *supra* note 30, at 745; Noyes, *supra* note 27, at 609–10.

246. *See* Paulson, *supra* note 25, at 476, 511–15.

247. El Ahdab & Bouchenaki, *supra* note 15, at 72.



necessary part of the adjudicative process. Indeed, there are several reasons why that presumption does not appear to be true as a matter of fact or theory.

First, the United States is exceptional, even within the common law world, in its approach to pre-trial discovery. Even those jurisdictions that adopt a common law, “whole case” view of judicial decision-making take a much narrower view of the necessary scope of pre-trial disclosures.<sup>248</sup> Furthermore, criminal procedure does not contemplate anywhere near the same amount of discovery that is seen in the civil context, and no one has ever claimed that criminal trials do not involve judges working in a judicial capacity.<sup>249</sup> Therefore, broad, U.S.-style discovery does not appear necessary for a judge to carry out his or her core adjudicative duties, even in the United States.

Second, U.S. practice strongly reflects the notion that the taking of evidence is a quintessentially private activity.<sup>250</sup> Not only do federal and state rules of civil procedure place the responsibility for gathering evidence firmly within the hands of the parties or their attorneys,<sup>251</sup> but U.S. judges seldom ask for particular evidence or witnesses to be introduced at trial, even if the court is entitled to do so.<sup>252</sup> Although U.S. practice differs

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248. See LEW ET AL., *supra* note 32, ¶ 22-49; El Ahdab & Bouchenaki, *supra* note 15, at 73; Strong, *Discovery*, *supra* note 74, at 510–11; S.I. Strong & James J. Dries, *Witness Statements Under the IBA Rules of Evidence: What to Do About Hearsay?*, 21 ARB. INT’L 301, 313 (2005).

249. See David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 714–15 (2006).

250. See Strong, *Consensual*, *supra* note 30, at 160.

251. See FED. R. CIV. P. 26; Noyes, *supra* note 27, at 611; Paulson, *supra* note 25, at 514 (discussing Rule 29 of the Federal Rules of Civil Procedure). Notably, the fact that the Federal Rules of Civil Procedure place certain restrictions on the ability of the parties to shape their own procedure does not preclude the possibility that autonomy exists in other regards. See *id.* (discussing Rule 29 of the Federal Rules of Civil Procedure). Thus, for example, the limitation on party autonomy in Rule 29 regarding the timing of certain discovery-related activities does not necessarily bar other types of procedural agreements relating to the taking of evidence. See FED. R. CIV. P. 29(b) (“[A] stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.”). Instead, that provision simply reinforces the notion that party autonomy cannot be exercised in a way that affects the relationship between the parties and the court.

252. See FED. R. EVID. 614, 706. The right to call fact witnesses is exercised more often in the criminal context than in the civil context. See FED. R. EVID.

from that of most civil law nations, where the taking of evidence is considered a public task,<sup>253</sup> the U.S. approach is consistent with that of other common law countries.<sup>254</sup>

Third, judges in the United States do not second-guess the parties' tactical decisions regarding the presentation of evidence during trial.<sup>255</sup> Although courts occasionally exercise their inherent powers in matters relating to the presentation of evidence, most acts of judicial intervention appear to focus on curtailing abusive litigation practices rather than promoting the court's own views about what evidence should be presented and how.<sup>256</sup>

Similar analyses can be conducted with respect to other types of procedural agreements, such as those involving a "trial on stipulated facts or on summary judgment rather than oral testimony"<sup>257</sup> or those eliminating the opportunity for an appeal on the merits.<sup>258</sup> However, both the Seventh and Third Circuits specifically stated that parties could enter into contracts concerning these procedures, which suggests that parties can agree to limit or eliminate certain procedural practices (such as oral testimony and cross-examination) that are typically conceived of as central to the common law legal tradition.<sup>259</sup> In-

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614 advisory committee's note to subdivision (a). Courts seldom appoint their own expert witnesses. See FED. R. EVID. 706 advisory committee's note; Strong, *Consensual*, *supra* note 30, at 160.

253. See Hazard, *Secrets*, *supra* note 15, at 1682.

254. See Andrews, *supra* note 182 (discussing English practice). Indeed, English courts have allowed parties to obtain evidence by means not otherwise known at English law. See ADRIAN BRIGGS, *THE CONFLICT OF LAWS* 38 (2d ed. 2008).

255. See Strong, *Consensual*, *supra* note 30, at 160.

256. See FED. R. EVID. 614, 706 (noting the right of the court to question fact and expert witnesses); Joseph J. Anclien, *Broader Is Better: The Inherent Powers of Federal Courts*, 64 N.Y.U. ANN. SURV. AM. L. 37, 46 (2008).

257. Del. Coal. for Open Gov't v. Strine, 894 F. Supp. 2d 493, 503 (D. Del. 2012), *aff'd*, 733 F.3d 510 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014); see also DDI Seamless Cylinder Int'l, Inc. v. Gen. Fire Extinguisher Corp., 14 F.3d 1163, 1165–66 (7th Cir. 1994).

258. See DDI Seamless Cylinder, 14 F.3d at 1165; Strine, 894 F. Supp. 2d at 503.

259. See BORN, ICA, *supra* note 3, at 1786. Using "tradition" as a touchstone for legal analysis is highly problematic. See Ronald J. Krotoszynski, *Dumbo's Feather: An Examination and Critique of the Supreme Court's Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48 WM. & MARY L. REV. 923, 928–30 (2006).

deed, U.S. courts appear to have long been capable of altering common law rules, even those that are of a longstanding nature.<sup>260</sup> Therefore, when considering what constitutes a core adjudicative duty, courts and commentators must be careful not to assume that a particular practice is central to the adjudicative function simply because it has traditionally been available in U.S. litigation.<sup>261</sup>

### *C. Interim Conclusions*

The preceding analysis suggests that although states may have a legitimate interest in protecting the fundamental principles of institutional design inherent in their legal systems, not every judicial procedure affects public, structural concerns. Instead, some procedures arise solely between the parties and therefore are entirely private as a matter of both theory and of practice.

At this point, courts and commentators agree that parties should not be able to alter matters touching on the administration and operation of the courts. However, there do not appear to be any reasons to justify a prohibition on procedural contracts concerning matters that arise solely between the parties. Furthermore, these types of procedural agreements can even reflect certain positive virtues, including an increase in predictability in international commerce and a possible reduction of certain public costs.

Although the preceding discussion paints a largely positive view of procedural contracts in international litigation, some courts may nevertheless resist party autonomy in procedural matters, either because of concerns about perceived encroachments on judicial prerogatives or because of worries about what constitutes a “proper” or adequate procedure. The first of these

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260. See *Funk v. United States*, 290 U.S. 371, 382 (1933) (“That this court and the other federal courts, in this situation and by right of their own powers, may decline to enforce the ancient rule of the common law under conditions as they now exist, we think is not fairly open to doubt.”); *DDI Seamless Cylinder*, 14 F.3d at 1166; see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 533–34 (2004) (allowing courts to tailor proceedings that did not fall within the mandatory core of constitutional due process); *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), 2013 WL 5548913, \*1–3 (S.D.N.Y. Oct. 7, 2013) (requiring parties to provide written witness statements instead of affirmative oral testimony in appropriate cases).

261. See Bone, *supra* note 30, at 1386–88.

two matters should be dispensed with relatively easily, since the United States Supreme Court has shown little patience for judicial hostility to party autonomy, particularly in situations involving international commerce. However, the second issue could be problematic, since courts are duty-bound to protect the parties' fundamental procedural rights. These sorts of substantive concerns are taken up in the next section.

### III. SUBSTANTIVE CONCERNS ABOUT PROCEDURAL AUTONOMY IN INTERNATIONAL COMMERCIAL LITIGATION

The previous section suggested that courts and commentators must look past surface considerations to determine whether and to what extent a particular procedural practice affects core structural concerns. This same kind of in-depth approach is necessary when analyzing substantive concerns about private procedural contracts in international commercial litigation. However, rather than focusing on matters of institutional design, substantive analyses focus on questions relating to individual rights and the principles of due process and procedural fairness.

Although it is critically important for courts and commentators to consider substantive concerns relating to procedural autonomy in international commercial litigation, the process can involve some methodological difficulties. For example, it can be challenging to even identify what the relevant substantive norms are because due process and procedural fairness are typically considered as a matter of domestic rather than international or transnational law.<sup>262</sup>

Though daunting, the problem is not insurmountable, since there may be another body of law that can help identify the due process norms that apply in international commercial litigation. For example, international commercial arbitration is extremely well-developed in terms of its procedural norms and has already been shown to have a structural connection with

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262. The development of an international norm of due process is somewhat more advanced in the criminal law context. See LARRY MAY, *GLOBAL JUSTICE AND DUE PROCESS* 1–17 (2011) (suggesting domestic due process standards should be extended to international law and recognized as *jus cogens*); Richard Volger, *Due Process*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 929, 939, 945 (Michel Rosenfeld & Andras Sajó eds., 2012).

international commercial litigation.<sup>263</sup> Therefore, it may be that there is a substantive link between the two processes as well. That issue is considered in the following sections.

*A. International Commercial Arbitration as a Framework for Analysis*

There are several reasons why international commercial arbitration might be able to provide an appropriate standard for evaluating substantive concerns relating to procedural contracts in transnational litigation. First, as the discussion on structural concerns demonstrated, numerous commentators have identified a jurisprudential connection between procedural contracts in litigation and procedural contracts in arbitration.<sup>264</sup> While the precise nature of that relationship has not yet been defined,<sup>265</sup> the fact that there is a structural connection suggests the possible presence of a substantive affiliation as well.<sup>266</sup>

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263. See KURKELA & TURUNEN, *supra* note 6; GEORGIOS PETROCHILOS, *PROCEDURAL LAW IN INTERNATIONAL ARBITRATION* ¶¶ 4.85–94 (2004); S.I. STRONG, *RESEARCH AND PRACTICE IN INTERNATIONAL COMMERCIAL ARBITRATION: SOURCES AND STRATEGIES* 71–137 (2009) [hereinafter STRONG, RESEARCH] (providing bibliographic information).

264. See ALI & UNIDROIT, *supra* note 10, at 17; Bone, *supra* note 30, at 1333; Dodge, *supra* note 30, at 781; Drahozal & Rutledge, *supra* note 30, at 1106–07; Hoffman, *supra* note 7, at 428; Resnik, *supra* note 11, at 599.

265. Some commentators have suggested that “the analytical problems involved in opting out of litigation [and into arbitration] are quite distinct from those arising inside the courtroom” while other scholars have taken the view that “parties’ greater ability to contract out of federal and state procedural rules entails the lesser power to modify it.” Hoffman, *supra* note 7, at 391, 395 (citations omitted).

266. One commentator has identified a number of procedural requirements that apply in both litigation and arbitration. For example,

[j]udicial and arbitral decision-makers are required to render a judgment or award, following representations from the parties. Six fundamental principles are associated with this relationship between the adjudicator and the parties: (i) the adjudicator’s impartiality and (ii) independence; (iii), the adjudicator’s duty to treat the parties equally, (iv) to listen to both sides and to respect each party’s right to controvert evidence or legal submission, and (v) the duty to reach a reasoned decision within (vi) a reasonable time.

More generally, the numerous fundamental and important principles of civil justice can be arranged under these five headings, which are the five constellations of procedural principles: (1) advice and access:

Some commentators would object to this methodology due to a belief that arbitrators use different analytical techniques than judges.<sup>267</sup> For example, these commentators suggest that arbitrators routinely disregard precedent and draft awards that are bereft of any sort of legal reasoning.<sup>268</sup> Setting aside the question of whether those practices still arise in domestic U.S. arbitration, it is clear that these allegations do not apply in international matters.<sup>269</sup>

Instead, international commercial arbitration is universally agreed to be a highly legalistic procedure involving extremely detailed written and oral submissions outlining what are often highly sophisticated legal arguments.<sup>270</sup> Arbitral tribunals typically issue fully reasoned awards that explain the arbitrators' substantive and procedural decisions in great detail.<sup>271</sup> Many of

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empowering the parties; (2) conditions for sound decision-making; (3) an efficient process; (4) a fair process; and (5) upholding judgment. Of these numerous principles, none can be regarded as detached from the judicial process.

Andrews, *supra* note 182.

267. See Bone, *supra* note 30, at 1386–88; Hoffman, *supra* note 7, at 391, 395; see also *supra* notes 160–64 and accompanying text.

268. See Bone, *supra* note 30, at 1386–88. Bone also describes a somewhat outmoded domestic U.S. practice (the non-neutral arbitrator) that does not exist in the international realm, where independence, impartiality and neutrality are required. See BORN, ICA, *supra* note 3, at 1494–1507; Bone, *supra* note 30, at 1387.

269. See STRONG, GUIDE, *supra* note 32, at 4–5.

270. See *id.*; Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69, 69, 73 (2003); Eric Bergsten, *The Americanization of International Arbitration*, 18 PACE INT'L L. REV. 289, 294, 301 (2006); Born, *Adjudication*, *supra* note 10, at 877; Lucy Reed & Jonathan Sutcliffe, *The "Americanization" of International Arbitration?*, 16 MEALEY'S INT'L ARB. REP. 36 (2001); Steven Seidenberg, *International Arbitration Loses Its Grip: Are U.S. Lawyers to Blame?*, 96 A.B.A. J. 50, 54 (2010).

271. See BORN, ICA, *supra* note 3, at 1871–72; Bone, *supra* note 30, at 1387–88. Indeed, some parties complain that arbitral awards are too long. See Pierre Lalive, *On the Reasoning of International Arbitral Awards*, 1 J. INT'L DISP. SETTLEMENT 55, 55 (2010). Although the style of the award may vary depending on whether the decision-maker comes from a common law or civil law background, arbitral tribunals are nevertheless acting in a judicial manner. See S.I. Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources*, 20 AM. REV. INT'L ARB. 119, 143 (2009) [hereinafter Strong, *Sources*]; see also *supra* note 247 and accompanying text (describing the different analytical approaches of civil law and common law lawyers).



these awards are subsequently published in denatured (anonymized) form,<sup>272</sup> which allows scholars to determine whether and to what extent arbitrators comply with the law. Detailed examination of these awards demonstrates a tradition of rigorous attention to legal argument and authority, similar to the approach adopted by judges.<sup>273</sup>

Notably, the debate about due process in international commercial arbitration is not limited to principles enunciated in arbitral awards and scholarly commentary. Instead, national judges from around the world often consider questions of procedural fairness as a result of various types of ancillary litigation.<sup>274</sup> As described further in the discussion below, the unique nature of international commercial arbitration requires national courts and arbitral tribunals to adopt a highly consistent set of due process standards that applies in both arbitral and judicial contexts and in different countries. Furthermore, the concept of procedural fairness in international commercial arbitration is developed through a highly iterative process that involves both public and private adjudicators, although judges necessarily have the final say about such issues. As a result, discussions about the proper bounds of procedural autonomy in international commercial arbitration appear highly relevant to similar debates concerning international commercial litigation.

Support for the analytical methodology adopted in this Article can also be found in judicial decisions such as *Delaware Coalition for Open Government v. Strine*.<sup>275</sup> Although that case focused primarily on confidentiality concerns within the context of U.S. constitutional law, Judge Roth's discussion of international commercial arbitration (rather than one of the various forms of domestic arbitration) supports this Article's use of international commercial arbitration as a guide to international norms of procedural fairness.<sup>276</sup>

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272. See STRONG, RESEARCH, *supra* note 263, at 45, 83–85.

273. See BORN, DRAFTING, *supra* note 2, at 9; LEW ET AL., *supra* note 32, ¶ 24-55; Bone, *supra* note 30, at 1388; Christoph A. Hafner, *Professional Reasoning, Legal Cultures, and Arbitral Awards*, 30 WORLD ENGLISHES 117, 117–28 (2011) (describing differences between civil law and common law reasoning).

274. See STRONG, GUIDE, *supra* note 32, at 37–87 (discussing various ways in which judges become involved in arbitration).

275. See *Del. Coal. for Open Gov't v. Strine*, 733 F.3d 510 (3d Cir. 2013).

276. See *Strine*, 733 F.3d at 525 (Roth, J., dissenting).



Another compelling reason to rely on international commercial arbitration involves the high degree of esteem with which it is held in the business and legal worlds. Despite recent concerns about increasing formalism and costs,<sup>277</sup> international commercial arbitration is generally considered to be one of the great success stories of the procedural realm.<sup>278</sup> Not only are the various conventions associated with international commercial arbitration among the most widely accepted treaties in the world (indeed, the most successful of these, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards [more commonly known as the New York Convention] has been signed or ratified by 149 state parties),<sup>279</sup> but private parties typically prefer arbitration as a means of resolving their cross-border business disputes.<sup>280</sup> Furthermore, the widespread approval and perceived legitimacy of the procedures used in international commercial arbitration have led numerous countries to adopt a treaty-based form of arbitration (investor-state arbitration) that draws heavily on the procedural rules developed in the private commercial context.<sup>281</sup>

The amount of public and private support for international commercial arbitration is impressive. However, what may be even more important for purposes of this Article is the way in which the norms associated with international commercial arbitration have become embedded in domestic law, either direct-

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277. These concerns focus more on issues of cost than issues of procedural irregularity. *See supra* notes 33–34 and accompanying text.

278. *See supra* note 32.

279. *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 217, 330 U.N.T.S. 3 [hereinafter New York Convention]; *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, U.N. COMM'N ON INT'L TRADE LAW (UNCITRAL), [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited Jan. 3, 2012) [hereinafter New York Convention Status]; William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 HASTINGS L.J. 251, 257 (2008). Other treaties in this field are also well-recognized, although those agreements are primarily regional in nature. *See* BORN, ICA, *supra* note 3, at 91–109.

280. *See* BORN, ICA, *supra* note 3, at 68–71.

281. *See* LUCY REED ET AL., *Preface to the Second Edition of GUIDE TO ICSID ARBITRATION*, at xi (2nd ed. 2010); Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L. REV. 1269, 1272 (2009).

ly<sup>282</sup> or indirectly through the adoption of national legislation based on the UNCITRAL Model Law on International Commercial Arbitration (“Model Arbitration Law”).<sup>283</sup> Although commentators suggest that it is often difficult for international legal norms to become incorporated into national law,<sup>284</sup> the process appears to have been very successful in the area of international commercial arbitration.<sup>285</sup>

Both the various conventions on international commercial arbitration and the Model Arbitration Law reflect a high degree of respect for the parties’ procedural autonomy.<sup>286</sup> However, parties cannot act with unfettered discretion. Instead, “procedural autonomy [in international commercial arbitration] is qualified . . . by the mandatory requirements of applicable na-

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282. This process is easier in monist states but also occurs in dualist regimes. See James A.R. Nafziger, *Book Review: Dinah Shelton, ed., International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion*, 61 AM. J. COMP. L. 901, 902 (2013); S.I. Strong, *Monism and Dualism in International Commercial Arbitration: Overcoming Barriers to Consistent Application of Principles of Public International Law*, in BASIC CONCEPTS OF PUBLIC INTERNATIONAL LAW: MONISM AND DUALISM 547, 555–57, 563–68 (Marko Novaković ed., 2013).

283. See UNCITRAL Model Law on International Commercial Arbitration, U.N. Comm’n on Int’l Trade Law, 18th Sess., Annex I, U.N. Doc. A/40/17 (June 21, 1985), revised by Rep. of the U.N. Comm’n on Int’l Trade Law, 39th Sess., June 17–July 7, 2006, Annex I, art. 34, U.N. Doc. A/61/17, U.N. GAOR, 61st Sess., Supp. No. 17 (2006) [hereinafter Model Arbitration Law]. The Model Arbitration Law was designed to be consistent with the terms of the New York Convention and thus with public international law relating to international commercial arbitration. See New York Convention, *supra* note 279; Model Arbitration Law, *supra*, Explanatory Note to 1985 version, paras. 47, 49; BORN, ICA, *supra* note 3, at 115–21; William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT’L L. 1241, 1243 (2003).

284. See René Provost, *Judging in Splendid Isolation*, 56 AM. J. COMP. L. 125, 153 (2008).

285. See Frédéric Bachand, *Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism*, 2012 J. DISP. RESOL. 83, 83; Zekoll, *supra* note 43, at 1348–51 (discussing “state-sanctioned party autonomy” in international commercial arbitration); see also EMMANUEL GAILLARD, *LEGAL THEORY OF INTERNATIONAL ARBITRATION* 26 (2010) (suggesting international commercial arbitration is consistent with a theory of “strict State positivism”).

286. See New York Convention, *supra* note 279; Model Arbitration Law, *supra* note 283; BORN, ICA, *supra* note 3, at 82–83, 91.

tional law (subject to applicable international limits).”<sup>287</sup> These requirements are reflected in certain well-established norms that are created and respected by both courts and arbitral tribunals.<sup>288</sup>

The jurisprudential connection between litigation and arbitration suggests that arbitration law may be able to provide certain insights into the boundaries of procedural autonomy in litigation. This is particularly true in the cross-border business context, since the law relating to international commercial arbitration is far more developed than the law relating to international commercial litigation.<sup>289</sup> Therefore, this Article analyzes the substantive concerns relating to procedural contracts by using examples drawn from international commercial arbitration.

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287. BORN, ICA, *supra* note 3, at 1749. One of the more salient discussions regarding the difference between domestic and international principles of public policy, including procedural public policy, is found in a series of reports by the International Law Association concerning public policy as a bar to enforcement of international awards. See Int'l Law Assn. Comm. on Int'l Commercial Arb., *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards* (2000), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/19>; Int'l Law Assn. Comm. On Int'l Commercial Arb., *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards* (2002), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/19>; Strong, *Due Process*, *supra* note 98, at 67–70.

288. Arbitrators' respect for international procedural norms exists not only as a matter of informal acculturation but also as a result of what is often seen as a duty to produce an enforceable award. See Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 792–93; Günther J. Horvath, *The Duty of the Tribunal to Render an Enforceable Award*, 18 J. INT'L ARB. 135, 135 (2001); see also GAILLARD, *supra* note 285, at 53 (discussing the comparative and iterative elements of the transnational rules method). Arbitrators know that if they exceed the limits of procedural fairness, their awards will be unenforceable, which is not the parties' contracted-for outcome. See Horvath, *supra*, at 137–38. Hence, there is an implicit duty on the part of the arbitral tribunal to conform with judicial norms of due process and procedural fairness. See *id.* at 145–48.

289. See *infra* notes 294–98 and accompanying text.

*B. Limits of Procedural Autonomy in International Commercial Arbitration*

1. Sources of Authority Describing Procedural Fairness in International Commercial Arbitration

When considering the limits of procedural autonomy in international commercial arbitration, it is useful to begin by identifying the relevant legal authorities.<sup>290</sup> Professor Matti Kurkela and Santtu Turunen have suggested that a “prima facie order of sources . . . for identifying *lex proceduralia* or transnational due process requirements in arbitration” includes

- 1) The New York Convention
- 2) Human rights conventions
- 3) International soft law concerning arbitration
- 4) Principles of law formulated from various national procedural laws.<sup>291</sup>

The first item on the list—the New York Convention—has been characterized as “constitutional” in nature, an interpretation that has arisen at least in part because the New York Convention plays a role comparable to that of a national constitution “in mediating between private autonomy (or liberty) and governmental regulatory interests.”<sup>292</sup> Although the New York

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290. See KURKELA & TURUNEN, *supra* note 6, at 10–11.

291. *Id.* at 11; see also New York Convention, *supra* note 279. “*Lex proceduralia*” can be described as a set of procedural norms that are analogous to the substantive law known as *lex mercatoria*. See KURKELA & TURUNEN, *supra* note 6, at 7–8. Extensive commentary exists regarding the content and historical development of the *lex mercatoria*, and it may be that some of these principles would be equally applicable to the development of the *lex proceduralia*. See BERGER, *supra* note 6; Mary B. Ayad, *Harmonization of Custom, General Principles of Law and Islamic Law in Oil Concessions*, 29 J. INT’L ARB. 477, 488–90 (2012) (suggesting *lex mercatoria* fulfills the requirements of Article 31(3)(c) of the Vienna Convention on the Law of Treaties); Emmanuel Gaillard, *Transnational Law: A Legal System or a Method of Decision Making?*, 17 ARB. INT’L 59, 59–72 (2001); Maniruzzaman, *supra* note 6, at 665; see also *supra* note 6.

292. Gary B. Born, *Arbitration and the Freedom to Associate*, 38 GA. J. INT’L & COMP. L. 7, 22 (2009) [hereinafter Born, *Associate*]; see also New York Convention, *supra* note 279; Peter B. Rutledge, *The Constitutional Law of International Commercial Arbitration*, 38 GA. J. INT’L & COMP. L. 1, 2 (2009). This constitutional function is also reflected in national laws of arbitration, which

Convention does not discuss procedural autonomy directly, a number of key principles can be derived from Article V, which describes the grounds upon which an objection to recognition and enforcement of a foreign arbitral award can be based.<sup>293</sup>

Article V is relatively general in nature (another characteristic that the New York Convention shares with many national constitutions),<sup>294</sup> but the principles are further interpreted and applied in judicial decisions and arbitral awards that are reproduced in detail in various yearbooks and databases.<sup>295</sup> Similar information has been gathered on judicial decisions construing the Model Arbitration Law, which was designed to be consistent with the terms of the New York Convention and which has been adopted in whole or in part in nearly 100 jurisdictions, including a number of U.S. states.<sup>296</sup>

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would include statutes based on the Model Arbitration Law. *See generally* Model Arbitration Law, *supra* note 283; Born, *Associate*, *supra*, at 22.

293. *See* New York Convention, *supra* note 279, art. V; KURKELA & TURUNEN, *supra* note 6, at 10.

294. *See* New York Convention, *supra* note 279, art. V; Born, *Associate*, *supra* note 292, at 21. The content of the various due process provisions are discussed in more detail below. *See infra* notes 330–53 and accompanying text.

295. *See* UNCITRAL, *Dissemination of Decisions Concerning UNCITRAL Legal Texts and Uniform Interpretation of Such Texts: Note by Secretariat*, ¶¶ 8, 16, U.N. Doc. A/CN.9/267 (Feb. 21, 1985); STRONG, RESEARCH, *supra* note 263, at 72–88; ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 2–3 (1981); Pieter Sanders, *Foreword* to INT'L COUNCIL FOR COMMERCIAL ARBITRATION, *ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION* v, vi (2011); Barbara Steindl, *The Arbitration Procedure—The Development of Due Process Under the New York Convention*, AUSTRIAN ARB. Y.B. 255, 255–82 (2008). For example, UNCITRAL has compiled a database known as CLOUT (Case Law on UNCITRAL Texts), which contains judicial decisions from all over the world construing the Model Arbitration Law and the New York Convention. *See Case Law on UNCITRAL Texts (CLOUT)*, UNCITRAL, [http://www.uncitral.org/uncitral/en/case\\_law.html](http://www.uncitral.org/uncitral/en/case_law.html) (last visited Apr. 13, 2014); *see also* New York Convention, *supra* note 279; Model Arbitration Law, *supra* note 283; STRONG, RESEARCH, *supra* note 263, at 85–87 (discussing CLOUT). Other databases also exist. *See* 1958 NEW YORK CONVENTION GUIDE, <http://newyorkconvention1958.org> (last visited Apr. 8, 2014).

296. *See* New York Convention, *supra* note 279; Model Arbitration Law, *supra* note 283, Explanatory Note to 1985 version, paras. 47, 49; UNCITRAL, *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006*, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arb](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arb)

Compilations of national court decisions concerning international commercial arbitration have been collected for over fifty years and provide an important insight into how judges interpret and apply mandatory principles of procedural law in the cross-border commercial context.<sup>297</sup> No similar collection exists with respect to the limits of procedural autonomy in civil litigation.<sup>298</sup>

Kurkela and Turunen suggest that information regarding the limits of procedural autonomy in international commercial arbitration can also be gleaned from “different kinds of soft law, institutional rules, other international conventions, model laws, human rights laws, and general procedural principles.”<sup>299</sup> Indeed, some commentators believe that human rights instruments are more important than the New York Convention to the question of procedural rights, since the synallagmatic character of the New York Convention gives it a lesser stature than documents discussing universal human rights norms.<sup>300</sup>

Several international human rights instruments, including the United Nations Universal Declaration on Human Rights (“Universal Declaration”), the International Covenant on Civil and Political Rights (“ICCPR”), and the European Convention on Human Rights and Fundamental Freedoms (“European Convention”), apply to arbitration (albeit indirectly) and therefore could shed some light on questions relating to procedural

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itation\_status.html (last visited Apr. 7, 2014) (including adherents to both versions of the Model Arbitration Law); BORN, ICA, *supra* note 3, at 115–21; STRONG, RESEARCH, *supra* note 263, at 85–87 (discussing CLOUT); Park, *supra* note 283, at 1243.

297. See New York Convention, *supra* note 279; Model Arbitration Law, *supra* note 283; STRONG, RESEARCH, *supra* note 263, at 85–87; VAN DEN BERG, *supra* note 295, 2–6; Sanders, *supra* note 295, at vi; Steindl, *supra* note 295, at 255–82.

298. Some comparative studies exist relating to procedural rights in criminal matters, and some commentators have suggested that useful comparisons can be made across the civil law-criminal law divide. See M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT’L L. 235, 253–92 (1993); Sklansky & Yeazell, *supra* note 249, at 684–85. However, no studies have actually applied this theory in the international commercial context.

299. KURKELA & TURUNEN, *supra* note 6, at 10; see also RUTLEDGE, *supra* note 85, at 145–59.

300. See New York Convention, *supra* note 279; ALEKSANDAR JAKSIC, *ARBITRATION AND HUMAN RIGHTS* 88, 221–25 (2002).

autonomy.<sup>301</sup> However, these instruments are somewhat different from the New York Convention in that they primarily address litigation rather than arbitration,<sup>302</sup> thereby giving rise to the question of whether it would not be preferable to establish the limits of procedural autonomy in litigation by looking directly at these particular norms rather than proceeding indirectly through arbitration.

A direct approach would have some benefits, including the ability to offset the argument that the New York Convention's limits on procedural autonomy only apply to proceedings meant to recognize and enforce arbitral awards.<sup>303</sup> However, primary reliance on human rights instruments gives rise to a number of

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301. See European Convention on Human Rights, as amended by Protocols Nos. 11 and 14, art. 6, *opened for signature* Nov 4, 1950, E.T.S. No. 5 [hereinafter European Convention]; International Covenant on Civil and Political Rights art. 14, Dec. 19, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR]; Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 10, U.N. Doc. A/810 (Dec. 10, 1948), [hereinafter Universal Declaration]; JAKSIC, *supra* note 300, at 23–28, 85–88; Schultz, *supra* note 133, at 8 (“[A]rbitration can only be permitted . . . if some mechanism exists that ensures that the national arbitration framework is in conformity with the ECHR. Through such a mechanism, through its constraints on the national arbitration framework, the ECHR applies *indirectly* to, or more generally has a bearing on, arbitration.”). Some commentators dispute that conclusion. See Adam Samuel, *Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights: An Anglo-Centric View*, 21 J. INT’L ARB. 413, 416–19, 426–27 (2004) (arguing that parties consenting to arbitration waive their rights under Article 6(1) of the ECHR); Schultz, *supra* note 133, at 7–8. A considerable amount of discussion has focused on the applicability of Article 6 of the European Convention to arbitration. See European Convention, *supra*, art. 6; KURKELA & TURUNEN, *supra* note 6, at 10; LEW ET AL., *supra* note 32, ¶¶ 5-57 to 5-67; Vasil Marmazov & P.V. Pushkar, *Is There a Right to Fair Settlement of a Case by Means of Arbitration, as Guaranteed by the European Convention on Human Rights?*, 2 L. UKR. 52, 52–64 (2001), available at <http://eurolaw.org.ua/publications/ukrainian-journal-of-european-studies/5-2011/42-is-there-a-right-to-fair-settlement-of-a-case-by-means-of-arbitration-as-guaranteed-by-the-european-convention-on-human-rights>.

302. See European Convention, *supra* note 301, art. 6; ICCPR, *supra* note 301, art. 14; Universal Declaration, *supra* note 301, art. 10; JAKSIC, *supra* note 300, at 23–28.

303. See JAKSIC, *supra* note 300, at 77, 176, 88. Of course, this argument can also be answered by the recognition that the due process norms applicable in international commercial arbitration reflect certain mandatory procedural principles that are consistent across national borders. See *infra* notes 338–42 and accompanying text.



practical problems. First, a number of these instruments are not directly applicable in domestic litigation<sup>304</sup> or are only applicable in a limited number of legal systems.<sup>305</sup> As a result, these instruments provide little assistance in determining whether and to what extent the various procedural principles are broadly recognized or reflected in domestic law.<sup>306</sup>

Second, most treaty language is relatively general in nature.<sup>307</sup> Although this is a problem shared by the New York Convention, there are very few judicial decisions construing human rights instruments' procedural protections in the civil litigation context. Those decisions that do exist are typically rendered by international tribunals of limited jurisdiction rather than by national courts.<sup>308</sup> Nowhere is there a global data-

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304. See JAKSIC, *supra* note 300, at 108–09, 112; David Sloss, *Legislating Human Rights: The Case for Federal Legislation to Facilitate Domestic Judicial Application of International Human Rights Treaties*, 35 *FORDHAM INT'L L.J.* 445, 446, 449–51 (2012).

305. For example, the European Convention is not applicable outside Europe. See *Convention for the Protection of Human Rights and Fundamental Freedoms*, Status, COUNCIL OF EUROPE, <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG> (last visited Apr. 13, 2014).

306. Some limited analyses exist in the context of criminal procedure. See Bassiouni, *supra* note 298, at 292.

307. See European Convention, *supra* note 301, art. 6; ICCPR, *supra* note 301, art. 14; Universal Declaration, *supra* note 301, art. 10.

308. See New York Convention, *supra* note 279. Most litigation focuses on the meaning of Article 6(1) of the European Convention, which has been cited 19,650 times by the European Court of Human Rights. See European Convention, *supra* note 301, art. 6(1); CASE LAW DATABASE, EUROPEAN COURT OF HUMAN RIGHTS, <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (searching under “Article 6-1”) (last visited Nov. 6, 2013). However, the United States is not a state party to the European Convention, so the jurisprudence arising out of the European Court of Human Rights is not applicable in the United States. See European Convention, *supra* note 301, art. 19; Council of Europe, *supra* note 305. Furthermore, although many of the due process provisions of the European Convention are the same or similar to other international instruments that have been signed by the United States (such as the Universal Declaration and the ICCPR), it is unlikely that U.S. courts would find the case law of the European Court of Human Rights persuasive. See European Convention, *supra* note 301; ICCPR, *supra* note 301; Universal Declaration, *supra* note 301; Oona A. Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 *CORNELL L. REV.* 239, 260, 319–20 (2013) (discussing U.S. adherence to, including conditions attached to, the Universal Declaration and the ICCPR); see also Richard A. Posner, *Foreword: A Political Court*, 119 *HARV. L. REV.* 31, 86 (2005) (decrying use of foreign and inter-

base or collection of cases relating to how these principles are interpreted and applied by national courts in international commercial disputes. Therefore, human rights instruments provide useful insights into discussions relating to the limits of procedural autonomy, but cannot compete with the depth or breadth of analyses arising out of international commercial arbitration.

## 2. An International Customary Law of Procedure

Some commentators have described the extensive amount of information relating to due process and procedural fairness in international commercial arbitration as constituting a type of *lex specialis*.<sup>309</sup> While a *lex specialis* may be controlling in its own field, those norms typically have little or no applicability in other areas of law.<sup>310</sup> However, experience in other contexts suggests that it is possible for a *lex specialis* to grow beyond its original scope of application and take on the attributes of customary international law or to "interpret the terms of another, more general norm."<sup>311</sup> Furthermore, strict segregation of the relevant legal principles may be inappropriate or impracticable in cases where there is a particularly strong connection between two areas of law, as is the case between mandatory procedural norms in international commercial arbitration and international commercial litigation.<sup>312</sup> Therefore, it appears possible to use judicial and arbitral authorities describing procedural limits in international commercial arbitration as a means

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national law); Antonin Scalia, Commentary, *International Judicial Tribunals and the Courts of the Americas: A Comment with Emphasis on Human Rights Laws*, 40 ST. LOUIS U. L.J. 1119, 1122 (1996) (same).

309. See New York Convention, *supra* note 279; Model Arbitration Law, *supra* note 283; JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW 387–89, 410–11 (2003); Bachand, *supra* note 285, at 84.

310. See PAUWELYN, *supra* note 309, at 387–89, 410–11.

311. *Id.* at 410–11; see also Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 611 (2007); Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123, 129 (2003) ("[T]he BIT movement has moved beyond *lex specialis* (or better, *leges speciales*) to the level of customary law effective even for non-signatories."); Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 114–15 (2005).

312. See *supra* notes 264–74 and accompanying text.

of identifying a customary international law that also describes the limits of procedural autonomy in international commercial litigation.

The concept of a customary international law of procedure appears to have been first proposed by Professor Thomas Wälde when he suggested that various decisions of the European Court of Human Rights could be said to constitute a “customary international law of procedure.”<sup>313</sup> In Wälde’s view, principles relating to Article 6 of the European Convention on Human Rights should be considered to apply in investment arbitration by virtue of Article 52(1)(d) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention),<sup>314</sup> which discusses annulment of an investment award on the basis of a serious departure from a fundamental rule of procedure.<sup>315</sup> Notably,

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313. Thomas W. Wälde, *Procedural Challenges in Investment Arbitration Under the Shadow of the Dual Role of the State; Asymmetries and Tribunals’ Duty to Ensure, Pro-actively, the Equality of Arms*, 26 ARB. INT’L 3, 11 (2010); see also European Convention, *supra* note 301, art. 6. Wälde’s point also raises the question of whether certain procedural practices should be considered to constitute a form of *jus cogens* that is applicable in both arbitration and litigation. See Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679; JAKSIC, *supra* note 300, at 35–43; MARTTI KOSKENNIEMI, INT’L LAW COMM’N STUDY GRP. ON FRAGMENTATION, FRAGMENTATION OF INTERNATIONAL LAW § 2.5.3, [http://legal.un.org/ilc/sessions/55/fragmentation\\_outline.pdf](http://legal.un.org/ilc/sessions/55/fragmentation_outline.pdf); Anja Lindroos, *Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, 74 NORDIC J. INT’L L. 27, 28–29 (2005); Wälde, *supra*, at 10–11. At this point, the principle of *jus cogens* is still under development, and there are those who would claim that *jus cogens* refers only to substantive rights. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 510–12 (7th ed. 2008). However, other commentators have argued that certain procedural norms can and should be included within the concept of *jus cogens* because they arise as a matter of necessity to give effect to various substantive norms. See Sévrine Knuchel, *State Immunity and the Promise of Jus Cogens*, 9 NW. J. INT’L HUM. RTS. 149, 29–30 (2011). Thus, the notion of a type of “procedural *jus cogens*” is not outside the realm of possibility, although a discussion of that point is beyond the scope of the current Article.

314. See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 52(1)(d), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]; Wälde, *supra* note 313, at 10–11.

315. See ICSID Convention, *supra* note 314, art. 52(1)(d); LEW ET AL., *supra* note 32, ¶ 28-104 (noting that the fundamental rules of procedure include “rules of natural justice such as the right to be heard, equal treatment of the parties and impartiality of the arbitrators”); Wälde, *supra* note 313, at 10–11.

the concept of a serious departure from a fundamental or mandatory rule of procedure is also implicitly recognized in Article V of the New York Convention.<sup>316</sup>

Wälde's hypothesis that the boundaries between arbitration and litigation are relatively fluid with respect to procedural fairness is consistent with the perspective advanced in this Article and by other courts and commentators.<sup>317</sup> However, Wälde's proposal began with judicial norms and moved to arbitration. The question is whether it is possible to make a similar leap from arbitration to litigation.

Such a move appears possible pursuant to a three-step analysis. First is the recognition, as enunciated by Professor Ian Brownlie, that "collections of municipal cases" are critical to the "assessment of the customary law."<sup>318</sup> The various compilations of domestic court decisions relating to international commercial arbitration would appear to qualify as "collections of municipal cases" within Brownlie's meaning.<sup>319</sup> This interpretation appears to apply even though the rights in question arise initially as a matter of international law, since the various principles are incorporated into national law and, in some cases, are even interpreted in light of domestic constitutional norms.<sup>320</sup>

Second, to be recognized as customary international law, a particular practice must be of sufficient duration, reflect a degree of uniformity and consistency, be of a general nature, and be accepted as law.<sup>321</sup> Although a detailed analysis of each of these four elements is beyond the scope of the current Article, the fundamental procedural norms recognized in the law relating to international commercial arbitration appear to meet

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316. See New York Convention, *supra* note 279, art. V; see also *infra* notes 330–53 and accompanying text.

317. See ALI & UNIDROIT, *supra* note 10, at 17; Schultz, *supra* note 133, at 7–8 (discussing the 2001 decision of the Swiss Federal Tribunal in *Abel Xavier v. UEFA*).

318. BROWNLIE, *supra* note 313, at 52.

319. *Id.*; see also Bachand, *supra* note 285, at 84; Lowenfeld, *supra* note 311, at 129–30; Salacuse & Sullivan, *supra* note 311, at 114–15.

320. See *supra* notes 282–85 and accompanying text (discussing domestic application of international law). Although judges are supposed to interpret the various instruments in light of international legal principles, courts will sometimes consider core procedural protections in light of domestic constitutional norms. See Strong, *Due Process*, *supra* note 98, at 59–60.

321. See BROWNLIE, *supra* note 313, at 7–8.

each of these requirements.<sup>322</sup> For example, the procedural protections embodied in international commercial arbitration have been recognized since 1959, when the New York Convention came into force.<sup>323</sup> While the international arbitral community is continually striving to improve consistency of interpretation in national courts,<sup>324</sup> the various principles are currently construed in a relatively uniform manner and are recognized as binding.<sup>325</sup> Furthermore, the various norms are of a general nature, as discussed in more detail below.<sup>326</sup>

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322. See *id.* at 6–7 (discussing evidence of international custom); KURKELA & TURUNEN, *supra* note 6, at 10–11.

323. See New York Convention Status, *supra* note 279.

324. Although a number of these initiatives come from the private sector, public bodies such as UNCITRAL have also tried to promote consistency in the interpretation and application of various UNCITRAL texts on international commercial arbitration. Not only did UNCITRAL promulgate the Model Arbitration Law in order to increase the consistent application of the principles found in the New York Convention in jurisdictions around the world, it also adopted a formal recommendation concerning the interpretation of the form requirements found in the New York Convention and the application of national law to matters relating to the enforcement of foreign arbitral awards. See New York Convention, *supra* note 279, arts. II(2), VII(2); Model Arbitration Law, *supra* note 283; UNCITRAL, *Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. Doc. A/61/17; GAOR, 61st Sess., Supp. No. 17, Annex II (July 7, 2006); Park, *supra* note 283, at 1243; S.I. Strong, *What Constitutes an “Agreement in Writing” in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act*, 48 STAN. J. INT’L L. 47, 51 (2012). Judicial training efforts, including those by the Federal Judicial Center, the International Council for Commercial Arbitration (ICCA), and the Organization of American States (OAS), have also attempted to make international commercial arbitration more consistent. See STRONG, GUIDE, *supra* note 32; *New York Convention Roadshow*, ICCA, [http://www.arbitration-icca.org/NY\\_Convention\\_Roadshow.html](http://www.arbitration-icca.org/NY_Convention_Roadshow.html) (last visited Apr. 7, 2014); *International Commercial Arbitration: Award Enforcement*, OAS, [http://www.oas.org/en/sla/dil/international\\_commercial\\_arbitration.asp](http://www.oas.org/en/sla/dil/international_commercial_arbitration.asp) (last visited Apr. 13, 2014).

325. See BORN, ICA, *supra* note 3, at 5; S.I. Strong, *Beyond the Self-Execution Analysis: Rationalizing Constitutional, Treaty and Statutory Interpretation in International Commercial Arbitration*, 53 VA. J. INT’L L. 499, 525–27 (2013) [hereinafter Strong, *Beyond*] (discussing UNCITRAL studies on international consistency in international commercial arbitration). Some aspects of the New York Convention are directed specifically to national courts themselves. See New York Convention, *supra* note 279, art. II(3); Strong, *Beyond*, *supra*, at 519–20.

326. See *infra* notes 330–53 and accompanying text.

The third and final step requires norms that have been developed and recognized in the arbitral context to be transferred to the judicial realm. This, of course, is the most controversial aspect of this proposition. However, courts and commentators have suggested that litigation and arbitration operate as functional equivalents at a structural level,<sup>327</sup> which would suggest that it would be appropriate to extend those analogies into the substantive arena. Indeed, regardless of whether arbitration is framed as a substitute for or alternative to judicial proceedings,<sup>328</sup> individual parties would appear entitled to the same core procedural protections.

Notably, the emphasis in this discussion is on certain fundamental norms, since it is well-established that parties in arbitration surrender some types of procedural protections that would normally be available as a matter of domestic law.<sup>329</sup> Since the propriety of this final step can be better analyzed in context, the discussion continues with an analysis of the content of procedural fairness norms in international commercial arbitration.

### 3. Content of Procedural Fairness Norms in International Commercial Arbitration

Describing the content of the various norms of procedural fairness in international commercial arbitration is a relatively straightforward affair and begins with Article V of the New

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327. See Michaels, *supra* note 160, at 342, 357 (describing equivalence functionalism); see also Schultz, *supra* note 133, at 2 (noting "awards are recognised as equivalents to judgments").

328. See EDMONSON, *supra* note 234, § 1:1, at 1-3, § 1:3, at 1-8 to 1-9; Buys, *supra* note 234, at 93-94; Davis & Hershkoff, *supra* note 11, at 535-37; Mayer, *supra* note 234, at 26; Stempel, *supra* note 234, at 260; Sternlight, *supra* note 234, at 1673; S.I. Strong, *Discovery Under 28 U.S.C. §1782: Distinguishing International Commercial Arbitration and International Investment Arbitration*, 1 STAN. J. COMPLEX LITIG. 295, 348-49 (2013) (framing arbitration as a form of concurrent jurisdiction); Strong, *First Principles*, *supra* note 234, at 241-45.

329. See Richard C. Reuben, *Process Purity and Innovation: A Response to Professors Stempel, Cole, and Drahozal*, 8 NEV. L.J. 271, 281-82 (2007) [hereinafter Reuben, *Process*] (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991), and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).



York Convention.<sup>330</sup> That provision states in relevant regard that

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

...

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

...

(d) The . . . arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place. . . .

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

...

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.<sup>331</sup>

Thus, the New York Convention suggests that the procedure chosen by the parties may not violate fundamental norms in-

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330. See New York Convention, *supra* note 279, art. V. Article V also addresses the invalidity of the arbitration agreement or the incapacity of the parties, *see id.* art. V(1)(a); matters not falling within the scope of the arbitration agreement, *see id.* art. V(1)(c); appointment of the arbitral tribunal, *see id.* art. V(1)(d); awards that have not yet become binding or that have been set aside, *see id.* art. V(1)(e); and the non-arbitrability of the subject matter of the dispute, *see id.* art. V(2)(a). However, these matters are not procedural in the same way that the issues described in Articles V(1)(b), V(1)(d), and V(2)(b) are. *See id.* arts. V(1)(b), V(1)(d), and V(2)(b).

331. *Id.* art. V. The concepts reflected in Article V(1) “safeguard the parties against private injustice,” whereas those found in Article V(2) “serve[] as an explicit catchall for the enforcement of a country’s own vital interests.” Park & Yanos, *supra* note 279, at 259. Sometimes matters of procedural fairness are discussed under Article V(1) and sometimes they are elevated to Article V(2)(b), which allows application of the public policy of the forum state, albeit through an international lens. *See* New York Convention, *supra* note 279, art. V; Strong, *Due Process*, *supra* note 98, at 59–60.



volving proper notice, presentation of one's case, or public policy.<sup>332</sup> The Convention also recognizes that states may include certain additional procedural safeguards in their arbitration laws,<sup>333</sup> although the parties may contract out of those provisions.<sup>334</sup>

These provisions have been construed on numerous occasions by courts from around the world, and the decisions have been collected in various databases and yearbooks.<sup>335</sup> Scholars and arbitrators have also played an active role in identifying the boundaries of procedural fairness in arbitration.<sup>336</sup> The depth and breadth of case law, arbitral awards, and commentary in this field prohibit a comprehensive independent analysis of the underlying principles in the current Article.<sup>337</sup> However, the discussion does not need to be very detailed in order to make the necessary points.

Commentators agree that the concept of due process in international arbitration "refers to a number of notions with varying

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332. See New York Convention, *supra* note 279, art. V. Other aspects of arbitral law indicate that parties are entitled to a tribunal that is impartial, independent, and neutral, although those principles are not specifically mentioned in the New York Convention. See *id.*; BORN, ICA, *supra* note 3, at 1494–1507; Andrews, *supra* note 182; see also *supra* notes 235, 266 and accompanying text.

333. Arbitration laws are not the same as rules of civil procedure. See STRONG, GUIDE, *supra* note 32, at 14. National rules of civil procedure do not apply in arbitration, unless the parties have an explicit agreement to that effect. See *InterCarbon Berm., Ltd. v. Caltex Trading & Transp. Corp.*, 146 F.R.D. 64, 72 (S.D.N.Y. 1993).

334. See New York Convention, *supra* note 279, art. V(1)(d). For example, parties may contract out of the right to obtain judicial review of the merits of an arbitral award under the English Arbitration Act 1996. See Arbitration Act, 1996, c. 23, § 69 (Eng.).

335. See New York Convention, *supra* note 279, art. V; see also *supra* note 295 and accompanying text. National courts have also construed similar provisions under the Model Arbitration Law. See Model Arbitration Law, *supra* note 283; see also *supra* note 295 and accompanying text.

336. Scholarly commentary holds a particular place of prestige in international commercial arbitration due to civil law influences and the private nature of the arbitral procedure. See Strong, *Sources*, *supra* note 271, at 150–51. Arbitral awards are also an excellent source of information about the procedures used in arbitration. See *id.* at 142–43.

337. Entire books have been devoted to the subject of due process in international commercial arbitration. See KURKELA & TURUNEN, *supra* note 6; see also JAKSIC, *supra* note 300, at 227–44; PETROCHILLOS, *supra* note 263, ¶¶ 4.85–4.94; see also Steindl, *supra* note 295, at 255–82.

names under different national laws, including natural justice, procedural fairness, the right or opportunity to be heard, the so-called *principe de la contradiction* and equal treatment.”<sup>338</sup> This principle “is often understood as a ‘hard’ rule of law, a kind of a core or foundation of all other procedural rules, the violation or disregard of which will lead to unenforceability of the award or decision given.”<sup>339</sup> “In many national laws this core is described as *ordre public* or public policy.”<sup>340</sup>

These principles are considered fundamental or mandatory in nature.<sup>341</sup> Thus,

[t]he parties cannot . . . waive the irreducible core of procedural guarantees, such as the right to an independent and impartial court, the right to a fair trial and the due process of law which are sine qua non for liberty, dignity, justice and primarily for the maintenance of the precedence of the rule of law principle.<sup>342</sup>

The non-waivable nature of these concepts suggests that they are as applicable in litigation as they are in arbitration.

Although the content of these norms is extremely consistent at its core, the arbitral regime tolerates a certain amount of diversity in how these principles are protected.<sup>343</sup> Variations arise as a result of the autonomy exercised by the parties in their arbitration agreements and choice of institutional rules of procedure, as well as through default provisions contained in

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338. Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT’L L. 1313, 1321 (2003) (citations omitted).

339. MATTI S. KURKELA & HANNES SNELLMAN, DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION 1 (2005).

340. *Id.* at 4.

341. However, it is not clear whether the rights are always constitutional in nature. *See id.*; KURKELA & TURUNEN, *supra* note 6, at 10; Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1203 (2009) (discussing subconstitutional nature of certain public policies); Stephen M. Schwebel & Susan G. Lahne, *Public Policy and Arbitral Procedure*, in COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION, VIII ICCA CONG. SER. (1986 New York) 205, 209 (Pieter Sanders ed., 1986) (discussing public policy’s constituent elements); James Y. Stern, Note, *Choice of Law, the Constitution, and Lochner*, 94 VA. L. REV. 1509, 1524 (2008) (noting public policy exceptions to enforcement of foreign judgments have at times been framed as subconstitutional in nature).

342. JAKSIC, *supra* note 300, at 218.

343. *See* Schultz, *supra* note 133, at 9.

the relevant national arbitration law.<sup>344</sup> Arbitral tribunals also retain a great deal of discretion to adopt procedures that are tailored to the dispute at hand.<sup>345</sup>

Although international commercial arbitration permits a significant amount of procedural diversity, parties seldom operate outside of certain relatively well-established parameters.<sup>346</sup> Much of the procedural standardization in arbitration arises as a result of the widespread use of institutional rules of procedure, which are similar in most regards and which harmonize some of the key differences between common law and civil law legal systems.<sup>347</sup> Thus, international arbitral proceedings typically feature certain common law elements (such as cross-examination of witnesses, limited exchange of documents between the parties, and a single evidentiary hearing) as well as various civil law features (such as the use of adverse inferences and early submission of documentary evidence).<sup>348</sup>

Some commentators have suggested that international commercial arbitration differs from litigation because parties in arbitration can select certain procedures, such as documents-only or fast-track arbitration, that are not generally available in court.<sup>349</sup> However, judicial analogues can be found for most, if not all, of these purportedly unique arbitral mechanisms. For example, some jurisdictions have created “rocket dockets” that simulate fast-track arbitration.<sup>350</sup> Other courts allow litigation to proceed on a documents-only basis if the parties consent to such procedures.<sup>351</sup> As a result, the differences between arbi-

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344. See BORN, ICA, *supra* note 3, at 1785–94; LEW ET AL., *supra* note 32, ¶¶ 21-5 to 21-18.

345. See LEW ET AL., *supra* note 32, ¶¶ 21-12 to 21-13. Though potentially broad, arbitral discretion is largely circumscribed in practice by party agreement as well as by the norms and principles described in various treatises, rules, and arbitral awards, and therefore is not completely unbounded. See STRONG, GUIDE, *supra* note 32, at 19.

346. See O'Connor & Drahozal, *supra* note 9.

347. See BORN, ICA, *supra* note 3, at 1785–92; LEW ET AL., *supra* note 32, ¶¶ 21-33 to 21-39; O'Connor & Drahozal, *supra* note 9.

348. See BORN, ICA, *supra* note 3, at 1785–92.

349. See *id.* at 1232 n.442; see also Schultz, *supra* note 133, at 6–7 (discussing expedited arbitration).

350. See Carrie E. Johnson, *Rocket Dockets: Reducing Delay in Federal Civil Litigation*, 85 CAL. L. REV. 225, 233–37 (1997).

351. See *The Pennsylvania Tax Appeals Process and Suggested Reform*, 8 PITT. TAX REV. 5, 10 (2010); Daniel F. Solomon, *Summary of Administrative Law Judge Responsibilities*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 475, 476,

tration and litigation appear to be diminishing, at least in the cross-border commercial context.

Furthermore, the literature suggests that most forms of procedural autonomy in arbitration do not result in a violation of international due process norms, even when the parties have agreed to limit the use of certain types of procedures typically found in their home jurisdiction and adopt practices more routinely seen in other legal traditions.<sup>352</sup> This phenomenon suggests that procedural fairness can exist even in the midst of procedural diversity, a conclusion that is as relevant in international commercial litigation as in international commercial arbitration.<sup>353</sup>

#### 4. Comparison of Arbitral and Constitutional Standards of Due Process

Some people might resist the notion that due process norms can be transferred from arbitration to litigation because arbitration is considered to constitute a form of “rough justice” that grants only minimal due process protections.<sup>354</sup> However, the idea that arbitration reflects a type of mandatory procedural minimum works to the benefit of the current analysis, since that principle can also be used to describe the outer bounds of procedural autonomy. The relevance of arbitral due process minimums to litigation is even more apparent given that the

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501 (2011) (discussing how parties in administrative disputes can waive their right to a hearing); *see also* *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), 2013 WL 5548913, \*1–3 (S.D.N.Y. Oct. 7, 2013) (using witness statements instead of affirmative oral testimony, which is more often seen in international commercial arbitration than in litigation); CPR Economical Litigation Agreement, *supra* note 37, § 7.4 (waiving oral argument in many types of motion practice).

352. *See supra* notes 347–48 and accompanying text.

353. The same conclusions could be drawn from decisions relating to the recognition and enforcement of foreign judgments, which also look to broad principles of procedural fairness rather than similarities of particular procedural practices. *See* Strong, *Judgments*, *supra* note 14. However, analyses of these decisions can be extremely difficult because courts are considering more than procedural fairness. *See id.* (noting the role that reciprocity, public policy, and other issues play in decisions relating to foreign judgments). The relatively limited nature of procedural review in arbitration makes the analysis easier and more transparent. *See* BORN, ICA, *supra* note 3, at 2739.

354. *See* Reuben, *Process*, *supra* note 329, at 281–82 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991), and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

core, non-derogable norms that are considered to form a “hard rule of law” in international commercial arbitration bear a striking resemblance to certain basic constitutional principles of procedural fairness.<sup>355</sup>

Domestic standards of constitutional due process<sup>356</sup> have traditionally been considered inapplicable to arbitration because arbitration does not constitute state action *per se*.<sup>357</sup> Nevertheless, Professor Peter Rutledge has suggested that “constitutional principles have seeped into arbitration through other mechanisms,” thereby establishing a *de facto* need for arbitration to comply with U.S. law regarding procedural due process.<sup>358</sup> This “seepage” occurs through a variety of means, including public policy provisions in various international treaties and national laws concerning international commercial arbitration.<sup>359</sup>

Professor Richard Reuben has also identified a connection between U.S. constitutional law and arbitration based on a theory of shared state action.<sup>360</sup> Although arbitration is technically a private form of dispute resolution, Reuben sees courts as becoming increasingly involved in overseeing, facilitating, and enforcing arbitration agreements.<sup>361</sup> Reuben believes this pub-

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355. KURKELA & SNELLMAN, *supra* note 339, at 1.

356. See U.S. CONST. amend. V; Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (stating “(d)ue process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances” and noting that “[d]ue process is flexible and calls for such procedural protections as the particular situation demands” (citations omitted)); Fuentes v. Shevin, 407 U.S. 67, 80 (1972); Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL’Y REV. 1, 8–9 (2006). The discussion here will focus on U.S. law, although a comparative analysis of different jurisdictions would eventually be useful.

357. See RUTLEDGE, *supra* note 85, at 144–45. The one exception to this general proviso is court-annexed arbitration, which clearly constitutes state action. See *id.* at 131; see also Amy J. Schmitz, *Nonconsensual + Nonbinding = Nonsensical? Reconsidering Court-Connected Arbitration Programs*, 10 CARDOZO J. CONFLICT RESOL. 587, 603–06 (2009).

358. RUTLEDGE, *supra* note 85, at 145–59.

359. *Id.*

360. See Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 956–58 (2000).

361. See *id.*

lic element is enough to trigger a duty to apply constitutional standards of procedural fairness in arbitration.<sup>362</sup>

These commentators' views have some notable support from Lord Neuberger, President of the Supreme Court of the United Kingdom, who recently stated that arbitrators have "a duty to act judicially" because they "are participating in the rule of law" when they are deciding cases.<sup>363</sup> Interestingly, this obligation is owed not only "to the parties to the arbitration, but . . . also . . . to the public."<sup>364</sup> While this principle has obvious structural implications,<sup>365</sup> it also carries important substantive ramifications, since it suggests that procedural practices in arbitration cannot drop below the minimum necessary for the rule of law.<sup>366</sup>

Regardless of whether one believes that constitutional principles must, or simply, may be applied in arbitration, it is nevertheless possible to consider whether and to what extent arbitral standards of due process are currently consistent with U.S. constitutional norms. For example, basic procedural norms in arbitration focus primarily on the opportunity to be heard (which includes notice), equality of arms, and use of an impartial adjudicator.<sup>367</sup> Interestingly, Professor Niki Kuckes has argued that

the essential element of procedural due process [in the United States], as clearly established in civil settings, is that notice and a hearing must ordinarily precede any governmental dep-

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362. *See id.*

363. Lord Neuberger, Address to Property Arbitrators at the ARBRIX Annual Conference, London (Nov. 12, 2013), <http://www.supremecourt.gov.uk/docs/speech-131112.pdf>.

364. *Id.*

365. For example, Lord Neuberger takes the view that arbitrators "are giving effect to the parties' contract in accordance with substantive and procedural legal principles," which contradicts assertions by certain commentators that arbitrators do not interpret and apply legal precedent. *Id.*; *see also* Bone, *supra* note 30, at 1386–88; *supra* notes 360–64 and accompanying text.

366. *See* Andrews, *supra* note 182; Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 7–9 (2008) (discussing procedural aspects of the rule of law); *see also* Richard H. Fallon, Jr., "The Rule of Law" as a Concept in *Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997) (discussing four conceptions of the rule of law); *supra* note 266.

367. *See* Kaufmann-Kohler, *supra* note 338, at 1321–22; Strong, *Due Process*, *supra* note 98, at 53–75; Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1770 (2006).

privation of a liberty or property interest. . . . [I]t is useful to refer to the notice-and-hearing model as a "civil" model of due process because it is in civil settings that this test is clearly established as the single constitutional approach to procedural due process.<sup>368</sup>

This description not only provides a useful retrospective analysis of how U.S. courts have behaved in the past, it also suggests how courts might act in the future. For example,

[w]hen a majority of Justices in *Hamdi* agreed on the core requirements of procedural due process, . . . they applied a classic civil formulation—the right to notice and an opportunity to be heard before an impartial adjudicator—as the correct constitutional approach to due process even for the executive detention of enemy combatants, a new and controversial civil setting.<sup>369</sup>

*Hamdi* therefore suggests that this basic standard of procedural fairness in civil litigation will be adopted in other types of novel circumstances, including, it is assumed, in cases involving individualized procedural contracts.<sup>370</sup> *Hamdi* also demonstrates a certain amount of consistency between judicial and arbitral standards relating to procedural due process, thereby suggesting that the corpus of authority concerning procedural fairness in international commercial arbitration may be relied upon to define procedural fairness in international commercial litigation.<sup>371</sup>

However, *Hamdi* is lacking in one notable regard.<sup>372</sup> Although arbitral standards of procedural fairness require equality of arms between the parties, *Hamdi* makes no mention of that particular principle.<sup>373</sup> This omission may simply be due to

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368. Kuckes, *supra* note 356, at 8–9 (footnotes omitted). Although notice appears to be a core element of due process in both litigation and arbitration, some authorities have suggested that parties may alter the means by which notice is given or even waive notice altogether. See *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 351 (1996) (discussing *cognovit* notes).

369. Kuckes, *supra* note 356, at 8–9 (footnotes omitted) (discussing *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)).

370. See *Hamdi*, 542 U.S. at 533.

371. See *id.*

372. See *id.*

373. See *id.*



the fact that *Hamdi* was more concerned with constitutional notions of procedural due process rather than equal protection *per se*.<sup>374</sup> However, this lacuna may also be attributed to the fact that the concept of “equality of arms” is better developed in international jurisprudence than in domestic U.S. case law.<sup>375</sup>

The international understanding of “equality of arms” is not precisely synonymous with equal protection under the U.S. Constitution.<sup>376</sup> For example, the notion of “equality of arms” involves “the fundamental principle that a party should be afforded a reasonable opportunity to present its case in conditions that do not place it at a substantial disadvantage vis-à-vis its adversary.”<sup>377</sup> While U.S. equal protection analyses incorporate some of these principles, the primary emphasis in U.S. civil litigation is on ensuring access to the courts<sup>378</sup> rather than on addressing the kinds of procedural disadvantages that can arise when parties come from different legal systems.<sup>379</sup> Focusing on access makes sense in a domestic system where a trans-substantive and purportedly uniform code of procedure is assumed to assuage most, if not all, outcome-determinative disparities that could arise between parties.<sup>380</sup> However, cross-

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374. See U.S. CONST. amend. XIV; *Hamdi*, 542 U.S. at 533; Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From Brown to Miranda, Furman and Beyond*, 54 VAND. L. REV. 359, 384 & n.128 (2001).

375. See Martha F. Davis, *Participation, Equality, and the Civil Right to Counsel: Lessons from Domestic and International Law*, 122 YALE L.J. 2260, 2264–65 (2013).

376. See U.S. CONST. amend. XIV.

377. Davis, *supra* note 375, at 2264–65.

378. See Helen Hershkoff, *Poverty Law and Civil Procedure: Rethinking the First-Year Course*, 34 FORDHAM URB. L.J. 1326, 1332–33 (2007). Many of these actions have been unavailing, even in cases arising under the Equal Protection Clause of the U.S. Constitution. See U.S. CONST. amend. XIV; Hershkoff, *supra*, at 1332–33. Equal protection claims also involve group identity, although some commentators have suggested that those injuries have “migrated” to the realm of due process. See Joseph Blocher, *Rights To and Not To*, 100 CALIF. L. REV. 761, 806 (2012).

379. For example, a number of procedural advantages can arise as a result of differences relating to the taking of evidence, preparation of witnesses, and evidentiary privileges. See, e.g., Berger, *Privileges*, *supra* note 16, at 517–18 (discussing evidentiary privileges); Strong & Dries, *supra* note 248, at 311–12 (discussing the presentation of evidence); Wälde, *supra* note 313, at 17–36 (discussing cases involving state parties).

380. See Marcus, *Past*, *supra* note 76, at 374, 376–80 (discussing purposes of trans-substantivity and disconnect with uniformity).

border litigants experience different sorts of issues, and, as parties in international commercial arbitration have found, a more flexible approach may be necessary to address various substantive and structural imbalances that arise.<sup>381</sup> Indeed, “[a]s transnational litigation continues to become the bread and butter for more and more lawyers, the absolute insistence on the application of the procedural law of the forum seems less and less justified without some form of a more complete choice of law analysis.”<sup>382</sup>

Further discussion of the substantive validity of any particular procedural practice is beyond the scope of the current Article, since due process analyses cannot be conducted in the abstract.<sup>383</sup> However, courts appear entirely capable of addressing any concerns that might arise, either through contract-based challenges (such as those based on unconscionability)<sup>384</sup> or via the inherent power of the court.<sup>385</sup> Indeed, the process by which such rulings can be made is even easier in litigation than in

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381. See, e.g., Berger, *Privileges*, *supra* note 16, at 517–18; Strong & Dries, *supra* note 248, at 311–12; Wälde, *supra* note 313, at 17–36.

382. Anton, *supra* note 87, at 489; see also BORN, *DRAFTING*, *supra* note 2, at 1 (suggesting procedure can have an effect on the outcome of a dispute).

383. See JAKSIC, *supra* note 300, at 227 (“[T]he right to a fair hearing represents an independent procedural guarantee whose contents are open and is to be determined in each particular case.”); see also *id.* at 230 (“[I]t is unlikely to expect that one could evaluate in abstracto the compliance of the arbitral process as a whole with the requirements of the right to a fair trial as laid down in Articles 6(1) of the EHRC and 14(1) of the Political Covenant respectively.”). Future analyses might consider the concept of procedural fairness from a socio-psychological perspective. See Nancy A. Welsh et al., *Why Theory Matters in Investor-State Dispute Resolution Processes*, 42 WA. U. J.L. & POL’Y (forthcoming 2014).

384. This approach has been effective in eliminating procedural unfairness in domestic arbitration. See *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1746 (2011); *Rent-A-Center West, Inc. v. Jackson*, 130 S.Ct. 2772, 2780–81 (2010). For example, it has been suggested that the concept of equality in litigation might be so fundamental that it cannot be contracted around as a matter of public policy. See *Am. Airlines, Inc. v. Wolens*, 513 U.S. 291, 249–50 (1995) (O’Connor, J., concurring in part and dissenting in part).

385. See *Matter of Dunleavy*, 769 P.2d 1271, 1272 (Nev. 1988) (noting inherent judicial powers include the “power to take actions reasonably necessary to administer justice efficiently, fairly, and economically”); Anclien, *supra* note 256, at 43.

arbitration, since the court has both initial and continuing jurisdiction over the parties.<sup>386</sup>

### *C. Interim Conclusions*

The preceding section has explored the idea that international commercial arbitration can provide an appropriate and useful means of identifying the substantive limits of procedural autonomy in international commercial litigation. This hypothesis is based not only on the functional similarities between arbitration and litigation, but also on the fact that international commercial arbitration has a well-developed body of law describing certain mandatory procedural minimums from which the parties may not derogate. Since parties may not contract around these norms in arbitration, it is logical to conclude that parties in litigation would also be prohibited from altering these procedures.

The transferability of arbitral norms to litigation is also supported by a content-based analysis. Although the standards described herein are relatively general in nature, arbitral standards of due process appear very similar to domestic principles of constitutional due process. While it will eventually be necessary to conduct a more extensive analysis of other nations' fundamental procedural norms, one would expect the research to show a relatively high degree of consistency between the outer bounds of procedural autonomy in international commercial arbitration and the limits of autonomy in national and international litigation, since the standards that have been developed in international commercial arbitration have been generated by long-term comparative analyses of domestic and international law.

## IV. LOGISTICAL CONCERNS

Although parties will need to consider carefully whether and to what extent a particular procedural practice is amenable to customization before entering into an agreement involving that issue, this Article takes the view that, generally speaking, procedural contracts are possible in international commercial dis-

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386. Concerns about procedural fairness can arise at the beginning or end of an arbitration and can be heard by either a court or an arbitral tribunal, although courts always have the final say on such matters. See STRONG, GUIDE, *supra* note 32, at 37–41, 65–66, 73–85.

putes as both a structural and substantive matter. This conclusion should increase the number of procedural contracts that appear in practice, since some of the uncertainty about the enforceability of such contracts has now been eliminated.

However, the fact that procedural contracts appear enforceable as a general matter does not mean that parties should start drafting those sorts of provisions without any further concerns. Instead, parties need to consider a number of logistical issues before entering into an agreement purporting to alter the procedures used in a particular court.

#### *A. Standalone Versus Embedded Agreements*

Experience with arbitration agreements and forum selection clauses suggests that procedural agreements can either be incorporated into a larger transactional document or memorialized independently.<sup>387</sup> To some extent, parties' preference for a particular type of contract may be driven by various external factors, such as when the agreement is made.<sup>388</sup>

However, one issue that may arise in cases of embedded provisions is whether the procedural agreement survives allegations that the contract in which the procedural provision is found is invalid, illegal, void, or voidable. Such claims have not proven unduly problematic in situations involving forum selection clauses or arbitration agreements, but this is a matter that may need to be considered with respect to private procedural contracts.<sup>389</sup>

#### *B. Pre-Dispute Versus Post-Dispute Agreements*

Experience with arbitration agreements and forum selection clauses suggests that parties may be most likely to enter into a procedural agreement before the dispute arises, since tactical considerations (either real or perceived) may preclude an

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387. See COCA, *supra* note 22, art. 3(d); BORN, DRAFTING, *supra* note 2, at 37.

388. See *infra* notes 390–94 and accompanying text.

389. For example, the arbitral principle of separability ensures the continuing validity of an embedded arbitration agreement even if the larger contract is said to be invalid, illegal, or terminated. See BORN, DRAFTING, *supra* note 2, at 136. While this principle is likely applied to forum selection provisions as well, there is far less authority on that point. See *id.* However, COCA will resolve some of these issues once that instrument comes into force. See COCA, *supra* note 22, art. 3(d); see also *supra* note 22.

agreement on procedural matters once hostilities have begun.<sup>390</sup> However, pre-dispute agreements may not be suitable in all circumstances, either because the parties do not have a pre-existing contractual relationship or because of policy concerns about waiving or amending certain procedural rights prior to the time the dispute arises.<sup>391</sup>

A full analysis of potential policy issues is beyond the scope of the current Article. However, future inquiries might focus on the adequacy of information at the time of contracting and inequalities in bargaining power.<sup>392</sup> A number of these matters have been considered in the arbitral context,<sup>393</sup> and it is likely that courts will consider procedural contracts in a similar light.<sup>394</sup>

### C. Customized Clauses Versus Model Agreements

Parties seeking to draft a private procedural agreement must also decide whether to create their own customized clause or rely on model language found elsewhere. Here, previous practice provides no clear guidance. For example, arbitration

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390. See Bone, *supra* note 30, at 1349; see also BORN, DRAFTING, *supra* note 2, at 37.

391. See RUTLEDGE, *supra* note 85, at 184–89; Davis & Hershkoff, *supra* note 11, at 527–29; Dodge, *supra* note 30, at 766; Kapeliuk & Klement, *Ex Ante*, *supra* note 30, at 1493–94 (noting public and private implications of timing decisions); see *supra* notes 186–90 and accompanying text.

392. See Davis & Hershkoff, *supra* note 11, at 527–29; Kapeliuk & Klement, *Ex Ante*, *supra* note 30, at 1493–94. Although many scholars focus on whether pre-dispute waivers are appropriate in situations where there is incomplete information, attention must also be paid to the possibility that post-dispute waivers could be deemed invalid as the result of judicial pressure. See *Heenan v. Sobati*, 96 Cal. App. 4th 995, 1003 n.5 (2002).

393. See RUTLEDGE, *supra* note 85, at 184–89. For example, some countries do not permit consumers to enter into pre-dispute arbitration agreements because of concerns about imbalances of power. See Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29; JONATHAN HILL, CROSS-BORDER CONSUMER CONTRACTS 206–07, 215 (2008); Llewellyn Joseph Gibbons, *Creating a Market for Justice: A Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due Process, and Fair Play in Online Consumer Arbitration*, 23 NW. J. INT'L L. & BUS. 1, 56 (2002).

394. See Hoffman, *supra* note 7, at 391, 412–13 (noting arbitration and litigation exhibit analytical similarities as well as dissimilarities). *But see* Kapeliuk & Klement, *Ex Ante*, *supra* note 30, at 1493–94 (discussing public implications).

agreements are typically based on well-known model clauses, since those provisions have been tested over time and are less likely to be found ambiguous or invalid.<sup>395</sup> In contrast, forum selection clauses are more likely to be drafted on an individual, case-by-case basis, although standard language also exists in this context.<sup>396</sup>

To some extent, the decision of whether to use a customized clause versus a model agreement may depend on the complexity of the procedure at issue. While it may seem counterintuitive to use a model agreement in more intricate situations, increased complexity often results in an increased opportunity for error.<sup>397</sup> Therefore, parties may be better served by using a pre-existing model if they intend to alter a large number of procedural practices.

The choice between customized and model language may also depend on the amount of institutional support for a particular process. The widespread popularity of international commercial arbitration has led to the proliferation of model arbitration agreements drafted by arbitral organizations.<sup>398</sup> Parties therefore have a number of different models from which to choose.<sup>399</sup> Even though the same amount of institutional support does not yet exist for private procedural contracts, parties seeking guidance in the drafting process can nevertheless consult several different sources for ideas regarding useful language.<sup>400</sup>

### 1. CPR Model Civil Litigation Prenup

Parties seeking assistance in drafting a private procedural contract might begin by looking at the CPR Economical Litigation Agreement, more commonly referred to as the CPR Model Civil Litigation Prenup.<sup>401</sup> Although this agreement is extremely detailed, the focus is primarily on discovery issues, which has the happy consequence of avoiding many of the concerns relating to the core adjudicative duties of the court or possible interference with the relationship between the court and the

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395. See BORN, DRAFTING, *supra* note 2, at 37–38; RUTLEDGE, *supra* note 85, at 200.

396. See BORN, DRAFTING, *supra* note 2, at 36.

397. See *id.* at 38.

398. See *id.* at 37–38.

399. See *id.*

400. See Noyes, *supra* note 27, at 640–45 (listing various alternatives).

401. See CPR Economical Litigation Agreement, *supra* note 37.

parties.<sup>402</sup> The agreement is specifically tailored to commercial disputes and includes various provisions that are sensitive to the particular demands of cross-border litigation, even though the agreement appears to contemplate a U.S. forum.<sup>403</sup>

The Model Civil Litigation Prenup has not yet been judicially considered, despite the respect with which CPR is held in the legal world and the relatively limited scope of the agreement suggest that courts may be inclined to uphold the provision.<sup>404</sup> Nevertheless, some commentators have argued that the discovery process includes some public elements, and it is possible that some courts may also adopt that perspective.<sup>405</sup>

CPR suggests that parties adopt the Model Civil Litigation Prenup by inserting certain standard language in their transactional document.<sup>406</sup> The provision may be amended by the parties, although such revisions should be made with caution, since they run the risk of creating an ambiguous or otherwise pathological clause.<sup>407</sup> CPR has attempted to avoid any questions about the separability of the Model Civil Litigation Prenup from the underlying contract by including language specifically indicating that the procedural agreement will survive claims relating to “the breach, termination or validity” of the substantive contract.<sup>408</sup>

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402. *See id.* §§ 9–12; *see supra* note 245 and accompanying text (noting discovery is perhaps the easiest procedure to alter). However, some problems could arise with respect to the timing of certain submissions, since some commentators have suggested that amendment of court dates could impermissibly infringe on the judge’s role. *See* CPR Economical Litigation Agreement, *supra* note 37, § 5; Paulson, *supra* note 25, at 476.

403. The agreement’s discussion of jury waivers, depositions, and the work product doctrine all suggest a U.S.-centric perspective, since those are all quintessential U.S. concerns. *See* CPR Economical Litigation Agreement, *supra* note 37, §§ 2, 11, 12.2.5. However, references to foreign privacy laws demonstrate a sensitivity to non-U.S. legal principles. *See id.* § 12.2.5 (discussing the European Union’s Data Protection Directive).

404. *See* CPR Economical Litigation Agreement, *supra* note 37.

405. *See supra* notes 246–47 and accompanying text.

406. *See* CPR Economical Litigation Agreement, *supra* note 37.

407. *See id.*; BORN, DRAFTING, *supra* note 2, at 38.

408. CPR Economical Litigation Agreement, *supra* note 37; *see also* BORN, ICA, *supra* note 3, at 353–54 (discussing separability in the arbitral context).



## 2. The ALI/UNIDROIT Principles of Transnational Civil Procedure

As useful as the CPR Model Civil Litigation Prenup may be, it is largely limited to discovery concerns.<sup>409</sup> Parties seeking a more comprehensive procedural agreement may find inspiration in the ALI/UNIDROIT Principles of Transnational Civil Procedure or the affiliated Rules of Transnational Civil Procedure, which were compiled by the Reporters as a means of “providing greater detail and illustrating concrete fulfillment of the Principles.”<sup>410</sup> Although no U.S. court appears to have considered either the Principles or the Rules in an actual litigation, the respect with which the ALI and UNIDROIT are held worldwide might increase the likelihood that a court will enforce a procedural agreement based on the Principles or Rules.<sup>411</sup>

The ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure were specifically designed for use in international commercial disputes, which may make this framework particularly attractive to parties involved in cross-border transactions.<sup>412</sup> Potential litigants may also be drawn to the ALI and UNIDROIT approach because of its respect for the various substantive concerns discussed in this Article.<sup>413</sup>

As a general matter, the ALI/UNIDROIT Principles of Transnational Civil Procedure do an excellent job in protecting the core elements of procedural fairness discussed in this Article.<sup>414</sup> Thus, the parties’ ability to present their case is guaranteed by provisions requiring “notice . . . by means that are reasonably likely to be effective” as well as language protecting “the right to submit relevant contentions of fact and law and to offer supporting evidence” and the ability to “have a fair oppor-

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409. See CPR Economical Litigation Agreement, *supra* note 37.

410. ALI & UNIDROIT, *supra* note 10, at 99. The Rules are meant “to be interpreted in accordance with the Principles of Transnational Civil Procedure and applied with consideration of the transnational nature of the dispute,” thereby creating an “autonomous mode of interpretation, consistent with the principles and concepts by which they are guided.” ALI & UNIDROIT, *supra* note 10, at 100.

411. See *id.* at xiii–xxii (listing reporters, advisers, and members of the various working and consultative groups); Glenn, *supra* note 21, at 490–91.

412. See ALI & UNIDROIT, *supra* note 10, at 16.

413. See *supra* notes 246–47 and accompanying text.

414. See ALI & UNIDROIT, *supra* note 10, at 20–24, 41.

tunity and reasonably adequate time to respond to contentions of fact and law and to evidence presented by another party, and to orders and suggestions made by the court.”<sup>415</sup> Equality of arms is similarly protected by language requiring “equal treatment and reasonable opportunity for litigants to assert or defend their rights” and the “avoidance of any kind of illegitimate discrimination, particularly on the basis of nationality or residence.”<sup>416</sup> Proceedings are also open to the public, except for good cause.<sup>417</sup>

However, some problems do exist. For example, the Principles are somewhat general, and it may be difficult for parties and courts to put the various concepts into practice.<sup>418</sup> Although the Rules were meant to provide more detail so as to allow parties to implement the Principles, the Rules were not meant to be comprehensive in nature, and some confusion may arise as to which procedures apply in any given situation.<sup>419</sup>

Other issues may arise at the structural level. For example, some aspects of the Principles and Rules could be interpreted as affecting public rather than purely private concerns.<sup>420</sup> While problematic elements could be excised from the parties’ agreement, extensive alterations could very well create ambiguities that could result in an unenforceable agreement.

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415. *Id.* at 22–23.

416. *Id.* at 20–21.

417. *See id.* at 41–42.

418. *See id.*

419. *See id.* at 99–100; GARNETT, *supra* note 20, at 68–69.

420. A considerable amount of debate could arise as to what aspects of litigation relate only to the relationship between the parties. Some of the more promising provisions would likely involve the taking and presentation of evidence. *See* ALI & UNIDROIT, *supra* note 10, at 128–47. Rules relating to the constituent elements of the statement of claim (complaint) and statement of defense could be seen as either public or private in nature. *See id.* at 111–13. Although settlement offers are typically considered to be a private matter in the United States (with the exception of settlements of class actions, which require court approval), the ALI/UNIDROIT rule regarding settlement contains certain public elements. *See id.* at 117–20; *see also* FED. R. CIV. P. 23. Furthermore, provisions requiring a single concentrated hearing could run afoul of traditions developed in civil law systems, although civil law courts could consider those practices waivable. *See* ALI & UNIDROIT, *supra* note 10, at 144–46. Rules regarding the rescission and enforcement of a final judgment could also be seen as affecting issues of institutional design and the state sovereign prerogative. *See id.* at 152–55.

As a result, parties should only adopt the ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure with caution.<sup>421</sup> Courts are more likely to uphold individualized procedural contracts if those agreements do “not do violence to the interests of society and the judiciary,”<sup>422</sup> and it is not yet clear whether and to what extent the Principles and Rules focus only on matters of private concern.<sup>423</sup>

### 3. Partial Adoption of Another State's Procedural Rules

Another possibility for parties seeking to customize their litigation procedures involves the partial adoption of another state's procedural rules. Wholesale incorporation of a foreign state's procedural code would be impossible, since there is no way a forum court could or would allow foreign law to control structural matters involving judicial administration or the relationship between the court and the parties.<sup>424</sup> Furthermore, precedent from the world of international commercial arbitration suggests that the parties' decision to have a dispute heard in a particular venue should be given some weight, even in the face of language purporting to adopt foreign procedural law.<sup>425</sup> However, a judge may be willing to apply foreign procedural law to govern certain specific aspects of the relationship between the parties themselves.

Even a limited choice of foreign procedural law would be not be without controversy, since conflict of laws analyses currently “limit the scope of party autonomy to the chosen state's substantive law and exclude its procedural law.”<sup>426</sup> However, the

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421. See ALI & UNIDROIT, *supra* note 10; GARNETT, *supra* note 20, at 69.

422. Paulson, *supra* note 25, at 478.

423. See ALI & UNIDROIT, *supra* note 10.

424. BORN, DRAFTING, *supra* note 2, at 161.

425. See *Union of India v. McDonnell Douglas Corp.*, [1993] 2 Lloyd's Rep. 48 (Q.B.D.) 50–51 (Eng.). The English court resolved the issue by allowing foreign procedural law to apply to “internal” aspects of the arbitral proceeding, while “external” matters (i.e., those involving the relationship between the arbitration and the courts) remained subject to the law of the arbitral seat. See *id.* This distinction between internal and external matters would also make sense in the litigation context, in that internal matters (i.e., those involving the parties *inter se*) could be made subject to a procedural contract while external matters (i.e., those involving judicial administration and the relationship between the parties and the court) could not.

426. SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS \*29 (chapter 3.IV.E)

traditional conflict of law rule has caused numerous problems over the years, since “the line between substance and procedure is not drawn in the same way in all systems, nor is the line always clear in each system.”<sup>427</sup> Statutes of limitations have been particularly troublesome for both courts and commentators, although other problems also exist.<sup>428</sup>

Interestingly, the Restatement (Second) of Conflict of Laws provides some support for partial adoption of foreign procedural law.<sup>429</sup> For example, the Restatement indicates that “[a] court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case” because “[e]normous burdens are avoided when a court applies its own rules, rather than the rules of another state, to issues relating to judicial administration, such as the proper form of action, service of process, pleading, rules of discovery, mode of trial and execution and costs.”<sup>430</sup> This approach is adopted, at least in part, because “the burdens the court spares itself would have been wasted effort in most instances, because usually the decision in the case would not be altered by applying the other state’s rules of judicial administration.”<sup>431</sup>

Although the initial presumption is in favor of the procedural law of the forum court, the Restatement recognizes that many procedural practices “fall into a gray area between issues relating primarily to judicial administration and those concerned

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(forthcoming 2014); *see also* Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), art. 1(3), 2008 O.J. ( L 177) 6; ALI & UNIDROIT, *supra* note 10.

427. SYMEONIDES, *supra* note 426, at \*29 (chapter 3.IV.E).

428. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 & cmts. a, b (1971); COLLINS ET AL., *supra* note 1, ¶¶ 7-002 to 7-058; SYMEONIDES, *supra* note 426, at \*29–30 (chapter 3.IV.E).

429. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971). While opponents to private procedural contracts may claim that the Restatement requires the law of the forum to govern various procedural issues (such as those involving questions of notice, pleading, etc.), those aspects of the Restatement can be interpreted as indicating that a private procedural contract relating to those matters should be upheld to the extent permitted by local law. *See id.* §§ 123–38.

430. *Id.* § 122 & cmt. a.

431. *Id.* However, as noted previously, procedure can sometimes affect the outcome of a dispute. *See supra* notes 86–87 and accompanying text.

primarily with the rights and liabilities of the parties.”<sup>432</sup> When determining which law to apply, courts may consider a number of factors, including

whether the issue is one to which the parties are likely to have given thought in the course of entering into the transaction. If they probably shaped their actions with reference to the local law of a certain state, this is a weighty reason for applying that law rather than the local law of the forum the plaintiff has chanced to select.<sup>433</sup>

Other relevant concerns may include public and private interests in making the dispute resolution process less expensive, less time-consuming, and less unpredictable.<sup>434</sup> As indicated in this Article, private procedural contracts can not only increase predictability in international commercial litigation,<sup>435</sup> they can also save expenditures by the parties and the court.<sup>436</sup> Therefore, private procedural contracts would appear to be consistent with the Restatement, particularly if the parties specifically chose to have certain principles of foreign procedural law apply.<sup>437</sup>

#### 4. Partial Adoption of Arbitral Rules

Finally, some commentators have suggested that parties seeking to create an individualized procedural contract in litigation could simply adopt various rules of arbitration.<sup>438</sup> This is

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432. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 & cmt. a (1971).

433. *Id.*

434. *See supra* notes 48–95 and accompanying text (noting the U.S. Supreme Court’s interest in avoiding unpredictability in international commercial transactions).

435. *See supra* notes 48–95 and accompanying text.

436. *See supra* notes 167–85 and accompanying text.

437. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 & cmt. a (1971).

438. *See* Noyes, *supra* note 27, at 642–44. Interestingly, the ALI/UNIDROIT Rules of Transnational Civil Procedure are in some ways both more and less detailed than arbitral rules of procedure. *See* ALI & UNIDROIT, *supra* note 10, at 100–56; *see* BORN, ICA, *supra* note 3, at 1753–55, 1782–85 (discussing general provisions of arbitral rules). The ALI/UNIDROIT Rules are more detailed in that they cover a wider range of issues and in a somewhat more comprehensive manner. For example, provisions regarding the taking and presentation of expert and fact evidence are far more detailed than many arbitral rules discussing the same subject. But the rules also lack the specificity of arbitral rules concerning, for example, the

an intriguing notion, particularly given the thesis advanced here that international commercial arbitration can provide useful insights into the outer boundaries of procedural autonomy in litigation.<sup>439</sup>

In many ways, arbitral rules of procedure would provide a useful starting point for parties, since most rule sets include detailed yet flexible provisions on various practical matters such as deadlines for written submissions, the use of fact and expert witnesses, etc.<sup>440</sup> Not only are these rules tailored to the particular needs of parties in international commercial disputes, they also feature a useful degree of procedural harmonization while complying with mandatory rules of due process and procedural fairness.<sup>441</sup>

However, arbitral rules do not provide a perfect fit for parties seeking to identify model language for procedural contracts. Not only are arbitral rules generally too long to be reproduced in their entirety in a transactional document,<sup>442</sup> they also include various structural provisions that would be inappropriate in a litigation context.<sup>443</sup> While the offending language could be omitted so as not to infringe on matters of public concern, parties would need to be careful not to create any ambiguities as a result.<sup>444</sup> Therefore, it appears as if parties should avoid adopting arbitral rules when attempting to create a procedural contract for use in court.

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various deadlines relating to the parties' submissions. *See* ALI & UNIDROIT, *supra* note 10, at 110–15, 139–47; BORN, ICA, *supra* note 3, at 1783.

439. *See infra* notes 264–89 and accompanying text.

440. *See* BORN, ICA, *supra* note 3, at 1783; LEW ET AL., *supra* note 32, ¶ 21–10.

441. *See* BORN, ICA, *supra* note 3, at 169–70, 1753–55; GAILLARD & SAVAGE, *supra* note 229, ¶ 1272; *see also supra* notes 330–86 and accompanying text.

442. *See* BORN, DRAFTING, *supra* note 2, at 38. Any attempt to incorporate these rules by reference could very well lead to arbitration rather than litigation, since the rules are generally not used to modify court proceedings. *See id.*

443. These provisions address the relationship between the arbitration and the court or between the parties, the tribunal, and/or the arbitral institution. *See* BORN, ICA, *supra* note 3, at 1753–55, 1782–85 (discussing general provisions of arbitral rules); STRONG, GUIDE, *supra* note 32, at 18–19.

444. *See* BORN, DRAFTING, *supra* note 2, at 38.

## CONCLUSION

As the preceding discussion has shown, private procedural contracts give rise to a number of structural, substantive, and logistical concerns. However, none of the issues raised in this Article has suggested that parties are or should be considered incapable of altering some of the procedural rules used in court proceedings. To the contrary, it instead appears possible to allow procedural autonomy in some matters while nevertheless preserving important state interests in the administration of justice and the relationship between the courts and the parties.

Much of the analysis conducted herein has been very general in nature. As such, the discussion does not provide specific answers as to whether and to what extent particular procedural practices are amenable to private contract. However, it is hoped that the general methodology adopted herein demonstrates how courts, commentators, and counsel can identify the appropriate limits of procedural autonomy.

This Article has focused primarily on international commercial litigation because those matters typically involve a higher degree of procedural and substantive unpredictability due to the disparate backgrounds of the parties. However, many of the points made here are also applicable to domestic disputes. Indeed, one of the key authorities supporting procedural autonomy in litigation—*Delaware Coalition for Open Government v. Strine*—arose in the domestic context.<sup>445</sup>

There are numerous ways of analyzing private procedural contracts, and all of them—theoretical, practical, contractual, and procedural—have merit. However, this Article has taken the view that the best way to consider these matters is by differentiating between structural concerns, which affect public questions of institutional design, and substantive concerns, which focus on questions of individual liberty and procedural due process. Only by parsing through the underlying public and private interests can these issues truly be understood.

More work is undoubtedly needed in this area of law. For example, it would be useful to consider how structural analyses regarding the public and private aspects of litigation would play out in civil law jurisdictions. Similarly, it would be helpful to know whether the due process norms established in interna-

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445. See *Del. Coal. for Open Gov't v. Strine*, 894 F. Supp. 2d 493 (D. Del. 2012), *aff'd*, 733 F.3d 510 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014).



tional commercial arbitration are consistent with minimum procedural protections in jurisdictions other than the United States. Both of these inquiries will help determine how acceptable private procedural contracts would be around the world and whether such contracts could or would ever replace international commercial arbitration as a realistic method of exercising procedural autonomy.

This Article has taken the view that private procedural contracts provide litigants with the means of structuring their business affairs in an orderly manner while simultaneously respecting issues of institutional design and due process. As a result, these sorts of agreements serve both public and private interests. Although courts and commentators still need to flesh out the precise boundaries of party autonomy on a procedure-by-procedure basis, that work should proceed secure in the understanding that the concept of procedural choice of law should be valued and protected as much as the notion of substantive choice of law.