

‘PRIVATIZING’ CIVIL JUSTICE THROUGH PROCEDURAL AGREEMENTS: A COMPARATIVE LAW ANALYSIS*

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Abstract: This study aims at examining, in a systemic and, to the extent possible, comprehensive manner, the topic of procedural agreements in United States civil procedure law and afterwards to compare the relevant experience with the results of analogous researches conducted in respect with single national procedural systems in Europe.

It is widely recognized that party autonomy is paramount in arbitration and other forms of alternative dispute resolution, but it also can play, as it in fact does, a prominent role in civil procedure, through many forms of agreement whereby the parties, either directly or indirectly, convene to produce a certain effect upon the course of an ongoing or future proceeding: examples can be observed, among others, in forum selection agreements, in provisions regarding admission of facts and consent judgments or decrees, as well as in waivers to judicial recourses, appeals and/or challenges. Despite converging perceptions that party autonomy is given, one way or another, “presence” and relevance in civil procedure, opinions, however, are not unanimous as to the limits of this presence and, since years, a systematic analysis at this regard, at least in continental Europe jurisdictions, is neglected, with the result that the issue appears quite unclear and a very “magmatic” one.

Whilst the study of the topic touches the very basis of any procedural system, a comparative study, here predicated for the U.S. jurisdiction, seems to be useful since it allows to understand a certain legal system in its entirety, hence to appreciate limits and foreseeable uses of such methods for streamlining civil procedure according with the common will of the litigants, consistently with the recent and increasing call, in many procedural traditions, for a more “cooperative” procedure.

Summary: 1. Preliminary remarks: why the US system? Comparing civil procedure laws. Method and merits of the research. - 2 Background of the project. Brief analysis of the “state of the art” in the field (European jurisdictions). - 3. Consensual adjudicatory procedure in the U.S. system. - 3.1 General background. - 3.2 The “arbitration analogy”. - 3.3 Unequal bargaining power. - 3.4 Types of procedural agreements. (3.4.1 - 3.4.18). - 4. Some inklings and “first” impressions.

1. Preliminary remarks : why the US system? Comparing civil procedure laws. Method and “merits” of the research.

Recent years have showed, in multiple legal systems, an increased tendency to “privatize” civil proceedings¹ and the present study seeks to examine this tendency, framing it in the different experiences of every single jurisdiction.

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¹ One may ask why the word “privatize” appears in the title under quotation marks: one provocative answer to this question, as will be pointed out infra, can be found in Sassani, *Il codice italiano di procedura civile e il mito della riforma perenne*, in *Studi in Onore di Juan Montero Aroca*, Valencia, 2012

Whilst the topic had been made subject of analysis only in rather dated contributions, a renewed attention is drawn on the issue and this tendency has to be seen in a rather precise historical context, in which the dogma of civil procedure being an exclusive prerogative of the States' jurisdictions – as an expression of their sovereignty – is progressively deflecting²: formal procedural guarantees are being abdicated and a principle of cooperation between the parties and the judge is strikingly invoked.

Needless to say, party autonomy is not given the same space and importance in civil procedure as it is in civil law, being the former, essentially and traditionally, a domain of public law and an expression of the public authority. It remains mere rhetorical the question of whether the parties, who basically enjoy the maximum freedom to choose which substantive law applies to their dispute, should not have the same control over the procedure, at least where relevant to the same substantive law.

If we look at the recent past, we find that Salvatore Satta, a prominent Italian scholar of the last century, observed that “*from the alienability of the substantive right to the free disposability of civil procedure there is no consequential passage, but a jump*”³. Standing on the same point of view, Tito Carnacini had previously explained that the “free disposability” of civil procedure law did not exist at all, and the extent to which a certain system leaves space for the parties to contract procedural rules could be just faced with as an issue of “procedural technique”⁴. Leaving from such authoritative premises, we now wish to add that the space dedicated to party autonomy (and, reciprocally, to the State's intervention) in a certain legal system is undoubtedly changeable in time and space⁵, as it is proved in civil

and in *Rivista di Diritto Processuale*, 2012, § 5, where the author emphasizes that the expression is a “non-sense”.

² Ex multis, Picardi, *La giurisdizione all'alba del terzo millennio*, Milano, 2007, passim and in particular 13 and ff.

³ Satta, *Commentario al codice di procedura civile*, 1966, vol. I, 451.

⁴ Carnacini, *Tutela giurisdizionale e tecnica del processo*, in *Studi in onore di Enrico Redenti*, Milano 1951, II, 695 and ff.

⁵ Irrespective of what just pointed out in the text, clear similarities can be observed with the issue of the extension, in civil law, of the so-called default rules (i.e. those rules “that are government-created rights and duties that are privatizable, rules that govern unless the parties contract out of them”: Ayres, Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, in *Yale Law Journal* 1989, 87 and ff.) and, reciprocally, of the so-called mandatory rules (which are “those government-created rights and duties that cannot be avoided by contract, those that are not privatizable”: Ayres, Gertner, *Filling Gaps*, cit., 88, footnote 8).

procedure, for instance, by the evolution that during years interested the concept of arbitrability⁶.

In addition, it is worth noting that a “political” component inevitably inspires every State’s approach to the subject at issue⁷: in the U.S., as explained by Oscar Chase, Ronald Reagan’s presidential election in 1980 symbolized the triumph of the private sector on the public one, with the power and the inference of the State in private affairs being significantly reduced (in various areas, leaving from industrial relations to environmental law)⁸. We may then conclude that whether a procedural agreement has to be enforced or not, or given somehow relevance in civil procedure, seems to be a matter to be solved, as it has been suggested, by investigating “*from the very basis of law and constitutional principles and the rule of law*” of every single legal system⁹: possible solutions to be outlined on the issue being all “*expression of the unity of law*”¹⁰; and there is no doubt that such values change all the times.

One may then ask why a comparative study, and why it is worth investigating the American system.

The answer to the former question, at this initial stage, may be but a declaration of intent, perhaps superstitiously supported by preceding experiences that have already proven that comparing civil procedure laws, on the one hand, helps the development of single domestic traditions and, on the other hand, serves to identify, often unexpected, match points¹¹.

⁶ See, in this respect, ex multis, Brekoulakis, On Arbitrability: Persisting Misconceptions and New Areas of Concern, in Mistelis, Brekoulakis (eds), *Arbitrability: International and Comparative Perspective*, London, 2009, 18 and ff.

⁷ This study will not investigate the political reasons for such tendency, being even too clear that political choices in procedure are everywhere (Resnik, *Managerial Judges*, Jeremy Bentham and the Privatization of Adjudication, in Walker, Chase (eds), *Common Law Civil Law and the Future of Categories*, Toronto, 2010, 205 and ff. and in part. 223 as well as, more in general, Pekelis, Legal techniques and political ideologies, in *Michigan Law Review*, 41, 1942/1943, 665 and ff.).

Neither the study will address potential practical and economic benefits and disadvantages of the practice of contracting for procedure, although some references to studies performed in this respect will sometimes be quoted.

⁸ Chase, I metodi alternativi di soluzione delle controversie e la cultura del processo: il caso degli Stati Uniti d’America, in Varano (ed), *L’altra giustizia. I metodi alternativi di soluzione delle controversie nel diritto comparato*, Milano, 2007, 151-152.

⁹ Belohlavek, *Arbitration, Ordre Public and Criminal Law*, Kiev, 2009, 177.

¹⁰ Belohlavek, *loc. cit.*, quoting Müller-Dietz, Zur Befreiung des Strafrechts vom zivilistischen Denken am Beispiel der Schadenswiedergutmachung, in Günther (ed), *Gedächtnisschrift für Schultz*, Köln, 1987, 253 and ff. (in part. footnote 394).

¹¹ See, representatively, Chase, Hershkoff (eds), *Civil Litigation in a Comparative Context*, St. Paul, 2007, *passim*.

The latter question, instead, requires a simple and didactic answer. Traditionally, under the adversary system that typifies U.S. civil procedure, “*the litigation process is party-initiated, party-controlled, and party-driven*” and this configuration is said to reflect the “*American values of individuality, autonomy, competition and disdain for government*”¹². Thus, a strong presumption of openness to the practice at stake, by the legal system taken in consideration, supports the research.

From a methodological standpoint, the study will be first of all performed through a comprehensive analysis of both the language used in codes, rules and legislation, and the doctrinal positions, as well of the relevant case-law, seeking to investigate the relationship between substantive and procedural law (and the relevance of the parties’ common will in the latter) in the United States jurisdiction¹³.

The notion of procedural agreements to be accepted, in principle, should be a “non-technical” notion, intending to cover procedural agreements in a broad sense, including both arbitration and prorogation agreements (characterized by the ability to induce effects approved by procedural law) and agreements in a “narrow sense”, among which are included all those procedural agreements that are entered into only in the course of a particular proceeding¹⁴.

An overview of different types of procedural agreements used in the American jurisdiction should follow, distinguishing the “typical” agreements (expressly provided by the law) from the “atypical” agreements (permitted absent a specific congressional authorization), in order to reach a preliminary conclusion upon their general admissibility¹⁵.

After that, we will try to define the limits for the use of such agreements by private parties and, symmetrically, the borders of extension of the judge’s control in this respect¹⁶.

Only once exhausted the above aspects, we will try to suggest a more appropriate notion of the idiomatic expression “procedural agreements” and then to identify their relevant regime, i.e., most of all, the law applicable to them¹⁷.

¹² Subrin, Woo, *Litigating in America*, New York, 2006, 22-23.

¹³ *Infra*, § 3.1.

¹⁴ *Infra*, passim and in part. § 3.1.

¹⁵ *Infra*, § 3.4.

¹⁶ I.e., the limits to “freedom of procedural contract” granted to the parties, with particular attention (but not limited to) to whether and to what degree a court is obliged to accept such agreements and/or whether and to what degree it may refuse to enforce them. See *infra*, § 4.

¹⁷ *Infra*, §§ 3.3 and 4.

Finally, we will try to verify if the results of the research are to change in cases in which certain “peculiar” substantive rights are involved in the proceedings. At this regard, we will consider the distinction between unalienable rights and the rights that can be freely waived by private parties, as well as the situations in which private actors relate themselves with the public powers¹⁸.

In general terms, throughout the investigation, we will keep into account that party autonomy is undoubtedly paramount in arbitration and that civil procedure law, with all due *caveat* and differences, can learn a lot from the experience of the former¹⁹.

Eventually, it is worth pointing out, always from a methodological standpoint, that analyzing a single national system will not require us to address and define the difference between “substance” and “procedure”²⁰, at least unless the need to consider conflict of laws issues emerges.

2 Background of the project. Brief analysis of the “state of the art” in the field (European jurisdictions)

A modern comprehensive study on the relevance of party autonomy in civil procedure is lacking in the European scientific panorama²¹.

¹⁸ Such aspect is only sketched for the time being and, to approach it in more detail, it would be of some interest trying to apply the results of the research to a typical “public law litigation” (for an inference at this regard, see *infra*, footnote 105). Similarly, the issue of unalienable substantive rights has not been yet properly addressed in this preliminary study: nonetheless, we note that in a study dedicated to the same topic the authors have compared procedural agreements with pre-marital agreements and with covenants not to compete: Taylor, Cliffe, *Civil Procedure by Contract: A Convolved Confluence of Private Contract and Public Procedure in Need of Congressional Control*, in *University of Richmond Law Review*, 2002, 185 and ff.

¹⁹ Parallel consideration of both issues is typical, for instance, in the northern Europe literature: analyses the role of party autonomy in arbitration and in civil procedure Heuman, *Arbitration Law of Sweden: Practice and Procedure*, New York 2003, 249: “application of the party autonomy principle, then, is not at all subject to the same condition as in civil procedural law. The state, which bears the cost of judges’ salaries and other judicial expenditures, has an interest in disputes being resolved as efficiently and inexpensively as possible. The state cannot accept procedural agreements which entail additional expenditure. True, there are provisions in the Code of Judicial Procedure, which give the parties a right of disposition, but the principle of party autonomy does not characterize civil procedure to anywhere near the same extent to arbitral procedure”. In respect with the U.S. system, it is usually stated that “enormous quantities of state and federal law are not privatizable” (Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, in *Minnesota Law Review*, 1999, 83, 3, 703 and ff. and, in particular, 707). For a more detailed analysis, see *infra*, § 3.2.

²⁰ A typical problem in the conflict of laws perspective (see *ex multis* Peari, *Book Review*, in *Melbourne Journal of International Law*, 2013, 308 and ff.). For problems pertaining to conflict of law issues, *infra*, § 3.4.14.

²¹ Besides references that will be mentioned later, we note hereinafter that in the German doctrine, after the ancient monographs of Wach, *Vorträge über die Reichszivilprozeßordnung*, Bonn, 1879 and

In the French system, the interest for procedural agreements rose already, during last century, in the middle of the 80s²².

Among most significant developments in this procedural system, Loïc Cadiet recently highlighted “*the contractualization of the procedure*”, consistent with the recent and increasing call, in many procedural traditions, for a principle of “cooperation” between the judge and the parties. A trend that is showed, in practice, by “*the consecration of the procedural agreement with the agenda for the mise en état before the tribunal de grande instance and the Court of Appeals*”²³, the so-called *calendrier de la procedure*²⁴.

Goldschmidt, *Der Prozeß als Rechtslage*, Berlin, 1925, in recent times attention has only seldom been drawn to procedural agreements: inklings can be found in Baumgärtel, *Wesen und Begriff der Prozesshandlung einer Partei im Zivilprozess*, Köln, 1972; Henkel, *Prozessrecht und materielles Recht*, Göttingen 1970; Soehring, *Die Nachfolge in Rechtslagen aus Prozessverträgen*, Köln, 1968; Cahn, *Prozessuale Dispositionsfreiheit und zwingendes materielles Recht*, in *Archiv für die civilistische Praxis*, 1998, 1, 35 and ff.; as well as, more recently, in the extensive study of Wagner, *Prozessverträge: Privatautonomie im Verfahrensrecht*, Tübingen, 1998.

Similarly, in the Italian scholarship, after the dated studies of Costa, *Contributo alla teoria dei negozi giuridici processuali*, Parma, 1920 and Ferrara, *L'elemento convenzionale del processo civile*, *Foro It.*, 1938, I, 180 and ff., an isolated reference following the entry into force of the current Code of Civil Procedure in 1942 is the study of De Stefano, *Studi sugli accordi processuali*, Milano, 1959 (however concerning only evidentiary agreements and agreements on judgments' execution), whilst particular positions, equally dated, are expressed in Carnelutti, *Meditando Capograssi; variazioni sull'accordo*, in *Rivista di diritto processuale*, 1957, 501 and ff.; Satta, *Accordo (diritto processuale civile)*, in *Enciclopedia del diritto*, Milano, 1958, 300 and ff.; Denti, *Negozi processuali*, in *Enciclopedia del diritto*, Milano, 1978, 138 and ff.; and Bongiorno, *Accordo processuale*, in *Enciclopedia giuridica Treccani*, Roma, 1988, I, 1 and ff.

The French scholarship, at first sight, seems to be richer (and, as we will mention, this is probably due to few provisions that, in the French system, recall the idea of the parties' contracting for procedure). Among the different references, it is worth quoting Cadiet, *Les clauses contractuelles relatives à l'action en justice*, in *Institut de droit des affaires, Les principales clauses des contrats conclus entre professionnels*, Aix-en-Provence, 1990, 193 and ff.; Id., *Case management judiciaire et déformalisation de la procédure*, in *Revue française d'administration publique*, 2008, 134 and ff.; and Chazal, *Justice contractuelle*, in Cadiet (ed), *Dictionnaire de la justice*, Paris, 2004, 723 and ff.

²² For an overview, see, ex multis, Magendie, *Le nouveau contrat den procedure civile: objectifes, exigences et enjeux de la réforme parisienne*, in *Gazette du Palais*, April 4 2001, nos. 94 and 95, 2 and ff.; as well as Cadiet, *Les conventions relatives su procès en droit français. Sur la contractualisation du règlement des litiges*, in *Rivista Trimestrale di Diritto e Procedura Civile. Accordi di parte e processo*, Milano, 2008, 121 and ff.

²³ Cadiet, *Introduction to French Civil Justice System and Civil Procedural Law*, in *Ritsumeikan Law Review*, 2011, 28, 330 and ff. and in part. 371, also explaining that this schedule, set with the agreement of the attorneys, contains “the foreseeable number and the date for exchanging conclusions, the date for closure, that for the debate and (...) that for the pronouncement of the ruling”.

²⁴ A similar instrument has been introduced, by recent law no. 69 of 2009, also in the Italian Code of Civil Procedure (“CPC”) (see article 81-bis of the Implementing Provisions to the CPC), but for the way in which it has been outlined, it cannot be considered as a “proper” agreement, because the provision is mainly (if not only) addressed to the judge, giving no relevance to the parties' common will. The provision, moreover, shows certain obscurities: see, ex multis, Sassani, *Lineamenti del processo civile italiano*, Milano 2012, 209 and footnote 21 and for another (more “optimistic”) position, De Cristofaro, *Case management e*

Indeed, the idea of a cooperative process is said to have been introduced in France with the *nouveau code de procédure civile* (“NCPC”) of 1975²⁵, but it is also sketched in the United Kingdom’s Woolf Reform²⁶ and, according with Cadiet²⁷, it can exactly “*deploy(s) by means of procedural agreements made between the judge and parties, be it in the framework of each particular case, under the form notably of individual contracts of procedure, be it in the framework of protocols of agreement, the sort of group procedural agreements more often concluded between the courts and their habitual partners, especially the bars*”.

Calls for a similar approach have also been raised in Italy²⁸, where the issue of procedural agreements has attracted some interests in recent times and has been made subject of some rather generalist studies²⁹ and of other more specific contributions³⁰.

This notwithstanding, as mentioned, a systemic approach on the topic is still and generally neglected.

On the one hand, a notion of procedural agreements could be variously stated, and much could be said upon their systemic positioning. In Germany, for instance, a procedural

riforma del processo civile, tra effettività della giurisdizione e diritto costituzionale al giusto processo, in *Rivista di Diritto Processuale*, 2010, 2, 282 and ff.

²⁵ Cadiet, Introduction, cit., 391.

²⁶ On which, see Zuckerman, Lord Woolf’s Access to Justice: Plus a change, in *Modern Law Review*, 1996, 59, 773 and ff.; as well as Id., Adjudication of civil dispute: a mismanaged public service, in *Accordi di parte*, cit., 7 and ff. In the U.K. system an example of procedure mainly regulated by the parties’ common will are, for instance, the pre-action protocols.

²⁷ Who also emphasizes that a similar approach is taken in the ALI/UNIDROIT Principles of transnational civil procedure, whose Article 11.2 provides that “the parties share with the court the responsibility to favor a solution for an equitable case, efficiently and reasonably rapid” (Cadiet, *loc. cit.*).

²⁸ Consistently with the growing demand for civil procedure to turn back to the more liberal imprinting, as arising from the former 1865 Italian Code of Civil Procedure, and as being viewed as a “*Sache der Parteien*”: for this statement see, among others, Scarselli, *Poteri del giudice e diritti delle parti*, in www.judicium.it.

²⁹ Caponi, *Autonomia privata e processo civile: gli accordi processuali*, in *Accordi di parte*, cit., 99 and ff.; Patti, *La disponibilità delle prove*, in *Rivista Trimestrale di Diritto e Procedura Civile*, *La disponibilità della tutela giurisdizionale (cinquant’anni dopo)*, Milano, 2011, 75 and ff. See also the recent work, on evidentiary agreements, of Pezzani, *Il regime convenzionale delle prove*, Milano, 2009.

³⁰ See, on the agreed “skip” of a hearing fixed in the regulation of “ordinary” civil proceedings, Asprella, *Dell’accordo processuale, ovvero della derogabilità convenzionale delle fasi che scandiscono il processo ordinario*, in *Giurisprudenza di Merito*, 1999, 716 and ff.; as well as, also with reference to the special procedure formerly regulated by law no. 5 o 2003 for company disputes, De Santis, *Riforme processuali e disponibilità del regime preclusivo*, in *Rivista Trimestrale di Diritto e Procedura Civile*, 2004, 3, 1257 and ff.

agreement is generally defined as “*an agreement that induces its direct effect in the area of procedure*”³¹.

On the other hand, there is no doubt that many legal systems acknowledge the existence of specifically regulated types of procedural agreements, the so-called “typical” procedural agreements, but scholars, however, are not unanimous regarding the admissibility of any type of procedural agreement even when a permitting provisions is lacking: in Italy – for example – opinions diverge at this regard, given the absence of a general norm such as the one provided for in article 1322 of the Italian Civil Code (“CC”)³², which is usually recognized as being the basis, in civil law, of freedom of contract and of the paramount role of party autonomy.

Irrespective of categorization attempts, in fact, “typical” (either collective³³ or individual) procedural agreements are not the only forms of existing procedural agreements and – by analyzing procedural systems in more detail – one can observe that the parties’ common will is often given significance during the course of a proceeding, also when this significance has not received a prior legal sanction and consideration. Below are thus given some examples, comparing – to the extent possible – the different legal systems and highlighting divergences and convergences there from.

Unanimously recognized types of procedural agreements are first of all prorogation agreements (forum selection clauses)³⁴ and arbitration agreements³⁵, respectively regulated by § 38 and § 1029 of German *Zivil Prozess Ordnung* (“ZPO”) and by articles 28 and 806 of the Italian CPC.

³¹ Musielak, Grundkurs ZPO, 7th ed., München, 2004, sidenote 52.

³² The lack of a specific provision permitting parties’ agreements in the field of civil procedure law is advocated, as a negative-prohibiting argument, by Luiso, *Diritto processuale civile*, Milano, 2011, vol. II, 314, whilst Caponi, *Autonomia privata*, cit., 107, takes the view for a balanced a more opened recourse to extensive analogical interpretation of the aforesaid provision of article 1322 CC also in regard with civil procedure. One can then ask if and to what extent a specific provision, allowing for agreements of the parties in regard with a specific proceedings, is really necessary: on this point, for the U.S. system, *infra*, § 4.

³³ On the French experience on mentioned collective agreements (between bar associations and judges’ associations), see also Canella, *Gli accordi processuali francesi volti alla “regolamentazione collettiva” del processo civile*, in *Rivista Trimestrale di Diritto e Procedura Civile*, 2010, 2, 549 and ff.

³⁴ Prorogation agreements may also regard jurisdiction of national courts (see article 4 of the Italian statute on international private law – no. 218 of 1995) and are regulated by various international conventions and legal supranational instruments, also in the European Union context (see, for example, articles 23 and 24 of (EC) Council Regulation no. 44 of 2001, today articles 23 and 25 of (UE) Council and Parliament Regulation no. 1215 of 2012).

³⁵ Rosenberg, Schwab, Gottwald, *Zivilprozessrecht*, München 1993, § 66.

More in general, procedural agreements are all those agreements whereby the parties waive their respective rights of access to the State justice, either by reaching an amicable settlement of their dispute or opting for an Alternative Dispute Resolution (“ADR”) method, as far as substantive alienable³⁶ or economic³⁷ rights are concerned.

Both in the Italian and in the German systems a waiver of the proceedings is considered as resulting from the effect of an agreement between the parties³⁸ and the same is valid for waivers of appellate remedies³⁹, regarding the validity of which – however – in certain specific cases Italian judges still cast doubt: to the extent that the question of the admissibility of a preventive waiver (prior to the very issue of the judgment) to a judgment’s mean of challenge, has been recently referred – given its particular importance and “complexity” – to the attention of the Joint Civil Divisions of the Italian Supreme Court⁴⁰.

At the phase of commencing the proceedings, since the enactment of the NCPC in 1975, the French system has contemplated a joint application by the parties, (“*requête conjointe*”), that is said to be “*designed as an ‘amicable substitute’ for a summons*”⁴¹.

Law of evidence is also an area with ample available space for agreements of the parties.

In Italy, for instance, a written testimony can only be admitted, pursuant to article 257-*bis* CPC⁴², with the agreement of the parties and, always and exclusively by the parties’ agreement, the latter have the ability to modify the reciprocal allocation of the burden of proof⁴³.

In Germany, article 404 ZPO commands that the litigants may jointly identify the person to be appointed as a court expert and, if this occurs, the court is bound by such

³⁶ For this limitation in the arbitration context, see, for instance, article 806 of the Italian CPC.

³⁷ See § 1030 ZPO.

³⁸ See section 306 ZPO and article 307 of the Italian CPC (under which, however, it is provided that discontinuance - waiver - of the proceedings does not constitute a waiver to the action).

³⁹ See § 515 ZPO.

⁴⁰ See, Italian Supreme Court, First Civil Division, order no. 3469 of March 6 2012, published in www.judicium.it.

⁴¹ Cadiet, Introduction, cit., 355, who also emphasizes that the joint petition “is rarely used because it presupposes a minimum of agreement between the parties, which is often lacking in adversarial procedures”.

⁴² Introduced by law no. 69 of 2009.

⁴³ See, representatively, article 2698 of the Italian CC.

private choice. Furthermore, according to § 391 ZPO the parties can even waive having “their” witnesses being placed and testifying under oath⁴⁴.

Agreements either on “conclusive” probative value of certain evidence or on derogating strict rules of law pertaining to the weight of evidentiary means are popular in international commerce and permitted by few national legislations, probably including the Italian one, even if, recently, such possibility has been firmly denied by an Italian legal scholar⁴⁵ who – more in general – also rejected the idea of a general admissibility of contracting for procedure.

An agreement of the parties is also identified, in different legal systems, in the tacit behavior of the litigant who did not specifically dispute the truth of the facts alleged by the opposing party: as provided by § 138 ZPO, facts that are not expressly disputed are to be deemed as having been acknowledged (unless the intention to dispute them is made clear from other declarations made by the same party)⁴⁶. Similarly, but not equally, article 115 of the Italian CPC, as amended by recent law no. 69 of 2009, provides that the judge “must” base its decision also on the facts undisputed between the parties. In both cases the attention of the authors commenting on such provisions is focused, on the one hand, on the limits of the judge’s power in controlling that the undisputed facts are real or not and, on the other hand, on the kinds of proceedings in which such a mechanism should be deemed as applicable (depending on the “alienability” of the rights therein involved)⁴⁷.

According with German civil procedure law, another form of agreement is the one provided for by § 128 ZPO, that establishes that the court “may give a decision without hearing oral argument provided that the parties have consented thereto” (meaning that the parties can waive their rights to an oral proceeding)⁴⁸. Also, in German civil procedure, the parties can waive (their right) to have a reasoning set out in the judgment⁴⁹, whilst proposals

⁴⁴ And see also § 436 ZPO, whereby, after the production of a document, the producing party may waive the evidence represented by the same document only with the consent of the counterparty.

⁴⁵ Pezzani, *Il regime convenzionale*, cit., and in part. 162-166.

⁴⁶ See Mayer, Maly, *Armbruster Münchener Kommentar*, München 2001, commenting on mentioned section 138. See, also, for a comparative overview in this respect, Sassani, *L’onere della contestazione*, in *Il Giusto Processo Civile*, 2010, 5, 401 and ff., as well as in www.judicium.it.

⁴⁷ See references quoted by the author mentioned in the preceding note, in part. §§ 3 and 4.

⁴⁸ On which, see Zöller, Greger, *Zivilprozessordnung*, Köln 2002, sub article 128.

⁴⁹ See § 313a, which reads as follows: “(d)es Tatbestandes bedarf es nicht, wenn ein Rechtsmittel gegen das Urteil unzweifelhaft nicht zulässig ist. In diesem Fall bedarf es auch keiner Entscheidungsgründe, wenn die Parteien auf sie verzichten oder wenn ihr wesentlicher Inhalt in das Protokoll aufgenommen worden ist. Wird das Urteil in dem Termin, in dem die mündliche Verhandlung geschlossen worden ist,

to the same effects have been raised also in Italy, but so far without success and, instead, receiving plenty of criticisms⁵⁰.

One may doubt whether, under what provided for by article 2908 of the Italian CC, the parties could also contract for granting, one to each other, a “private” right of action in order to “create, modify or extinguish” legal relationships⁵¹.

Under § 307 ZPO, relating to the *Anerkenntnis*, a judgment can be rendered based on an acknowledgment by the defendant⁵² and a similar provision is contained in section 204 of the Austrian ZPO, whereby a consent decree can be issued based on the agreement of the parties, both kinds of orders being commonly considered of a “biunique (both substantive and procedural) nature”⁵³. Similarly, according to article 14 of the UK Civil Procedure Rules, a judgment by admission may (shall) be pronounced in certain cases, and the admission may be only restrictively withdrawn⁵⁴. It has been reported that in the new Bulgarian Civil Procedure Code, section 237⁵⁵ provides that the recognition of the claim by the respondent binds the court, which is obliged to uphold the claim in accordance with the assenting⁵⁶.

verkündet, so bedarf es des Tatbestands und der Entscheidungsgründe nicht, wenn beide Parteien auf Rechtsmittel gegen das Urteil verzichten. Ist das Urteil nur für eine Partei anfechtbar, so genügt es, wenn diese verzichtet”.

⁵⁰ At this regard, see Santangeli, *La motivazione della sentenza civile su richiesta e i recenti tentativi di introduzione dell'istituto della "motivazione breve" in Italia*, in www.judicium.it.

⁵¹ But this interpretation is *prima facie* barred by the wording of the same provision in the point in which it refers only to the “cases provided for by the law”.

⁵² It is worth noting that also in this case, as set forth by § 313b ZPO, the judgment must neither contain nor cite the reasons based on which it is rendered.

⁵³ Belohlavek, *Arbitration*, cit., 225.

⁵⁴ Zuckerman, *Permission for withdrawing an admission – a threat to the closure that admissions are meant to provide*, in *Civil Justice Quarterly*, 2013, 32, 1, 1 and ff.

⁵⁵ Popova, *Principles of Bulgarian Civil Procedure Law*, in *Civil Procedure Review*, 2011, 2, 2, 28 and ff.

⁵⁶ Such an ability, provided within other legal systems, seems to be denied in the Italian jurisdiction, where it is commonly argued that under article 114 CPC, the only alternative to the judgment based on the law would be, on the parties’ joint request, the judgment *ex aequo et bono*. One may note, from one side, that perhaps when the CPC admits the parties’ ability to mutually bind the judge for a decision *ex aequo et bono*, it could be intended also as bestowing them the ability to choose a certain law to be applied to their relation, binding the judge accordingly (compare Confortini, *Clausola compromissoria: regole “per” decidere e regole “del” decidere*, in *Obbligazioni e Contratti*, 2011, 8-9, 565 and ff.): even once recognized that, nonetheless, discussions should more fairly deal, once again, with the extension of the judge’s power in controlling such agreement (in order to avoid, for example, an agreement in fraud and so on). We may also mention that article 12 subparagraph 3 of the French NCPC, still in its original 1975 version, provides that the judge “ne peut changer la dénomination ou le fondement juridique lorsque les parties, en vertu d'un accord exprès et pour les droits dont elles ont la libre disposition, l'ont lié par les qualifications et points de droit auxquels elles entendent limiter le débat”.

A procedural agreement (with double nature and kinds of effects, both substantive and procedural) is also, in Germany, the *Insolvenzplan*⁵⁷, the Italian equivalent to *concordato preventivo*, an agreement (equally procedural but also substantive), reached by all the creditors of a commercial company or entrepreneur with the purpose of avoiding the latter's declaration of bankruptcy and the commencement of the relevant proceedings.

As to the Swedish procedural system, where there is a long-standing tradition for ADR methods and a great openness for "privatization" of civil procedure, Lindblom⁵⁸, discussing proposals of reform brought by in recent years, has advocated for a simplified procedural model, to be grounded and built upon party autonomy⁵⁹, in which the litigants, among other abilities, should be allowed to agree on the interpretation of the law (as well as on the law to be applied in their proceeding), on the binding probative value of certain evidence (binding both for the parties and the judge) or, even, to agree for avoiding a reasoning being included in the judgment. Such a model, in the Author's view, should be preferred, prospectively, to a further increase in the use of ADR forms⁶⁰.

The list could be much longer. However, at this point a basic idea should have been given of the fact that whilst the agreements of the parties are often resorted to in many procedural legislations in a way which is consistent with the "implications" that the exercise of a certain procedural power can have in respect with the (alienable) nature of the substantive right involved in the proceedings, in other cases the agreement is only referred to as a, rather collaborative, mean of regulating the procedure.

In other terms, there is neither agreement nor a uniform interpretation on a coherent and uniform positioning of all cases in which the parties' consent is given, one way or another, relevance during the proceedings.

⁵⁷ See at this regard, within the German scholarship, the monograph of Happe, *Die Rechtsnatur des Insolvenzplans*, Munchen, 2004, *passim*, as well as, for a slightly different position, Leopold, *Zur Rechtsnatur des Insolvenzplans*, in *Konkurs, Treuhand und Schiedsgerichtswesen*, 2006, 109 and ff.

⁵⁸ Lindblom, *La risoluzione alternativa delle controversie – L'oppio del sistema giuridico? Prospettive in materia di ADR in generale e nel contesto svedese in particolare*, in Varano (ed), *L'altra giustizia*, cit., 219 and ff. and in part. 238.

⁵⁹ Despite the general assumption, recalled by the a., according to which in Swedish procedural law agreements not regulated by the law would be *per se* void (Lindblom, *La risoluzione*, cit., 245 and ff.; see also references in footnote 55, in which he by the way acknowledges the existence of different procedural agreements).

⁶⁰ Warning about the risk that, by lavishly regulating ADR forms, the right of access to justice would be unduly narrowed (Lindblom, *lc. ult. cit.*).

In addition, there appears to be no unanimous opinions, in specific situations, as to the power for the judge to control, validate and enforce the agreements of the parties. Which also means, in turn, that it is not always clear whether such agreements have a binding effect on the former or not.

3. Consensual adjudicatory procedure in the U.S. System

3.1 General framework

Having recalled the traditional features of the American judicial order, it is not surprising that the issue of consensual adjudicatory procedure in litigation between private parties has been made subject of a deep investigation, especially in the last years, by a number of scholars.

Indeed, despite rules of procedure being endowed of a “public nature”, they report that judicial decisions are increasingly based on private rules agreed by the litigants⁶¹.

Contracting for procedure has now received a proper definition, as “the practice of setting out procedures in contracts to govern disputes (...)”⁶², and this happens to be the product of a progression, as in the past, prior to 1970, such contracts were considered unenforceable, for reasons of public policy⁶³.

By different stages, the initial approach of hostility to procedural private ordering has been revisited, whilst the American system experienced some important changes, from the due process revolution of the 70s, to the advent of the problem of the “vanishing trial”, which is still a living matter⁶⁴, from the ADR movement of the 80s⁶⁵, to the more recent introduction, partly borrowed by the British experience, of the “managerial judge”⁶⁶.

⁶¹ Davis, K. E., Hershkoff, Contracting for Procedure, in *William and Mary Law Review*, 2011, 53, 2, 507 and ff., in part. 511.

⁶² Davis, Hershkoff, *loc. ult. cit.*

⁶³ Compare Taylor, Cliffe, *Civil Procedure*, *cit.*, 1091-1092 and 1135, where the aa. report that the “history of judicial enforcement of PLAs (pre-litigation agreements) shows an ever-increasing deference to them as matters of private contractual autonomy, and a decreasing concerns for their effect on the public system of dispute resolution”.

⁶⁴ Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, in *Journal of Empirical Studies*, 2004, 459 and ff.; more recently, Thornburg, *Designer*, *cit.*, 204-205.

⁶⁵ Resnik, *Managerial Judges*, *cit.*, 205 and ff., also for references in footnote 6.

⁶⁶ On which, compare Subrin, Woo, *Litigating*, *cit.*, 25: “the managerial judge has replaced the passive, neutral judge of the adversary system”, as well as Miller, A. R., *Simplified Pleading, Meaningful Days in Court, And Trials On The Merits: Reflections On The Deformation of Federal Procedure*, in *New York University Law Review*, 2013, 88, 286 and ff., in part. 296: “judicial management represents a

Today, it has even been suggested that the increasing use of private contracts for regulating the procedure would be the symbol of a new era of exile from the public dimension, the era of “consensual adjudicatory procedure”⁶⁷, of a “New Civil Procedure”⁶⁸, in the age of ‘managerial litigants’⁶⁹. One can assist to a deformation of the federal procedure⁷⁰ and all these factors, of course, have a great impact in the field of the legal profession⁷¹ and change the nature of the American judicial system.

These changes, however, have not always been seen as positive and the practice of contracting for procedure has been defined as a “nightmare”⁷² against which some have raised many strong criticisms⁷³.

Furthermore, even when accepting the evolution, the opinions of the scholars do not converge in many respects and – as we will see later in the present analysis – irrespective of some considerable efforts of finding a coherent and systemic positioning, there remain a lot of open questions and, still, a lack of uniform treatment⁷⁴.

Some of these questions invest the topic in its general terms and will be mentioned immediately here below; some others concern single types of agreements and will be tentatively dealt with in due course.

First of all, there are diverging views on the theoretical premises and justification of the practice and any of them focuses on a different conception about the role of the judicial

significant modification, and perhaps an unquantifiable debilitation, of the historic bilateral adversary system that has characterized civil proceedings in common law courts for century”.

⁶⁷ Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, in *Fordham Law Review*, 1988, 291 and ff. where the author coined the expression of “consensual adjudicatory procedure”.

⁶⁸ Resnik, *Competing and Complementary Rule Systems: Civil Procedure and ADR: Procedure as Contract*, in *Notre Dame Law Review*, 2005, 593 and ff.

⁶⁹ Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, in *Hastings Law Journal*, 2000, 1199 and ff. and in part. 1201.

⁷⁰ Miller, A. R., *Simplified*, cit., 329-330: “compelled private adjudication essentially is now competing with the public adjudicatory system and replacing access to the courts, the possibility of jury trial, and any process transparency”.

⁷¹ Ribstein, *Delawyerizing the Corporation*, in *Wisconsin Law Review*, 2012, 305 and ff., and in part. 322, mentioned the tendency among those factors that are changing the role of in-house lawyers and, in turn, of the market of legal services.

⁷² The “experiment, or maybe a nightmare, about the intersection of freedom of contract and the trials”: Thornburg, *Designer Trials*, in *Journal of Dispute Resolution*, 2006, 181 and ff.

⁷³ See, for instance, Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, in *Texas Law Review*, 2011-2012, 90, 1329 and ff., especially in footnotes 21 and 22 where the a. recalls that the debate over procedural agreements is sharply divided and then reports scholars in favor or contrary to the employ of such agreements.

⁷⁴ Cole, *Managerial*, cit., 1207; Resnik, *Competing and Complementary*, cit., 651-652.

system in the American society: on one hand, lies the vision for which civil procedure would perform a purely public function⁷⁵, a vision that, whether right or wrong, is basically adverse to any form of privatization; on the other hand, lies the opposing theory whereby a dispute would be only of the parties⁷⁶ who, as a result, should be able to manage it as they please. If the debate resembles rather classical and stale discussions existing in all jurisdictions⁷⁷, the former – more hostile – vision is somehow supported, in the case at issue, by the consideration of what is maybe the most important “public good” that American courts produce, i.e. the “binding” precedent: but the contention significantly diminishes when considering that, nowadays, affirming the binding character of them largely depends on “one’s theory of adjudication”⁷⁸, as the “courts pay attention to one another, however, even when they are not bound to do so”, and “even ‘binding’ decisions are not precedent”⁷⁹. To further address the topic of contracting for procedure, we will move from a more balanced view that acknowledges a double function to the civil justice system, being simultaneously both private and public⁸⁰.

Secondly, and regardless of theoretical approaches, a great confusion on the topic stems from the lack of unanimous opinions as to the possibility of contracting for procedure without a preventive congressional permission. There is no doubt that parties have some latitude to choose some procedural rules under current law⁸¹, but it remains an unsolved question whether one should distinguish between cases in which the agreement is required or permitted by a legislative provision, from the others in whose respect there is no provision at all.

⁷⁵ See Fiss, *Against Settlement*, in *Yale Law Journal*, 93, 1073 and ff.; compare also Bone, *Party Rulemaking*, cit., 1353 and ff. and for further references, see Davis, Hershkoff, *Contracting*, cit., footnote 15. Remembers the “public goods” provided by the courts also Tyler, *Lawmaking in the Shadow of the Bargain: Contract Procedure as a Second-Best Alternative to Mandatory Arbitration*, in *Yale Law Journal*, 2013, 122, 1560 and ff.

⁷⁶ Menkel, *Meadow, Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, in *The Georgetown Law Journal*, 1995, 83, 2663 and ff.

⁷⁷ For a summary of the Italian debate, Carnacini, *Tutela giurisdizionale*, cit., in part. 702 and footnote 19: “that civil procedure is per se a public instrument, for the exercise of an equally public function is not in doubt (...) Still, it is carried out by activities of the parties”.

⁷⁸ Bone, *Party Rulemaking*, 1377.

⁷⁹ Tyler, *Lawmaking*, cit., 1586 and references in footnotes 120 and 121.

⁸⁰ Thornburg, *Designer*, cit., 206 and ff.

⁸¹ Bone, *Party Rulemaking*, 1342.

In fact, the Federal Rules of Civil Procedure (the “Rules”) only in certain cases encourage the agreement between the parties, but do not embrace any general rule within their content, neither any mention in the relevant accompanying commentary⁸². Other forms of agreement have been given nature by courts⁸³, which did not wait for the Congress to enact specific provisions but proceeded either way in enforcing them.

The question is a very complex one and, if we put it in another way, it consists of assessing whether the rules of procedure dictated by the State would be default or mandatory rules⁸⁴; keeping in mind this distinction, below we will provisionally provide an overview of all possible procedural agreements (either contemplated by a precise rule or not), with the goal of trying to identify the nature of procedural rules a posteriori once the research will have been completed and the limits for the use of such agreements will have been declined⁸⁵.

3.2 The “arbitration analogy”

As anticipated in the foreword, we may smoothly leave from the assumption that the use of the “arbitration analogy”, in the following investigation, will be useful to our purposes, both in terms of assessing the limits to party autonomy in civil procedure and to identify the limits for derogating the Rules⁸⁶. Regardless of some warnings not to push too much such argument⁸⁷, we deem that the perspective could still prove as a valid one: all the

⁸² Taylor, Cliffe, *Civil Procedure*, cit., 1108.

⁸³ The distinction is taken into account also by Taylor, Cliffe, *lc. ult. cit.*

⁸⁴ The U.S. scholarship itself has not yet resolved the issue of the nature of procedural rules: see, for instance, Kapeliuk, Klement, *Contracting*, cit., quoting in footnote 68 also Yeazell, *Civil Procedure*, 2008, 138.

⁸⁵ Some attempts have been made to set a proper and complete theory of such limitations only in the last years (whilst until 2000, Cole, *Managerial*, cit., 1201, was still writing that “the question of whether, and to what extent, this type of litigant control over the dispute resolution process in the judicial setting is appropriate, however, has been largely ignored”).

⁸⁶ Explicit calls for or an extensive use of the “arbitration analogy” are made in Thornburg, *Designer*, cit., 193 and ff.; Noyes, *If You (Re)Build It, They Will Come: Contracts To Remake The Rules of Litigation In Arbitration Image*, in *Harvard Journal of Law and Public Policy*, 2007, 30, 579 and ff., in part. 610; Cole, *Managerial Litigants*, cit., 1231 and ff. (where the a. considers the case of the parties contracting for expanding judicial review of arbitral awards) and *Id.*, *Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards*, *Nevada Law Journal*, 2007, 214 and ff.; Tyler, *Lawmaking*, cit., 1570 and 1574.

⁸⁷ Bone, *Party Rulemaking*, cit., 1352 and 1388-1389, after (rhetorically) asking “if parties can and do cooperatively design their own procedures in arbitration, why should they not have broad power to do so in adjudication as well?”, labels the “arbitration analogy” as a flawed argument, because, among other reasons, arbitration would not perform the same function of civil adjudication.

more if tackled in view of the fact that the arbitrators, although not being professional judges, exercise an adjudicatory function as well as the latter do; and as the latter they are equally subjected to the system (arbitral awards, moreover, are capable to become res judicata, with all relevant preclusive effects, as well as courts judgments do). Rather, if at all, arbitration and litigation can be found to be somehow different because, only in the former context, explicit provisions exist allowing the largest possible party autonomy for shaping the procedure, while in the latter – as we have just mentioned and will try to detail infra – the absence of a specific permission is one of the strong suit for the detractors of the practice of consensual adjudicatory procedure.

3.3 *Unequal bargaining power*

In the American system, like everywhere, procedural agreements of different types are not only used in commercial relations between “peers”, but they are often employed in cases in which there is an unequal bargaining power between the parties, such as contracts of adhesion, consumer contracts, employment contracts.

Even if it has been written that by the decision rendered in the famous Carnival Cruise case the Supreme Court “*abandoned the endeavor to distinguish between sophisticated commercial and fine-print consumer contracts, creating a presumption of responsibility expressly premised upon an assumption of market functioning*”⁸⁸, it is certainly true that from this decision and from other rulings still derives a need for “clarity”: both in the negotiation and in the drafting of the contracts, in order to avoid that a certain clause reveals to be substantially unfair, against bad faith, resulting into a defective consent of the “weaker” party. These requirements are mirrored by those dictated by case law for arbitration agreements concluded in respect with similar relations⁸⁹.

In the following analysis, although certainly meritorious⁹⁰, we will put aside this problem, as in our view it does not pertain to the “general” admissibility of procedural agreements in a certain jurisdiction⁹¹: the research, except in some very specific

⁸⁸ Dodge, *The Limits of Procedural Private Ordering*, in *Virginia Law Review*, 2011, 97, 723 and ff., in part. 735.

⁸⁹ Thus, it would be undoubtedly worth developing a general theory for the assessment of any single type of agreement, again with the help of the “arbitration analogy”: for this view, see also Thornburg, *Designer*, cit., 190-191.

⁹⁰ As emphasized also by Davis, *Hershkoff*, *Contracting*, cit., 527-528.

⁹¹ In the same sense, if we well understand, Bone, *Party Rulemaking*, cit., 1360 and ff.

circumstances, will be hereinafter carried out on the assumption that both parties to the contract are on the same plane⁹².

3.4 Types of procedural agreements

3.4.1 Jurisdiction and forum selection agreements

The U.S. Constitution⁹³ allocates competencies between federal and district courts. Save for a defect in subject matter jurisdiction, that may be raised by any party, and by the court *sua sponte*, at any time during the proceedings (including for the first time on appeal⁹⁴), as recalled by the Supreme Court, “*the 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*”⁹⁵. Departing from the ancient rule whereby contractual provisions limiting or amending the place or court where the action could be brought were invalid as contrary to public policy⁹⁶, forum selection clauses are today considered *prima facie* to be valid⁹⁷, unless enforcement is shown by the resisting party to be ‘unreasonable’ under the concrete circumstances.

Pending questions still concern what factors are relevant in determining whether a forum selection clause is unreasonable or meets fundamental fairness⁹⁸.

Case law on forum selection agreements, nevertheless, “*demonstrates that it is the parties – not the courts – who own the process*”⁹⁹.

⁹² An exception will be the case of class action waivers (*infra*, § 3.4.17), a context which, as it is well notorious, is typically related to “mass” relations and consumer contracts.

⁹³ See section 6, Article 6.

⁹⁴ Friedenthal, Miller, Sexton, Hershkoff, *Civil Procedure. Cases and Materials*, New York, 2013, 262-264.

⁹⁵ Supreme Court, in the case *Bremen v. Zapata Off-Shore*, 1907, quoted in Friedenthal, Miller, Sexton, Hershkoff, *Civil Procedure*, *cit.*, 195.

⁹⁶ For a historical analysis at this respect, see Dougherty, *Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought*, in *American Law Reports*, 1984, 404; Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, in *Tulane Law Review*, 2008, 974 and *ff.*; and Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, in *Cornell Law Review*, 1992, 51 and *ff.*

⁹⁷ Babcock, Massaro, Spaulding, *Civil Procedure. Cases and Problems*, New York, 2013, 218 and *ff.* and in part. 227.

⁹⁸ Friedenthal, Miller, Sexton, Hershkoff, *Civil Procedure*, *cit.*, 196.

⁹⁹ Noyes, *If You (Re)Build It*, *cit.*, 599.

3.4.2 Service of process

Due process requires that the defendant is afforded notice and an opportunity to be heard, but parties may waive this guarantee in an ex ante contract, renouncing to their right to be served, pursuant to R. 4(d). In addition, parties can agree to choose certain individuals for the service of the summons (for instance, a trustee), or, reciprocally, to appoint a certain service agent for receiving the service: all of these cases, permitted by the law, do not trigger particular problems.

3.4.3 Waiver of the right to counsels

A similar waiver has been theorized (and neither at this regard there seem to be difficulties or criticisms) for the right to counsel, even more so given that this right is not afforded constitutional protection¹⁰⁰.

3.4.4 Complaint

The original purpose of rules 7 and 8 was to regulate the initial pleadings of the parties in a more liberalistic way than the one previously adopted by the Field Code¹⁰¹, but this goal, in recent years, was partly set aside by the Supreme Court, when, in the notorious Twombly case, in 2007, the existing interpretation of the notice pleading requirements of R. 8(a)(2), was changed and replaced by a new stricter standard of a pleading's required specificity.

The issues of the pleadings, the complaint and its amendments, as everyone who has more than a simple interest in civil procedure knows, touch serious problems of general theory and so it is not possible to get into detail with them in this occasion. Suffice to say, to our purposes, that since the Twombly decision, proposals have been raised for the new pleading's standard set by the Supreme Court to be misapplied through the agreement of the parties, who could opt out from it¹⁰², although no provisions contemplate such agreement.

¹⁰⁰ Thonburg, *Designer*, cit., 192.

¹⁰¹ Subrin, *Woo*, *Litigating*, cit., 124.

¹⁰² Kapeliuk, *Klement*, *Contracting Around Twombly*, in *DePaul Law Review*, 2010, 1 and ff. and in part. 15 and ff.

3.4.5 *Objections and affirmative defenses*

Under R. 12(h), as a general principle, certain objections or potential affirmative defenses, like that related to personal jurisdiction, are waived by the parties when they are not raised in the forms and within the time-limits prescribed by the law.

This is an implicit behavior of the litigants (typically of the defendant) to which the law connects precise negative consequences¹⁰³. Exceptions are provided in some hypothesis, such as – as mentioned earlier – the subject matter jurisdiction, definable as the power to adjudicate in respect of certain types of controversies, and whose purpose (and reason for being a non waivable defense) is to protect the “division of powers”.

Other cases, instead, still trigger specific doubts: for example, among potential waivable affirmative defenses are also the statutes of limitations, but it is only relatively clear to what extent the parties could contract in their respect¹⁰⁴ and in which cases the limitation periods should not apply¹⁰⁵. On the other hand, more in general, doubts might be cast on the validity of a preventive waiver to objections, defenses, or claims¹⁰⁶.

The aforesaid principle, of course, does not embrace all procedural protections and the operation of the rule seems to be linked to the problematic question of whether the procedural rules are default or mandatory, absent an express indication to this effect; meaning that, when a certain defense can be waived, there could be a presumption for the rule to be a default rule¹⁰⁷. Neither at this regard, however, there is clarity and uniformity among scholars’ opinions.

¹⁰³ Friedenthal, Miller, Sexton, Hershkoff, *Civil Procedure*, cit., 193, where the aa. ask if in case a defendant fails to raise objections to a court’s exercise of personal jurisdiction, “is the defendant’s consent the basis for the court’s power?”.

¹⁰⁴ Bone, *Party Rulemaking*, 134, observing that the law is relatively clear as to the possibility of contractual modifications to the statutes of limitation (in general, parties can shorten applicable statutes if it is reasonable but they cannot lengthen the statutes or waive the defenses in advance of a suit).

¹⁰⁵ The Supreme Court stated that parties cannot waive the relevant statute of limitation for claims filed against the United States (as if the public nature of one of the party would change the nature of the rule, from default to mandatory): see *Sand & Gravel Co. v. United States*, 2008, quoted in Friedenthal, Miller, Sexton, Hershkoff, *Civil Procedure*, cit., 264.

¹⁰⁶ It could be argued that when the dispute has not yet arisen, similar waivers would be devoid of object.

¹⁰⁷ *Contra*, see Taylor, Cliffe, *Civil Procedure*, cit., 1104, highlighting that this is a false analogy often relied upon as a justification for enforcing procedural agreement. The aa. contrast this theory arguing that, among other reasons, the different timing would impede the analogy.

3.4.6 Amendments

According with R. 15(a) a leave is necessary by the courts for the parties to amend their previous claims, and whilst in the past version of the rule the amendment was to be granted when “justice so require(d)”, after the 2007 modification, permission “should” be freely given. Both in the previous and in the current version of the provision a great importance is given to the court’s discretion¹⁰⁸; however, this discretion can be easily overcome through the parties’ agreement, as the provision itself establishes that this amendment is (always) possible “*with the opposing party’s written consent*”.

3.4.7 Admissions

For the combined provisions of rules 8(b)(6), 10 and 12, courts shall accept all factual allegations raised by the parties as true, and, also, under the former provision “*an allegation – other than the one relating to the amount of damages – is admitted if a responsive pleading is required and the allegation is not denied*”¹⁰⁹.

As to the possibility of insufficient denials being treated as admissions it has been reported that “*harsh applications of the strictures of Rule 8(b) on the pleading on denials have generally been avoided and the sanction of Fed. R. Civ. P. 8(b)(6) has been applied sparingly*”¹¹⁰. One may still wonder if, when the provision is applied (or when an explicit stipulation of uncontested facts is concluded), the effects of this combined mechanism of allegation and non-denial shall bind the judge or not: what if the judge has more than one suspect that some uncontested facts are not true? Does she have to take them for granted either way?

3.4.8 Case management by courts. Time-limits

R. 16 is the American’s main source of discipline for judges acting as “case managers”, which refers to pre-trial proceedings and conferences and contemplates a rather general

¹⁰⁸ Subrin, Woo, *Litigating*, cit., 112.

¹⁰⁹ We understand that the drafters of R. 8 intentionally avoided any reference to facts, evidence or conclusions. From this provision, if we are not mistaken, it follows that it should also be possible to make, between the parties, stipulations about uncontested facts.

¹¹⁰ Babcock, Massaro, Spaulding, *Civil Procedure*, cit., 405, who nevertheless remember that “gross departure from the requirements of the Rule, such as those that could mislead the adversary, may be treated as admissions”. Compare also Friedenthal, Miller, Sexton, Hershkoff, *Civil Procedure*, cit., 917 and ff.

“collaborative” approach, which reminds to the ones observed (and proclaimed) in a number of European systems, putting party autonomy into the foreground.

So, for instance, the provision requires the judge to issue a scheduling order “after consulting with the parties”, and this order, according with R. 16(b)(4), “may be modified only for good cause and with the judge’s consent”. In both cases the criterion contemplated for modifying the order are of a discretionary nature¹¹¹, but, again, one may wonder: how do they interrelate with the parties’ mutual consent?

Also, the timing of the proceedings, as a general principle, should be a matter for the party to deal with: for this reason, one may ask if the parties’ agreement, besides of participating in the prior planning of all activities, could even do more than that and, for example, deciding an agreed stay of the proceedings¹¹².

3.4.9 Conventional limits on the discovery process

A process which, in American litigation, is traditionally and historically party-controlled is the discovery process. Coherently, R. 26 requires the agreement of the litigants either on a general discovery plan or on specific manners for the taking of the depositions. The parties are responsible for defining the scopes of this phase, which is in turn connected to (and limited by) the limits of their claims and defenses.

The Rules have been amended several times to encourage the parties’ cooperation in this respect and such cooperative imprinting is aimed at persuading the former to explore settlements and other possibilities for expeditious resolution¹¹³: to our purposes, it is also interesting to note that the 1993 amendments to R. 26 finally deleted the prior need for the court’s approval¹¹⁴, leaving full scope to party autonomy.

¹¹¹ Babcock, Massaro, Spaulding, *Civil Procedure*, cit., 433.

¹¹² Compare also, at this regard, the possibility of a voluntary dismissal of the claim, on which, see Friedenthal, Miller, Sexton, Hershkoff, *Civil Procedure*, cit., 976 and ff.

¹¹³ Friedenthal, Miller, Sexton, Hershkoff, *Civil Procedure*, cit., 854.

¹¹⁴ Noyes, *If You (Re)Build It*, cit., 609. The same reasons had inspired also the 1970 reform: Taylor, Cliffe, *Civil Procedure*, cit., 1109 and footnotes 147-149.

3.4.10 *Law of evidence*

As a general rule, as we have seen for the discovery process, proof must be confined to the limits laid down by the plaintiff and the defendant in their respective claims, defenses, factual allegations and denials; and no exception seems to derogate this general rule.

In the field, – even if not always expressly contemplated by the law – are popular in the praxis agreements on contractual changes to the allocation of the burden of proof¹¹⁵, on waiver of hearsay or authenticity of documents objections, on the qualification of expert witnesses or on the invocation of privileges¹¹⁶. The faculty of agreeing on the joint appointment of an expert witness has also been suggested¹¹⁷. Regardless of the acknowledgment of a general use of the agreements in the evidentiary context, it has been written that “courts have not directly confronted the tension between the values of party autonomy and fact-finding reliability” and that case law remains split at this regard¹¹⁸.

3.4.11 *Confidentiality agreements*

Doubts have been cast on the parties’ ability to agree for their proceedings to be confidential, as some commentators have advocated for the existence of a general presumption of public access to all documents filed with the courts¹¹⁹ or, to put it in another way, of a rule whereby the existence of a lawsuit would inevitably be public¹²⁰: these arguments are all well understandable since it is not to be taken for granted that a similar agreement would be capable to bind the judges. Nonetheless, one may still wonder if these presumed rules (of the “publicity” of the lawsuits) are default rules, or overriding and mandatory ones.

3.4.12 *Contracting for private rights and causes of action?*

It is true that, also in U.S. civil procedure as in many continental Europe jurisdictions, there has been a long-standing departure from the ancient British approach

¹¹⁵ Thornburg, *Designer*, cit., 192-193 and footnote 143; Taylor, Cliffe, *Civil Procedure*, cit., 1086 and footnote 5.

¹¹⁶ All cases cited by Noyes, *If You (Re)Build It*, cit., 607-608.

¹¹⁷ Dodge, *The Limits*, 750.

¹¹⁸ Wigmore on Evidence. *Evidence At Trials At Common Law*, New York, 1985, 563, quoted by Thornburg, cit., 203.

¹¹⁹ Resnik, *Competing and Complementary*, cit., 657 and footnote 258.

¹²⁰ Thornburg, *Designer*, cit., 196 and ff.

based on the writs system¹²¹, opting for a different design based on the concept of a general and “atypical” right of action.

This notwithstanding, we can find out statements that the general procedural rules still define the set of permissible actions¹²²; that the legislator creates a private right of action, but that sometimes also the judiciary does (and so the latter did with the creation of the so-called implied right of action, where a question of federal law is involved¹²³); that certain agreements on the scope of the action are permitted with clauses that, even if lacking of a precise legal basis, constrain the plaintiff to declaratory or injunctive relief¹²⁴ or specify available provisional remedies¹²⁵.

One may ask, given the relation between state and federal systems and in view of the latter’s unwillingness to enforce state procedural rules in conflict with federal rules, whether the courts’ restrictive approach in these cases should be different when the parties incorporate the state rule into an *ex ante* contract¹²⁶.

Furthermore, one may perhaps hesitate on the opportunity of deducing, from all of those cases, a general and implied freedom for the parties to contract in this respect.

3.4.13 Waiver of the trial by jury

Right to a jury in federal trial courts is guaranteed by the article III of the U.S. Constitution and, with particular regard to civil law cases, by its Seventh Amendment.

Regardless of the constitutional foundations of the right at issue¹²⁷, R. 38(d) however provides that a written jury claim is necessary for having a jury and if neither parties request a jury trial this right can be waived “by procedural default”. Even if not providing expressly for *ex ante* contracts, the rule has been interpreted as being a default one, thus opening the

¹²¹ I.e. on “typical” and distinguished rights of action. For a historical summary on the subject, Babcock, Massaro, Spaulding, *Civil Procedure*, cit., 296-297.

¹²² Bone, *Party Rulemaking*, cit., 1338.

¹²³ The doctrine of the implied right of action, the so-called preemption doctrine, was progressively theorized by the Supreme Court for cases in which Congress did not grant an explicit right of action (see, at this regard, Babcock, Massaro, Spaulding, *Civil Procedure*, cit., 272).

¹²⁴ Dodge, *The Limits*, cit., 748.

¹²⁵ Davis, Hershkoff, *Contracting*, cit., 519; Bone, *Party Rulemaking*, 1350.

¹²⁶ Davis, Hershkof, *Contracting*, cit., 563.

¹²⁷ Compare Noyes, *If You (Re)Build It*, cit., 579 and ff., recalling that the Supreme Court has defined the right to trial by jury as a “basic and fundamental right”. In general, on the waiver of the right to the jury trial, see Gonzalez, *A Tale of Two Waivers: Waiver of the Jury Waiver Defense Under the Federal Rules of Civil Procedure*, in *Nebraska Law Review*, 2009, 675 and ff.

way to similar agreements¹²⁸ and the same solution has been reached, even in lack of any Supreme Court’s ruling on the topic, by the majority of state courts¹²⁹.

If the “more embraces the less”, then we may wonder if the parties should be also allowed to contract other issues related to the jury, narrowing its scope, for example, or stipulating agreements on the identity or on certain capacities of the jurors.

It might happen, for instance, that the parties jointly ask for a more feasible and restricted version of the jury trial, a sort of abbreviated version of it, maybe reducing the number of the jurors: again, the solutions devised by the doctrine and the courts are neither clear nor unanimous¹³⁰.

3.4.14 Choice of applicable substantive law

The parties to a proceeding have the ability, by private agreement, to affect and decide what law will be applied to their controversy¹³¹. A court, on the other hand, cannot fail to identify the applicable law by imaginatively stating that “*there is simply no law to apply*”¹³².

Whether and when courts will respect these choice of law clauses depends on several practical and policy considerations”¹³³: they are usually enforced, both in federal and state courts, “*absent evidence of significant overreaching*”, unless “*they offend a significant public policy of the state whose law would have applied absent the clause*”¹³⁴ and not when their content

¹²⁸ Noyes, *If You (Re)Build It*, cit., 608

¹²⁹ For an analysis, Thornburg, *Designer*, cit., 183 and ff. and the references quoted in footnotes 14-17.

¹³⁰ Cole, *Managerial*, cit., 1211, reports that at the time of writing only some courts had addressed this possibility, concluding that the judicial treatment until then suggested, in the absence of congressional authorization, such agreements to be considered invalid and unlawful.

¹³¹ Under the Second Restatement of Conflict of Laws, 1988, 186-87, parties to a contract may choose to designate the law to be applied to their relation. The inclusions of such agreements into the category of the procedural agreements could be maybe questioned, but – as pointed out supra in the foreword – at least in this first stage of the research we prefer resorting to a definition of procedural agreements in the broadest possible sense. This approach seems also implicitly followed, among others, by Taylor, Cliffe, *Civil Procedure*, cit., 1124 and ff.; and Dodge, *The Limits*, cit., 733, who defines the choice of law agreements as a hybrid category, for its interrelations with the substantive law.

¹³² As made clear by the Supreme Court in *Meredith v. City of Winter Haven*, 1943, quoted by Friedenthal, Miller, Sexton, Hershkoff, *Civil Procedure*, cit., 475.

¹³³ Including, also in this case and as a consequence of the general rule we mentioned supra, § 3.3, “the extent to which the agreement was freely negotiated”: Babcock, Massaro, Spaulding, *Civil Procedure*, cit., 218.

¹³⁴ Thonburg, *Designer*, cit., 191.

leads to the application of a foreign discipline that, for the U.S. system, is illegal and prohibited¹³⁵.

Precisely defining the limits of the judges' intervention at this respect is however a task that places itself in a rather gray area¹³⁶. Several objections, for example, could be raised against the possibility that the parties be allowed, through an agreement concluded during the course of the proceeding, to bind the judge to apply a certain set of rules or even to interpret them in a certain manner. And this leads us to the immediately following question: whose judgment?

3.4.15 Settlements, consent decrees or judgments. *Whose judgment?*

During the course of civil proceedings, the U.S. courts are often called on to interpret and enforce agreements by which the parties settle their disputes, “*some of which are incorporated into formal court dismissals but many of which do not show up in court records*”¹³⁷.

No general rule, nevertheless, pertains explicitly and completely to settlements, consent decrees¹³⁸, or consent judgment, with the effect that the parties are general abandoned when figuring out how to end a case with an enforceable agreement¹³⁹.

They could reach this objective, first of all, by resorting to the provision contained into R. 68, whereby “*a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued*”¹⁴⁰, but the rule is said to be “underutilized”¹⁴¹.

¹³⁵ One may think about a contract providing for gambling, that – despite being somewhere else permitted – is illegal as a matter of U.S. law.

¹³⁶ Let's think about the (didactic, but non only) case in which if the parties, by agreeing on a series of procedural conducts to be held during the proceedings are pursuing the sole scope of legitimating a transfer of money under the protection of a court judgment (but in so doing – for example – are violating some tax laws, or damaging the prerogatives of a third creditor): how across, in similar cases, may the supervising role of the judges extend?

¹³⁷ Subrin, Woo, *Litigating*, cit., 56.

¹³⁸ Consent decrees are not regulated in general terms, but still certain types of lawsuits, in particular cases, require a court to issue a consent decree: so it is provided for class action settlements under R. 23 (that establishes that a federal district court must determine whether a proposed settlement is fair, adequate, and reasonable before approving it); so it is provided, for antitrust cases, under the Antitrust Procedures and Penalties Act (the so-called Tunney Act), 15 U.S.C.A. § 16(b)-(h).

¹³⁹ Resnik, *Competing*, cit., 630, also for a historical analysis of the use of consent decrees.

¹⁴⁰ The provision is available only to the defendant: Miller, G. P., *An Economic Analysis of Rule 68*, *Journal of Legal Studies*, 1986, 93 and ff.

¹⁴¹ Friedenthal, Miller, Sexton, Hershkoff, *Civil Procedure*, cit., 1350, list among the possible reasons the consideration that a typical settlement would include a non-admission of liability and a

They could also look at the provisions regarding the termination of the proceedings, asking that they be extinguished through a voluntary dismissal¹⁴².

More frequently, in practice, occurs that the parties jointly request the issuance of a so-called “consent decree”, which is a “creature of the courts” not generally recognized by the legislation¹⁴³, and that can be defined as a “*settlement agreement, typically containing injunctive relief, which the judge agrees to enforce as a judgment*”¹⁴⁴.

Since years, the Supreme Court has plainly recognized the double nature of such consent decrees¹⁴⁵ and thus corroborated their use. In a rather dated case, the Supreme Court even enforced a so-called cognovits note, i.e. a contractual agreement that went far beyond, providing for a preventive waiver of both notice and hearing and allowing “*the contracting party to preclude fact-finding by agreeing to confession of judgment*”¹⁴⁶.

From a foreign observer’s point of view, however, it appears that permission for consent decrees would need to be reconciled with the common assumption, coming also from the same Supreme Court, according to which “*parties cannot, by giving each other consideration, purchase an injunction from a court*”¹⁴⁷.

In addition, even if it has been reported that facing with such requests the judges use to take an active role in the formation of the settlement¹⁴⁸, opinions oscillate as to the limits of this control: from deeming that the court should “*focus on whether the decree resolves the litigation at issue, is consistent with the laws and the Constitution, does not have a significant impact on the rights of third parties, and is an appropriate utilization of judicial resources*”¹⁴⁹,

confidentiality provision, whilst the judgment is public. At this regard, see also Bone, To Encourage Settlement: Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure, in *Northwestern University Law Review*, 2008, 1561 and ff.

¹⁴² See references supra, in footnote 110.

¹⁴³ Cole, *Managerial*, cit., footnote 37 and 1208: “even where congressional authorization does not exist, however, courts continue to implement consent decrees” and that in these cases “the parties’ agreement is the primary source of the obligations in the decree”.

¹⁴⁴ Cole, *Managerial*, cit., 1207.

¹⁴⁵ See the 1986 decision quoted by Resnik, *Competing*, cit., footnote 153.

¹⁴⁶ The defendant will only have the possibility of “reopening” the judgment: Supreme Court, in the case *D. H. Overmyer Co. v. Frick Co.*, 1974. Criticisms vis-à-vis such decision have been raised in Yeazell, *Civil Procedure*, New York, 2004, 144 (quoted by Noyes, *If You (Re)Build It.*, cit., 605). Compare also Babcock, Massaro, Spaulding, *Civil Procedure*, cit., 228-229.

¹⁴⁷ See, Supreme Court, in *Employees Dept. v. Wright*, 1961.

¹⁴⁸ Sometimes suggesting the content and the wording of the decree: Resnik, *Competing*, cit., 664 and ff.

¹⁴⁹ Cole, *Managerial*, cit., 1210 and references to both scholarship and case law in footnote 48.

until stating that these settlements concluded under the “wings” of the courts” should be submitted to a “public policy” control¹⁵⁰. All doubts which, once again, concern the role that the courts should play in the enforcement of the agreements.

3.4.16 Appeals (waivers to)

The failure to comply with appellate deadlines is sufficient for an appeal to be foregone by tacit agreement. Therefore, the parties’ ability of contracting to waive any mean of challenge against their judgment has ever been acknowledged, although in the absence of a specific permissive provision.

Other than excluding the appeal, parties might have an interest in contracting about various aspects of it, including timing or scope of the review¹⁵¹, but federal courts are said to be split about the admissibility of these sorts of agreements¹⁵².

The category may also embrace the case in which the parties, having reached a settlement in the course of the appeal, request the lower court’s judgment being vacated consistently: a case which presents a lot of similarities with the above figures of consent decrees and judgments and that, as a consequence, could be construed in accordance¹⁵³. Surprisingly enough, the Supreme Court¹⁵⁴, while admitting consent decrees, contradictorily rejected such practice and this generates confusion and has led some to suggest that, for this practice to be permissible, a congressional authorization would be inescapable¹⁵⁵.

3.4.17 Class action waivers

Since the last two years, a debate has been going on in the United States also regarding contractual clauses by which the parties agree to waive litigating their case in a

¹⁵⁰ Resnik, *Competing*, cit., 648, who also, agreeably recalls that this parameter is a “dynamic” one.

¹⁵¹ Bone, *Party Rulemaking*, 1351.

¹⁵² Thornburg, *Designer*, cit., 201-202 and the references listed in footnote 114.

¹⁵³ Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, in *University of California Law Review*, 1994, 1471 and ff. and in part. 1513. A comparison between these two cases has also been made by the Seventh Circuit, in the case *In re Memorial Hosp. of Iowa County Inc.*, 1988, quoted by Cole, *Managerial*, cit., in footnote 31.

¹⁵⁴ *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 1994.

¹⁵⁵ Cole, *Managerial*, cit. 1216.

class¹⁵⁶. Such clauses are quite common in consumer contracts (especially when accompanied by an arbitration clause¹⁵⁷), but they are still not enforced by some state courts.

The topic came back in fashion after the 2011 decision in the well-known AT&T Mobility LLC v. Conception case¹⁵⁸, where the Supreme Court, by a 5-4 margin, ruled against the possibility of a class arbitration, inter alia confirming the legitimacy of class action waivers, not deemed “unconscionable” as previously sometimes stated by the lower district courts.

The decision makes more difficult to challenge the validity of these waivers and a question remains open as to whether it would be possible to void them according with general contract defenses¹⁵⁹.

3.4.18 *Miscellanea*

Many other cases, in which the agreement of the parties appear to play somehow a role in civil procedure, would equally deserve attention: from the so-called post dispute stipulations¹⁶⁰ to procedural agreements related either to the lawyers’ fees or to the applicable standard of proof¹⁶¹, to the proceedings conducted before a “magistrate”, that can be resorted, according to 28 U.S.C., section 636, only with the parties’ consent¹⁶².

4. *Some inklings and “first” impressions.*

In light of the above analysis, we can conclude by outlining some preliminary impressions.

¹⁵⁶ Thornburg, Designer, cit., 194. In general, see also Noll, Rethinking Aggregation Doctrine, in Notre Dame Law Review, 2012, 649 and ff. (revitalizing the idea of class action waivers).

¹⁵⁷ Such clauses are rarer when the adhesion contract provides for litigation: Eisenberg, Miller G. P., Sherwin, Arbitration’s Summer Soldiers: an Empirical Study of Arbitration Clauses in Consumer and Non-consumer Contracts, in University of Michigan Law Review, 2008, 871 and ff.

¹⁵⁸ For an analysis, see Friedenthal, Miller, Sexton, Hershkoff, Civil Procedure, cit., 823.

¹⁵⁹ But, at this regard, as already made clear supra, in 3.3, the question is not about permitting the agreement but about making sure the agreement is fair and was fairly negotiated by the parties.

¹⁶⁰ Moffitt, Customized Litigation: The Case for Making Civil Procedure Negotiable, in George Washington Law Review, 2007, 461.

¹⁶¹ Rhee, Toward Procedural Optionality: Private Ordering of Public Adjudication, in New York University Law Review, 2009, 514 and ff. and in part. 539-540.

¹⁶² Irrespective of the role played when opting for this particular procedure, the parties’ common will, could also be relevant in its dynamic course: for example, section 636 positively lists the activities that can be performed by the Magistrate and doubts concern the possibility that the Magistrate acts, as appointed by the parties, as an arbitrator: Cole, Managerial, cit., 1219-1220, mentioning one precedent in which the possibility was denied.

First, we have observed that there seems to be no agreement as to the need of a prior “congressional authorization” for allowing the parties to contract on procedure. Some authors have a propensity for requiring such authorization¹⁶³, also in view of a presumed need for a uniform application of procedural rules in federal civil practice¹⁶⁴; some others believe the Rules to be a set of default rules¹⁶⁵; some others adhere to a more balanced view¹⁶⁶. Still there is opacity on the possible way in which default rules, though very important in civil law to preserve freedom of contract, do operate in civil procedure¹⁶⁷. And there is neither sensitivity to the argumentation whereby, even if the call for a normative “*framework for reviewing party requests for non-traditional exercise of judicial power*”¹⁶⁸ is sharable and would solve several problems, engaging in a study and trying to tackle the above issues would undoubtedly be worth, at least *rebus sic stantibus*.

This leads us, in turn, to the second concern that arises from the above survey, which is related to the limits of the practice of contracting for procedure and to the role of the courts when having to do with such practice.

Commentators, in fact, have tried to analyze the limitations to procedural agreements and if we had to identify a common denominator we would highlight a convergence in imposing limitations “necessary to protect the public interest”¹⁶⁹. No clarity, however, surrounds the content of this “public law protecting argument”: should it only include

¹⁶³ Bone, Party Rulemaking, 1369 and ff., recalls the common assumption whereby, as a policy matter, contracting should be allowed only when sanctioned in some way by existing procedural rules. Need for an express authorization is also advocated by Dodge, *The Limits*, cit., 785.

¹⁶⁴ Taylor, Cliffe, *Civil Procedure*, cit., in part. 188, saying that the enforcement of such contracts defeats the goal of uniformity of civil procedure before federal courts. But differently on this point, compare Noyes, *If You (Re)Build It.*, cit., 610, observing that, among other reasons to the contrary, application of the Rules necessarily results in a dispute resolution process unique to each case.

¹⁶⁵ Noyes, *If Your (Re)Build It.*, 610 concludes that the Rules are default rules.

¹⁶⁶ As to the need of an express authorization, Davis, Hershkoff, *Contracting*, cit., 562, conclude that a presumption of enforcement should not attach to the contract procedure term, but – if we understand well – not in a sense that require the prior congressional authorization, but only because “even within an adversarial system, the judge has an obligation to ensure – at some level – the integrity of the court system and not simply endorse the procedural preferences of the parties”.

¹⁶⁷ Insomuch as commentators have argued that it remains “only relatively certain” that subject matter jurisdiction, fraud, duress or unconsciousability are still mandatory rules that cannot be contracted by the parties: Davis, Hershkoff, *Contracting*, cit., 520 and footnote 45.

¹⁶⁸ Cole, *Managerial*, cit., 1221.

¹⁶⁹ Dodge, *The Limits*, cit., 729.

overriding procedural considerations, covering due process¹⁷⁰ and other minimum common standards? Should it bar also “unusual or unfamiliar procedure”¹⁷¹, or all of those procedures that interfere with the adjudicative reasoning process¹⁷²? Should it also serve for avoiding that the practice neither produces damages to third parties¹⁷³, nor harms the “institutional integrity”¹⁷⁴?

All these considerations, which would surely deserve a better and clearer placement, justify the categorization of the procedural agreements as “Super Contracts”¹⁷⁵, to which, not only general contract law¹⁷⁶, but also the above procedural public policy considerations apply.

Some other recommendations have been made, which relate to the *quomodo* of the practice and to its concrete implementation, aiming at ensuring transparency through information disclosure¹⁷⁷, and asking for the adoption of a sort of collaborative method between the parties and the courts¹⁷⁸.

¹⁷⁰ Noyes, *If You (Re)Build It*, cit., 623 and ff.: “the Court’s statement regarding ‘overriding procedural considerations’ might simply reflect a concern for the constitutional requirements of due process”.

¹⁷¹ Noyes, *If You (Re)Build It*, cit., 634. We could for instance think about the example of having a dispute decided by flipping a coin, also recalled Bone, *Party Rulemaking*, cit., 1380, who agreeably observes that if judges routinely flipped coins and if flipping coins would be part of the American culture, then coins flipping would be accepted as a procedural method (in general, on the mutual links between culture and procedural law, see Chase, *Gestire i conflitti. Diritto, cultura, rituali* (translated by Ferrarese), Bari, 2009, passim).

¹⁷² Bone, *Party Rulemaking*, 1390 and ff.

¹⁷³ Noyes, *lc. ult. cit.*

¹⁷⁴ Cole, *Managerial*, cit., 1225.

¹⁷⁵ Taylor, Cliffe, *Civil Procedure*, 1127 and ff.

¹⁷⁶ For cases characterized by an unequal bargaining power, see *supra*, § 3.3.

¹⁷⁷ At this regard, Davis, Hershkoff, *Contracting*, cit., 557 and ff., propose that a disclosure of the agreements concluded by the parties is made promptly in time, at the very beginning of the procedure (suggesting the inclusion of the relevant information in the civil cover sheet, the form accompanying the complaint).

¹⁷⁸ Compare again Davis, Hershkoff, *Contracting*, cit., 557 and ff., who also propose the creation of a database for all these forms and procedure. We may add that this “collaborative” method could easily find its *raison d’être* in the context of R. 16.

We may also define such method as the “meet and consult” method, borrowing the expression used in the context of international commercial arbitrations, where there is no doubt that the role of the parties and their common will play a vital role: hints on the privatization of adjudication of international disputes are in Davis, K. E., *Privatizing the Adjudication of International Commercial Disputes: The Relevance of Organizational Form*, in NYU, Law & Economics Research Paper Series, Working Paper no. 11-01, 11 and ff.; for broader considerations in this respect compare also, if you want, Fabbi, *La prova nell’arbitrato internazionale tra privati*, (forthcoming), Torino, 2013, in part. Ch. I.

Indeed, also from these recommendations, one must observe that the courts play a key role in the development of the practice: they have not only an inherent power to control the accuracy of any consensual procedural arrangement designed by the parties¹⁷⁹, but a proper duty to do so, whose fulfillment serves to drive away the bothersome ideas of a de facto outsourcing of a governmental function with “*no meaningful oversight by Congress, by agencies, or by the courts*” and of a “*state-breaking function*”¹⁸⁰.

In other words, rather than preferring to acquiesce in these private agreements¹⁸¹, the courts shall have an overriding duty to supervise, and by this fashion they shall give their contribution to the development of the practice¹⁸².

No doubts that “*enforcement of a contract that makes a package of procedural choices would also work dramatic changes in the role of the trial judge*”¹⁸³ and that for the American system the implications of the present study are complex. Interesting to note, these implications seem to drive the U.S. system to a certain approximation with the “civil law” models of justice, thereby upholding many of the conclusions already reached in the study of comparative civil procedure¹⁸⁴.

¹⁷⁹ Noyes, *If You (Re)Build It*, cit., 630 and ff., a power that cannot be excluded by the parties.

¹⁸⁰ Davis, Hershkoff, *Contracting*, cit., 515.

¹⁸¹ Davis, Hershkoff, *Contracting*, cit., respectively 515 and 520.

¹⁸² That can be viewed as a new “customary” source for civil procedural law: in the same sense, Bone, *Party Rulemaking*, cit., 1320.

¹⁸³ Thornburg, *Designer*, cit., 208. See also Miller, A. R., quoted retro, in footnote 66.

¹⁸⁴ Documenting the erosion of rigid concepts and categories in civil procedural laws: Chase, Walker, *Common Law, Civil Law and the Future of Categories: An Introduction*, in Walker, Chase, *Common Law*, cit., in part. lii.; and previously, for the American system, Chase, *American ‘Exceptionalism’ and Comparative Procedure*, 2002, 50 *American Journal of Comparative Law*, 277 and ff., in part. 283.