Procedural Contracts and Agreements: An Introduction to a New Era of Party Autonomy in Litigation

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1 Introduction

Contract and litigation – the improbable encounter of the two worlds that seemed as apart as incompatible. Usually portrayed as the realm of dissensus, depicted as a game, a war or a duel,[1] litigation would always entail belligerence and repel consensual interactions among disputants to determine the formalities of court proceedings.

Furthermore, since most jurisdictions restrict self-help mechanisms (limiting one party's ability to impose unilateral determinations on others), access to justice has always been a matter of public policy. Whenever a conflict arises, the legal system would have to channel the dispute to structured organs and bodies, providing fair proceedings to solve the conflict within the rule of law. The formalities governing court procedures would thus be predetermined by imperative default rules that the parties may not modify, and judges would rule on procedural issues simply by applying statutory provisions and precedents. Based on these assumptions, many jurisdictions have consolidated an understanding of litigation as a space of public interests, and the design of court procedures reflected the choice of legislators, with no participation of the parties.

Contracts, covenants and agreements were seen as instruments of private nature, voluntary declarations driven by a logic of negotiation, flexibility and party control, mechanisms that could seldom be applied to deviate from cogent legal rules. Therefore, parties' stipulations could not determine the shape and form of court procedures. According to this line of thought, any procedural agreement, understood as a contract or consensual determination of the disputants to modify the rules of civil procedure in an actual or future litigation, would be invalid and disallowed.

1 Piero Calamandrei, 'Il processo come giuoco' in Mauro Cappelletti (ed), *Opere Giuridiche*, vol I (Morano 1965) 559.

For quite a long time, this traditional view has excited vehement opposition to party autonomy in civil procedure, reducing the protagonism of the litigants in defining procedure before state courts. Following the public nature of litigation, an agreement-based procedure would not be permissible, and parties' disposition over litigation proceedings was exceptional.[2] Then procedural agreements gradually faded away, virtually disappearing from some jurisdictions and often seen as a monstrosity, challenging to define, categorise and operate.[3]

However, attempts to implement party-driven flexibilisation of court procedures are not entirely novel. Agreements are practices as old as the law itself. The origins of concepts related to procedural agreements can be traced back to contractual forms of court proceedings observed throughout legal history.[4] Yet, a comparative analysis shows that most contemporary legal systems are familiar with at least some types of procedural contracts, such as arbitration agreements, choice of court clauses and agreements to mediate before filing a lawsuit before the judiciary.[5] Hence, this historical resistance to procedural agreements seemed to echo old practices that were hard to couple with contemporary components of civil litigation.

This perception has led to a clear pendulum swing in the past decades. Procedural agreements and contracts have been a growing trend in many jurisdictions, starting in contractual practice and slowly climbing into formal normative status. Indeed, this renewed interest in procedural contracts began as a bottom-up movement that originated in day-to-day contractual life, even if, at that point, legal scholars were not attentive to them. Despite initial scepticism towards this type of agreements, legislators and courts across the globe are steadily adopting models that favour party self-determination as to the rules of court procedures, and legal literature has begun to approach the subject from other perspectives.

This shift towards the empowerment of litigants to shape court procedures has lately acquired renewed strength and different nuances, enabling parties to contractually agree upon many procedural rules, such as those related to filing formalities, service and notifications, standing to sue and other requirements for participation in court procedures, evidence, appeals, enforcement, costs, etc. The extent to which these

2 Until the end of the 20th century, many jurisdictions only acknowledged voluntary declarations of the parties to govern procedural effects if they were unilateral, performed exclusively by way of a procedural defence (*exceptio*); cf. Arthur Nikisch, Zivilprozeßrecht (Mohr Siebeck 1950) 217-219.

3 Cf. Yvonne Muller, *Le contrat judiciaire en droit privé* (University of Paris I 1995) 4, 17, 179-182. Robson Godinho (*Negócios processuais sobre o ônus da prova no novo Código de Processo Civil* (RT 2015) 28-29, 61) has seen this as an 'epistemological trauma hard to overcome'.

4 Muller (n. 3) 11 ff; Emilio Betti, *Istituzioni di Diritto Romano*, vol I (2nd edn, Cedam 1947) 256-259; Loïc Cadiet, 'Propos introductif: faire lien' in Sandrine Chassagnard-Pinet and David Hiez (eds), *La contractualisation de la production normative* (Dalloz 2008) 170, 178.

5 Anna Nylund and Antonio Cabral, 'General Report: Contractualisation of Civil Litigation' in Anna Nylund and Antonio Cabral (eds), *Contractualisation of Civil Litigation* (Intersentia 2023) 3-5.

agreements and contracts are allowed in a given legal system varies. Still, there is certainly a movement in favour of the contractualisation of civil litigation.[6]

This introduction discusses key concepts related to contractual agreements, highlights their correlation to other aspects of contemporary civil procedure law and identifies possible future challenges. It also gives an overview of the themes and chapters of this book.

2 Procedural Contracts as Hybrid Means to Improve Access to Justice, Efficiency, Flexibilisation and Adaptation of Court Procedures

The rise of consensual dispute resolution is a tale of the search for more flexibilisation, adaptation and efficiency. It relates not only to procedural contracts but also to several connected trends of contemporary civil justice, which provide a more benign normative framework for party disposition over litigation procedures.

Undeniably, there are reasons for submitting court proceedings to a rigid and inflexible proceeding in contemporary civil procedure. Invariable formal rules protect the parties against the abusive discretion of judges, and sticking to pre-established sets of default rules might favour legal security and legal certainty while allowing courts to command litigation from filing until decision-making swiftly.

However, in many legal systems, one can observe an intense efficiency crisis in court procedures. The number of pending proceedings has skyrocketed, and the increased influx of new cases created huge backlogs and brought up problems such as excessive duration of court procedures, high costs and enforcement effectiveness deficits, which have made court administrators and policymakers struggle to provide adequate settings for dispute resolution. This frustrating scenario has provoked disillusionment and a lack of belief in litigation, which called for new strategies and different instruments to streamline, accelerate and simplify proceedings.

Therefore, in many jurisdictions, litigation shifted towards increasing flexibilisation, aiming at improving efficiency. Procedures provided for in statutory norms became defeasible, and management powers have been granted to courts to waive formalities, change deadlines, interfere in the order of the production of evidence,[7] sequence issues

6 Ibid., 36-37.

7 Emmanuel Jeuland, 'Le renouveau du principe du juge naturel et l'industrialisation de la justice' in Benoît Frydman and Emmanuel Jeuland (eds), *Le nouveau management de la justice et l'indépendence des juges* (LGDJ 2011) 98; Peter Chan and C.H. van Rhee (eds), *Civil Case Management in the Twenty-First Century: Court Structures Still Matter* (Springer 2021); C.H. van Rhee (ed), *Judicial Case Management and Efficiency in Civil Litigation* (Intersentia 2008) 11-25.

or invert stages of the proceedings,[8] set a timetable for pretrial discovery, etc.[9] This growing flexibilisation has eroded the ideal of a court procedure fully determined by constant and non-alterable default norms. The rules of court procedures are much more alterable than in the past.

Party autonomy to shape court proceedings might have also grown from the perception that statutory default norms are not optimal for governing all kinds of procedures. Arguably, the old-fashioned way of providing a fixed number of default rules, offering the parties a limited list of statutory procedures, might have indeed moved the judiciary structures smoothly with few bumps along a predictable path of pregiven curves and shapes. A smaller menu of court procedures may also decrease complexity, and a simpler display of procedural alternatives speaks in favour of more vulnerable litigants who might not always have access to sophisticated and ultra-specialised attorney services. However, pregiven legislative rules providing rigid and inflexible ordinary proceedings do not offer the parties adequate relief to solve every dispute brought before the judiciary.

Specificities of the case at hand often reveal a need not only for flexibility but also for adapting default rules. If parties are the ultimate beneficiaries of access to justice, the legal system should provide some room for party-driven flexibilisation and adaptation. Debatably, efficiency could be seen merely as a problem of the judiciary since court administration requires public expenditure and relates to budget issues. Notwithstanding this, parties might think that efficiency should be thought of from the perspective of those whose conflicts are brought to court. Therefore, the disputants should be the ones to define, if not all, at least some formalities of court procedures. After all, parties know better which proceeding suits their needs better. Therefore, they should be given some initiative to adapt proceedings to what they consider to be the most efficient framework for each case.

However, even in light of problems of low efficiency and lack of flexibility and adaptability, some legal systems have historically resisted giving the parties the power to determine court procedures, and this resistance is seen until today. So, disputants started to seek alternatives.

First, parties began to move away from the judiciary and towards alternative dispute resolution (ADR), which allows disputants to shape the procedure through contract

8 Robert Bone, 'The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and the Procedural Efficacy' (1999) 87 Georgetown Law Journal 917. For the different systems regarding discretionary case management powers of the judge, see John Sorabji, 'Managing Claims – General Report' in *IAPL Tianjin Conference Papers* (2017) 38 ff.

9 Robert Bone, 'Who Decides – A Critical Look at Procedural Discretion' (2007) 28 Cardozo Law Review 1968.

as they find adequate. Indeed, arbitration agreements represent a well-known form of contractually designed procedure, although not conducted before a state judge.[10]

This movement towards ADR represented a veritable 'flight' from the courts: in the absence of suitable proceedings in litigation, the alternative extrajudicial means of dispute resolution appeared to be the only possible path.[11] However, arbitration and other kinds of ADR are not suited for every conflict (e.g. nonwaivable rights). They are often expensive dispute resolution methods, economically unfeasible for millions of people, especially in developing countries. Therefore, ADR has not entirely solved the need for adaptation and flexibilisation in dispute resolution.

The result of this complex equation is that, for a considerable number of individuals worldwide, there would be mainly two choices for dispute resolution: (i) extrajudicial alternatives such as arbitration, that is, private procedures of contractual nature where parties can model proceedings as they deem adequate, even if at high costs and (ii) litigation, less costly, more bureaucratic and with rigid and inflexible default rules of procedure, which could only be bent or adapted by decree of judges exerting case management powers. There had been no third way, no 'alternative to ADR' that would provide party-driven flexibilisation within the framework of court proceedings.[12] This lack of options has undermined access to justice. Because of the inadequacy of ordinary court proceedings for resolving certain disputes, there seem to be fewer reasons to limit the parties to only a few possible alternatives nowadays.[13]

Thus, procedural agreements appeared as an instrument to improve access to justice, fostering new settings for dispute resolution that are not framed in the 'litigation versus arbitration' duality but rather provide for intermediate and hybrid paths,[14] a way for the parties to design court proceedings (i.e. formal self-regulation) before the judiciary. Rather than 'alternative',[15] this technique could be portrayed as 'complementary', aiming at flexibilisation and adaptation but done within litigation.[16]

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10 Loïc Cadiet, 'Le jeux du contrat et du procés' in Marie-Jeanne Campana, *Philosophie du Droit et Droit Économique: Mélanges offerts à Gérard Farjat* (LGDJ 1999) 23 ff.

11 Michelle Taruffo, 'Un'alternativa alle alternative: modelli di risoluzione dei conflitti' (2007) 152 Revista de Processo 321.

12 Sarah Rudolph Cole, 'Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution' (2000) 51 Hastings Law Journal 1233-1234.

13 Gerhard Wagner, *Prozeßverträge: Privatautonomie im Verfahrensrecht* (Mohr Siebeck 1998) 3-4.

14 Remo Caponi, 'Autonomia privata e processo civile: gli accordi processuali', (2010) 1 Civil Procedure Review 47.

15 Kevin E. Davis and Helen Hershkoff, 'Contracting for Procedure' (2011) 63 William & Mary Law Review 517.

16 Loïc Cadiet, 'Los acuerdos procesales en derecho francés: situación actual de la contractualización del proceso y de la justicia en Francia' (2012) 3 Civil Procedure Review 2.