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Party Autonomy and State's Intervention in Civil Justice. Privatizing Civil Justice through Procedural Agreements?

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Alla mia Mamma
e alle mie rane.

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INTRODUCTION

The purpose of the present thesis is to engage in a discussion on a peculiar form of party autonomy: procedural agreements.

The validity, the boundaries and the limits of such agreements are highly controversial but not as thoroughly discussed and analysed.

Indeed, contemporary insights on the subject with a global and general framework are not overwhelming, just as the case-law on the topic.

In light of the above, the present thesis will examine the privatization of civil justice and the role of procedural agreements in the civil trial.

In particular, this work is aimed at analysing whether and to what extent parties' autonomy can play a role in the dynamics of the proceedings; autonomy meant as the power of concluding an agreement on the rules to be followed by the parties in the possible litigation phase of their legal relationship.

The study will involve the analysis of the so-called procedural agreements, understood here as agreements that affect the conduct of the civil proceedings, at its various stages.

Agreement – henceforth meant as the outcome of the mutual meeting of the mind– and trial are traditionally seen as contrasting concepts, two parallel lines, that look at each with no point of intersection[1].

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[1] CABRAL A., *Accordi processuali nel diritto brasiliano*, Rivista di diritto processuale, no. 3, 2016, p. 773.

Indeed, agreement on disagreement seems quite anachronistic itself, especially whether the trial is considered as the place where the conflicting interests of the parties are brought before a third, neutral, party. [2]

It should be noted that, for the purpose of this thesis, the author will refer to the term procedural agreement meaning those agreements with a direct effect on the proceedings, excluding from the scope of investigation those contracts which affect procedurals rules indirectly, such as the third-party litigation founding[3].

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[2] CABRAL A., *supra* no. 1; CALAMANDREI P., *Il processo come giuoco*, Rivista di diritto processuale, Vol. I, 1950, p. 31.

[3] Relatedly, for the sake of completeness it is worth to briefly recall a figure of un-direct procedural agreement, being it used not to modify directly procedural rules but to alter indirectly their effects: private litigation funding. In particular, this instrument in the last decade has been highly discussed and developed for a renewed interest of scholars and practitioners on the topic. Third party litigation funding concerns the practice of a party, extraneous to the litigation, to fund entirely or partially the costs of a national or cross-border litigation, in return for a payout of the investment and a compensation that may (i) be linked to the outcome of the dispute or (ii) be framed in a flat (success) fee. The procedural effect that an agreement of this kind may have on procedural law is primarily undirect, not altering the rule but their effect, allocating the litigation costs (and therefore the risks) on a subject which is not a party and consequently enlarging the effects of the decision. In some cases, national legislator (for England and Wales see the following cases: Arkin v Borchard Lines Ltd (no 2 and 3) [2005] EWCA Civ 655, [2005] 1 WLR 3055, Excalibur [2016] EWCA Civ 1144, Julie Anne Davey [2019] EWHC 997 (Ch), ChapelGate Credit Opportunity Master Fund Ltd v James Money [2020] EWCA Civ 246) has also granted the winning defendant with an action for the recovery of costs directly against the funder. In this sense, third party funding became a procedural agreement to the benefit of the defendant, attributing a right of action to the latter, therefore having a directly effects on procedural rules. The topic of third-party funding is really broad and worth of an accurate analysis which fall outside the scope of this thesis and therefore could not be hereby assessed. For a complete understanding see the European Parliament Study on added value assessment on responsible private funding litigation, MULLER K. / KORONTHALYOVA I. / SAULNIER J.L., *Responsible private funding litigation*, 2021,

In light of the above, this thesis will try to answer two fundamental questions: may parties affect the regular conduct of the proceedings – as regulated by national legislators – by means of an agreement? In case of affirmative answer, to what extent?

These questions have found a general sense of closure with respect to the traditional doctrine, which, in dismissing the value of the individual will in civil proceedings in a negative, or at least extremely limited, sense, has failed to provide conclusive arguments that enable the reader to understand why the denial in this regard is so marked.

In an effort to provide a valiant answer to the issues just presented, the work will be divided in three parts.

Chapter One aims at providing the reader with an overview of the fundamental principles and notions underpinning the topic of procedural agreements. In particular – given some preliminary definitions – the general framework of civil proceedings and its regulation will be provided, analysing the different models of trial with a particular focus on the prototype of procedural agreements: the *litis contestatio.* The author will drive its attention on the public and private conception of procedural law in order to question the ongoing fenomenon of the privatization of civil justice, moving than to an

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available at **https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf** and the annexed research paper by PONCIBÒ C. / D'ALESSANDRO E. *State of play of the EU private litigation funding landscape and the current EU rules applicable to private litigation funding*, 2021.

analysis of the nature of procedural rules and the role of party autonomy within civil proceedings.

In Chapter Two, attention will be drowned to the very notion of procedural agreements. With the intention to develop such definition, the author conveys the reader's attention to their notion and nature, their classification and the position of the judge with regard to the agreement. The effecs of such instruments will be analysed, moving as a final remark on their validity requirements, both from a formal, and from a substancial perspective.

Lastly, the author brings together the concepts and phenomena analysed in the first chapter, in order to investigate whether or not procedural agreements can be a useful tool to counteract the ever-increasing phenomenon of flight from civil proceedings.

The third Chapter will then move to the heart of the dissertation: atypical procedural agreements. In particular, the author will investigate whether they are compatible within the realm of procedural law, analysing some practical examples of atypical agreements.

Following a focus on the Italian legal system, a comparative analysis of different national system will be provided, in an effort to present the advantages related to the admission of freedom of contract in the field of procedural law.

Arguably the most interesting experience is the Brazilian one, where as a result of the 2015 reform of the Code of Civil Procedure a general clause was introduced giving the parties the power to enter into agreements with the purpose of modifying the procedural rules in order to adapt them to the

specificity of the case, as well as to conclude agreements regarding procedural burdens, powers, faculties and duties.

Finally, some issues concerning the validity and the enforcement of procedural agreements will be investigated.

The conclusions will then draw together the threads of the argument, in order to provide the position assumed by the author of this thesis at the end of its inquiry.

CHAPTER ONE: FUNDAMENTAL NOTIONS

It has been highlighted that the aim of the present work is to gather and analyse the mutual interferences of two concepts which seems diametrically opposite: agreement and disagreement.

Agreement, as the meeting of the minds of different subjects; disagreement, as the conflict between the parties' opposed rights or interests.

It is precisely on the concept of disagreement that the essence of the proceedings itself is based, which tends not to see its *raison d'être* in non-pathological situations[4].

Indeed, the concept of Jurisdiction itself has been historically tailored as the State's power to compose dispute. Relatedly, the study of procedural agreements cannot but start from the definition of the concept of Jurisdiction, which over the years has significantly evolved, at the same time as the world has changed.

From a concept of jurisdiction as the fair composition of the dispute[5], scholars moved, with procedural publicism, to a consolidated trend which considers jurisdiction as a revelation of the concrete will of the law, tooled by the judge, through provocation of the parties.

On these grounds, prof. Liebman defined Juridiction as "*one of the fundamental*

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[4] CARNELUTTI F., *Istituzioni del processo civile italiano,* V ed., Roma, Società editrice del Foro Italiano, 1956, p. 48.

[5] CARNELUTTI F., *Lezioni di Diritto Processuale Civile*, Introduzione, Padova, CEDAM, 1930, p. 38.

functions of the state, having its object the implementation of the right"[6], since through this function the State gives practical effect to the abstract rules representing the objective tight.[7]

Within this debate, the concept of jurisdiction has, however, always remained strongly anchored to the State and to the dichotomy between publicism and privatism.

At present, this dichotomy has been partly overcome, with the admission of the relevance of private interests in the trial, without, however, returning to the concept of Roman privatism, nor eliminating the role of the state, whose presence in the trial is irrepressible.

A contemporary tendency emerges to foment the self-composition of the dispute and to confer powers on the litigants, with an increasing growth in the spaces in which their will is considered enough to produce legal effects.[8]

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[6] LIEBMAN E.T., *Manuale di diritto processuale civile*, II ed., Milano, Giuffrè, 1968, p. 3, translation provided by the author of this thesis; translation provided by the author of this thesis; original text: "*una delle funzioni fondamentali dello stato ed ha per oggetto l'attuazione del diritto*"; on the same concept see CHIOVENDA G., *Principi di diritto processuale civile – Le azioni. Il processo di Cognizione*, III ed., Napoli, Casa Tipografico-editrice dott. Eugenio Jovenne, 1980, p. 63.

[7] LIEBMAN E.T., *supra* no. 6.

[8] See DALLA BONTÀ S., *Giustizia consensuale*, Giustizia Consensuale, I, 2021, p. 4, arguing that (translation provided by the author of this thesis: " *there is no doubt that jurisdiction has been and still is, in the national and supranational - at least in the European Union framework, the key path through which to reach the solution (-decision) of disputes through the application of the rule to the concrete case and the reaffirmation in it of the objective law and its values. However, for some time now, the scenario has been enriched - even behind differently articulated legislative 'thrusts' - by an increasingly wide range of non-jurisdictional ways of resolving conflict. With the undeniable backwardness of jurisdiction in favour of means, for various reasons and in various ways, for the self-composition of the dispute*"; original text: "i*ndubbio è che la*

And it is precisely in these spaces that procedural agreements are located, being increasingly popularized and adopted in practice.

Such phenomenon is not only gaining ground in arbitration – where party authonomy is paramount – but also in the state trial.

The aim of this chapter is to give the reader a preliminary overview of the key concepts and principles on which the peculiar topic of this thesis is based and operates.

For this purpose, different topics will be discussed. Firstly, the author will analyse the concept of fact, act and agreement, moving than to a brief overview of the notion of civil proceedings and its regulation, elaborating on the different models elaborated over years by scholars and practice.

Then, the attention will be shifted to the dichotomy between a public or private conception of the law, to lay the groundwork for analysing the current phenomenon of the privatization of justice ant to investigate the space of party autonomy in civil proceedings and highlighting the tense relationship between private autonomy and the institutional instrument of dispute settlement, a phenomenon historically conditioned both by the design of the modern state and by the embedding of procedural law within public law.

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giurisdizione sia stata e permanga, nell'assetto nazionale e sovranazionale – quanto meno euro-unitario – via centrale attraverso cui giungere alla soluzione(-decisione) delle liti mediante applicazione della norma al caso concreto e riaffermazione in esso del diritto oggettivo e dei suoi valori. L'orizzonte si è tuttavia da tempo arricchito – anche dietro 'spinte' legislative diversamente articolate – di un ventaglio sempre più ampio di modalità agiurisdizionali di soluzione del conflitto. Con innegabile arretramento della giurisdizione a favore di mezzi, a vario titolo e modo, auto-compositivi della lite".

1.1 Procedural fact, act, and agreement

This section is focused on identifying the general definition of the concept of fact, act, and agreement in order to define the latter term being the most appropriate to address the study of procedural agreements in the present work.

From a general standpoint, facts anticipate the law since the term fact refers to something that is pre-ordained to positive norms[9].

Whether a fact is subsumed under a provision, it is defined as a juridical fact.

A juridical fact is any event capable of producing the creation, modification or extinction of a right. Such an event may depend as much on a *causa naturae* as on the human will. [10]

Given such definition it emerges that facts cannot but be divided into a twofold classification: juridical facts in the strict sense and juridical acts in the broad sense.

The former, encompass facts of nature, involuntary, not produced by human being, therefore, they are generally extraneous to legal norms and legally irrelevant.

The latter are always characterised by a voluntary nature and are the outcome of the human will. Such category of facts in the broad sense is qualified as

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[9] CABRAL A., *Convenções processuais*, Salvador, JusPODIVM, 2016, pp. 43-44.

[10] DONÀ G., *Del negozio giuridico processuale*, Milano, Subalpina, 1933, p. 7; to make an example, it is possible to imagine the intrinsic difference between what characterises the creation of an earthquake and the conclusion of a contract of sale.

juridical act. [11] The juridical act is a voluntary human act, which is the basis of any legal relationship and is precisely the highest expression of the will characterising private autonomy.

Juridical acts as well are divided into a twofold classification: juridical acts in the strict sense and juridical acts in the broad sense.

The former are those whose effects are provided for by positive norms and which therefore originate from objective law[12].

Vice versa, when the act stems from the subjective will and thus from the freely and autonomously determined individual autonomy, it is defined as a juristic act, *i.e. negotium iuridicum*. [13]

A *negotium,* therefore, is nothing but the individual manifestation of the will to create, modify or extinguish a right, as provided by objective law.

When the manifestation of the parties will is the outcome of a meeting of minds such *negotium* is bilateral and shall be referred to as juridical agreement.

Given the premises aimed at understanding the meaning of juridical fact, act and agreement, it is possible now to attribute these concepts to the procedural framework defining procedural fact as any event producing the creation, modification or extinction of a right within the proceeding, which may depend on a natural cause, as well as on the human will. [14] As a consequence, a

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11 DONÀ G., *supra* no. 10, p. 7.

12 CABRAL A., *supra* no. 10, p. 44.

13 DONÀ, *supra* no. 10, p. 8.

14 DONÀ, *supra* no. 10, pp. 10-11.

procedural act is the procedural fact which stems from private autonomy. [15]

Procedural acts are in principle distinguishable from legal acts because they belong to the proceedings and exercise a direct and immediate legal effect on it by constituting, conducting or concluding its course[16].

The definition of these notions has been briefly provided as an introduction to the present work, in order contextualise the terms that the author will henceforth use.

Indeed, as anticipated, the object of this work is the study of procedural agreements. This term is intended and will be used by the author to identify bilateral agreements arising from the meeting of the minds of two or more parties, that alter the course of the proceedings as *per se* defined by the law.

Many authors also refer to the above-mentioned agreement with the term "*contract*"[17].

However, it is well-known that plurilateral legal conventions (or agreement *lato sensu*) are divided, by the prevailing doctrine, into two main categories: on the one hand those conventions concerning the establishment, regulation or extinction of legal relationship characterized by an economic value[18], on the

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15 DONÀ, *supra* no. 10, p. 11.

16 LIEBMAN E.T., *supra* no. 6., pp. 183-184.

17 DAVIS K.E. / HERSHKOFF H., *Contracting for procedure*, William and Mary Law review, 53, 2, 507-565, 2011, pp. 507-564.

18 ROPPO V., *Il Contratto*, II ed. Milano, Giuffrè Editore, 2011, pp. 3 – 8; see the incorporation of the given concept of contract for example in Italiana Civil Code, art. 1321, translation provided by the author of this thesis: "*a contract is an agreement between two or more parties for the purpose of establishing, regulating or extinguishing between them a patrimonial legal relationship*".

other hand those agreement with embraced the same requirements, apart from the pecuniary interest.

In the view of the author, the term contract in nor suitable to refer to procedural negotiation due to the intrinsic connection to a patrimonial obligation the term recall. Indeed, not all procedural agreements have a pecuniary nature, actually almost none of them. An exception clearly can be seen in those agreement aimed at allocating *ex ante* procedural costs[19]. In light of the above, the author will refer to the creation, modification and extinction of procedural legal relationship, as well as to the alteration of the procedure, as the outcome of the parties will using the term procedural agreements. Such concept of agreement will be use to encompass both procedural agreements included in the main contract and therefore being tailored as a clause or, both those subscribed separately from the main contract, prior to or following the dispute.

1.2 General framework of civil proceedings and its regulation

The aim of this paragraph is to depict a general overview of the essence of procedural law and proceedings in order to analyse as they have been perceived over time.

First, a definition of procedural law, emphasising its general features, will be provided.

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19 See *supra* no. 3.

Secondly, the author will analyse the concept of trial and its different models. In conclusion, the prototype of procedural agreement will be discussed.

1.2.1 Procedural law and models of trial

From an empirical perspective, civil procedural law may be conceived as the set of rules regulating the activity of the so-called "*proceedings*"[20] towards the protection of rights and interests recognizes by the law as worthy of protection, which is traditionally called jurisdiction.

Jurisdiction is understood, with reference to its function, as the implementation of substantive rights that have not been implemented in a primary way[21], on a voluntary bases, and in relation to which a conflict arises. Indeed, the very essence of procedural law is the enforcement of substantive rights, throw the application of the so called "*secondary*" legislation which intervenes where primary legislation has failed[22].

Quoting Professor Luiso, "t*he trial is at the service of substantive law: it is not a*

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[20] CARRATTA A. / MANDRIOLI C., *Corso di diritto processuale civile, I – nozioni introduttive e disposizioni generali*, Torino, Giappichelli, 2020, pp. 3-8.

[21] Before moving in further consideration, it is important to clarify that in this work, the author will focus on the rules governing the secondary protection of rights implemented by courts, *i.e*. through the authoritative activity of the State, excluding from the scope of investigation the protection of rights implemented through alternative means of dispute resolution such as arbitration.

[22] On the concept of procedural law as secondary legislation, see LUISO F.P., *Diritto processuale civile I, Vol. I, principi Generali*, Milano, Giuffrè,10° ed., 2019, p. 80 and LIEBMAN E.T., *supra* no. 6, pp. 4-5.

good in itself, but an instrumental good"[23].

Hence, civil proceedings is generally conceived as a mechanism leading to the issuing of an act having the effect of resolving a dispute on private rights and interests. In this sense, the civil trial is nothing but the performance of judicial activity [24] aimed at resolving private dispute.

Indeed, the trial has long been considered to be the place where the conflicting interests of the parties are brought before a third, neutral, subject, being it normally designed as a game, a war, typified by belligerence. [25]

Painted the canvas with such warring picture, it is not surprising that concepts as agreement, consent, meeting of the minds, seem to be detached from the rules of the litigation game[26] .

However, on the other hand, it is well known that agreements are anchored to law since ancient times[27].

Lieabman stated that ""*the cornerstone of the validity of the legal system is in fact its acceptance by the vast majority of citizens, who recognise in it the rule and bond of their coexistence. This acceptance and this recognition are manifested in the observance of the law, which is given voluntarily and*

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23 LUISO F.P., *supra* no. 22, p. 7., translation provided by the author of this thesis; original text: "*il processo, dunque, è al servizio del diritto sostanziale: esso costituisce non un bene in sé, ma un bene strumentale*".

24 CARRATTA A. / MANDRIOLI C., *supra* no. 20, pp. 3-8.

25 CABRAL A., *supra* no. 9, p. 31; CALAMANDREI P., *supra* no. 2.

26 CABRAL A., *supra* no. 9, p. 31.

27 The prototype of litigation agreement and the elaboration of the notion will be further examined in details infra (1.1.2 and 2.1)

spontaneously to an extent that must be overwhelming and which, from a historical and social point of view, serves as a seal of its legitimacy and positivity"[28].

In other words, the very concept of legal order is built on the assumption that some individual has agreed to give value to a specific set of rules.

When a dispute arises over conflicting interests, however, the act resolving such a dispute does not necessarily have to consist of a content determined exclusively by a third party, out of the relational sphere of the contending parties.

In principles, the dispute could be solved by the same litigant, autonomously or not.

On the basis of this premises it is possible to draw the distinction between dispute resolution instruments, depending on the subject determining the content of the resolutive act: (i) whether they are the opposing parties, binding themselves to the resolutive act through the expression of their will the instrument of dispute resolution is autonomous (an examples is the settlement agreement); (ii) whether the act is issued by a third party, who autonomously determines its content, the dispute resolution instrument is heteronomous

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28 LIEBMAN E.T., *supra* no.6, p. 3, translation provided by the author of this thesis; original text: "*il fondamento della validità dell'ordinamento giuridico è dato infatti dalla sua accettazione da parte della grande maggioranza dei consociati, i quali vi riconoscono la regola e il vincolo della loro convivenza. Questa accettazione e questo riconoscimento si manifestano nella osservanza del diritto, prestata volontariamente e spontaneamente in una misura che deve essere soverchiante e che, dal punto di vista storico e sociale, vale come suggello della sua legittimità e positività*".

(such as in case of judgments and awards).[29]

Whether to achieve or safeguard a good ensured by the law it is necessary its implementation by the State body, here it is transcended the concept of civil trial[30].

The characteristic feature of civil proceedings is the presence of a public body, which marks the difference between proceedings and arbitration[31].

Scholars have been divided on the identification of the trial purpose: on the one hand, the subjective conception of the trial[32] contended that proceedings seek the defence of subjective rights[33]; on the other hand, it has been argued that the trial pursues the implementation of the law[34].

Such concept steams from a vision of the trial (and the law in general) as characterised by a strong social function – emerging in the latter decades of the XIX century and consolidated over the following century in most of the European codifications – according to the which the civil trial is seen as a phenomenon involving the whole community, rather than just the parties, as it is in the community interest the reaching of a proper, efficient and effective

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[29] SELLITO A., *Architetture processuali*, Pisa, PHD thesis, department of lae, 2014/2014, pp. 20-64, available at **https://core.ac.uk/download/pdf/79621053.pdf**.

[30] CHIOVENDA G., *supra* no. 6, p. 63.

[31] CHIOVENDA G., *supra* no. 6, p. 68.

[32] ORESTANO R., *Azioni, diritti soggettivi, persone giuridiche*, Bologna, Il Mulino, 1978, p. 51.

[33] WACH, *Grundfragen und Reform des Zivilprozesses,* Berlin, Verlag von Otto Liebmann, 1914, p. 26.

[34] CHIOVENDA G., *supra* no. 6, pp. 65-66.

judicial protection through the trial[35].

Such conception rejected the traditional liberal definition of the trial, which meant it as having the sole function of resolving disputes between private individuals therefore being a private matter of the parties, with no involvement of the community.

In the view of the author of this thesis, the mentioned theories are rather connected than conflicting, given that the subjective right deserving judicial protection has to be the right which has as its source within the legal system itself and therefore, in this sense, implements the law.

The trial has assumed different qualification, not only in relation to the object pursued, but also depending on the role that the parties assume in relation to each other and the judge, and the latter in relation to them.

It has been already anticipated that traditionally the trial has been depicted as a war between the parties, whose position is intrinsically conflictual.

Relatedly, Salvatore Satta defined it as "*struggle*", having a dramatic character and where "*the plaintiff is against the defendant*" and "*all the parties are against the judge*". In the same direction, he describes civil procedure as the set of rules aimed at regulating the struggle between parties[36].

As an opposition to the conflictual definition of the process, the theory of the cooperative trial has been developed, mooving from the idea that since

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35 CARRATTA A., *Funzione sociale e processo civile fra XX e XXI secolo*, Rivista trimestrale di diritto e procedura civile, Vol. 71, 2, 2017, pp. 87-138;

36 SATTA S., *Il mistero del processo*, Milano, Adelphi,1994, p. 30.

procedural acts are necessarily coordinated in order to pursue a common objective, their performance presupposes cooperation between the private party and the judge: the party cannot obtain the application of the law without the judge and the judge cannot apply the law without the party's request.[37]. It emerges a trial which is the result of the combined activities of plaintiff, defendant and judge, which must all contribute to shape the factual or legal element of the trial to submit it to the final examination by the judge[38].

In practice, national legal systems started to enhance some form of cooperative trial.

Relatedly, in this direction moved the Franch legislator with the reform of the Code of Civil Procedure of 1975 and the introduction of the procedural agenda agreed by the parties and the judge, under the form of a procedural agreements as well as the British legislator due to the Woolf Reform on Procedure Rules[39] and, in particular, the introduction of the pre-action

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37 CARNELUTTI F., *Diritto e processo*, Napoli, Morano, 1958, p. 92; in particular, Carnelutti argued that "*le parti non sono giudicate se non aiutano a giudicare*"; translation provided by the author of this thesis: "*parties cannot be judged if they do not help to judge*".

38 ASPARELLA C., *Dell'accordo processuale, ovvero della derogabilità convenzionale delle fasi che scandiscono il processo ordinario*, Giurisprudenza di Merito, Vol. 4-5, p. 712.

39 In 1988, following the reform (known as the Wolf Reform) of the code of civil procedure with the promulgation of the Civil Procedure Rules, courts' management power has been greatly extended and "*English civil procedure has moved from an antagonistic style to a more co-operative ethos*", see ANDREWS N., Andrews on Civil Processes: Court Proceedings, Vol. I, Cambridge/ Antwerp / Portland, Intersentia, 2017, p. 8 and p. 7-10, pp. 197 – 211.

protocols[40].

Such cooperative approach has also been followed at a supranational leve.

Rule 2 of the ELI – UNIDROIT Model European Rules of Civil Procedure[41], in this sense, provides: "*parties, their lawyers and the court must co-operate to promote the fair, efficient and speedy resolution of the dispute*".

As for the official comments, "*these Rules consider the proper conduct of proceedings to require effective co-operation between the court, parties and their lawyers. The emphasis on co-operation, which has been a feature of some European civil procedural codes since the 19th century and others since the turn of the 21st century, is an important move away from the traditional division between adversarial and inquisitorial conceptions of civil procedure*".

It is evident, how the conception of a cooperative trial envolve both the parties and the judge, which has to operate a sitesize between the thesis and antitheses of the trial subjects, monitoring the parties' compliance with their procedural responsibilities.

1.2.2 The prototype of procedural agreement: *litis contestatio*

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40 FABBI A., preliminary draft of the presentation on "*Privatizing' civil justice through procedural agreements: a comparative law analysis*, New York University, 2013, p. 7, available at **http://www.law.nyu.edu/sites/default/files/upload_documents/AlessandroFabbi2.pdf** ; ANDREWS N., *Procedure, Party agreement, and Contract*, Giustizia Consensuale, I, 2021, pp. 67-123.

41 Full text available at https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/200925-eli-unidroit-rules-e.pdf .

In Roman law, the trial constituted the activity necessary for the application of the sanction, carried out by the state or under the control of its organs. Two types of trial were distinguished: those in which the application of the sanction was requested by subjects representing the collective interest, and those in which it was requested by the holder of the subjective right infringed as a private subject. A distinction was thus made between public proceedings on the one hand and private proceedings on the other[42].

From these principles follows the definition that Roman law gave to the private trial: the activity carried out by the parties to a private legal relationship, one of whom asserts the violation of his own right, in order to reach, with the assistance of the public power, an incontestable declaration as to the existence or the violation and, in case of ascertained infringement, the application of the sanction[43].

In this context, the activity of private individuals became predominant compared to that of the adjudicating body, since the latter's function was limited to assisting the parties in the setting up of the dispute and ensuring the correct formulation of the reciprocal claims, while the decision was taken by iudex privatus, chosen or at least accepted by the parties[44].

It is also interesting to point out how scholars have emphasised a fundamental

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42 ARANGIO-RUIZ V.*, Istituzioni di diritto romano*, Napoli, Casa Editrice dott. Eugenio Jovenne, XIV ed, 2006, p.107.

43 ARANGIO-RUIZ V., *supra* no. 42, p. 108.

44 ARANGIO-RUIZ V., *supra* no. 42, p. 108.

feature of the Roman legal system: the impossibility of separating the study of substantive and procedural law[45].

This is because the development of Roman legal institutions began (at least in certain historical periods) from the means of defence rather than from the relationship of substantive law considered by them.[46]

The Roman trial system is marked by major differences between the various historical types of trial, which are mainly three (listed in chronological order): legis actiones, formulae, cognitio extra ordinem.[47]

Within the scheme of the first two model provided by Roman law, the prototype of procedural agreements is encapsulated by the *litis contestatio*[48], whose best-known form developed especially during the periods in which the division of the procedure into two phases was observed by Roman law [49].

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45 ARANGIO-RUIZ V., *supra* no. 42, pp. 108-109.

46 In this sense, ARANGIO-RUITS V., supr no. 42, p.108, took as an example the Praetorian Edict - a programmatic edict guiding the activity of the praetor - which neither conferred subjective rights, nor it imposed obligations upon individuals, but was a source of judicial means, arranged to protect relationships recognized by the ius civile or considered to be merely factual. Therefore, in the latter case, the procedural means were not subsequent to the primary rules, but prior to them: factual situations assumed formal character through judicial protection.

47 An in-depth analysis of the three mentioned models is out of the scope of the present thesis; for a comprehensive study, see SCIALOJA V., *Procedura civile romana: esercizio e difesa dei diritti*, Roma, Anonima romana editoriale, 1936 e LUZZATO G.I., *Procedura civile romana*, esercizio dei diritti e difesa privata – Vol. 1, Bologna, Zuffi, 1948.

48 It is known that *litis contestatio* assumed different forms, depending on the phase of evolution of Roman procedural law. However, the for the purpose of this thesis, the author will examine the form developed within classical Roman law during the phase of *litis contestatio* and of the process by formulae; CABRAL A., *supra* no. 9.

49 CABRAL A., *supra* no. 9, pp. 31-32.

Relatedly, the proceedings both in the trial by legis actiones and in the trial by formulae, were divided into two parts: (i) in iure, before the Magistratus (the Pretor from the IV century a.c.), and (ii) apud iudicem, before the Judex.

The first phase, was aimed at establishing the claims of the parties (fixing the legal issues upon whose resolution the decision depends), before the Magistratus, whose role was to guide the parties to correctly set up such claims. The second phase, before a *Iudex*, was aimed at deciding on the single claim presented[50].

Between the first and the second phase lies a fundamental moment: the *litis contestatio*.

Such concept refers to the solemn parties' exchange of declaration[51], at the presence of witnesses, in order to finally define the subject matter of the trial. As a consequence (i) parties were committed to resolve the dispute before the Iudex, accepting the decision, and (ii) were precluded from repeating the dispute over the same relationship[52].

Whereas during the era of the legis actiones, at the end of the in iure phase, *litis contestatio* was the moment in which the limits of the dispute to be

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50 GROSSO G., *Lezioni di Storia del Diritto Romano,* V. ed., Torino, Giappichelli, 1965, pp.280-283.

51 It should be considered that whereas in the *legis actiones* phase such exchange of declaration was orally given at the presence of witnesses, moving to the trial by formulae period, the *litis contestatio* has been enclosed in a written document signed by the parties, whereby the declarations of the plaintiff and the defendant were formally set out.

52 ARANGIO-RUIZ V., *supra* no. 42, p. 121.

subsequently decided by the iudex were fixed, in the era of the procedure by formulae, the *litis contestatio* assumed essentially the shape of an agreement by which the parties undertook to participate in the phase apud iudicem and to accept the judgment that would be delivered[53]. Subsequently, in the cognitio extra ordinem phase, *litis contestatio* was meant as the mear claimant's statement before the Pretor, followed by the defendant's reply.

However, in the first two phases (legis actiones and per formulas), *litis contestatio* could be viewed as an arbitration-type instrument, which represented the ancestor of procedural agreement[54], being constructed as a contract, a bilateral agreement mutually binding the plaintiff and the defendant[55].

Indeed, it embodied an agreement on the procedural program, by which the parties agreed on what and in which terms must be submitted to the judge's examination. The agreement of the parties, thus, became the basis for the entire proceedings.

In other words, in the event that the action was granted by the law, the parties undertook to accept the future decision, provided that the Iudex would decide within the limits fixed by the same parties.

Without the acceptance of both the parties of the *litis contestatio*, the Iudex was not allowed to judge.

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53 CABRAL A., *supra* no. 9, pp. 31-32.

54 CABRAL A., *supra* no. 9, pp. 31-32

55 ARANGIO-RUIZ V., *supra* no. 42, p. 136.

It means that an agreement of the parties on the trial was a prerequisite of the decision. This was because of the entire conception of the trial of the time: the trial was a private matter of the parties and the public power had no power to affect their private interest.[56]

The influence of the institute of *litis contestatio* in procedural law has been considerable. Many authors began to define the very nature of the case as a contract or quasi-contract for its cause. Its private essence, proper of the Roman model, linked to the schemes of the contract, marked the understanding that every scholar has until today of the different procedural institutions.[57]

1.3 Publicism vs. Privatism

A traditional distinction, once considered fundamental, is that of public law and private law.

This difference might, indeed, be easily perceived whether reflecting on the various types of legal relationship. Relatedly, the difference undergoing a payment of a tax from the payment of a good to a private individual at an agreed price in order to acquire property does not need much of an explanation.

Public law is what governs the organization of the State and public

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[56] VIDAL L.C.D., Convenções processuais: no paradigma do processo civil contemporâneo, Rio de Janeiro, Gramma, 2017, pp. 23-24.

[57] CABRAL A., *supra* no. 9, pp. 31-32.

bodies, regulates their action, both internally and with regard to private individuals, and imposes on the latter the behaviour they must adopt in order to respect the associative life and the finding of the financial means necessary for the pursuit of the purposes from time to time considered public. Private law, on the other hand, regulates the relations between individuals and private entities, without entrusting their care to public bodies but leaving the implementation of individual rules to personal initiative. [58]

The boundary between public law and private law is, however, extremely blurred. On the one hand, the functions of the state have changed over time and are often taken over by private individuals; on the other hand, functions once left to private actors have been delegated to public bodies: public bodies may be allowed to carry out activities under private law, just as private individuals may be concessionaires of public services.

Faced with this situation of tendential variability, the traditional division of public and private seems to be unsuited to contemporary dynamics and ends to depend on the concrete needs perceived by the community at a given moment in history.

In fact, the attempt to harness procedural law within the borders of the rigid dogmatic dichotomy between private and public law is bound to fail, so that, as we have seen, the concept of 'public dispositive law', which

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58 TORRENTE A. / SCHLESINGER P., *Manuale di diritto privato*, XXIII ed., Milano, Giuffrè, 2017, p. 21.

should in itself seem an oxymoron according to the traditional conception, is undeniable[59].

In modern society, where legal protection is a restrained asset, the public-private bipartition should not be understood as an adversarial system. On the contrary, the public and private sectors cooperate to achieve the same end, namely the administration of justice.[60]

Markedly, it seems more coherent and realistic to consider legal reality and to assess and qualify legal norms on the basis of the relevance of the interests at stake[61].

The distinction between public law and private law is still of the outmost importance since public law rules are generally considered as mandatory rules, whereas most private law rules are considered to be dispositive.

This idea has ancient origins and has its roots in classical Roman law. In particular, it is encompassed by the two brocades of Papinian and Ulpianus according to which "*ius publicum privatorum pactis mutari non potest"*[62] and *"privatorum conventio juri publico non derogat*"[63](D. 2, 14, 38 and D. 50,17,45, 1).

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[59] SATTA, S. / PUNZI, C.: *Diritto processuale civile*, Padova, CEDAM, XII ed., 2000, pp. 278 – 279.

[60] ANDREWS N., *supra* no. 39, p. 45-60.

[61] TORRENTE A. / SCHLESINGER P., *supra* no. 58, pp. 22-23.

[62] Translation provided by the author of this thesis: "*the agreements of private individuals cannot amend public law*".

[63] Translation provided by the author of this thesis: "*a private law agreement cannot derogate public law*."

In the context of such bipartition of the law, processual scholars have long questioned how to categorise procedural matters.

The general tendency is to consider the procedural rule as a rule of public law[64].

Throughout history, each legal system has structured its trial's architecture in relation to the primacy of either the private element or the public one.

The Italian Code of Civil Procedure of 1865 displayed a marked predominance of the private element. In this sense parties had the exclusivity on the trial timing, on proof and the judge had no cooperative power as to the definition of the *thema decidendum,* neither discretionary powers.[65]

German scholars influence in the XIX century led to a shift in the civil procedural system balance from the prevalence of the private element to the public one. Relatedly, the reform project proposed by Giuseppe Chiovenda[66] was driven precisely by the public character of the action and jurisdiction, with the aim of enlarging judicial protection of rights,

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64 See on Italian approach CAPPELLETTI M./ PERILLO J.M., *Civil Procedure in Italy*, The Hague, Springer Netherlands, 2013, p. 41.

65 PROTO PISANI A., *Il codice di procedura civile del 1940 fra pubblico e privato*, Il Foro Italiano, Vol. 123, no. 3, 2000, pp. 73 - 87.

66 Project for the Reform of Civil Proceedings, drafted in the framework of the First Subcommittee of the Royal Commission for the Post-War Period, released on 30 June 1919 and published in 1920, in CHIOVENDA G., *Saggi di diritto processuale civile*, II, Roma, Società editrice Foro Italiano, 1931, pp. 1 et seq.

proposing to widen the discretionary powers of the judge in order to achieve a fast and immediate trial.[67]

Chiovenda's public view of procedural law has been the cornerstone for procedural theorists since 1924. In Italy, indeed, central to the approach developed by Chiovenda's scholars was the classification of civil procedure as a branch of public law.[68]

It was in this context that the Italian reform introducing the 1940 Italian Code of Civil Procedure was achieved and assets reversed[69].

Indeed, leaving aside an in-depth analysis of the reform, it is sufficient to point out that due to the new code although the parties retain a monopoly on the judicial demand, they lose power over the determination of the trial time, which has been transferred exclusively to the judge, whose powers of investigation increase even though the general principle of the availability of evidence has been maintained.[70]

Quoting Andrioli and Micheli, hence, "*l'ago della bilancia si è decisamente*

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67 PROTO PISANI A., *supra* no. 65.

68 CAPPELLETTI M./ PERILLO J.M., *supra* no. 64, p. 42.

69 PROTO PISANI A., *supra* no. 65.

70 Art. 115, Italian Code of Civil Procedure in its original version provided: "*salvi i casi previsti dalla legge il giudice deve porre a fondamento della decisione le prove proposte dalle parti o dal pubblico ministero. Può tuttavia, senza bisogno di prova, porre a fondamento della decisione e nozioni di fatto che rientrano nella comune esperienza*"; translation provided by the author of this thesis: "*the judge, with the exception of the case expressly provided by the law, shall ground its decision the evidence proposed by the parties or by the public prosecutor. He may, however, without the need for proof, use as a basis for his decision factual notions which fall within common experience*".

spostato dalla facoltà delle parti ai poteri del giudice"[71].

The prevalence of the public element over the private element affirmed by Chiovenda at the beginning of the 20th century has continued to prevail in any procedural study for a considerable time.

A strong criticism of such approach was presented by Franco Cipriani who, highlighting the authoritative character of the 1940 Italian Code of Civil Procedure, firmly argued that a code that deprives guarantees from the parties and gives discretionary powers to the judge is an anti-liberal and authoritarian code[72].

According to Cipriani, the aforementioned code had been erroneously constructed on the basis of an inaccurate publicist conception of the civil procedure: markedly, procedural matters were addressed not from the stand point of the party seeking judicial protection, but from the point of view of the judge who has to administer justice[73].

The system change brought about by the 1940 Code was thus the result of the trial in the public interest, the authoritarianism of which derives precisely from the accentuation of the publicist component.

From this initial moment of discontinuity with the Chiovendian public

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[71] ANDRIOLI V. / MICHELI G.A*., Riforma del codice di procedura civile*, in Ann. Dir. Comp., XVII, 1946, pp. 199 - 202; translation provided by the author of this thesis: "*the balance has definitely shifted from the parties' powers to the judge's powers*".

[72] CIPRIANI F., *Il Codice di procedura civile tra gerarchi e processualisti*, Edizioni Scientifiche Italiane, 1992.

[73] CIPRIANI F., *ibidem*; PROTO PISANI A., *supra* no. 65; CIPRIANI F., *Per un nuovo processo civile,* Il Foro Italiano, vol 124, 2001, p. 321.

vision of the trial something changed.

Andrea Proto Pisani, even taking for granted the public nature of procedural law stated that the trial "*may be regulated in different ways by the legislator, depending on the different balance between the private and public components of the trial: hence the history of successive trials over time, hence the ever-present problem of trial reform*"[74].

Therefore, it is feasible how the legal framework of the trial is openly subject to choices of opportunity, related both to the usages of the practitioners, both, and mostly, to the balancing between public and private that is identified in time by the community.

Relatedly, the author of this thesis believes it is not sufficient to emphasise the public and social character of the trial in order to ascribe the entire field of civil procedural law to public law.

Rather, the nature of the procedural rule has in itself both the features of public and private law: public is the judicial function, private is the relationship in regard to which it is exercised.

The immediate consequence is the duty of the jurist to set aside the classical bipartition of law and lift procedural rule to a *tertium genus*, endowed with its proper features and principles that can be drawn both

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[74] PROTO PISANI A., *supra* no. 65, p 74, translation provided by the author of this thesis; original text: "*può essere variamente disciplinato dal legislatore a seconda del diverso punto di equilibrio volta a volta individuato dal legislatore tra la componente privatistica e la componente pubblicistica del processo: di qui la storia dei processi succedutisi nel tempo, di qui il sempre attuale problema della riforma del processo*".

from the sphere of public law, and from private law.

Adopting this approach, it is possible to unfold why procedural rules often takes into due consideration the will of the parties and in some cases even makes it decisive whether it does not overcome the general purpose of the trial.[75]

Relatedly, it is a matter of fact that in civil trials the private will of the parties often appears to determine itself procedural effects. This: on the one hand, unilaterally in those cases, for example, where the activity of the judge is subordinate to the direct request of one party[76] ;on the other hand, bilaterally when the law recognises in the trial the effects produced by ad agreements of the party.[77]

1.4 Flight from courts and the privatization of civil justice

The length of the civil trial in its various degrees of jurisdiction and the dysfunction of the civil justice system, have worldwide led to what has long been defined as a "*flight*" from the trial and from judicial protection[78].

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75 SATTA S., *Accordo (diritto processuale civile)*, in Enciclopedia del Diritto, I, 1958, pp. 300-301.

76 It can be considered, as an example, the exception of territorial jurisdiction.

77 In this case, a well-known example worldwide recognized are jurisdiction or arbitration clauses.

78 TARUFFO M., *Diritto processuale civile nei paesi anglosassoni*, in Digesto delle discipline privatistiche, sezione civile, IV, Torino, 1997, p.40; MARINELLI M., La natura dell'arbitrato irrituale, profili comparatistici e processuali, Torino, Giappichelli, 2002, p. 1.

It is undeniable that this flight from court exists, as is demonstrated not only by the abandonment of many pending disputes, but also by the gradual decrease of new ones.

The National Monitoring of Italian Civil and Criminal Justice (which provides quarterly information on the progress of pending proceedings) is a useful tool for an empirical confirm of the abovementioned assertion.

In particular, as far as civil justice is concerned, the object of the survey are the proceedings pending before all Italian judicial offices (with the exclusion of proceedings brought before the tutelary judge and those of preventive technical assessment).

Considering the years 2003 - 2020 data reveals that there has been a continuous growth in the number of pending proceedings, until the year 2009. Thereafter, the number of pending proceedings decrease steadily: from 5,700.105,00 in 2009 to 3,258,014,00 in 2020. [79]

Relatedly, individuals seeking judicial protection seems to be concerned of the unproductiveness of the outcome of judicial action, and, consequently, attempt every means to reach a settlement of the dispute, or even withdraw from the very outset whether the economic content of the right is minimal.

However, the inefficiency of civil justice is not the sole reason for the described "flight". Indeed, the economic and social changes that characterised the last

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[79] The study is available at: https://www.giustizia.it/giustizia/it/mg_1_14_1.page?contentId=SST1287132&previsiousPage=mg_2_9_13 .

century, also considering the effects of globalisation, have led to the emerging of a need for protection that is difficult to set and reconcile within the classic scheme of the civil proceedings[80].

Indeed, due to today's worldwide economy, private and public actors enter more and more often into business agreements with foreign parties.

This means a consequential increase in the number of potential international controversies.

It follows that whether national courts proceedings are stacked in a system characterized by tightness, private actors needing flexibility, certainty and speediness end to resort in alternative methods of dispute resolutions.

The need for contracting parties to select the proper means of litigation is inherent to commercial relations, especially those characterised by a trans-border element.

Over the last decades, as a result of the deconstruction of the dogma of civil litigation as an exclusive prerogative of national jurisdictions and, most importantly, as a reaction to the drop-out in civil proceedings described above, there has been a growing tendency in many legal systems to resort to the privatization of civil litigation[81].

As brilliantly explained by Professor Hess, "*the basic idea behind privatization*

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80 MARINELLI M., *supra* no. 78, pp. 1-2.

81 FABBI A., *Appunti sugli accordi processuali nel diritto federale statunitense*, in Arens, Briguglio, Martino, Panzarola, Sassani, Scritti in onore di Nicola Picardi, Pisa, Pacini editore, 2016, p. 1003; ANDREWS N., *supra* no. 39, pp. 67 – 70.

is simple: it designates a shift from the public to the private"[82].

Such phenomenon, in the context of litigation, means that Alternative Dispute Resolution mechanisms (ADR) became a tool to obtain a final decision in case of dispute, recognized and enforced by the State[83].

Indeed, many national European legal systems are gradually enlarging the arbitrability of claims as well as they have updated their arbitration laws and liberalized resort to arbitration, trying to facilitate parties in the use of private dispute resolution mechanism[84].

Arbitration, negotiation and mediation procedures and methods have been worldwide developed and, most importantly, are widely recommended by national legislators to facilitate the resolution of disputes between parties.

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82 HESS B., *Privatizing Dispute Resolution and its limits*, p. 17, in CADIET L. / HESS B. / ISIDRO M.R., Privatizing dispute resolutions, trands and limits, Baden-Baden, Nomos, 2019.

[83]Ii is worth recalling Rule 9, ELI – UNIDROIT Model European Rules of Civil Procedure (*supra* no. 41), which provides: "*(1) Parties must co-operate in seeking to resolve their dispute consensually, both before and after proceedings begin. (2) Lawyers must inform the parties about the availability of consensual dispute resolution methods, assist them in selecting the most suitable method, and, where appropriate, encourage its use. They must ensure that they use any mandatory method. (3) Parties may ask the court to render a settlement agreement enforceable. (4) When a consensual settlement as a whole cannot be reached, parties must take all reasonable opportunities to reduce the number of contested issues prior to adjudication"* .

84 MURRAY P.L., *Privatization of Civil Justice*, 15 Willamette J. Int'l L. & Dis. Res., 2007, p. 138; ANDREWS N., *supra* no. 39, p. 68 encapsulates arbitration agreements in the so called "*extra-curia procedure*", by which parties might agree not to resort to the mechanism of court trial otherwise provided as a default mechanism in case of dispute.

An example of such trend may be seen in Italy where mediation[85] and assisted negotiation[86] have been raised to the status of procedural conditions for the

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[85] Decreto legislativo, 04/03/2010 n° 28, art. 5, paragraph 1 *bis*, provides as follows: "*chi intende esercitare in giudizio un'azione relativa a una controversia in materia di condominio, diritti reali, divisione, successioni ereditarie, patti di famiglia, locazione, comodato, affitto di aziende, risarcimento del danno derivante da responsabilità medica e sanitaria e da diffamazione con il mezzo della stampa o con altro mezzo di pubblicità, contratti assicurativi, bancari e finanziari, è tenuto, assistito dall'avvocato, preliminarmente a esperire il procedimento di mediazione ai sensi del presente decreto*, translation provided by the author of this thesis: "*a person who seeks to bring an action in court concerning a dispute relating to condominium, rights in rem, division, hereditary succession, family agreements, tenancy, gratuitous lease, business lease, compensation for damages arising from medical and health care liability and from defamation in the press or by other means of advertising, insurance, banking and financial contracts, must, with the assistance of a lawyer, first undertake the mediation procedure pursuant to this decree*".

[86] Decreto Legge, 12 settembre 2014, n. 132, art. 3, paragraph 1: "*Chi intende esercitare in giudizio un'azione relativa a una controversia in materia di risarcimento del danno da circolazione di veicoli e natanti deve, tramite il suo avvocato, invitare l'altra parte a stipulare una convenzione di negoziazione assistita. Allo stesso modo deve procedere, fuori dei casi previsti dal periodo precedente e dall'articolo 5, comma 1-bis, del decreto legislativo 4 marzo 2010, n. 28, chi intende proporre in giudizio una domanda di pagamento a qualsiasi titolo di somme non eccedenti cinquantamila euro. L'esperimento del procedimento di negoziazione assistita e' condizione di procedibilita' della domanda giudiziale. L'improcedibilita' deve essere eccepita dal convenuto, a pena di decadenza, o rilevata d'ufficio dal giudice, non oltre la prima udienza. Il giudice quando rileva che la negoziazione assistita e' gia' iniziata, ma non si e' conclusa, fissa la successiva udienza dopo la scadenza del termine di cui all'articolo 2, comma 3. Allo stesso modo provvede quando la negoziazione non e' stata esperita, assegnando contestualmente alle parti il termine di quindici giorni per la comunicazione dell'invito. Il presente comma non si applica alle controversie concernenti obbligazioni contrattuali derivanti da contratti conclusi tra professionisti e consumatori*."; translation provided by the author of this thesis: "*a person who intends to bring an action in court relating to a dispute concerning compensation for damage caused by the use of vehicles and craft must, through his lawyer, invite the other party to enter into an assisted negotiation agreement. In the same way, apart from the cases provided for in the preceding paragraph and article 5 (1-bis) of legislative decree n. 28 of 4 March 2010, a person who intends to bring an action for payment on any grounds of sums not exceeding fifty thousand euros shall proceed in the same way. The assisted negotiation procedure shall be a condition for the admissibility of the subsequent legal proceedings. Inadmissibility*

admissibility of the claim in courts in several areas.

The global trend is therefore to assign a residual role to the public trial and state jurisdiction, as if it shall be the last resort in the management of private dispute, to be invoked only whether another attempt to solve the dispute have failed.[87]

Prof. Andrews argued that "*it does not appear pessimistic, but rather a realistic conclusion rooted in long experience, to declare that modern court systems (sources of 'public justice') are unlikely to improve to the point that mediation and arbitration (sources of 'private justice') cease to be attractive alternative forms of justice*"[88]. As a consequence, "*it makes sense to speack of a binary system of public and private justice. Th e challenges are to continue to improve all elements of the binary system: enabling the court system to perform better; ensuring that arbitration and mediation are conducted fairly and effi ciently; and promoting the harmonious co-existence of – a happy marriage between – the public and private systems*"[89].

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must be objected to by the defendant, under penalty of forfeiture, or detected ex officio by the judge, no later than the first hearing. If the court finds that the assisted negotiation has already begun but has not ended, it shall fix the next hearing after the expiry of the time limit referred to in Article 2 (3). The same shall apply when the negotiations have not taken place, at the same time assigning to the parties a time limit of fifteen days for the communication of the invitation. This paragraph shall not apply to disputes concerning contractual obligations arising out of contracts concluded between traders and consumers".

87 SELLITO A., *supra* no. 29, p. 20.

88 ANDREWS N., *supra* no. 39, p. 45.

89 ANDREWS N., *ibidem*.

1.5 The (non) general mandatory nature of procedural rules

Civil law has two fundamental attitudes: either it regulates human relations itself, or it operates in conjunction with the normative source constituted by the manifestations of private autonomy.

When civil law operates in relation to the manifestations of private autonomy, the problem arises within the framework of a concourse of normative sources, *i.e.* within the framework of the relationship between law and private autonomy[90].

Consequently, the impact of the law on the principles of autonomy takes on, by definition, a wide variety of attitudes. [91].

It is in this context that the concepts of mandatory and dispositive rules emerge, marking the relationship between law and private autonomy.

Mandatory rules require strict compliance, whereas the others are freely derogable by the parties and apply only where the will of the parties has not provided otherwise.

The distinction between public law and private law is here of the outmost importance, since, as anticipated above, public law rules are generally interpreted as mandatory rules whereas most private law rules are considered to be dispositive. However, even this distinction should not be used as the sole parameter for investigating whether or not a rule of law is derogable. There

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90 RUSSO E., *Norma imperativa, norma cogente, norma inderogabile, norma indisponibile*, Rivista di Diritto Civile, 5, 10573, 2001, pp. 10573-10576.

91 RUSSO E., *supra* no. 90.

are derogable public law rules and mandatory private law rules.

The mandatory character of a rule often results directly from its wording[92] or from the provision that an act performed without complying with the rule is void[93]. However, the mandatory character may also result from the reconstruction of the legislature's intention. Conversely, indicative of the non-mandatory nature of the provision may be expressions such as "*unless the parties agreed otherwise*"[94] or "*unless the title provides otherwise*"[95]. Where the literal element is not decisive, it is the spirit of the rule itself that must be investigated, and hence the intention of the legislature according to the general rules on interpretation. [96]

Traditionally, it has been refused a wide space for the parties' dispositions in

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92 See art. 147, Italian Civil Code which provides: "*il matrimonio impone ad ambedue i coniugi..*"; transaltion provided bt the author of this thesis: "*marriage imposes on both spouses the obligation to*". The mandatory character of the provision may be desumed by the verb impose.

93 See art. 1350, Italian Civil Code: "*devono farsi per atto pubblico o per scrittura privata, sotto pena di nullità…*"; translation provided by the author of this thesis: "*they must be made by public deed or private agreement, under penalty of nullity*". The mandatory natur of the provision is immediately perceavable due to the express referenc to the fact that without the recalled written form the act is null.

94 See art. 1815, italian Civil Code: "*salvo diversa volontà delle parti, il mutuatario deve corrispondere gli interessi al mutuante*"; translation provided by the author of this thesis: "*unless otherwise agreed upon by the parties, the borrower shall pay interest to the lender*".

95 See art. 957, Italian Civil Code: "*l'enfiteusi, salvo che il titolo disponga altrimenti, è regolata dalle norme contenute negli articoli seguenti":* translation provided by the author of this thesis: *"emphyteusis, unless the title provides otherwise, shall be governed by the rules contained in the following articles*".

96 TORRENTE A. / SCHLESINGER P., *supra* no. 58, pp. 24.

procedural law. This view is mainly due to Bülow 's approach to the subject [97]. An authority on the subject, Bülow argued that the possibility to dispose on rules, and hence to derogate from them, can arise exclusively from an authorisation of the law which allows the addressees to define the peculiar legal rule applicable to the case, always within certain limits imposed by objective law[98].

In light of this approach, for Bülow the non-mandatory nature of the rule (and therefore the applicability on it of party autonomy) is reduced to those spaces expressly recognised by the law, by means of an authorisative rule, the so-called *Ermachtigunsnorm*.

Bülow's argument has been yoused by successive scholars to justify the mandatory nature of procedural law ant to anchore it to the public character of procedural law.

However, such view seems to lack of practical reference. Indeed, it is undeniable the existence of mandatory rules in substantive law and vice versa. Applying a more pragmatic approach, within the realm of procedural law, De

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97 BÜLOW O., *Dispositives Civilprozessrecht und die verbindliche Kraft der Rechtsordnung*, Archiv für die civilistische, Praxis, 1881, pp. 56 – 108; such approach is the prevailing among German Scholas, see for example LEIPOLD D., in Stein, Jonas, *Kommentar zur Zivilprozessordnung*, XXII ed., 3, Mohr Siebeck, Tübingen, 2005, premises to § 128, p. 111 et seq.; ARENS P., *Die Grundprinzipien des Zivilprozeßrechts*, in GILLES P., *Humane Justiz*, Frankfurt, Athenaum, Kronberg, 1977, p. 3; on the opposit approach SCHLOSSER, P., *Einverständliches Partei handeln im Zivilprozeß*, Tübingen, 1968, according to which the autonomy of the parties, even in the context of proceedings, may extend as far as there is no legislative prohibition, since "*in dubio pro libertate*".

98 BÜLOW O., *ibidem*, p. 108.

Stefano argued that whether a procedural rule may be derogated from, is a matter to be resolved on a case-by-case basis, through an historical and dogmatic interpretation, in order to identify the purpose and the real meaning of the provision.[99]

Alessandro Fabbi promote the same approach, providing that a case-by-case assessment is required to ascertain whether the individual provisions are rigid or flexible[100].

As a matter of fact, Chiovenda himself, undisputed defender of the public nature of procedural law, already clarified that "*le norme processuali non sono sempre assolute o cogenti, ma sono talora dispositive: sia perchè talora la legge può avere avuto di mira proprio l'interesse individuale, così che la deroga a tali norme appaia come la rinuncia a un beneficio, sia perché la legge può talora fare assegnamento sulla conoscenza che le parti hanno delle circostanze concrete della lite per rimettere ad esse il regolamento di qualche punto nel rapporto processuale*[101].

Embracing in full Chiovenda's argument, the author of this thesis considers

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99 DE STEFANO G., *Studi sugli accordi processuali*, Milano, Giuffrè, 1959, p. 76; MARINELLI M., *supra* no. 78; SCHLOSSER D. *supra* no. 97.

100 FABBI A., *supra* no. 81, pp. 1026-1029.

101 CHIOVENDA G., *supra* no. 6, pp. 100-103; translation provided by the author of this thesis: "*le norme processuali non sono sempre assolute o cogenti, ma sono talora dispositive: sia perchè talora la legge può avere avuto di mira proprio l'interesse individuale, così che la deroga a tali norme appaia come la rinuncia a un beneficio, sia perché la legge può talora fare assegnamento sulla conoscenza che le parti hanno delle circostanze concrete della lite per rimettere ad esse il regolamento di qualche punto nel rapporto processuale*".

dispositive procedural rules as those provisions which, before their application, allow a contrary agreement of the parties, which is mandatory for the judge[102]. The logical consequences is that procedural rule cannot be considered as mandatory in nature.

In conclusion, the mandatory nature of procedural rules is a presumption which admits proof to the contrary.[103]

1.6 Party Autonomy

Party autonomy is the principle according to which parties have the power to freely bargain pursuing their private interests, providing for the creation, modification, extinction of legal relations. Every person having legal capacity, has not only the freedom to decide whether to enter into a contract or not, but also to freely determine its terms.[104]

Party autonomy aims at maximising the development of economic relations, relying on the free and voluntary cooperation of the involved parties in order to establish their own rules.[105]

Such notion belongs to substantive law and in Italy is encapsulated in art. 1322 of the Civil Code, which provides as follow: "*le parti possono liberamente*

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102 CHIOVENDA G., *supra* no. 6, p. 103.

103 DE STEFANO G., *supra* no. 99, p. 76.

104 GALLO P., *Contratto e Buona Fede*, Torino, UTET, 2014, pp. 19-21.

105ARCANGELO G.A., *Gli Angusti Confini dell'Autonomia Privata,* available at: http://www.altalex.com/documents/news/2007/04/13/gli-angusti-confini-dell-autonomia-contrattuale.

determinare il contenuto del contratto nei limiti imposti dalla legge e dalle norme corporative. Le parti possono anche concludere contratti che non appartengano ai tipi aventi una disciplina particolare, purché siano diretti a realizzare interessi meritevoli di tutela secondo l'ordinamento giuridico"[106].

Although this principle is expressly regulated by the legislator, its application to procedural law is not self-evident and many doubts have been raised as to its possible application in the field of procedure.

In point of fact, discussions on the effects of the parties will on procedural law have their roots in ancient times.

Markedly, an agreement between private parties has commonly seen as an adequate tool to enlarge the borders of the national jurisdiction. Such assumption finds its historical roots in the Justinian codification,[107] in particular within the *Corpus Juris Civilis,* which provides that the grounds of the Imperial jurisdiction is the result of the consensus of the party, being it the only essential element.[108]

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106 Translation provided by the author of this thesis: "*the parties may freely determine the content of the contract within the limits imposed by the law and by corporate rules. The parties may also conclude contracts which are not expressly regulated by the law, provided that they are aimed at realising interests worthy of protection according to the legal system*".

107 In this reguard see LENHOFF A., *The Parties' Choiche of a Forum: Prorogation Agreements*, Rutgers Law Review, no. 414, 1960-1961 and QUEIROLO I., *Gli Accordi Sulla Competenza Giurisdizionale tra Diritto Comunitario e Diritto Interno*, in Studi e Pubblicazioni di Diritto Internazionale Privato e Processuale n.51, Padova, CEDAM, 2000, pp. 70-71.

108 Corpus Iuris Civilis, Digesto, Liber V states as follows: "*Convenire autem utrum inter privatos sufficit an vero etiam ipsius praetoris consensus necessarius est? lex iulia iudiciorum ait quo minus inter privatos conveniat: sufficit ergo privatorum consensus.*

However, it is commonly accepted by scholars that private autonomy does not play the same role in the regulation of the trial than in civil substantial law. Indeed, the question of whether the parties, who has the power to choose the substantial law applicable to their relationship, has the freedom of choice in the rule on the conduct of the proceedings, has remained purely theorical. As a result, the conclusion taken on the issue are firmly negative.[109]

Many scholars have found difficult to reconcile the concept of party autonomy within the realm of procedural law, which seems to be concordantly reconducted to the public sector and, therefore, subject to the sovereignty of the states.

Party autonomy have never sat comfortably with traditional conceptions of state jurisdiction under a procedural perspective.

Indeed, many scholars denied the existence of such concept precisely because they consider that individuals could not have power over sovereigns, and thus could not have control over procedural rules.

The entry of private autonomy into the trial process has historically been viewed unfavourably on the basis of two main arguments.

Firstly, it has been held that the activity of private individuals cannot affect the proceedings because of its public nature and because of the presence of a

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proinde si privati consentiant, praetor autem ignoret consentire et putet suam iurisdictionem, an legi satisfactum sit, videndum est: et puto posse defendi eius esse iurisdictionem".

109 FABBI A., *supra* no. 81, p. 1005.

public body as exercising state sovreignity[110].

Secondly, it has been contested that due to the mandatory nature of procedural rules, they cannot be departed from.

In the precedent paragraph it has already been demonstrated that both arguments are vulnerable because (i) the public nature of procedural law is not clear-cut, nor is the equation of procedural law with mandatory law true.

Denying party autonomy has not proven a durable approach in practice.

The existence of a derogable procedural law is beyond dispute nowadays, given the availability of different typified scenarios.[111]

Exemplificatory enough, party autonomy is worldwide granted within the realm of jurisdiction: Jurisdicion and arbitration agreements raise no doubts on their admissibility[112].

The first to identify an area of availability of the process has been Oscar Bülow, who, as seen above, suggested that the parties may exercise their authonomy out of an express legal authorisation. [113]

In line with such approach, the solution generally adopted is to view party autonomy as merely a privilege, granted by the legislator and contingently

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110 KOHLER J., *Über prozessrechtliche Verträge und Creationen*, in Gesammelte Beiträge zum Zivilprozess, Berlin, 1894, P. 157.

111 DE STEFANO G., *supra* no. 99, pp. 76-77.

112 In the Italian legal system, before the entrance into force of the private international law reform in 1995, Art. 2 of the 1940 Italian Code of Civil Procedure, then repealed in 1995, expressed the principle of the non-derogation of the national jurisdiction that, consequently, was undoubtedly seen as a non-disposable attribute of the state power.

113 BÜLOW O., *supra* no. 97, p. 43.

conferred on individuals. To put it in another word, individuals only have the power to determine procedural rules to the extent that states give them that power, and legislator could just as readily take away that power.

Relatedly, it is unanimously acknowledged by academics that party autonomy exercised in the trial cannot overcome the general principles of law on which the lawful and the possible in the sphere of law depend, nor with those of an imperative nature concerning the discipline of the process[114].

Relatedly, Prof. Andrews N., taking for granted and obvoious the abvementioned limits provided that "*of course, the parties have no general consensual control of the conduct of court proceedings. Such a general power would be inconsistent with the mandatory nature of much of the judicial process. It remains the starting point that an agreement to oust the court's jurisdiction is prima facie contrary to public policy and hence not legally binding*".[115]

However, what is important for the time being is to consider that party autonomy has been commonly accepted as a phenomenon inherent to procedutal law.

The question that, on the other hand, remains open is that of identifying the boundaries within which private autonomy might operate in civil proceedings. In the next paragraphs the bouders and limits of party autonomy within civil procedural law will be investigated in details.

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114 CHIZZINI A., *Konventionalprozess e poteri delle parti*, Rivista di diritto processuale, 1, 2015, pp. 1-5.

115 ANDREWS N., *supra* no. 39, p. 78.

CHAPTER TWO: DEFINITION

Chapter one has been designed to familiarise the reader with a series of definitions that will be used in the close examination of the subject matter of the thesis, and, above all, to highlight the fact that the concept of private autonomy is not something extraneus to civil proceedings.

Having established the framework surrounding the core concepts on which the present study has been conducted, the second chapter of this thesis leads this analysis to the core of its discussion, examining the notion of procedural agreements.

This is achived by investigating the notion, nature and function of procedural agreements, as well as their different classifications, and finally by highlighting the position of the judge in relation to the agreement.

Secondly, the readers attention will be shifted to an analysis of the different effects of procedural agreements.

Lastly, the validity requirements of the agreements will be assessed, in an efford to anlyse their formal and substancial requirements.

2.1 Procedural agreements

Since the topic of procedural agreements is very broad and complex, the aim of this paragraph is to depict a general overview on the matter.

First a definition of procedural agreements and their notion will be provided. This will be followed by an analysis of their function and practical use. In conclusion, the position of the judge as to the agreement will be discussed.

2.1.1 Notion and nature of procedural agreements

In recent decades, procedural agreements have become of the outmost importance in civil litigation, due to their increasing use, especially in the forms typified by legislators, in international contracts. The possibility for the contracting parties to set forth the rules that will characterise possible disputes arising between them is nowadays widely recognized mostly because contractual clauses such as the one related to jurisdiction are inherent to commercial relations, especially when a trans-border element is involved.[116]

Indeed, due to the modern global economy, it is not uncommon for private and public parties to trade with foreign actors. Naturally, an increase in the number of international relations is generally followed by an increase in the number of international controversies.

The more diverse the set of parties becomes, the more the need to establish common rules from the beginning of the relationship becomes apparent.

Since cross-border disputes are usually far from being fast and cost efficient, parties need to ensure favourable rules to solve any hypothetical proceedings: here comes into play the need of certainty and predictability in commercial relationship.

"*Through the negotiation of the proceedings rules, parties seek to outline a format of proceedings that suits their interest, adapting the judicial process in*

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116 DE MAESTRI M.E., *La Proroga di Giurisdizione nel Nuovo Regolamento UE n. 1215/2012*, Diritto del Commercio internazionale, 3, 2014, pp. 577 et seq.

order to render it more efficient."[117]

The selection of rules suitable for their interest is fundamental for parties in two different stages: first and foremost, when negotiating and drafting the terms of the contract, in order to convey their interests in a manner that is consistent with the applicable procedural rules; secondly and relatedly, when performing such contract, in order to be able to foresee where and how any disputes between parties would be likely to be solved.

Outlined the background, it is worth focusing on the foreground picture.

Generally speaking, a procedural agreement might be defined as an agreement which produces its effects in the sphere of procedural law, being it a direct or an undirect effect.

From a broad perspective, it can be stated that such agreements influence the means of enforcement of substantive rights[118].

Indeed, in the first chapter it has been highlighted that the very essence of procedural law is the enforcement of substantive rights, throw the application of the so called "*secondary*" legislation which intervenes where primary legislation has failed[119].

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117 CABRAL A., *New trends and perspectives on case management: proposals on contract procedure and case assignment management*, Introductory report, Tianjin Conference of the International Association of Procedural Law, 2017, p. 16.

118 BELOHLAVEK A., *The definition of procedural agreements and the importance to define the contractual nature of the arbitration clause in international arbitration*, 2 Y.B. on Int'l Arb. 21, 2012, p. 24.

119 On the concept of procedural law as secondary legislation, see LUISO F.P., *supra* no. 22 and LIEBMAN E.T., *supra* no. 6, pp. 4-5.

In light of the above, procedural agreements are the outcome of the parties will, concerning the rules of the proceedings on all possible stages (introduction, conduct of the trial, decision, appeal and enforcement of the decision), with the purpose of establishing a clear and predictable picture between them.

For the sake of completeness, it needs to be recalled that procedural agreements in the broadest sense are not confined to civil law, but are well known instruments of criminal and administrative[120] law as well.

To this regard, the concept of agreement has become an integral part of criminal proceedings and the use of the latter to solve criminal procedure issues has become increasingly common. To mention some examples, it is possible to consider both the application of the penalty at the request of the

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120 concerning oblation see Consiglio di Stato n. 3371/2012: "*In disparte la questione di fatto se il calcolo sia stato sviluppato sulla scorta dei dati forniti dagli appellanti medesimi (come sostiene l'Amministrazione e come ritiene provato la sentenza impugnata), il Collegio è dell'avviso di aderire all'orientamento della Corte di Cassazione, secondo cui l'oblazione non è un semplice adempimento pecuniario, ma consiste in un negozio giuridico unilaterale, processuale o extraprocessuale, produttivo di effetti di diritto pubblico, nel senso che il relativo pagamento implica riconoscimento dell'illecito con conseguente rinuncia irretrattabile alla garanzia giurisdizionale*"; translation provide by the author of this thesis: "*Leaving aside the question of whether the calculation was developed on the basis of the data provided by the appellants themselves (as claimed by the Administration and as proven in the judgment under appeal), the Court of Cassation agrees with the well-established opinion of the Court of Cassation, according to which the oblation is not a simple monetary payment, but consists of a unilateral agreement, with procedural or extra-procedural nature, producing effects of public law, meaning that its payment implies acknowledgement of the unlawful act resulting in an irreversible waiver of the jurisdictional guarantee*" .

parties (see. art. 444 Italian Code of Criminal Procedure[121]) and the proceedings by decree (see. artt. 459 – 464, Italian Code of Criminal Procedure). [122]

However, for the purpose of this thesis, the analysis will be limited to the civil procedure realm.

Given this premise and moving back to the notion of procedural agreements,

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121 Art. 444, co. 1, Italian Code of Criminal Procedure.: "*L'imputato e il pubblico ministero possono chiedere al giudice l'applicazione, nella specie e nella misura indicata, di una sanzione sostitutiva o di una pena pecuniaria, diminuita fino a un terzo, ovvero di una pena detentiva quando questa, tenuto conto delle circostanze e diminuita fino a un terzo, non supera cinque anni soli o congiunti a pena pecuniaria*"; translation provided by the author of this thesis: "*The defendant and the public prosecutor may request the court to impose, in the type and to the extent specified, an alternative sanction or a fine, reduced by up to a third, or a detention order if the latter, taking into account the circumstances and reduced by up to a third, does not exceed five years, either alone or combined with a fine*". Relatedly, Italian Corte di Cassazione, no. 55190/2018, provided as follows: "*Secondo la giurisprudenza consolidata di questa Corte, l'accordo tra l'imputato e il pubblico ministero che sta alla base del "patteggiamento" costituisce un negozio giuridico processuale recettizio che, una volta pervenuto a conoscenza dell'altra parte e quando questa abbia dato il proprio consenso, diviene irrevocabile e non è suscettibile di modifica per iniziativa unilaterale dell'altra, in quanto il consenso reciprocamente manifestato con le dichiarazioni congiunte di volontà determina effetti non reversibili nel procedimento e pertanto ne all'imputato nè al pubblico ministero è consentito rimetterne in discussione i termini*"; translation provide by the author of this thesis: "*According to the well-established case-law of this Court, the agreement between the defendant and the public prosecutor which forms the basis of the "plea bargain" constitutes a receptive procedural legal agreement which, once it has come to the knowledge of the other party and when that party has given its consent, becomes irrevocable and is not susceptible to modification by the unilateral initiative of the other party, in so far as the mutual consent manifested by the joint declarations of will determines non-reversible effects in the proceedings and therefore neither the defendant nor the public prosecutor is permitted to call into question the terms involved*".

122 CAMON A., *Accordi processuali e giustizia penale: la prova patteggiata*, Rivista di diritto processuale, Vol. 63, 1, 2008, p. 55.

as it is known it was developed by German pandectics, in particular by Wach[123] and Kohler[124], in order to identify a category of acts, performed in the course of proceedings and operating for procedural purposes, in relation to which the will of the parties assumed a role equivalent to that played in substantive law [125].

Originally, such category was meant to encompass both (*i*) acts of a procedural nature with dispositive effect on substantial situation[126] and (*ii*) non-procedural acts connected with the trial, whose course they affect[127].

More specifically, in the context of a general revitalisation of private autonomy in the procedural field, German doctrine has laid down, as mentioned, a bipartition between two categories of substantive agreements affecting the procedural aspect.

On the one hand, to the first category belong those agreements by which the parties undertake to exercise, or not to exercise, certain procedural prerogatives. In such cases a procedural powerdispositive act could be traced

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123 WACH A., *Das Geständniss. Ein Beitrag zur Lehre von dem prozessualischen Rechtsgeschäft*, in AcP, LXIV, 1881, p. 216 et seq.

124 KOHLER J., *supra* no. 110, p. 127 et seq.

125 DENTI V., *Negozio processuale*, Enciclopedia del diritto, XXVIII ed., Milano, 1978, 138.

126 Scholars included in the mentioned category agreements on the dismissal of the claim or the confession, see WACH A., *supra* no. 123, where including the judicial confession arguing that it is not a predetermined procedural act due to its affections to the underlying legal relationship.

127 Such as the *pactum de non petendo / pactum de non exequendo* or jurisdiction agreements.

(Befugnisdisposition) which presupposes the validity of the procedural rules on which the act of autonomy impact.

On the other hand, the second category includes agreements whereby the parties dispose rather than onf their powers, directly of the procedural rules (*Normdisposition*), the validity of which requires not only the presence of an ad hoc legal provision[128].

For the purpose of this thesis, the Author will use the term procedural agreement, to identify in a broad sense the different kind of agreements between the parties on the rules of the proceedings,

It clearly emerges that three key elements constitute the under-structure of a procedural agreement: the agreement, the litigation and the parties.[129]

The first one is clearly the most evident: the meeting of the minds in regard to the election of a particular rule. To make it simpler, there must be a valid agreement between the parties to devolve litigation to a selected court, to limit the means of proof, to abbreviate certain time lines etc. Such agreement can be included in the main contract and therefore being tailored as a clause or, it can be subscribed separately from the main contract, prior to or following the dispute.

In any case, the manifestation of the parties' will shall be free and self-

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[128] LEIPOLD D., *supra* no. 97; ARENS P., *supra* no. 97, p. 3; SCHLOSSER, P., *supra* no. 97.

[129] In this regard see: HARTLEY T.C., *Choice-of-Courts agreements under the European and International Instruments*, Oxford, Oxford University Press, 2013, pp. 4-6; BRIGGS A., *Agreements on Jurisdiction and Choice of Law*, Oxford, Oxford University Press, 2008, pp. 8-16, SCHLOSSER, P., *supra* no. 97.

determined.

The second cornerstone is the fact that the agreement must contemplate state litigation as the mean to solve potential disputes. This is fundamental, in order to cut a line between procedural agreements as for the scope of this thesis and agreements on alternative dispute resolution mechanism.

The former empowers the parties to select rules which will be applied by national courts. On the contrary, the latter refers to private mechanism of dispute resolution.

In addition, the contracting parties need to specify if they are regulating a particular dispute, one that is already existing or all the possible future claims, but always in connection with an identified legal relationship[130].

Finally, such agreements produce its effects for the parties[131] who are bound

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130 QUEIROLO I., *Gli Accordi Sulla Competenza Giurisdizionale tra Diritto Comunitario e Diritto Interno*, in Studi e Pubblicazioni di Diritto Internazionale Privato e Processuale n.51, Padova, CEDAM, 2000, pp. 154-155.

131 It is worth mentioning that in the context of procedural law, the concept of party assumes a twofold dimension: party in the procedural sense on the one hand, party in the formal sense on the other LUISO F.P., *supra* no. 22, pp. 215 - 215.

The first concept relates to the capacity to be a party and to assume the role of subject of the proceedings, as recipient of the effects of procedural acts. Thus, a party in the procedural sense may be any subject endowed with legal capacity (See art. 1 Italian Civil Code: "*La capacità giuridica si acquista dal momento della nascita. I diritti che la legge riconosce a favore del concepito sono subordinati all'evento della nascita*"; translation provided by the author of this thesis: "*Legal capacity is acquired as from the time of birth. The rights that the law recognises in favour of the conceived are subject to the event of the birth*").

On the other hand, a party in the formal sense can be anyone who has the capacity to act on a substantive level in relation to the disputed right, since he is endowed with the free exercise of the rights which are the object of the claim See art. 75, Italian Code of Civil Procedure, para 1: "*Sono capaci di stare in giudizio le persone che hanno il libero*

by it. They are primarily the ones which entered into it but also the ones which obtain benefits from it. Indeed, even if it is true that "party" is firstly the one who concretely executed the agreement, it is also true that party can be the one who is committed by the legal consequences.[132]

It has been highlited that a procedural agreement is a peculiar manifestation of party autonomy.

The identification of the nature of such agreements, however, is not straithforward.

Indeed, scholars have been divided on defiying agreements as material in nature[133], independently by their effects on procedural rules, on the one hand,

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esercizio dei diritti che vi si fanno valere"; translation provided by the author of this thesis: "*Persons who have the free exercise of the rights claimed in proceedings are capable of standing in court*".

A person who is legally capable but lacks the capacity to act in relation to a certain right may therefore be the addressee of procedural acts but cannot perform them. In order to remedy this impasse, incapable persons must be represented, assisted or authorised in court See art. 75, Italian Code of Civil Procedure, para 2: "*Le persone che non hanno il libero esercizio dei diritti non possono stare in giudizio se non rappresentate, assistite o autorizzate secondo le norme che regolano la loro capacità*"; translation provided by the author of this thesis: "*Persons who do not have the free exercise of their rights may not stand in court unless they are represented, assisted or authorised in accordance with the rules governing their capacity*".

132 For the purpose of this thesis, the author will refer to the term party meaning the contractors of the agreement. In order to have a complete picture of the effects of the agreement on third parties see HARTLEY T.C., *supra* no. 129, p. 174-176 and PENASA L., *Gli Accordi sulla Giurisdizione tra Parti e Terzi II*, Padova, CEDAM, 2013, pp. 33-111. It is also woth mentioning that, in England and Wales, the Contracts right Act of 1999 expressly provides rules for third parties to engage in the arbitration proceedings even if they are third rather than contractors; on the point see ANDREWS N., *supra* no. 39, p. 71.

133 This is the prevailing opinion according to German case law, see for example: BGH, 29.02.1968 – VII ZR 102/65, BGHZ, 49, 384, 386; BGH., 24.11. 1988 – III ZR 150/87,

and considering the mere procedutal nature[134], irrespective of the origins of the agreement on the other. [135]

Neither of this thesis seems to be convincing. Indeed, in accordance with the argument proposed by Hartley[136] on jurisdiction agreement, the legal nature of an agreement on procedure is intrinsically dualistic since it encompasses both substantial and procedural elements.

On the one hand, it is an agreement between private parties which simply provides a binding contract term and is consequently regulated by contract law. On the other hand, it is an agreement on procedural issues, with procedural effects, hence falling within the scope of procedural law.

In principle, materiality of procedural agreements consists merely in the contractual structure of the same due to the bilateral manifestations of the

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NJW, 1989, 1431,1432; BGH, 18.03.1997 – XI ZR 34/96, NJW, 1997, 2885, 2886; BGH, 20.01.1986 - II ZR 56/85, NJW, 1986, 1438, 1439; BGH, 17.05.1972 - VIII ZR 76/71, BGHZ 59, 23, 26; on arbitration clauses, see BGH, 22.05.1967 - VII ZR 188/64, BGHZ, 48, 35, 46; BGH, 28.11.1963 - VII ZR 112/62, BGHZ, 40, 320, 322; BGH, 30.1.1957 - V ZR 80/55, BGHZ, 23, 198, 200. Marinelli has the same view, see *supra* no. 78, p. 148. It also worth to remember that Traditionally, common law systems reject the general category of procedural agreements but rather, those agreements are conceived as contractual agreements of a purely private nature, see BRIGGS A., *Private International Law in English Courts*, Oxford, Oxford university Press, 2014, p. 346 and ANDREWS N., *supra* no. 39, p. 68.

134 SCHIEDERMAIR G., *Vereinbarungen im Zivilprozeß,* Bonn, 1935, pp. 40,100; BORK R., *§ 38*, in F. Stein- M. Jonas, *Kommentar zur Zivilprozessordnung,* ed. 23, Auflage, Tübingen, 2013, par. 50; ROSENBERG L. / SCHWAB K. H./ GOTWALD P., *Zivilprozessrecht*, 18 Auflage, München, 2018, pp. 202 et seq.; PENASA L., *Gli accordi sulla giurisdizione tra parti e terzi. I. Natura e legge regolatrice*, Padova, CEDAM, 2012, 83 et seq.

135 CABRAL A. *supra* no. 9, p. 92.

136 HARTLEY T.C., *supra* no. 129, p. 4.

parties' minds[137].

In conclusion, as procedural agreements have, however, ad extra-judicial nature, to be evaluated in its origin according to civil law, but falling within the scope of procedural law in its effectiveness. Indeed, the procedural legal agreement reflects the possibility of a potential litigation, or regulates the events of a litigation already raised, in any case for the purpose of giving the agreement normative effect to the manner in which the litigation is to be decided[138].

Such assumption is not purely theorical, but rather imply practical consequences, especially related to the evaluation of the agreement validity, as it will be analysed infra.

2.1.2 Different classifications

Traditionally, Gerard Wagner has proposed a bipartition of the category of procedural agreements[139].

Firstly, he identifyed thos agreements by which the parties undertake to exercise or not to exercise procedural powers (such as the *pactum de non*

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137 PENASA L., *supra* no. 134, p. 81; see BGH, 17.10.2019 - III ZR 42/19, paras. 26-36.

138 FERRARA L., Udienza 17 Novembre 1906, Pres. Masi, P. P., Est. Bianco, P. M. Borrelli (Concl. Conf.); D'Avalos, (Avv. Fadda, Simeoni, Cutillo) c. Caturano (Avv. Grippo, De Roberto, Ferrara), Il Foro Italiano, Vol. 32, 1907.

139 WAGNER G., *Proze8vertr5ge: Privatautonomie im Verfahrensrecht*, Tubingen, Mohr Siebeck, 1998, pp. 35-36.

petendo or *non exequendum*). This first chategory does not impact on procedural rules[140].

Secondly, Wagner identifyed those acts resulting from the consensual derogation to procedural rules (competence derogation and agreements on the burden of proof), which, according to the author, require an express legislative provision[141].

In Italy a bipartition of the system has been also provided.

Salvatore Satta, distinguished procedural agreements depending on the "*place*" of formation.

On the one hand there are agreements concluded outside the proceedings, but impatting on it; on the other hands there are agreements reached in the proceedings.

Examples of the first chategory are jurisdiction clauses, clauses limiting the possibility to promote exceptions in the trial, agreement on the burden of proof. These agreements, in the view of Salvatore Satta do affect the proceedings but are regulated by substancial provisions.

The second chategory, encompasses strictly procedural agreements, regulated directly by procedural law, such as agreement on the suspension of the trial and the decision by equity.

The most interesting element of Satta's distinctions, however, could be found in the comment the author provides on the second category, while arguing that

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[140] WAGNER G., *supra* no. 139.

[141] WAGNER G., *ibidem*.

"*e per essi sorge il problema se si possano ammettere accordi processuali fuori dai casi stability dalla legge del processo. In generale si deve dire di no: in ogni caso è da escludere che tali accordi possano modificare forme o termini stabiliti a pena di nullità o di decadenza (ad esempio, prorogare i termini di impugnazione, di estinzione) o alterare l'ordine stabilito per garanzia della giustizia*"[142].

The abovementioned argument could be deconstructed in order to argue in favour of the admissibility of atypical agreements, concluded outside the proceedings, but producing their effect on it.

Indeed, if Satta expressly specified the limits of the provided second cathegory, this imply that those limits do not apply to the first chategory.

More recently, Federico Carpi proposed a tripartition of the notion of procedurl agreement which seems to the author of this thesis more convinving[143].

Carpi distinguished between:

- agreements for the trial;
- agreements within the trial;

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142 SATTA S., *supra* no. 75, p. 300; translation provided by the author of this thesis: "*and for them the problem arises as to whether procedural agreements can be admitted outside the cases established by the procedural law. In generalthe answer is no: in any case, it is to be excluded that such agreements can modify forms or terms established under penalty of nullity or forfeiture (for example, extending the terms of appeal, of extinction) or alter the order established to guarantee justice*".

143 CARPI F., Accordi di parte e processo, Rivista trimestrale di diritto e procedura civile, supplement to no. 3, 1-7, 2008, pp. 1-7.

- agreements within the trial and for the trial itself[144].

Firstly, agreements for the trial aim at chategorizing those made by parties outside the trial but with effect on the same and on the judge's power, such as agreements on jurisdictions and penalty clauses.

Secondly, agreements within the trial encompass agreement concluded in the proceedings with substancial effect, such as congiliation and agreement aiming at regulating the conduct of the proceedings.

Finally, the third chategory of agreements are concluded pending a dispute and pursue the regulation of procedural aspect. Examples are *contract de procedure* and case management.

2.1.3 Position of the judge: party or third?

Procedural agreements produce their effects when the dispute arises and il brought before a national court.

In that moment the bilateral relationship expands, and a third party enters the scene: the judge

It is necessary to question the role of the judge in the context of procedural agreements and the role of his consent, if any, in relation to the implementation of the effects of the agreement.

Some authors claim that the judge has the capacity to conclude negotiations

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144 CARPI F., *supra* no. 143, p. 4-6.

and would be a party to the agreement. [145] Relatedly, his will would be added to that of the other parties involved as an essential element for the conclusion of the agreement.

However, such an approach is not convincing and misrepresents the role of the judge in the trial.

Indeed, as pointed out by Cabral, the capacity to enter into agreement is a power conferred by the legal system on individuals to generates legal relationship, in accordance with general principles and on the basis of their autonomy and freedom.[146]

It goes without saying that the capacity to enter into agreement is not proper to the judicial function.

The power to perform an agreement is exercised in the interest of the subject who performs it.[147]

The judge, however, do not have the power to perform acts in favour of its own interest. Indeed, the public interest forseable in the trial do not pertain to the judge. The latter, has only the power to ecercise a function of control, in relation to the validity of the agreement and its compliance with public policies and mandatory procedural norms.[148]

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145 DIDIER F. JR., *Curso de Direito Processual Civil*, Salvador, Jus Podivm, vol.1, 9a Ed., 2008, p. 150.

146 CABRAL A., *supra* no. 1, p. 223.

147 CARNELUTTI F., Sistema del diritto processuale civile, II atti del processo, Padova, CEDAM,1938, pp. 70-77.

148 CABRAL A., *supra* no. 1, p. 223.

Whethere the judge would act on behalf of a proprer interest, it would lose its own main features: impartiality.

In conclusion, the judge is not a party to the procedural agreement.

However, the fact that the judge is not a party does not mea that him is not bind by the agreement: there is no need for the judge to be a party to the agreement in order for him to be bound by it.

The judge is bound by the agreement by valid legal conventional norm, whose applicability could not be denyed if the legal system recognize its validity, exactly in the same manner it happens with private law contracts: the judge is not a party but when they arise, he must apply them even if they derogate from the general rule. As a consequence, the judge is not deprived of his functions, buth rather he exercises a function of control on validity or otherwise of the conventions.

2.2 Effects of procedural agreements

Having illustrated the general definition, the different classification and the mail issues concerning the validity requiremnts, it is now time to turn the readers' attention to procedutal agreements effects.

The admissibility of such agreement means that the will of the parties may derogate from the specific rule, established by law, on the conduct of the proceedings.

The meeting of the parties' minds in this case generates two different procedural effects, which seems to be opposite but, actually, represent two sides of the same coin: the positive effect and the negative effect [149].

Such effects can be easily understood if thought in connection with the more common type of procedural agreement: jurisdiction clause.

A jurisdiction clause, generally speacking, has: on the one hand, the positive effect of identifying a competent court, on the other hand, the negative effect of excluding the *ab originem* competent court.

Applying such concept to the general notion of procedural agreements nothing change.

The positive effect is intended to confer to the parties a duty (to bringh the action in a peculiar forum, to sue with a specific action etc.), that couls consist in a "to do" duty (sue in a peculiar forum) or in a "not to do" duty (suc as in the *pactum de non petendo).* In other words, the positive effect imposes a procedural conduct who otherwise would not be imposed by the applicable procedural law[150].

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149 GRUSON M., *Forum Selection Clauses in International and Interstate Commercial Agreements*, University of Illinois Review, 1982, p. 134; MERRETT L., *Interpreting non-exclusive jurisdiction agreements*, Jurnal of Private International Law, Vol. 14, 2018, pp. 36-65; KEYES M./MARSHALL B.A., *Jurisdiction Agreements: Exclusive, Optional and Asymmetrical*, Journal of Private International Law, Vol. 11, No. 3, 2015, pp. 345-379.

150 RIGHETTI E., *La Deroga alla Giurisdizione*, Milano, Giuffrè, 2002, pp. 71-76.

Conversely, the latter, also named derogation effect, derives from the fact that when choosing procedural rule, parties are, implicitly or explicitly, derogating from the provision would otherwise applied to the litigation. [151]

As mentioned above, the positive and negative effects of a procedural agreement are two faces of the same coin. Indeed, the conventional choice of a specific procedural rule, simultaneously imply its counterpart: the derogation from the applicable rurle if the agreement was not in force.

However, the presence, at the same time, of both the positive and negative effects within a single agreement depends on its wording.

As a matter of fact, parties may construct an agreement in which they add a procedural possibility, without excluding the original applicable rule[152].

Moving back to the example of jurisdiction agreements, they may be tailored in peculiar ways, in order to assume both the positive and the negative effect, or not.

In this sense, an exclusive procedural agreement may be defined as the one empowering parties with a clear procedural duty wich exclude all the diverse possibility otherwise provided by the law.

Such kind of agreement are usually far from being obscure and do not generally create doubts as to their interpretation, since theey provide a clear

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151 RIGHETTI E., *supra* no. 150.

152 NYGH P.E., *Autonomy in International Contracts*, in Oxford Monographs in Private International Law, New York, Clarendon Press Oxford, 1999, p. 15.

and restrictive framework that is identical, regardless of the party which initiates the proceedings

Contrariwise, a non-exclusive agreement simply adds a procedural possibility compared to the one provided by the law.

As an example, it can be considered a non-exclusive choice of forum, which grant the partyes the possibility to bring an action in a specific court, not excluding the possibility to sue in the natural forum of the dispute.

In light of the foregoing, the following may be deduced: procedural agreements are acts having purely procedural effects.

2.3 Validity requirements

Procedural agreements should both be formally and substantially valid in order to be enforceable.

Relatedly, this paragraph is aimed at identifiying firstly the eventual forma requirement of the agreements as a general cathegory. Secondly, the applicable law to the agreement will be assessed, in order to identify the substancial validity requirements.

2.3.1 Formal requirements

The formal requirements of an agreement are inherent in the means by which the parties' consent is externalized.

Relatedly, parties may conclude a procedural contract before or after the proceeedings is commenced. Indeed, they may regulate *ex ante* the conflict potencially arising as well as after the trial is concretely pensinf.

Naturally, the former kind of agreements are concluded outside the proceedings.

However, parties are also capable of concluding procedural contracts while the dispute is pending, in any of the procedural phase, including the appeals and the execution phases.

The distinction between outside-proceedings agreement and inside-proceedings agreement produces its effects on the forms requested to the agreement in order to be considered valid.

Indeed, whereas the meeting of the minds can be ascertained while pending the proceedings directly from the judge, and be transposed in the proceedings acts and records (such as in case of acceptance of the waiver of the claim) lacking a written agreement, that will not be possible in the outside-proceedings concluded agreement.

Relatedly, there is not a common understanding of the formal requirements of procedural agreements, even if procedural norms tendencially identify them in the typified models.

However, in order to drow some common line within the European panorama, it is important to highlite that the European legislator formally regulate a form of procedural agreements as wall as the formal requirement it must have.

Notably, the relevant provision is art. 25 of Regulation (Eu) No 1215/2012 (Brussels Recast)[153], which provides:

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[153] Regulation (Eu) No 1215/2012 of The European Parliament and Of The Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

"1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either: (a) in writing or evidenced in writing; (b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.

3. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive

jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved.

4. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15, 19 or 23, or if

the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24.

5. An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid".[154]

It is evident that in case of jurisdiction agreement, the formal requirements are encapsulated in the text of Art. 25, which prescribe that the Agreement shall be alternatively: (a) in writing; (b) in a form which is in accordance with parties' established practice; (c) in international trade or commerce, in a form consistent with a usage of which the parties are or ought to have been aware and which is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

In light of the above a conclusion may be deduced: there is essentially one fundamental formal requirement, common in all the wording of the European legislator.

Such requirement is the clear and unambiguous manifestation of the parties will, bein it in writing, in accordance with the parties' practice or the well-known commercial use.

Such reasoning complies with the national reasoning provided by the Corte di

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[154] Art. 25 Regulation (Eu) No 1215/2012 Of The European Parliament and of The Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Cassazione[155], which require for the agreement to be formally valid, a clear and unambiguous manifestation of the parties will.[156]

As a consequence, it can be concluded that although some formality is required in order to record the meeting of the minds of the contractors, there is not a general formal requirement in the field of procedutal agreement.

Written form is a requirement for the validity of the agreement only when expressly required by law.[157]

2.3.2. Law governing the validity of the agreement and substancial requirements

Determining the law governing the validity, as well as to evaluate the validity requirement of procedural agreements, is not straightforward.

It has been said that the procedural agreements described in this work are agreements, created by private autonomy often outside the contractual schemes provided by the legislator.

As a consequence, where not expressly regulated by procedural law, it needs to be investigated which is the law governing the substancial validity and the validity requirements of procedural agreements.

Most legal system, indeed, lack any explicit and general rule on procedural agreement and only provides on the content, the form and the effects of the

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155 Cass. 899/1962; Cass. 3104/1963, Pretura di Verona, 22.09.1998.

156 ASPARELLA C., *supra* no. 38, p. 717.

157 CABRAL A., *supra* no. 9, p. 289.

same.[158]

Traditionally, civil law jurisdictions are keen to apply substantive law to the validity of the agreement, by way of the principle of *analogia juris*[159].

This, on the grounds that "*the Code of Civil Procedure only contains very few rules on procedural contracts, and because the rules of substantive law can be considered to enshrine general rules of contract law*"[160].

In particular, due to the dualistic nature of procedural agreements, dualistich should be the approach to the applicable law. Relatedly, procedural normas regulats the effects of the agreement. Conversly, material law is applicable to the substantial validity of the agreement, as for the manifestation of the

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[158] For example, in Italy, the Code of Civil Procedure does not encompass procedural agreement in general, whereas single disposition regulate the typical agreement ad art. 807, Italian Code of Civil Procedure, which provides (translation provided by the author of this thesis): "*the submission to arbitration must, in order not to be null, be made in writing and must indicate the subject matter of the dispute. The written form requirement is considered complied with also when the will of the parties is expressed by telegram, telex, telecopier or telematic message in accordance with the legal rules, which may also be issued by regulation, regarding the transmission and receipt of documents which are teletransmitted*", original text: "*Il compromesso deve, a pena di nullità, essere fatto per iscritto (1) e determinare l'oggetto della controversia (2).La forma scritta s'intende rispettata anche quando la volontà delle parti è espressa per telegrafo o telescrivente telefacsimile o messaggio telematico nel rispetto della normativa, anche regolamentare, concernente la trasmissione e la ricezione dei documenti teletrasmessi*".

[159] See BELOHLAVEK A.J., *supra* no. 118, p. 33 who is providing Switzerland as an example due to the fact that in such legislation, lacking applicable procedural rules, federal laws on obligations govern procedural contract; KERN C.A., *Procedural Contract in Germany,* in CABRAL A./NOGUEIRA P.H., *Negócios processuais, Grandes temas do novo CPC*, Salvador, Editora JusPodivm, 2015, p. 187.

[160] KERN C.A., *ibidem*.

consensus and the caminf into existence of the agreement itself.[161]

Such approach is choherent to the one followed by the European Union.

The extension of the issue could be contextualised if it is taken as an example what has been achieved in the context of one of the procedural agreements typified, not only at national but also at Community level: jurisdiction agreements.

In 2012, Art. 25 of the Recast[162] put order on the issue, providing for the applicable law to the substantial validity of jurisdiction agreements. As a consequence, today, the substantive law of the nominated forum (to be identifyied applying the chosen seat conflict of laws rules), may be used to assess the validity of the choice of forum.

In light of the proposed consideration, therefore, the substancial validity of procedural agreements is preliminary subject to the verification of whether the interest such agreements pursue is worthy of protection for the juridical system.

Relatedly, Marinelli argues that irritual arbitration is an atypical contractual arrangement, the purpose of which is to settle a dispute that is certainly in the

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161 BELOHLAVEK A.J., *supra* no. 118, p. 34.

162 Art. 25(1) Regulation (Eu) No 1215/2012 of The European Parliament and of The Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters in relation provides: "I*f the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State".*

interest of the State and therefore deserving of protection.[163]

The author of this thesis is of the opinion that such reasoning shall apply also in the case of procedural agreement.

They have been extensively defined in paragraph 2.1 as agreement by which the parties model the proceedings to suits their interest, in order to render the trial fast and cost efficient. As a consequence, in an attempt to identify a common interest perpetrated by procedural agreement as a whole category, it cannot but be identifyied in the regulation of dispute resolution.

As a consequence, applying Marinelly well motivated argument, the purpose of settling disputes is in the interest of the state and deservs protection.

That being said, in any case even whethere generically falling under the interest worth of protection, the specific purpose of the single agreement still needs to be verified.

Markedly, the concrete and atypical cause of any procedural agreements have to (i) serve the same purpose as that for which the proceedings is intended by the legislator and (ii) comply with public polcy and the general principles of procedural law.[164]

2.4 Procedural agreements as a form of privatization

In chapter I, paragraph 1.4, it has been analysed the ongoing phenomenon of the exit of the parties from the public litigation system: the so-called flight

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163 MARINELLI M., *supra* no. 78, p. 104.

164 ASPARELLA C., *supra* no. 38, p. 712.

from courts.[165]

Given this premise, the aim of this pharagraph is to investigate the possible reaction to the mentioned phenomenon, in order to conclude that procedural agreements are a valid tool to contrast the flighting from national courts.

The privatization of justice, in the author's opinion, although in many situations may be a more than valid tool, also raises critical issues with regard to the democratic nature of the legal system.

Indeed, conducting proceedings exclusively behind closed doors, without judicial control (other than in connection with the recognition and execution of the measure) may have disruptive consequences.

First and foremost, the arrest of the production of national case-law, which are publicly accessible and not only allow the state control over the application of the law, but also facilitate the evolution of the practitioner's knowledge.

How impoverished would the legal argumentation be without the interpretative insights provided by case law?

In addition, it is worth to mention that in recent years, the development of an entrepreneurial industry of private dispute resolution services providers has been constant[166]. The concern here is relate to the fact that "*these new providers of decision-reaching services are private economic actors, not public agencies. It is already apparent that their activities are subject to economic*

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[165] *Supra* Chapther I, para. 1.4.

[166] MURRAY P.L., *supra* no. 76, p. 135.

influences inconsistent with the standards of impartiality and independence associated with public justice and the rule of law. The privatization of public justice brings the risk that public justice, as we know it, is being eroded"[167].

Indeed, the rise of diversified and autonomous conflict resolution systems could undermine the protection of rights when improperly used[168].

The author of this thesis is favourable to Ciprianis's approach[169].

In particular, the most efficient method of improving the civil legal system would be to "privatise" the civil justice, but in the sense of eliminating the public excesses in the conduct of the proceedings, in order to liberalise" it, while respecting the fundamental principles and democratic constitutions, with a view to establishing a process that respects citizens' right of action and defence, that is conducted in an adversarial manner by the parties and before a third, impartial judge, and that lasts a reasonable time[170].

Here come into play the fundamental rule that procedural agreement could play as instrument to grant the parties with a public trial, but promoted and conducted maximizing their private interest.

As it will be explained infra, leave more space to autonomy in civil proceedings will make resort to alternative dispute resolution mechanism less compelling

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167 MURRAY P.L., *ibidem*.

168 DALLA BONTÀ S., *supra* no. 8, pp. 6-7.

169 CIPRIANI F., *supra* no. 73, p. 322.

170 CIPRIANI F., *ibidem*.

and it will enhance the efficiency of the national justice system, which is " *key for an attractive investment and business-friendly economy"*[171].

[171] Council Recommendation on the 2020 National Reform Programme of Italy and delivering a Council opinion on the 2020 Stability Programme of Italy, COM (2020) 512 final, del 20 maggio 2020, cons. 24; on the same line the Report of the Committee of Experts on Economic and Social, Initiatives for the relaunch "Italy 2020-2022" of June 2020, had remarked that (translation provided by the author of this thesis): "*The reform of civil justice, with the objective of reducing the time and increasing the the certainty of civil justice, is essential for a country that intends to attract foreign attract foreign investment and increase domestic investment. The average length of proceedings is unanimously recognised in Italy and abroad as one of the abroad as one of the country's greatest structural weaknesses. structural weakness of the country*", original text: "*la riforma della giustizia civile, con l'obiettivo di ridurre i tempi e aumentare la certezza della giustizia civile, è imprescindibile per un Paese che intenda attrarre gli investimenti esteri e aumentare quelli domestici. La durata media dei procedimenti è riconosciuta unanimemente, in Italia e all'estero, come uno dei maggiori punti di debolezza strutturale del Paese*", available at https://www.governo.it/sites/new.governo.it/files/comitato_rapporto.pdf ; LUCARELLI P., *Mediazione dei conflitti: una spinta generosa verso il cambiamento,* Giustizia consensuale, Giustizia Consensuale, I, 2021, pp. 15-16.

CHAPTER THREE: THE PROBLEM

Provided the definition of procedural agreements, the third chapter moves the lens on the question underlying the entire work: the possibility of concluding atypical procedural agreements.

In particular, the object of the inquiry will be driven by the fundamental research question: may parties, and to what extent, affect the regular conduct of the proceedings by concluding an agreement pursuant to their autonomy? Markedly, the author will discuss whether the cases in which the answer is positive are only those expressly provided for by law, or, instead, it is possible to recognize a general principle of private autonomy within procedural law.

In an effort to solve the mentioned queries, the chapter will deal with different topics, starting from the preliminary comparison between the concept of typicality and atypicality.

Subsequently, the author will focuse on the Italian legal system, moving than on an analysis of those figures of procedural agreements that are not typified. This will be followed by a comparative analysis, with a main focus on those legislative systems which have provided for general clauses for the acceptance of atypical agreements into their legal systems. Finally, the author will analyze some critical profiles in relation to the validity and enforcement of procedural agreements.

3.1 Typical agreements or atypical agreements?

Typical or atypical, that is the question.

Further to the above reasoning, perhaps it is worth recalling – even if it may appear trivial – that typical is everything expressly provided for by the

legislator, thus incorporated in positive law. Vice versa, atypicall is something not expressly regulated by the law.

It has been demonstrated that typical procedural agreements are worldwide recognized.

On the opposite, the possibility to conclude procedural agreements that are not expressly recalled by civil or procedural law is generally excluded[172].

One of the long-standing arguments for the exclusion of private autonomy in civil proceedings is the public character attributed to procedural law[173].

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172 CHIOVENDA G., *supra* no 6, pp. 105 – 113; FABBRINI TOMBARI G., *Pactum de non exsequendo*, Il Foro Italiano, Vol. 1, 1992 p. 1849; See LEIPOLD D. *supra* no. 97, who provides that the principle of freedom of contract does not apply in civil procedural law. In other words, for the scholar there is no room for a conventional process (*i.e*. a process whose rules can be determined by agreement of the parties).

173 See LEIPOLD D. *supra* no. 97, who argues that whereas the rules of civil law are largely dispositive, so that the general rule is that they can be derogated from by contract, this is not the case in civil procedural law, which leaves little room for derogation, precisely in view of the public-law nature of procedural law and ARENS P., *supra* no. 97, who, on the same wavelength, argues that there is a public interest in the streamlining of proceedings, so that large areas of civil procedural law are of a mandatory nature and cannot be changed by agreement of the parties; SATTA S., *Contributo alla dottrina dell'arbitrato* (1931), reprint Milano, Giuffrè, 1969, p. 50, argued that: "*il punto di contrasto sull'ammissione dei con-tratti processuali trascende la loro singolare manifestazione per toccare le radici più intime di tutto il diritto processuale, la conce-zione cioè del processo nella sua struttura e nella sua funzione non solo giuridica, ma forse insieme sociale. Si tratta insomma di deci-dere sulla convenzionalità o meno del processo, di accettare cioè l'idea del rapporto pubblicistico che prevale nelle concezioni e nelle legislazioni moderne, o di tornare all'antico. I contratti processuali rappresentano una nostalgia di quest'antico*"; translation provided by the author of this thesis: "*The point of contention on the admission of procedural agreements transcends their singular manifestation to tackle the innermost roots of all procedural law, that is, the conception of the trial in its structure and function, not only juridical but perhaps also social. It is a question, in short, of deciding whether or not the process is conventional, that is, of accepting the idea of the public*

Accordingly, given the mandatory nature of public law, any contractual derogation of the parties from procedural rules would be precluded.

This view is often used to quickly dismiss the analysis of atypical procedural agreements.

As concluded by Marino Marinelli, while standing on the opposite side, this argument is often used as a mere syllogism:

- premise 1: *procedural law is public law*;
- premise 2: *public law is not subject to private autonomy*;
- conclusion: *procedural law is not subject to private autonomy.*[174]

The above reasoning is not convincing. The public character of procedural law is not a decisive factor in sustaining its imperativeness or in sustaining a presumption that its rules are mandatory.

In fact, as mentioned above, even in public law there are non-mandatory rules, and the distinction between mandatory and dispositive law is rather a transversal distinction than a consequential one to that between public and private law. [175]

The mandatory public law, the *ius publicum*, is not public law in general, but includes those rules that are enacted for the protection of a public interest that is therefore mandatory[176].

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relationship that prevails in modern concepts and legislation, or of returning to the past. Procedural contracts represent a longing for the old".

174 MARINELLI M., *supra* no. 78, p. 159.

175 MARINELLI M., *supra* no. 78, p. 159.

176 MARINELLI M., *supra* no. 78, p. 160.

In conclusion, even considering civil procedural law as public law, this is not sufficient to exclude *a priori* the applicability of party autonomy whitin the procedural rehalm.

Let's put some order.

First, it is well known that the will of the parties can affect the dispute, primarily initiating, ending, and composing it, both outside and inside the proceedings[177].

Secondly, there are no doubts that many (not to say all) lega system already acknowledge the existence of specifically regulated, *i.e.* typical, procedural agreements.

In particular, jurisdiction and arbitration clauses are unanimously recognized as valid and bindig.[178]

That being said, since in procedural law it is well recognized that judictial action is subject to the principle of party disposition, *i.e principio dispositivo*,[179]

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177 See DE STEFANO G., *supra* no. 99, p. 3, while analyzing as examples institutes as the transaction, the judicial settlement, and the withdrawal from the proceedings.

178 They are indeed recognized by national and supranational legislator (see. §38 and § German ZPO, artt. 28 and 806 of the Italian Code of Civil Procedure, art. 4, Italian Law n. 218/95, on jurisdiction agreements see art. 25, Regulation (Eu) No 1215/2012 of The European Parliament and Of The Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters). In addition, it is relevant to consider that as of November 2020, 166 states have joined the Convention on the recognition and enforcement of Foreign Arbitral Awards, thereby recognizing the legal admissibility of arbitration agreement (see signatories' Map at **https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=4&menu=671&opac_view=-1**).

[179] See § 282, German Code of Civil Procedure, "(*1) Jede Partei hat in der mündlichen Verhandlung ihre Angriffs- und Verteidigungsmittel, insbesondere Behauptungen,*

it is also aknowledge that the trial is not unavailable to the parties will.

In this perspective, the principle of the demand, which subordinates civil jurisdiction to the autonomy of the party, constitutes an essential and indefectible aspect of the subjectivity of the law, since only the promoter of the claim, as such, has the possibility to determine the bounders and limits of judicial protection.

In conclusion, the feasibility of a procedural agreement between the parties having as its object the management of the process is therefore explained not by the consideration of the public nature of the judicial activity, but rather by the purely private nature of the interest on which the performance of the

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Bestreiten, Einwendungen, Einreden, Beweismittel und Beweiseinreden, so zeitig vorzubringen, wie es nach der Prozesslage einer sorgfältigen und auf Förderung des Verfahrens bedachten Prozessführung entspricht. (2) Anträge sowie Angriffs- und Verteidigungsmittel, auf die der Gegner voraussichtlich ohne vorhergehende Erkundigung keine Erklärung abgeben kann, sind vor der mündlichen Verhandlung durch vorbereitenden Schriftsatz so zeitig mitzuteilen, dass der Gegner die erforderliche Erkundigung noch einzuziehen vermag. (3) 1Rügen, die die Zulässigkeit der Klage betreffen, hat der Beklagte gleichzeitig und vor seiner Verhandlung zur Hauptsache vorzubringen. 2Ist ihm vor der mündlichen Verhandlung eine Frist zur Klageerwiderung gesetzt, so hat er die Rügen schon innerhalb der Frist geltend zu machen"; translation avaiable ad https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html : *"(1) In the hearing, each party is to submit to the court its means of challenge or defence, specifically allegations, denials, objections, defence pleas, evidence and objections to evidence submitted, as promptly as, based on the circumstances of the proceedings, this corresponds to a diligent pursuit of the court proceedings and serves to promote them. (2) Petitions and means of challenge or defence regarding which it is foreseeable that the opponent will be unable to react to them without previously making inquiries, are to be communicated prior to the hearing by a preparatory written pleading in such time as to enable the opponent to still make the necessary inquiries. (3) Concurrently, the defendant is to file any objections concerning the admissibility of the complaint, and is to do so prior to being heard on the merits of the case. Should, prior to the hearing, a deadline have been set for him by which he is to submit his statement of defence, he is to raise his objections within this period*".

activity in question is based. Consequently, it seems to be possible at first sight to affirm that the procedural activities that do not involve interests of public order can therefore be freely waived by the parties, wheter it is not oustining *per se* the court's power[180].

3.2 Italian legal system

After illustrating that atypical procedural agreements are not *per se* incompatible with the procedural law system, it is worth now deepening the analyses on the Italian legal system.

The purpose of this pharagraph is to address the typified figures of procedural agreements, in an effort to identify their function and common features.

This will lead to the assessment of the concrete application of the principle of party autonomy within procedural law.

3.2.1. Typical agreements

Italian law recognizes a wide range o procedural agreemetnts.

First and foremost, it is worth reasoning on the most common kind of procedural agreement: jurisdiction clauses.

The Italian liberal approach to choose of forum clauses has not always been straightforward.

Relatedly art. 2 of the 1940 Code of Civil Procedure provided that the Italian jurisdiction could not be derogated by agreement of the parties in favor of a

[180] ANDREWS N., *supra* no. 39, p. 78.

foreign jurisdiction, unless the dispute concerned obligations between foreigners or between a foreigner and an Italian not resident or domiciled in Italy, provided that such an agreement was drawn up in writing.[181]

Such rule expressed the closed nature of the system configurated in 1940, in which the exercise of jurisdiction had very strong publicistic connotations, as an expression of national sovereignty.

Such approach has been reversed in 1995, when the private international law reform took palce by the entrance in to force of Law no. 218/1995[182], by which jurisdiction agreements were essentially "*liberalized*"[183] .

Paragraph 2, of art. 4 of Law n. 218/95, establishes that Italian jurisdiction can be derogated by agreement in favor of a foreign court or arbitrator if such derogation is proved in writing and the dispute concerns disposable rights. Therefore, the validity of choice of court clauses was no longer limited by the nationality of the parties and the only requirement on the subject matter of the dispute was the freely disposability of rights.

However, the relevance of Law n. 218/1995, is nowadays only residual, since, as it is known, jurisdicnion agreements are regulated at the Community level,

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181 The Italian Code of Civil Procedure of 1940 provided in Art.2 that, the Italian Jurisdiction could not be derogated by agreement of the parties, asserting that: "*La giurisdizione italiana non può essere convenzionalmente derogata a favore di una giurisdizione straniera, né di arbitri che pronuncino all'estero, salvo che si tratti di causa relativa ad obbligazioni tra stranieri o tra uno straniero e un cittadino non residente né domiciliato nella Repubblica e la deroga risulti da atto scritto".*

182 Law n. 218, 31/05/1995, available at **http://www.esteri.it/mae/doc/l218_1995.pdf** .

183 CARBONE S.M., *La (nuova) disciplina italiana della deroga alla giurisdizione*, Diritto del commercio internazionale, 1995, p. 553.

by art. 25 of EU Regulation 1215/2012[184].

Notably, Brussels I Recast applies regardless of the parties' domicile. Consequently, all choice of forum clauses which prorogate jurisdiction in favour of a Member State's court will receive equal treatment, regardless of where the involved parties are domiciled, thus significantly expanding the scope of application of the Brussels system[185].

A complete analysis of the thopic is out of the scope of the present work. However, here it is important to emphasise the validity requirement of such procedural agreements, as laid down by the European legislator.

Those requirements, as seen, are both formal and substancial.

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184 Art. 25(1) Regulation (Eu) No 1215/2012 of The European Parliament and of The Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, see *supra*, p. 71.

185 Under the Brussel I Regulation, indeed, in order to apply Art. 23 (the equivalent of art. 25 Brussel Recast), at least one of the contracting parties has to be domiciled in a Member State; Art. 23 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters provided as follows ""*1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either: (a) in writing or evidenced in writing; or (b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned. 2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing"."*

The formal requirements of the agreement are provided by art. 25 of the Regulation, which prescribes that the agreement shall be alternatively: (a) in writing; (b) in a form according to the parties' established practice; (c) in international trade or commerce, in a form consistent with a usage of which the parties are or ought to have been aware and which is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

Relatedly, the European Court of Justice affirmed that: "*the purposes of the formal requirements imposed by Art. 17 is to ensure that the consensus between the parties is in fact established*."[186] Moreover, in 1980 the Court added that : "*Contracting States are not free to lay down formal requirements other than those contained in the Convention*."[187] Therefore, all formal requirements of the jurisdiction agreement are solely governed by the Brussels system, with no room for the application of national law.[188] On the contrary, the substantial validity of the agreement, again regulated by art. 25 of the Recast, shall be evaluate pursuant to the substancial law of the court chosen by the parties[189].

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186 CASE 24/76, Estasis Salotti di Colzani Aimo e Gianmario Colzani s.n.c. v Rüwa Polstereimaschinen GmbH, [1976] ECR, para. 7.

187 Case 150/80, *ElefantenSchuh GmbH v Pierre Jaqmain*, [1981] ECR 01671, para 25.

188 In this sense, see HARTLEY T.C., *supra* no. 129, pp. 144-145.

189 CARBONE S.M./TUO C.E., *Il Nuovo Spazio Giudiziario Europeo in Materia Civile e Commerciale il Regolamento UE n. 1215/20012*, in Trattato di Diritto Privato dell'Unione Europea, Torino, edited by Ajani G. and Benacchio G.A., Giappichelli, 2016, p. 243.

Notably, according to such provision, the seized court must assess the substantial validity of a forum selection clause according to the law of the chosen *forum*. However, it is fundamental to add that Recital 20 of the Brussels Recast also provides that: "*Where a question arises as to whether a choice-of-court agreement in favour of a court or the courts of a Member State is null and void as to its substantive validity, that question should be decided in accordance with the law of the Member State of the court or courts designated in the agreement, including the conflict-of- laws rules of that Member State*"[190]. The recital undoubtedly clarifies that the applicable law to the agreement is not the substantive *lex fori* but the rules of private international law in force in the chosen jurisdiction[191], thus applying the theory of *renvoi[192].*

Lastly, it needs to be pointed out that the Brussels regime, not oly imposes formal conditions and the verification of the substantial validity according to national private international law.

Other two main principles underlie the very essence of art. 25: legal certainty and fairness.

Firstly, the principle of legal certainty inspires the entire Brussel regime. Indeed, even if not expressly provided by the wording of the Regulation, the European Court of Justice has considered it as one of the main objectives of its

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190 Recital 20 Regulation (Eu) No 1215/2012 Of The European Parliament and of The Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

191 PENASA L., *supra* no. 134, pp. 14-15.

192 HARTLEY T.C., *supra* no. 129, pp. 166-167.

legal order.[193] Related to jurisdiction allocation, such concept shall be interpreted as to ensure the foreseeability of the forum of litigation to both the parties[194].

Secondly, the principle of due process is not expressly provided by the Brussels regime. However, recital 38 of the Recast provides that: "*This Regulation respects fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, in particular the right to an effective remedy and to a fair trial guaranteed in Article 47 of the Charter*".[195] Consequently, the principle of due process and fair trial is not only recognised by the European Union and its Member State, but it also underlies the whole Regulation. Art. 6 of the ECHR[196] is the cornerstone of fair trial. It

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193 Case 38/81, Effer SpA v Hans-Joachim Kantner, [1982] ECR 825, para. 6; Case 26/91, Jakob Handte & Co. GmbH v Traitements Mécano-chimiques des Surfaces SA, [1992] ECR I-3967, para 12.

194 Case C-125/92, Mulox IBC Ltd v Hendrick Geels, [1993], ECR I-4075, para. 1, in particular where provided that certainty means that *"the plaintiff [is able to] to easily identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued*".

195 Recital 38 Regulation (Eu) No 1215/2012 of The European Parliament and of The Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

196 Art. 6(1) of the European Convention of Human Rights provides: "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice*".

has been largely interpreted by the European Court of Human Rights as referring to different aspects of the due process, consequently enlarging the rights covered by the definition of fair trial. In particular, one of the paramount corollaries that steams from such provision is the principle of equality of arms.[197] In light of such principle, parties should be granted with the same rights, since its aim is to promote a fair balance between the parties. [198] In addition, "*each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent".*[199]

In the light of the above principles, it is possible to draw the line of what are the requirements for the validity of a choice of court agreement in the Italian legal system.

Notably, a jurisdiction clause is valid when respecting the requirements provided by article 25 of Brussels Recast and does not violate in general the requirements of form, certainty, and fairness.

Another paromount example of typical procedural agreements are agreements on the burden of proof and agreements on the means of proof.

Significanly enough, they have become popular tools in modern civil proceedings.

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197 BESSO C., *Il Processo Civile, nozioni generali*, II ed., Torino, Giappichelli, 2015, p. 9.

198 Council of Europe, Guide on Article 6 of the European Convention on Human Rights, 2013, p. 21.

199 *De Haes and Gijsels v. Belgium*, ECHR 24 February 1997, para 53.

Indeed, it often occurs that the parties to a contract regulate the rules of evidence in case of a possible future dispute, with the aim of limiting the proof connected risks as far as possible.

German scholars have drawn a distinction between two types of agreements: on the one hand *Beweislastvertrage*, *i.e.* those agreements concerning the distribution of the burden of proof; on the other hand, *Beweisvertrage*, *i.e*. those agreements concerning the taking of evidence and the means of proof.

The former essentially allocate the risk and consequences of failure to prove the existence of a fact., whereas the latter concern the availability of certain means of proof or the mechanism of presumptions [200].

In the Italian legal system, originally admitted by case law, agreement on proof are now encapsulate by art. 2698 of the Italian Civil Code, which in a negative formulation provides that "*sono nulli i patti con i quali è invertito ovvero è modificato l'onere della prova, quando si tratta di diritti di cui le parti non possono disporre o quando l'inversione o la modificazione ha per effetto di rendere a una delle parti eccessivamente difficile l'esercizio del diritto*"[201] .

Firstly, such provision empowers contracting parties to overturn the subjective burden of proof generally provided by art. 2697of the Italian Civil

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200 PATTI S., *La disponibilità delle prove*, Rivista Trimestrale di Diritto e Procedura Civile, supplement to no. 1, Varese, Giuffrè, 2011, pp. 92-93.

201 Art. 2698 Italian Civil Code, translation provided by the author of this thesis: "*agreements by which the burden of proof is reversed or modified shall be null and void, whenever rights which the parties cannot dispose of are involved, or when the reversal or modification has the effect of making it excessively difficult for one of the parties to exercise the right*".

Code[202]. Indeed, art. 2697, provides the standard rule to identify the party boud to succur lacking the proof: the party who asserts a right (or, on the contrary, asserts its impediment, modification or extintion).[203]

Secondly, it also grants the contractors with the rights to modify the objective effect of the burden of proof, excluding or admitting the recourse to specific evidence as an exception to the general rule provided by the law[204], or recognizing a qualified demonstrative effect in favor of certain documents[205].

Two are the conditions to the legitimacy of such agreements: (i) that the agreement does not encompasses rights which the parties cannot dispose of;

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202 According to which "*chi vuol far valere un diritto in giudizio deve provare i fatti che ne costituiscono il fondamento. Chi eccepisce l'inefficacia di tali fatti ovvero eccepisce che il diritto si è modificato o estinto deve provare i fatti su cui l'eccezione si fonda*"; translation provided by the author of this thesis: "*whoever wishes to assert judicially a right must prove the constitutive facts of such right. Whoever objects to the ineffectiveness of such facts, or objects that the right has been modified or extinguished, must prove the facts on which the objection is basedz*".

203 CARRATTA A. / MANDRIOLI C., *Corso di diritto processuale civile, II – il processo di cognizione*, Torino, Giappichelli, 2019, p. 177.

204 Such as, for example, a clause by which the parties agree on presumptions, see DE STEFANO G., *supra* no. 99, p.7 and LIEBMAN E.T., *supra* no. 6, p. 88.

205 An example in this respect can be found in the interpretation given by local courts. Tribunals have repeatedly considered valid clauses by which the parties, by means of an agreement, have attributed the effectiveness of full proof to the bank accounting entries, see. Trib. Parma, 2 marzo 2015; App. Ancona, 31 marzo 2016; Trib. Pesaro, 3 maggio 2016; Trib. Pisa, 20 maggio 2016; Trib. Firenze, 23 novembre 2016; Trib. Bari, 25 settembre 2017; Trib. Pordenone, 14 dicembre 2017; Trib. Latina, 22 febbraio 2018; Trib. Ivrea, 14 maggio 2018; Trib. Roma, 22 ottobre, 2018; Trib. Spoleto, 27 novembre 2018 e Trib. Foggia, 24 gennaio 2019, tutte in *DeJure*; cfr. Trib. Bari, 10 novembre 2015 and for an accurate analysis on the agreement on the burden of proof in relation to consumers law, see BECHIS C., *Profili della tutela individuale dei consumatori e della riforma di quella collettiva – la tenuta processuale delle clausole probatorie nei rapporti consumeristici,* Giurisprudenza Italiana, I, 2021, pp. 226

(ii) that such an agreement does not generate excessive difficulty in the exercise of the right.[206]

The second limitation aims to avoid any possible compression of the exercise of the right of defense of the parties resulting by the procedural agreements.

It is clear that the Italian legislator has adopted a concept of the trial in which the rules to be applied to the burden of proof and the use of evidence are the result of the autonomy of the parties and the meeting of their wills[207].

The judge has the role of verifying first of all that the agreement is the outcome of the free private autonomy and of preventing any abusive use of the proceedings.[208] Thus, the judge has a primary function of control where the two aforementioned limits must be verified in order to confirm the validity of such agreements[209].

Moving from the field of evidence to that of appeals, article 360, paragraph 2, of the Italian Code of Civil Procedure governs the so-called per saltum appeal.

The mentioned provision – listing which judgments may be appealed to the italian supreme court – reads in its second paragraph as follows: *""An appeal may also be brought against an appealable judgment of the court of first instance if the parties have agreed to omit the appeal; however, in that event the appeal may be brought only in accordance with paragraph 1(3)* [*i.e*. for breach

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206 Art. 2698 Italian Civil Code, see *supra* no. 198.

207 PATTI S., *supra* no. 200, p.99.

208 PATTI S., *ibidem*.

209 PATTI S., *ibidem*.

or misapplication of rules of law and national collective labour agreements and contracts]"[210] .

In other words, an appeal per saltum to the supreme court is an appeal brought against a first instance decision (only whether issued by a Tribunal) directly before the Corte di Cassazione. Such possibility is granted to the parties only whether they agreed to do so.

It clearly follows that under Italian law, parties are free to conclude an agreement excluding the second instance hearings and, in any case, limiting the appealability of the judgment to breaches of law. This is a cliear example of a typical procedural agreement.[211] An institute disciplined by the legislator with a clear intention of reducing the numbers and the costs of the proceedings.[212]

Art. 360, Italian Code of Civil Procedure is silent as to what the parties' agreement should look like.

According to case law, first of all, the agreement can only be validly concluded between the parties to the proceedings and not by the lawyers unless they

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[210] Translation provided by the author of this thesis, original text:" *può inoltre essere impugnata con ricorso per cassazione una sentenza appellabile del tribunale, se le parti sono d'accordo per omettere l'appello; ma in tal caso l'impugnazione può proporsi soltanto a norma del primo comma, n. 3"*.

[211] LUISO F.P., *Diritto processuale civile, Vol. II, Il processo di Cognizione*, Milano, Giuffrè, 10° ed., 2019, p. 429.

[212] FRUS G., *Il ricorso per cassazione c.d. "per saltum",* Rivista Trimestrale di Diritto e Procedura Civile, I, 2000, p. 154 – 177.

have a special power of attorney[213].

Secondly, "*it must precede the expiry of the time-limit for lodging an appeal, since its subject-matter is a judgment which can be "appealed" and it is not intended as a means of overcoming the fact that a judgment has become res judicata but rather as a means of obtaining a kind of prior interpretation of the law by the Court of Cassation. Lastly, it must precede or at least be contemporaneous with the lodging of the appeal in cassation*"[214].

As regards form, art. 366, co. 3, Italian Code of Civil Procedure[215], provides that the agreement may also result from the apposition of an endorsement on the application of the other parties and, of course, also from a separate document. Most importantly, the provision clarifies that the agreement could be even

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[213] See Cass. 3321/2008, specifically providing that the agreement to appeal immediately against the judgment at first instance is a procedural agreement, at least from the point of view of the relevance of the declarants' manifestation of intent, and therefore if the that agreement has not been concluded by the parties personally or by their lawyers with a special power of attorney, the suits brought before the Cassazione per saltum, must be declared inadmissible; similarly, Cass. 16993/2006; Cass. 7707/2004.

[214] Cass. 15032/2020, translation provided by the author of this thesis, original text: "*deve altresì precedere la scadenza del termine per la proposizione dell'appello, avendo quale oggetto una sentenza "appellabile" e non essendo previsto come mezzo per superare l'intervenuta formazione del giudicato bensì quale strumento per ottenere una sorta di interpretazione preventiva della legge da parte della Corte di cassazione. Esso infine deve preesistere o quanto meno essere coevo alla proposizione del ricorso per cassazione*"; on the same grounds Cass. 22956/2010, Cass. 16993/2006; Cass. 4397/1998.

[215] Art. 366, paragraph 3, Italian Code of Civil Procedure: "*Nel caso previsto nell'articolo 360, secondo comma (7), l'accordo delle parti deve risultare mediante visto apposto sul ricorso dalle altre parti o dai loro difensori muniti di procura speciale, oppure mediante atto separato, anche anteriore alla sentenza impugnata, da unirsi al ricorso stesso*".

prior to the judgment under appeal. The intention of the legislator has been to overcome the previous trend of the legitimacy case-law. Indeed, the Corte di Cassazione used to declare valid agreement on the appeal only whether they were concluded after the judgment of first instance[216].

From the above, it can be concluded that the requirements for this type of procedural agreement relate exclusively to the necessary and unequivocal manifestation of will that must result from a written agreement.

As a final remark, the Italian legislator, also grant the parties with the possibility to require to the court to assess the case under equity[217]. In order for the court to be bound to decide in equity both parties have to consent. This agreement is clearly a procedural agreement. The only limitation imposed by the legislator is that the subject matter of the proceedings relates to the disposable rights of the parties.

By drawing the lines of what has emerged from the analysis of the above-mentioned instruments, it is possible to clarify what are the limits expressly identified by the Italian legislator on the subject of procedural agreements.

The first, fundamental requirement is evident: a clear and unequivocal manifestation of the will of the parties.

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[216] See Cass. 4480/1986.

[217] Art. 114 Italian Code of Civil Procedure provide that: "*il giudice, sia in primo grado che in appello, decide il merito della causa secondo equità quando esso riguarda diritti disponibili delle parti e queste gliene fanno concorde richiesta*"; translation provided by the author of this thesis: "*the judge, whether at first instance or on appeal, shall decide on the merits of the case on an equitable basis when the case concerns rights available to the parties and they so request*".

Secondly, procedural agreements must guarantee the principles of legal certainty and fairness. In addition, the parties may not agree on unavailable rights.

Finally, any procedural agreement may not unduly burden the exercise of substantive rights, especially in the perspective of imbalance between the position of the parties.

3.2.2. The principle of party autonomy and its compatibility with procedural law

Traditionally, in Italy procedural agreements are seen as a closed number, in which there is no room for party autonomy. This, as it has been over described, preliminary because of the conception that procedural law can be derogated only whether expressly provided by the law.[218]

However, the author of this thesis has the opinion that the prevailing conception is actually not confirmed by any express normative reference and that it is more coherent with the general system provided by the legislator and enhanced by courts to affirm that there is room in procedural law for opening up to a source of negotiated regulation even in an atypical way, pursuant to art. 1322, para. 2, Italian Code of Civil Procedure.

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[218] LUISO F.P., *supra* no. 22, p. 80.

Indeed, the argument used by Italian doctrine to firmly exclude such possibility is the categorization of procedural law as a public law, as well as the *riserva di legge* provided by art. 111 Italian Costituzione.

In particular, art. 111 provides that "*la giurisdizione si attua mediante il giusto processo regolato dalla legge. Ogni processo si svolge nel contraddittorio tra le parti, in condizioni di parità, davanti a giudice terzo e imparziale. La legge ne assicura la ragionevole durata*".[219]

However, in the writer opinion it is precisely under the mentioned art. 111 Italian Costituzione that party autonomy and atypical procedural agreement should be considered possible, within the limits of the compliance with mandatory rules, public order, legal certainty and due process. Thus, procedural agreements to which the system can recognize protection are exclusively those marked by the contribution of private autonomy to the better realization of due process under article 111, Italian Costituzione, and in particular efficiency of the procedure and an increase in the probability of achieving a procedural assessment closer to the *rei veritas*.

In this perspective, the same constraint expressed by the rule of law as regulatory provision for the trials seems to impose the opening to the operativity of procedural agreements, since the private regulation of the

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219 Translation provided by the author of this thesis: "*Jurisdiction is implemented through due process. Every trial takes place in the contradictory phase between the parties, on equal terms, before a third and impartial judge. The law ensures its reasonable duration.* […]"

procedure, within the functional limits now mentioned, contributes to configure a keen due process, as imposed by the law.

As a result, the textual content of art. 1322, Italian Civil Code[220] appears prima facie compatible with the recognition of procedural agreements.

Markedly, paragraph 2, art. 1322, Italian Civil Code allows the parties to enter into contracts that do not fall within the typical schemes, provided that the set of interests pursued are worthy of protection under the legal system.

Therefore, there do not seem to be any obstacles to the configurability of atypical procedural agreements, given their qualification in negotiation terms. Indeed, art. 1322 may regulate procedural agreements that, as it is over described, may be reconducted to substantial contracts and their requirement, due to their dualistic nature.

On the same side, Italian case law shown an approach openness to a more flexible trial, always respecting the parties' right of defense.

In this regard, a recent ruling of the Court of Cassation provided that: *"a seguito della costituzionalizzazione del principio del giusto processo, la violazione delle regole processuali, per assumere rilievo, deve tradursi nella lesione di specifiche facoltà difensive che compete alle parte allegare e la sua deduzione deve essere sorretta da un interesse pratico, restando esclusa la necessità di regolarizzare il processo qualora non sia*

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[220] See *supra* p. 47.

riscontrabile alcuna concreta contrazione dei diritti sostanziali e processuali" [221].

Such reasoning implies that the party who intends to assert a procedural rule violation has the burden of proving in what way and with what utility could have used the right that is considered violated.

The principle provided by the recalled ruling applies to all procedural violation and seems to imply that that procedural rules deserve compliance, whether their breach result in the injury of specific defensive powers that the party must allege and prove. Failing this, the procedural exception should be treated as inadmissible and the compliance with the procedural rule should be considered irrelevant.

In this perspective, the judge would apply the procedural rule not necessarily, but because he assessed that its compliance has, in the specific case, a concrete defensive purpose, considering the general principle of due process.

But then, if the judge is granted with such a power, what is the legal basis for not giving it to the parties?

In fact, applying backwards the above reasoning, if there is a general possibility to disapply the procedural rules in the case where there are no demonstrated injuries to the rights of defense of the parties, it must

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221 Cass. no. 20152/2019, translation provided by the author of this thesis: "*the violation of procedural rules, in order to become relevant, must result in the injury of specific defensive faculties that it is up to the party to allege and its deduction must be supported by a practical interest*".

also be assumed that such an assessment can be made ax ante, by the parties themselves, subject in any case to judicial review.

In conclusion, the feasibility of a procedural agreement between the parties having as its object the management of the process is therefore explained not by the consideration of the public nature of the judicial activity, but rather by the purely private nature of the interest on which the performance of the activity in question is based.

Consequently, it seems to be possible at first sight to affirm that the procedural activities that do not involve interests of public order can therefore be freely waived by the parties.

In order to evaluate the validity of a procedural agreement, it would then be necessary to apply the limits expressly provided for by the legislator to typical procedural agreements, as pointed out in paragraph 3.2.1.

3.3 Food for thought: which space for atypical agreements?

In order to put in practice the study over conducted, the aim of the present paragraph is to list some examples of not-typified procedural agreements whose construction is compatible within procedural law and the above presented limits expressly imposed to the parties' bargaining freedom, in an effort to suggest the definitive applicability of party autonomy within the civil

trial, throwhow an extensive application of the requirement actually provided by the law for typical agreement[222].

3.3.1 Agreements on the kind of trial

Normally, the possibility of choosing the form of procedure, in the legislative availability of several models, is granted to the plaintiff through his or her own initiative to introduce the procedure.

However, the parties may have a common interest in identifying the type of procedure most suited to their needs, such as, for example, the speediness in obtaining an enforcement order.

This can be done by means of a manifestation of the consent of both parties in relation to the kind of trial to be choose in case of dispute.

This mechanism of conventional choice of trial is in abstract the very same as the one in place in case of choice of court clauses or arbitration clauses.

Rather, as Tiscini pointed out, the impact of the decision-making power of private parties on the procedural rules is less marked in this case. In fact, the parties, in such a hypothesis, limit themselves to identifying a rite whose rules have been predetermined by the legislature itself, in the absence of deviations

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[222] It is not possible here to analyse every conceivable phenomenon of agreement, (especially in light of the atypical character we are dealing with) nor is it possible to proceed to an ontological analysis of them, which would require a degree of time and space not available here. The figures quoted shall be considered as food for thought in order to understand how the aprioristic exclusion of parties (atypical) autonomy in civil proceedings seems quite stance rather than a transcendent systemic incompatibility.

from what is deemed to be compliant with due process[223].

In Italy, this agreement was formalised by art. 70 ter of the operative provisions of the Code of Civil Procedure, which provides as follows: "*la citazione può anche contenere, oltre a quanto previsto dall'articolo 163, terzo comma, numero 7), del codice, l'invito al convenuto o ai convenuti, in caso di pluralità degli stessi, a notificare al difensore dell'attore la comparsa di risposta ai sensi dell'articolo 4 del decreto legislativo 17 gennaio 2003, n. 5, entro un termine non inferiore a sessanta giorni dalla notificazione della citazione, ma inferiore di almeno dieci giorni al termine indicato ai sensi del primo comma dell'articolo 163 bis del codice. Se tutti i convenuti notificano la comparsa di risposta ai sensi del precedente comma, il processo prosegue nelle forme e secondo le modalità previste dal decreto legislativo 17 gennaio 2003, n. 5*".[224]

This rule essentially allowed the parties to agree on the procedure to be applied to the dispute.

This was by virtue of an agreement between the litigants following the

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223 TISCINI R., *Il rito convenzionale: note a margine dell'art. 70-ter disp. Att. C.p.c.*, Giurisprudenza Italiana, 2, 519, 2007;

224 Art. 70 ter, disp. att. Italian Code of Civil Procedure, translation provided by the author of this thesis: "*The summons may also contain, in addition to the provisions of article 163, third paragraph, number 7) of the code, an invitation to the defendant or defendants, in case of several defendants, to serve the statement of defence on the plaintiff's lawyer in accordance with article 4 of legislative decree no. 5 of 17 January 2003, within a time limit of no less than 60 days from the service of the summons, but at least 10 days less than the time limit indicated in accordance with the first paragraph of article 163 bis of the code. If all the defendants serve the statement of defence pursuant to the previous paragraph, the proceedings shall continue in the form and according to the procedures provided for by legislative decree no. 5 of 17 January 2003*".

defendant(s)' adherence to the proposal made by the plaintiff in the writ of summons, so that the case, which was in itself subject to the ordinary procedure, would be dealt with and decided under the company procedure.

Thus, this rule allowed an express derogation from the conventional procedural forms, making corporate proceedings a possible variant granted to the parties on the basis of their express will.[225]

The past form is needed due to the fact that the special regime for corporate trials introduced by d.lgs. n. 6/2003 was short-lived.

Indeed, it was abolished by art. 54, para. 6, L. 69/2009.

Even if the mentioned art. 70 ter has not been explicitly abolished, the provision may, however, be regarded as no longer applicable on account of supervening incompatibility within the meaning of article 15 of the preliminary provisions of the Civil Code[226].

The over described example of procedural agreements, even if not usable today, clarify that agreements on the kind of trial are not per se invalid in Italy, but rather they comply with mandatory rule on procedural law and with the

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[225] MENCHINI S. Il rito su accordo delle parti ai sensi dell'art. 70 ter disp. att. c.p.c., Il Foro Italiano, Vol. 128, no. 10, 2005, pp. 203.

[226] Art. 15, preliminary law of the Italian Civil code provides that: "*le leggi non sono abrogate che da leggi posteriori per dichiarazione espressa del legislatore, o per incompatibilità tra le nuove disposizioni e le precedenti o perché la nuova legge regola l'intera materia già regolata dalla legge anteriore"; translation provided by the author of this thesis. "laws are only abolished by subsequent laws either by express declaration of the legislature, or by incompatibility between the new provisions and the previous ones, or because the new law regulates the entire matter already regulated by the previous law*".

general principle of due process.

3.3.2 Agreements on the trial phase

In certain circumstances, the parties may have an interest in agreeing to derogate from certain stages of the civil proceedings.

For example, by requesting that the hearing for the admission of evidence is fixed directly, without the preliminary hearing being held.

Such an agreement was considered valid by a decision, albeit dated, of the Pretura di Verona on the 22nd of September 1998[227].

In the case at stake, the parties jointly requested to the Court to fix *per saltum* directly the hearings pursuant to the old version of art. 184 Italian Code of Civil Procedure, without the undertaking of the duties of the first hearing.

Thus, the Court had to face the issue "*della derogabilità convenzionale delle rigide scansioni processuali fissate dal legislatore che ha riformato il processo civile ordinario*"[228].

Such an agreement of the parties can be seen as a procedural agreement in the strict sense and in the trial for the trial, since it imply an amendment of the ordinary rules on procedure.

The arguments used by the court to rule on such an agreement are twofold: (i)

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227 Pretura di Verona, 22.09.1998, III issue.

228 Pretura di Verona, 22.09.1998, III issue, translation provided by the author of this thesis: "*the conventional derogation from the strict procedural rules laid down by the legislature which reformed the ordinary civil proceedings*".

the failure to conduct the free questioning of the parties and the attempt at conciliation is not sanctioned by the legislature with procedural consequences and (ii) the further tasks at the hearing (new requests and objections, third party call) are activities freely entrusted to the parties, who may therefore freely waive them.[229]

In conclusion, the Court considers that where there is an irrevocable agreement between the parties, the court may proceed *per saltum*[230].

3.3.3 Agreements on the procedural conduct

Procedural conduct may be the subject of valid agreements.

A clear example may be found in the litigation management agreement often added to insurance policies, which affect the course of the proceedings more or less directly[231].

Entering into such agreements, parties agree that any dispute (both in and out of court) can be managed by the insurer in the name of the insured, for as long as the insured is interested, giving the insurer the power to appoint lawyers or experts and to avail itself of all the rights and actions due to the insured.

In Italy, the insurer's obligation to indemnify the insured is provided for by article 1917, paragraph 1 of the Civil Code, even if the insurer has not directly

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229 Pretura di Verona, 22.09.1998, III issue.

230 Pretura di Verona, 22.09.1998, III issue.

231 TOMMASEO F., *Sulle clausole della gestione della lite nei contratti di assicurazione*, in Carnacini, Studi in onore di Tito Carnacini, Milano, Giuffrè, 1984, pp. 1184 - 1187.

taken on the defense of the insured and, therefore, even in the absence of a specific agreement to manage the dispute.

The litigation management agreement allows the insurer to satisfy its own interest by supervising the progress of the proceedings, even without intervening in the proceedings and simply directing the party's activities.[232]

Such an instrument is capable of granting far greater procedural powers than those which the insured could have if he simply intervened in the proceedings.

Agreements of this kind could be well understood in the context of arbitration and third-party litigation funding[233] but could also been structured, within the context of national litigation, as clause which set up benches of rules the parties should reciprocally follow in a possible dispute, without reference to third parties, such as obligation of loyalty, fairness.

Moving a little bit further, it is possible to think on clauses which exclude the possibility for parties to require the court to grant terms to submit specific written act, such as the one provided by the art. 183, paragraph 6, Italian Code of Civil Procedure[234].

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[232] TOMMASEO F., *supra* no. 231, p. 1187.

[233] See *supra* no. 3.

[234] Art. 183, para. 6: "*se richiesto, il giudice concede alle parti i seguenti termini perentori: 1) un termine di ulteriori trenta giorni per il deposito di memorie limitate alle sole precisazioni o modificazioni delle domande, delle eccezioni e delle conclusioni già proposte; 2) un termine di ulteriori trenta giorni per replicare alle domande ed eccezioni nuove, o modificate dall'altra parte, per proporre le eccezioni che sono conseguenza delle domande e delle eccezioni medesime e per l'indicazione dei mezzi di prova e produzioni documentali; 3) un termine di ulteriori venti giorni per le sole indicazioni di prova contraria*"; translation provided bu the author of this thesis: " *if so requested, the court shall grant the parties the following mandatory time-limits: 1) an additional*

3.3.4 Agreements on the proposition of claims and enforcement of judgements

Peculiar figure of atypical agreements generically recognised by case-law and scholars are the *pactum de non petendo* and the *pactum de non exsequendo*. Those procedural agreements have not been typified in a legal provision by Italian law, but rather have been created by practice and case-law[235].

The former is an agreement by which the parties to the substantive relationship agree not to exercise the right in court, either generally or for a fixed period of time[236]; the latter is an agreement by which parties agree not to bring an enforcement action. Such agreements are de facto agreements on the voluntary unenforceability of the claim (as a substantive right)[237]; on the

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period of thirty days to file pleadings limited to clarification or modification of the claims, exceptions and conclusions already proposed; 2) a term of a further thirty days to reply to the claims and exceptions that are new or modified by the other party, to propose the exceptions that are a consequence of the claims and exceptions themselves and to indicate the means of proof and documentary production 3. a further period of twenty days for the indication of contrary evidence only".

[235] See amongh others Cass. 8774/1991 which stated that a mutual negative obligation assumed by the parties not to enforce a judgment before it becomes final is legitimate, even though it is already enforceable by law. In this case, the private interest in avoiding reciprocal financial allocations and procedural burdens between the parties, depending on the course of the proceedings, coincides with criteria of cost-effectiveness.

[236] BELOHLAVEK A.J., *supra* no. 118, p. 37.

[237] ORLANDI M., *Clausole riduttive*, in Confortini, Clausole negoziali. Profili teorici e applicativi di clausole tipiche e atipiche, Fiori Assago (MI), Utet Giuridica, 2017, p. 1394.

substantive level, the right to claim remains unaffected, but on the procedural level, the creditor is left without any protection[238].

Traditionally, the Italian Supreme Court is favorable to such agreements. In this regard, it has been provided that: "*the pactum den on exsequendo, as more generally the pactum de non petendo (of which the former is usually considered a particular figure) is attributed the nature of extra-trial negotiations or agreements with procedural effects, which find their source in parties's autonomy, and receive recognition and protection provided that the private interest – of which they are an expression – is reconcilable with the general public interest underlying the regulation of the trial and the non-derogation of the procedural rule (since it is inconceivable that the agreement between the parties frustrates the purpose of the trial or reduces it to an abstract academic exercise, or conditions the cognitive activity of the judge or modifies the manner of exercising the judicial function in general).*"[239]

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[238] ORLANDI M., *supra* no. 237..

[239] Translation of Cass. 8774/1991 provided by the author of this thesis; original text: "*al pactum den on exsequendo, come più in generale al pactum de non petendo (di cui il primo è solitamente considerato figura particolare) viene dalla dottrina attribuita natura di negozi giuridici extraprocessuale o con efficacia processuale, i quali trovano la loro fonte nella autonomia delle parti, e ricevono riconoscimento e tutela sempreché l'interesse privato, del quale risultino espressione, sia conciliabile con l'interesse pubblico generale sotteso alla regolamentazione del processo ed alla inderogabilità della norma processuale (non essendo concepibile che l'accordo tra le parti frustri lo scopo del processo o lo riduca ad astratta esercitazione accademica, ovvero condizioni l'attività cognitoria del giudice o modifichi le modalità di esercizio della funzione giurisdizionale in genere)*."

It is possible, from these brief introductory remarks, to understand that in point of fact these types of agreements do not have a direct effect on the procedural rules and the powers of the court, but rather they give the debtor the possibility to raise an exception to paralyses the creditor action. Hence the prevalence of the substantive component of such agreements, which modify and extinguish a substantive right having an economic value.

In any event, in the view of the author of this thesis, the procedural character and its effects on the procedural system are undeniable, since it is precisely the power to bring claims and to obtain protection that underpins the entire structure of civil procedural law. Therefore, the shared validity of such agreements may act as a driving force for the recognition of further atypical forms of agreement.

3.3.5 Agreements on the juridical qualification

Parties to a contract often has the interest to fix in advance the meaning and the interpretation to be given to certain terms and provisions of their mutual understanding. On the basis of this interest a series of clauses intended to protect and crystallize the text of the contract are drafted. [240]

It is in fact common practice to include among the first clauses of any contract definitions of the terms used in the contract, as well as clauses excluding the relevance of the preparatory work for the contract and the behavior of the

[240] DE NOVA G., *supra* no. 196, p. 68.

parties.[241]

Such clauses, having a substantial nature, indirectly affect the proceedings.

Indeed, tribunal, in its judgement is bound by the statements of the parties, their admissions and also by the agreed (and uncontested) statement of facts. While it is not bound by the interpretation given to the contract by the parties, it must at the same time exclude the possibility for the judge to go beyond the petitum, the facts and and the evidence of the case, such as documentary evidence of the parties' intention[242].

3.3.6 Agreements on the decision

In arbitration it is possible, under certain circumstances, to terminate the dispute by way of an agreement by consent.

The 2021 ICC Arbitration Rule, provide in art 33 that "*if the parties reach a settlement after the file has been transmitted to the arbitral tribunal in accordance with Article 16, the settlement shall be recorded in the form of an award made by consent of the parties, if so requested by the parties and if the arbitral tribunal agrees to do so*".[243]

The rationale behind such an institution is to ensure that parties, who have settled their dispute by agreement (after investing time and funds in

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241 DE NOVA G., *supra* no. 196, p. 68.

242 SANGERMANO F., *L'interpretazione del contratto, profili dottrinali e giurisprudenziali,* Milano, Giuffre, 2007, p. 6.

243 Avaiable at. https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_33 .

arbitration are able to attribute), the jurisdictional value and effectiveness to their agreement through the formal guise of the award.[244]

Such a possibility could clearly constitute a useful tool also in civil proceedings, especially in light of the recognition and enforcement of judgements within the European framework.

Upon closer inspection, these characteristics are partly attributed, within the context of Italian national law, to the minutes of judicial conciliation within the meaning of article 185 of the Italian Code of Civil Procedure.

This provision provides that in the event of conciliation (the attempt at which may be renewed by the judge until the case is referred for decision), a record of the agreements reached is to be drawn up as an enforceable title.[245]

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[244] BRIGUGLIO A., *Conciliazione e arbitrato. Conciliazione dell'arbitrato. Appunti sparsi tra diritto, psicologia e prassi,* Giustizia Consensuale, I, 2021, p. 60.

[245] Art. 185 Italian Code of Civil Procedure: "*il giudice istruttore, in caso di richiesta congiunta delle parti, fissa la comparizione delle medesime al fine di interrogarle liberamente e di provocarne la conciliazione. Il giudice istruttore ha altresì facoltà di fissare la predetta udienza di comparizione personale a norma dell'articolo 117. Quando è disposta la comparizione personale, le parti hanno facoltà di farsi rappresentare da un procuratore generale o speciale il quale deve essere a conoscenza dei fatti della causa. La procura deve essere conferita con atto pubblico o scrittura privata autenticata e deve attribuire al procuratore il potere di conciliare o transigere la controversia. Se la procura è conferita con scrittura privata, questa può essere autenticata anche dal difensore della parte. La mancata conoscenza, senza giustificato motivo, dei fatti della causa da parte del procuratore è valutata ai sensi del secondo comma dell'articolo 116. Il tentativo di conciliazione può essere rinnovato in qualunque momento dell'istruzione. Quando le parti si sono conciliate, si forma processo verbale della convenzione conclusa. Il processo verbale costituisce titolo esecutivo*"; translation provided by the author of this thesis: "*the preparatory judge shall, in the event of a joint request by the parties, summon them to appear in order to question them freely and to bring about a conciliation. The judge may also set the abovementioned personal appearance hearing in accordance with Article 117. When a personal appearance is ordered, the parties may be represented by a general or special attorney who must be*

3.4 Comparative analysis and Brazil and Argentina's leading models

As transnationalism grows, comparative analysis become of the outmost importance. Indeed, "*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 points*"[246].

The world landscape on procedural agreements is extremely heterogeneous. Without pretending to give a global and comprehensive view, it is appropriate to focus on some peculiar features of procedural agreements in different jurisdictions.

As mentioned above with regard to their definition, procedural agreements have a flourishing history in Germany[247]. Here they are classified as procedural contracts if their content directly affects the proceedings.

However, a bipartition is made by the majority of the scholars: on the one hand procedural agreements in the strict sense; on the other hand, procedural agreements in the broad sense.[248]

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familiar with the facts of the case. The power of attorney shall be conferred by an authenticated public or private instrument and shall confer on the attorney the power to conciliate or settle the dispute. If the power of attorney is conferred by private instrument, it may also be authenticated by the party's lawyer. Lack of knowledge, without good reason, of the facts of the case on the part of the agent shall be assessed in accordance with the second paragraph of Article 116. The attempt at conciliation may be renewed at any time during the proceedings. When the parties have conciliated, minutes of the conciliation shall be drawn up. The minutes shall be enforceable".

[246] BELOHLAVEK A., *supra* no. 118, p. 36.

[247] See *supra* para 2.1.1.

[248] KERN C.A., *supra* no. 159, p. 181.

Procedural agreements in the strict sense are those agreements having an immediate effect on the proceedings, amending or excluding the application of specific procedural rules[249]. Such agreements are typified by the law and do not leave space for a full understanding of freedom of contract.

Procedural agreements in the broad sense are the ones creating an obligation concerning the party's behavior in litigation, such as the promise to withdraw an action or not to use certain means of proof.

Such kind of agreements do not modify procedural rules and consequently are generically admitted, due to the parties' freedom of contracts.

The German Supreme Court is firm[250] in asserting that procedural contract shall be subject to the general rule on contracts provided by the BGB as to their formation, interpretation, and validity.

German law lack of a general provision allowing parties to enter in atypical procedural agreement.

Such a rule is provided only in the realm of arbitration where § 1042 of the German Code of Civil Procedure provides that the parties may, subject to the mandatory provisions of civil procedural law, regulate the proceedings themselves or by reference to arbitral rules of procedure[251].

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[249] KERN C.A., *supra* no. 159, p. 181.

[250] See, most recently, BGH, 17.10.2019, *supra* no. 137.

[251] ZPO, § 1042, reads as follows: " *(1) Die Parteien sind gleich zu behandeln. 2Jeder Partei ist rechtliches Gehör zu gewähren. (2) Rechtsanwälte dürfen als Bevollmächtigte nicht ausgeschlossen werden. (3) Im Übrigen können die Parteien vorbehaltlich der zwingenden Vorschriften dieses Buches das Verfahren selbst oder durch Bezugnahme auf eine schiedsrichterliche Verfahrensordnung regeln. (4) 1Soweit eine Vereinbarung*

However, specific rules on typical agreements are provided by the law. This happen in relation to choice of forum and arbitration clauses[252], but not only. Indeed, procedural contracts between parties are also granted, just to mention some examples, on the kind of security to be provided[253], as well as on the reduction of terms other than the statutory ones[254].

In the German legal system, procedural agreements by means of which the parties exclude (in full or for a fixed time) the possibility of asserting a particular right in court are permitted. This type of agreement is the Stillhalteabkommen, *i.e*. the *pactum de non petendo*. The operation of such an agreement must always be assessed in accordance with the principle of the equal position of the parties and the principle of contractual good faith[255]. Generally speaking, it has been anticipated that within procedural agreement in the broad sense, German scholars are open to the possibility for contractors to oblige themselves to implement, or not to implement certain procedural

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der Parteien nicht vorliegt und dieses Buch keine Regelung enthält, werden die Verfahrensregeln vom Schiedsgericht nach freiem Ermessen bestimmt. 2Das Schiedsgericht ist berechtigt, über die Zulässigkeit einer Beweiserhebung zu entscheiden, diese durchzuführen und das Ergebnis frei zu würdigen". A full translation of the ZPO is avaiable at https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p0401 .

[252] See § 38 ZPO on choice of forum clauses, § 1032 ZPO on arbitration clauses.

[253] See § 108 ZPO, providing that "*Unless the court has made provisions in this regard, and unless the parties to the dispute have not agreed otherwise…*".

[254] See § 224 ZPO, providing that "*The parties may agree to shorten periods; this shall not include statutory periods. Statutory periods shall be only those periods that have been designated as such in the present Code*".

[255] BELOHLAVEK A., *supra* no. 118, p. 37.

steps, whether this is not conflicting with mandatory provision as well as public policies[256].

As far as French law is concerned, first of all, the mechanism for bringing a claim generally involves not a summons by the plaintiff to the defendant at a given hearing, but the fixing by the president of the court of the day of the hearing. At this first hearing, it is decided which type of procedure the case will be dealt with, *i.e*. circuit court, moyen or long[257].

When the circuit long is undertaken, the actual mise en e´tat of the case is carried out before a judge who has to supervise the legal course of the procedure.

The subsequent steps of the case can be fixed in two different ways: unilaterally by the judge in relation to the urgency and complexity of the case, or in a negotiated manner, by fixing the so-called procedural calendar[258].

This is the most emblematic example of privatization as an extension of the autonomy of the parties in French civil justice.

Since 2005, the practice of "procedural contracts" has been institutionalized.

The peculiarity of this type of agreement is that it has a trilateral structure: it is concluded by the parties, and the judge jointly. The deadlines set by the agreement of the parties and the judge are peremptory for all the contractors

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[256] KERN C.A., *supra* no. 159, p. 185; BELOHLAVEK A., *supra* no. 118, p. 36.

[257] CANELLA M.G., *Gli accordi processuali francesi volti alla regolamentazione collettiva del processo civile*, Rivista Trimestrale di Diritto e Procedura Civile, 2, 2010, pp. 556 – 557.

[258] CANELLA M.G., *ibidem*.

and can only be extended in cases of serious and documented reasons. The timetable provides for the number of defenses and their respective deadlines, the date of the closure of the preparatory stage, the date on which the case is to be heard and the date on which the judgment is to be handed down.[259]

The reform to the Code of Civil Procedure implemented in Brazil in 2015 witnessed the first codification of a general clause allowing for the conclusion of procedural agreements.[260]

Specifically, Article 190 of the Brazilian Code of Civil Procedure provides that: "*versando o processo sobre direitos que admitam autocomposição, é lícito às partes plenamente capazes estipular mudanças no procedimento para ajustá-lo às especificidades da causa e convencionar sobre os seus ônus, poderes, faculdades e deveres processuais, antes ou durante o processo. De ofício ou a requerimento, o juiz controlará a validade das convenções previstas neste artigo, recusando-lhes aplicação somente nos casos de nulidade ou de inserção abusiva em contrato de adesão ou em que alguma parte se encontre em manifesta situação de vulnerabilidade*".[261]

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259 CANELLA M.G., *supra* no. 257, pp. 556 – 557.

260 CABRAL A., *supra* no. 1, pp. 792-793.

261 Art. 190 Brazilian Code of procedural Law, translation provided by the author of this thesis: "*When the proceedings involve rights that admit self-composition, the fully capable parties may stipulate changes in the procedure in order to adjust it to the specificities of the case and agree on their procedural burdens, powers, faculties and duties before or during the proceedings. The judge, ex officio or on request, shall control the validity of the conventions provided for in this article, refusing their application only in cases of nullity or abusive insertion in an adhesion contract or when any party is in a manifestly vulnerable situation*."

Even if the novelty introduced by the mentioned art. 190 is enormous, procedural agreements were not a new tool of Brazilian procedural system.

In the previous codifications, indeed, many typical agreements were regulated: conventions on the burden of proof, on jurisdiction, on the stay of proceedings, and on the extension of time limits[262].

The novelty of the 2015 Code is not in the conception of procedural agreements, but rather is to be found in the establishment of a general clause in the topic, which opens up space for atypical agreements.

In addition to the general clause provided by art. 190 the 2015 Brazilian Code has extended the number of typical procedural agreements. For example, it has regulated, in art. 191[263], the timetable of the proceedings, on a France inspired base. Art. 357[264] introduced the possibility for the parties to limit the issues of

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262 CABRAL A., *supra* no. 1, pp. 792-793.

263 Art. 191 Brazilian code of Civil Procedural law: "*De comum acordo, o juiz e as partes podem fixar calendário para a prática dos atos processuais, quando for o caso. § 1º O calendário vincula as partes e o juiz, e os prazos nele previstos somente serão modificados em casos excepcionais, devidamente justificados. § 2º Dispensa-se a intimação das partes para a prática de ato processual ou a realização de audiência cujas datas tiverem sido designadas no calendário*".

264 Art. 357 Brazilian code of Civil Procedural law: "*Art. 357. Não ocorrendo nenhuma das hipóteses deste Capítulo, deverá o juiz, em decisão de saneamento e de organização do processo: I - resolver as questões processuais pendentes, se houver; II - delimitar as questões de fato sobre as quais recairá a atividade probatória, especificando os meios de prova admitidos; III - definir a distribuição do ônus da prova, observado o art. 373 ; IV - delimitar as questões de direito relevantes para a decisão do mérito; V - designar, se necessário, audiência de instrução e julgamento. § 1º Realizado o saneamento, as partes têm o direito de pedir esclarecimentos ou solicitar ajustes, no prazo comum de 5 (cinco) dias, findo o qual a decisão se torna estável. § 2º As partes podem apresentar ao juiz, para homologação, delimitação consensual das questões de fato e de direito a que se referem os incisos II e IV, a qual, se homologada, vincula as partes e o juiz. § 3º Se a causa*

fact and law to be analyzed by the court Issues concerning the validity and enforcement of procedural agreements, and art. 471[265] regulates for the consensual choice of the expert, which is binding for the judge.

From the above, it is self-evident that Brazilian procedural law is heading towards progressive flexibility of the procedure within the civil trial, by virtue of a contractualization of the procedure.[266]

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apresentar complexidade em matéria de fato ou de direito, deverá o juiz designar audiência para que o saneamento seja feito em cooperação com as partes, oportunidade em que o juiz, se for o caso, convidará as partes a integrar ou esclarecer suas alegações. § 4º Caso tenha sido determinada a produção de prova testemunhal, o juiz fixará prazo comum não superior a 15 (quinze) dias para que as partes apresentem rol de testemunhas. § 5º Na hipótese do § 3º, as partes devem levar, para a audiência prevista, o respectivo rol de testemunhas. § 6º O número de testemunhas arroladas não pode ser superior a 10 (dez), sendo 3 (três), no máximo, para a prova de cada fato. § 7º O juiz poderá limitar o número de testemunhas levando em conta a complexidade da causa e dos fatos individualmente considerados. § 8º Caso tenha sido determinada a produção de prova pericial, o juiz deve observar o disposto no art. 465 e, se possível, estabelecer, desde logo, calendário para sua realização. § 9º As pautas deverão ser preparadas com intervalo mínimo de 1 (uma) hora entre as audiências".

265 Art. 471 Brazilian code of Civil Procedural law: "*As partes podem, de comum acordo, escolher o perito, indicando-o mediante requerimento, desde que: I - sejam plenamente capazes; II - a causa possa ser resolvida por autocomposição. § 1º As partes, ao escolher o perito, já devem indicar os respectivos assistentes técnicos para acompanhar a realização da perícia, que se realizará em data e local previamente anunciados. § 2º O perito e os assistentes técnicos devem entregar, respectivamente, laudo e pareceres em prazo fixado pelo juiz. § 3º A perícia consensual substitui, para todos os efeitos, a que seria realizada por perito nomeado pelo juiz*"

266 CABRAL A., *supra* no. 1, p. 793.

This is in line with the general principle underlying the whole reform: the cooperative principle, the dialogue between the parties, the conciliation and the democratic participation of the parties.[267]

In Argentina on 1 July 2019, the "*Preliminary Draft of the Nation's New Code of Civil and Commercial Procedure*"[268] was presented in the framework of the Justice 2020 program[269].

In line with the main trends in comparative law, the draft of the Code of Civil and Commercial Procedural law reconfigures the publicist paradigm, broadening the scope of the parties' will, enabling procedural agreements to adapt procedural rules. The legislative initiative stands as a break from the preceding system.[270]

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[267] FERNANDES DE MOURA LEITE O., *Negócios jurídicos processuais e tutela arbitral: possibilidade de servir como forma de tutela de direito de humanidade?,* Revista de Direito Privado, Vol. 74, 2017, p. 3.

[268] Avaiable at **http://www.saij.gob.ar/anteproyecto-nuevo-codigo-procesal-civil-comercial-nacion-nv21913-2019-07-01/123456789-0abc-319-12ti-lpssedadevon?&o=6&f=Total%7CFecha%7CEstado%20de%20Vigencia%5B5%2C1%5D%7CTema%5B5%2C1%5D%7COrganismo%5B5%2C1%5D%7CAutor%5B5%2C1%5D%7CJurisdicci%F3n%5B5%2C1%5D%7CTribunal%5B5%2C1%5D%7CPublicaci%F3n/Novedad%7CColecci%F3n%20tem%E1tica%5B5%2C1%5D%7CTipo%20de%20Documento&t=18446**

[269] Official website avaiable at **https://www.argentina.gob.ar/noticias/los-logros-y-las-metas-de-justicia-2020**

[270] BERIZONCE R.O., *Entre el publicismo y la autonomía de la voluntad : un nuevo modelo de proceso civil*, Anales de la Facultad de Ciencias Jurídicas y Sociales, año 17, no. 50, 2020, pp. 587-607.

It is possible to affirm that the whole initiative is moved by the objective of ensuring the fundamental right to effective judicial protection and its corollaries, emphasized in the Principles enshrined in the Preliminary Title.

Among the structural pillars of the legislative initiative the conception of procedural agreements stands out.[271]

In particular, it is provided by the proposed art. 14, which reads as follows: "*Acuerdos procesales. Las partes pueden celebrar, en procesos donde se debatan derechos disponibles y en tanto no concurriera una inobservancia del orden público, acuerdos procesales que puedan determinar una modificación de las normas procesales. Tales acuerdos podrán adecuar el proceso a las particularidades del conflicto y especificar el alcance de las cargas, facultades y deberes procesales de las partes. De oficio o a requerimiento de parte, el juez controlará la validez de los acuerdos debiendo negar su aplicación en los casos en que lo pactado resulte nulo, suponga un abuso del derecho o importare el sometimiento a un contrato de adhesión*".[272]

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271 BERIZONCE R.O., *supra* no. 270, pp. 593-594.

272 Translation provided by the author of this thesis: "*Procedural agreements. The parties may enter into procedural agreements that may lead to a modification of procedural rules in proceedings in which available rights are at stake, provided that there is no breach of public order. Such agreements may adapt the procedure to the particularities of the dispute and specify the scope of the procedural burdens, powers and duties of the parties. Ex officio or at the request of a party, the judge will control the validity of the agreements and must deny their application in cases in which what has been agreed is null and void, involves an abuse of law or implies the submission to a contract of adhesion*."

The provision recognizes the right of the parties to enter into agreements so that they can "*determine a modification of the procedural rules*", in relation to the proceedings in which available rights are at stake, and subject to the limit of the compliance with " *public policy*". Such agreements may adjust the scope of the procedural burdens, powers and duties of the parties. The judge will control the validity of the agreements, ex officio or at the request of a party, and have to refuse to apply them in cases in which what has been agreed is null and void, or would result in an abuse of rights or involves the submission to a contract of adhesion.[273]

Article 14 can be traced back to the rule provided forth by art. 190 of the Brazilian Code of Civil Procedure, which it essentially reproduces.

In light of the above, it may be concluded that the reform project in Argentina wished to opt for a model that grants trust to procedural agreements. A degree of confidence such as to provide for a general clause, an open framework, sufficiently comprehensive to accommodate the various agreements that the parties may enter into for the aforementioned purposes, under the judicial control that guarantees the validity of the same.

It seems that a reasonable balance has been sought between the public component and the principle of legality of the forms, on the one hand, and the enlarging of party autonomy on the other, as a compromise between rigidity and flexibility.[274]

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[273] BERIZONCE R.O., *supra* no. 270, p. 594.

[274] BERIZONCE R.O., *supra* no. 270, pp. 594 – 595.

3.5 Issues concerning the validity and enforcement of procedural agreements

Having defined and contextualized procedural agreements, it is now time to analyse some particular issues that arise from the use and application of such instruments.

For this reason, different topic will be discussed.

Firstly, the author will argue upon their compliance with the principles of due process and fairness.

Secondly, it will be developed an analysis of their recognition and enforcement, especially within the European Judicial Area.

Finally, attention will be shifted to their possible infringement and the recoverability of the emerged losses.

3.5.1 Due Process and fairness

This thesis has demonstrated the general validity of atypical procedural agreements.

However, it is undisputable that even where generally admitted, procedural agreements should not overcome the principles of due process and fairness[275].

Procedural agreements are commonly used in commercial relationship, characterized by equality between the two party (or more) that can be

[275] See *supra* pp. 90-91; CARRAL A., *supra* no. 110, p. 14.

considered as peers. However, procedural agreements could be used also in cases where parties have unequal bargaining power[276].

In this respect, a critical point in the regulation of procedural agreements is related to the circumstances in which a party to the agreement has inadequate information and, thus, the position of the contractors is asymmetric.[277] Such doubts are relevant, for instance, in case the individual enters into a standard contract, without any legal assistance or advice and consequently the agreement is concluded laking any negotiation between the parties.[278]

It can easily be understood that the occurrence in which the understanding of the procedural terms is completely absent is far from being remote.

Moreover, the procedural agreement could reasonably be included in contract standard terms contracts, which are often not analysed with due consideration. [279]

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276 FABBI A., *supra* no. 81, p. 17.

277 DAVIS K.E. / HERSHKOFF H., *supra* no. 17, pp. 528 – 529.

278 DAVIS K.E. / HERSHKOFF H., *ibidem*.

279 For the sake of clarity, it is important to specify that even if the author is mentioning unequal bargaining power, the analysis of consumers' law it is outside of the scope of this thesis. In any case, it can be recalled here that the European legislator as well as national law prescribes autonomous preferential discipline in relationship to consumers' contracts, in light of their vulnerable position; in the specific field of jurisdiction agreements, for example, limitations are put forward by art. Art. 19 Regulation (Eu) No 1215/2012 of The European Parliament and of The Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters provides for the sole mean to depart jurisdiction in consumer matters, especially by an agreement between the parties which is either: a) negotiated and concluded after the dispute has arisen; b) which provides for a more favourable agreement for the consumer, by enlarging the courts it may seize; c) which designates the parties' common domicile or habitual residence, in a Member State.

However, the author of this thesis believes that procedural agreements do not per se result in a harm to the principle of due process and fair trial.

Indeed, such reasoning would imply that by default all procedural agreement infringe due process requirements, including typica agreements.

On the contrary, supporters of procedural agreements invoke the general presumption that voluntary agreements concluded by competent parties will be mutually beneficial. [280] Indeed, there are many reasons why parties to a contract may profit a sufficient benefit from avoiding the common procedural rules provided by the national legislator by seeking to obtain an economic benefit (possibly offsetting the transaction costs) from the customized regime. It can be understood, for instance, that choice of court agreements allows parties to minimize travel costs (or at least calculate them accurately in advance). [281] At the same time, provisions on the production of documents and limitations of which documents may be produced may shorten the time of the pre-trial proceedings and thus of the trial in general. [282]

On this grounds, Professor Remo Caponi assumed that "*it must be recognised that the processual normative system is not closed in its own normative self-referentiality, but is willing to learn from the surrounding environment. And if it is an environment rich in potentially universal good reasons, such as that which*

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[280] DAVIS K.E. / HERSHKOFF H., *supra* no. 17, pp. 526 – 257; CAPONI R*., Autonomia privata e processo: gli accordi processuali*, Rivista Trimestrale di Diritto e Procedura Civile, supplement to no. 3, 99-121, 2008, pp. 108 - 111.

[281] DAVIS K.E. / HERSHKOFF H., *ibidem*.

[282] DAVIS K.E. / HERSHKOFF H., *ibidem*.

can arise from a balanced exercise of the power of autonomy (individual or collective), the enrichment of the procedural system can only be considerable".[283]
As laid down in the context of the Italian provisions, procedural agreements to which the system can recognize protection are exclusively those marked by the contribution of private autonomy to the better realization of due process.
As a consequence, a preliminary evaluation of the concrete effect of the agreements would be imposed to courts, in the same form of the evaluation of the boundaries and limits of party autonomy within the substantive definition of party autonomy, thus granting parties with a case by case control over due process requirements.

3.5.2 Recognition and enforcement

This work has repeatedly highlighted the marked difference in the approach to procedural agreements adopted by the different countries. In particular, a procedural agreement would be declared valid in light of a "procedural agreement-friendly" national law; on the contrary, it would be voided pursuant to a "non-procedural agreement-friendly" national law.
What is fundamental to highlight here is that within the European Union such decision would be enforceable in all the other Members States, regardless of its outcome. Hence, the effect of the approval or denial of the validity of a procedural agreement could be disperse in the entire European legal

[283] CAPONI R., *supra* no. 267, p. 118.

regime[284].

Indeed, pursuant to Art. 36 and 39 of the Brussels Recast, a judgment given in a Member State shall be recognized and enforced in other Member States, without any special procedure or declaration.[285] However, in order for such provisions to be effective, the European Legislator had to clarify what does judgment means. It did so in what is now Art. 2(a) of the Brussels Recast (that almost mirrors Art. 32 of the Brussels Regulation), clarifying that "*judgment means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court*".

Nonetheless, the inclusion of procedural decisions, such as the declaration of validity or voidance of choice of forum agreements and procedural agreements in general, within the concept of judgments has been considered a delicate issue, upon which the ECJ had to clarify its position, in order to strengthen the recognition and enforcement of decisions among Member States.

Relatedly, in the field of jurisdiction and choice of forum, the dispersive effect of the assessment of the choice of court's validity is the outcome of the decision taken by the European Court of Justice in the case *Gothaer Allgemeine*

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284 DRAGUIEV D., *Unilateral Jurisdiction Clauses: the Case for Invalidity, Severability or Enforceability*, Journal of International Arbitration 31, no. 1, Kluwer Law International, 2014, p 39.

285 Art. 36 and 39 Regulation (Eu) No 1215/2012 of The European Parliament and of The Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Versicherung AG v Samskip GmbH.[286] The dispute at stake involved a German company, Krones AG, insured by Gothaer Allgemeine Versicherung AG and others, against Samskip GmbH, a subsidiary of Samskip Holding BV, a transport and logistics undertaking company, incorporated in Iceland and established in the Netherlands. Samskip has been hired by Krones for the transport and delivery of a brewing installation to a Mexican purchaser. The legal relationship between the parties was regulated by a bill of lading which included a jurisdiction clause, in favour of the exclusive jurisdiction of the courts of Iceland. The insurers and Krones brought a request for damages before a Belgian court in 2007 alleging a loss, due to harms caused to the installation during transport.[287] The Antwerp Court of Appeal dismissed the case, declaring itself incompetent to hear and decide the action, due to the applicable jurisdiction agreement. As a consequence, the claimants brought new proceedings before a German court in 2010. However, the Landgericht of Bremen stayed the proceedings and ask to the ECJ a preliminary ruling on the interpretation of Articles 32 and 33 of the Brussels Regulation.[288]

Indeed, the Court observed that the ruling provided by the court of Antwerp was merely a judgment on a procedural matter that in light of German law, is not capable of recognition. Consequently, it questioned whether it was bound by the Belgian judgment and whether, in case of affirmative answer, the

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286 Case C-456/11, Gothaer Allgemeine Versicherung AG v Samskip GmbH, [2012].

287 Case C-456/11, *ibidem*, para. 1.

288 Case C-456/11, *supra* no. 181, para. 20.

recognition encompassed also the ratio decidendi adopted in the decision. In particular, the German court referred three questions to the: (i) whether the term judgement provided by Art. 32 and 33 of the Brussels Regulation covered procedural judgments; (ii) whether the same term extended also to judgements in which a court declines its jurisdiction pursuant to a jurisdiction clause; (iii) whether, in light of the principle of extended effect, Art. 32 and 33 needed to be interpreted as to require to each Member State to recognise the final decision of another Member State's court on the validity of a choice of forum agreement, even if the judgement is a procedural ruling dismissing the action.[289]

The first two questions were analysed jointly by the ECJ and answered in the affirmative. Indeed, the court reasoned that the wording of Art. 32 referred to any judgement, independently from its classification as procedural, thereby including decisions by which the court declines jurisdiction on the basis of a choice of forum clause. [290]

The Court based its argument on four main grounds. Firstly, it relied on recital no. 2 of the Regulation which prescribed the need to simplify the formalities of recognition and enforcement of judgments, supporting tough an interpretation of the term which does not consider the national classification of decisions.[291] Secondly, it recalled recital no. 6 which prompted to the

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289 Case C-456/11, *ibidem*, para. 21.

290 Case C-456/11, *ibidem*, para. 32.

291 Case C-456/11, *supra* no. 181, para. 26.

objective of free movement of decisions that, in the view of the Court, supported an extensive interpretation of the term judgement. [292] Thirdly, it called into play the principle of mutual trust among Member States to interpret the concept extensively, in order to forgo disputes concerning what can be considered a judgment.[293] Finally, the ECJ considered that a "*restrictive interpretation of the concept of judgment would give rise to a category of judicial decisions which are not among the exhaustively-listed exceptions set out in Articles 34 and 35 of Regulation No 44/2001, which could not be categorised as 'judgments' for the purposes of Article 32 and which the courts of other Member States would accordingly not be obliged to recognise*". Such an outcome would create impediment to the recognition of judgments and would violate the impossibility of review of the competence of the court of the Member State of origin by the courts of the Member State in which recognition is sought.[294]

Also the third question found the European Court of Justice's approval. Indeed, the ECJ established that the court before which the recognition of a decision, which declines jurisdiction pursuant to a choice of forum clause, is sought, is bound by the finding regarding the validity of such clause.

It reasoned that a final foreign judgment shall have the very same effects that it has in the State of origins, also in the Member State in which recognition is

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292 Case C-456/11, *ibidem*, para. 27.

293 Case C-456/11, *ibidem*, para. 28.

294 Case C-456/11, *ibidem*, para. 31.

sought.[295] As a consequence, "*it would in principle be contrary to the principle of mutual trust between the courts of the European Union to allow a court of the Member State in which recognition is sought to review that very same issue of validity*". [296]

The Court went further, recollecting the attention on Art. 36 which prevents courts from reviewing the merits of the decisions of other Member State[297] , in order to support its argument that allowing courts in which recognition is sought to overturn the declared validity of a choice of forum agreement would undoubtedly infringe the prescribed prohibition of review. In addition, it also highlighted that the concept of res judicata under European Union law need to be interpreted extensively, as to cover the *ratio decidendi* of judgments, since it is inseparable from the operative part of a ruling. [298]

In light of the above, the ECJ concluded that a judgment by which a court declines its competence on the basis of a valid choice of forum agreement, binds the courts of all European Union States both to the operative part of the judgment that declines jurisdiction, and to the ratio decidendi which led to the declaration of validity.[299]

The application of the legal principle established by the European Court of

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295 Case C-456/11, *supra* no. 181, para. 34.

296 Case C-456/11, *ibidem*d, para. 36.

297 Case C-456/11, *ibidem*d, para. 38.

298 Case C-456/11, *ibidem*d.

299 Case C-456/11, *supra* no. 181, para. 41.

Justice in *Gothaer Allgemeine Versicherung AG v Samskip GmbH* implies that the court of all Member States will have to accept other European courts' decisions on jurisdiction agreements, with no possibility to contest or to contradict it, due to the conclusive effect attributed to the ratio decidendi. The same approach should be followed in case of procedural agreements.

Finally, it is worth mentioning that laking a common approach on procedural agreements, especially within the European Union, parties may be encouraged to transfer proceeding to "procedural agreement-friendly" forum, highly increasing the so-called phenomenon of forum shopping.

3.5.3 Consequences of breach of contract and damages claim

As a last food for thoughts of this work, it is worth reflecting on a topic which symbolises the brittleness of the border line between procedural and substantive law: damages claim for breach of procedural agreement. Indeed, there are no doubts that a party who fails to fulfil its contractual obligation commits a breach of contract and that, consequently, the other party may seek protection in court, trying to enforce that contract or to recover the financial loss caused by the alleged breach.

Nonetheless, the recoverability of the eventual losses suffered as to the breach of a procedural agreement is not straightforward.

As a first remark, it is important to notice that the basis for this kind of claim is a binding exclusive agreement between the parties pursuant to which promises were exchanged on the rules or the place of litigation.

However, it is not always easy to define the possible economic losses arising

from a breach of a procedural agreement.

Indeed, whether in the case of jurisdiction agreement it goes without saying that if a violation occurred, the losses suffered by the non-breaching parties are equal to the legal cost sustained in the derogated forum proceedings, the same cannot be said in different situations. For example, losses due to violation of agreement on the burden of proof are quite difficult to identify.

Generically, those losses are intrinsically connected to the costs of the proceedings and therefore consists in the eventual legal costs unduly sustained[300]. Eventually, losses can also include the damages suffered by a party due to the delays in the proceedings caused by non-compliance with the agreement made. However, in those case the proof of the losses would be extremely difficult since the time of a trial is something that is never pre-determined by the legislator and may vary on the basis on unpredictable factors.

Potentially, the author of this thesis identifies three kind of losses: (i) the litigation costs sustained due to the commencement of a proceedings that the parties explicitly exclude as suitable or brought in a forum that the parties had contractually derogated, (ii) the eventual differences in the legal costs sustained for the wrongful kind of trial choosed in breach of the agreement; (iii) to the expenses linked to a peculiar kind of trial and its phases.

The rationale of granting compensation in case of breach is to strengthen the

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[300] BRIGGS A., *Civil Jurisdiction and Judgements,* New York, VI ed., Informa Law by Routledge, 2015, p. 579.

effectiveness of procedural agreements.

Such idea finds its origins in English law, which does not recognize the category of procedural agreements, but rather treats agreements such ad choice of forum clauses as substantial agreements that confer contractual obligations to the parties. [301] Remarkably, in relation to forum selection clauses, in the past years English courts have shown a general trend to grant compensation for the expenses sustained due to the counterparty breach of an exclusive jurisdiction clause[302].

As anticipated, the naturalness with which such an institution is recognized in English law is due to the fact that the category of procedural agreements is unknown to English law.[303]

Relevant Spanish case law has assumed the same position[304]. Indeed, the Tribunal Supremo has attributed to an exclusive forum selection clause contractual nature, therefore attributing to its conscious breach the value of contractual infringement generating economic losses in the non-breaching

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301 AKAHASHI K., *Damages for Breach of a Choice-of-Court Agreement*, Yearbook of Private International Law, Munich, Vol. 10, European Law Publishers & Swiss Institute of Comparative Law, 2008, p. 67.

302 Union Discount Co Ltd v Zoller and Others, [2001] EWCA Civ. 1755; Sunrock Aircraft Corporation Ltd v Scandinavian Airlines System Denmark-Noeway-Sweden, [2007] EWCA Civ. 882; A v B, [2007] EWHC 54.

303 D'ALESSANDRO E., *Danno da inadempimento dell'accordo di scelta del foro esclusivo: un'importante sentenza del Bundesgerichtshof*, Rivista di diritto processuale, 2020, no. 2, CEDAM, p. 792.

304 Tribunal Supremo, Sala de lo Civil, Seccion I, sentencia num. 6/2009.

party, which economic losses has to be compensated by the breaching party[305]. Within the realm of European Civil Procedure, the debate on damages for breach of jurisdiction agreements has become crowd-pleasing following the ECJ decision in *Turner v Grovit*[306] pursuant to which the Court has put an end on anti-suit injunctions[307]. The reasoning of the Court was based on the mutual trust between Member States since an injunction clearly interfere with the jurisdiction of other courts.[308] Indeed, in its decision the ECJ found that: "*the Convention provides a complete set of rules on jurisdiction. Each court is entitled to rule only as to its own jurisdiction under those rules but not as to the jurisdiction of a court in another Contracting State. The effect of an injunction is that the court issuing it assumes exclusive jurisdiction and the court of another Contracting State is deprived of any opportunity of examining its own*

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305 REQUEJO M., *On the Value of choice of Forum and Choice of Law Clauses in Spain*, 2009, available at: http://conflictoflaws.net/2009/on-the-value-of-choice-of-forum-and-choice-of-law-clauses-in-spain/.

306 Case C-159/02, Turner v. Grovit [2004] ECR I-03565; see comments of: ANDREWS N., Abuse of process and obstructive tactics under the Brussels jurisdictional system: Unresolved problems for the European authorities Erich Gasser GmbH v MISAT Srl Case C-116/02 (9 December 2003) and Turner v Grovit Case C-159/02 (27April 2004), Zeitschrift für Gemeinschaftsprivatrecht, 2005, pp. 8-15; DICKINSON A., A Charter for Tactical Litigation in Europe?, Lloyd's Maritime and Commercial Law Quarterly, 2004 pp. 273-280; MERLIN E., *Le anti-suit injunctions e la loro incompatibilità con il sistema processuale comunitario*, Il Corriere giuridico, 2005, pp. 14-22.

307 An anti-suit injunction is an interim or final measure by which courts may restrain a party to commence proceedings before a different *forum*. On the issue, see ILLMER M./NUYTS A./FITCHER J., *Scope and Definition,* in Dickinson A./Lein E. *The Brussels I Regulation,* Oxford, Oxford University Press, 2015 p.77.

308 See HARTLEY T.C., *supra* no. 129, pp. 213-215.

jurisdiction, thereby negating the principle of mutual cooperation underlying the Convention"[309]

Recently, the German Federal Supreme Court (BGH) issued a landmark ruling on the possibility to recover damages for breach of a choice of court agreement[310].

The dispute at stake involved two telecommunications companies: one based in Germany, the other in the USA.

The legal relationship between the parties was regulated by a contract for the sharing of data which includes a jurisdiction clause, in favor of the exclusive jurisdiction of the court of Bonn, Germany.[311]

The American company brought an action aimed at obtaining a greater data volume before a US Federal District Court in 2016. The District Court dismissed the case, declaring itself incompetent to hear and decide, due to the applicable jurisdiction agreement. Providing such ruling, however, the District Court, in light of the "American Rule" on costs allocation, did not order to the losing party to refund any attorney's fees to the winning party.

Following the dismissal, the US company brought new proceedings before the German court of Bonne, seeking also in this case the extra data volume.

However, the German company brought a counterclaim, claiming the damages

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[309] Case C-159/02, *supra* no. 270, para. 20.

[310] BGH, 17.10.2019, *supra* no. 137; see D'ALESSANDRO E., *supra* no. 303.

[311] BGH, 17.10.2019, *supra* no. 137, para 2, in particular where quoting the agreement as follows: "*This agreement shall be subject to the law of the Federal Republic of Germany. Bonn shall be the place of jurisdiction*".

sustained as a consequence of the breach of the jurisdiction agreement (quantifying the loss in the attorney's fees incurred by defending itself in the US Federal District Court Proceedings).[312]

The Court of Bonn: (i) on the one hand, rejected the plaintiff's claim; (ii) on the other hand, granted the defendant's counterclaim.

As a reaction to the ruling, the US company appealed the decision.

The *Oberlandesgericht* (the Court of appeal) reversed the ruling, rejecting the counterclaim on the recoverability of attorney's fees as damages.

This on the grounds that, even if it was undisputed the validity of the exclusive jurisdiction agreement which has been violated by the US company, the defendant had no rights to claim damages. Indeed, the *Oberlandesgericht* held that the agreement on jurisdiction does not imply substantive legal effects and thus it could not serve as a valid basis for claiming damages.[313]

The German company seek for the reversal of the ruling and seized the German Supreme Court (BGH).

The BGH, when invested of the question, upheld the *Oberlandesgericht*'s decision, providing that the German company had a claim for damages for the US company's breach of the jurisdiction agreement. The BGH remanded the case to the court of appeal to resolve a remaining open issue.

The reasoning of the BGH is of great importance, due to the impact it may have on other European Member States jurisdictions.

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312 BGH, 17.10.2019, *supra* no. 137, para 5.

313 BGH, 17.10.2019, *supra* no. 137, paras 11-13.

Firstly, the BGH clarified the applicability of German substantive law on the issue at stake, due to the parties' choice of law in their contract: consequently, German law regulates the effects of the jurisdiction agreement, its interpretations and the eventual presence of contractual rights flowing from the same.[314]

On the opposite of what provided by the appellate court, the BGH held that the parties' agreement on jurisdiction does create a substantive contractual obligation to submit all disputes to the courts chosen since it shall be interpreted as being a substantive law contract which governs procedural law relationships.[315]

The Supreme Courts further add that it is important to distinguish in agreements of this kind a double set of effects: dispositive on the one side, obligatory on the other. Dispositive, meaning the modification of the otherwise applicable procedural rules on jurisdiction; obligatory, meaning that it generates a contractual obligation on the parties, provoking direct losses for its breach which need to be restored through damages claim.

The BGH went further, examining the peculiar clauses at stake, applying the principles of contractual interpretation provided by German substantial law, considering first and foremost the interests of the parties and the scope of a jurisdiction agreement.

Applying such principle, the Supreme Court found that the parties clearly

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314 BGH, 17.10.2019, *supra* no. 137, para. 21.

315 BGH, 17.10.2019, *supra* no. 137, para. 26.

intended to undertake an obligation to refrain from bringing an action in any jurisdiction other than the German one (precisely Bonn).[316]

As a consequence, the parties accepted that, under German law, a breach of contract generates right for damages and this also whether the breach involve the proposition of a claim. Likewise, the contractors also acknowledge the rules on the allocation of costs provided by the German Code of Civil Procedure which impose to the losing party to bear the costs.

In conclusion, the BGH provided that in case of an exclusive jurisdiction agreement, a party who has brought proceedings outside the chosen court may become liable for the legal costs incurred by the other party which resisted in the seized, but not chosed, forum.

The above analysed ruling is of the outmost importance, especially due to the effort of harmonizing common law institute with civil law conceptions.[317]

Furthermore, as a consequence of the position assumed, it is reasonable to believe that different member states will adopt a similar approach, taking a further step toward the enhancing of jurisdiction agreements and their effects, as well as to grant contracting parties with an effective remedy to fight forum shopping.

However, it is important to note that the case involved a proceeding in a court outside the EU, where a different rule on the allocation of costs has been applied.

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316 BGH, 17.10.2019, *supra* no. 137, para. 36.

317 D'ALESSANDRO E., *supra* no. 303, pp. 786 – 806.

Within the system of jurisdiction provided by the Brussels regime the feasibility of such instrument is controversial. On the one hand it is argued that damages cannot be granted by a Member State's court if the other proceedings was brought before another Brussels Convention contracting State, pursuant to the obligation to recognize Member States Judgements under the Regulation.[318] On the other hand, it is affirmed that there are no elements within the Brussels Regime to prevent the use of such a remedy.[319] That assumption relies on the fact that a claim for damages does not interfere with other States' decisions on their jurisdiction, therefore it is not possible to analogically apply *Turner*[320] reasoning to the issue of damages[321].

The analysed case-law involves the most typical figure of procedural agreements: jurisdiction clauses.

However, the argument thereby used could found claims for damages for the breach of any other kind of procedural agreements assumed to be valid.

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318 HARTLEY T.C., *supra* no. 129, p. 220.

319 BRIGGS A., *supra* no. 223, p. 584.

320 Case C-159/02, *supra* no. 185.

321 However, since as it has been explored the losses deriving from such kind of breach are equivalent to legal costs, in every situation whether the seized court (than declining its jurisdiction on the basis of a choice of court agreement) is one of a Member State, whose commonly adopt the losers pay rule, there will be a ruling on the litigation costs enforceable in all the other Member States according to Regulation 1215/2002. Consequently, the eventual losses will merely consist in the delta between the part of losses not covered by the ruling on legal costs.

Relatedly, it must be noted that differently from the case of jurisdiction agreements, there will not be a "double" set of proceedings, one of which has been unduly perpetrated.

Consequently, the event that parties will suffer material losses are rare, since the quantification of damages is practicable only whether the loss has materialized[322].

[322] TAKAHASHI, *Damages for breach of a choice-of-court agreement*, Yearbook of Private International Law, Vol. X, 2008, pp. 57-92.

CONCLUSIONS

This thesis has investigated the mechanism of procedural agreements as a form of privatization of civil justice.

In particular, special attention has been paid to atypical procedural agreements, in order to assess their compatibility within procedural law in general and, specifically, within the Italian legal system.

In the first chapter, the analysis necessarily had to commence with some basic notions that enabled the author to clarify her terminology. Such analysis is particularly meaningful because it approached the under-structure that is common to every kind of procedural agreement.

Above all, however, the first chapter has been crucial in order to undertake an empirical analysis of the procedural reality in progress in today's legal order.

Notably, attention has been payed to the essence of procedural law.

A critique to the traditional conception of procedural law as public law has been moved whether investigating the purpose of the trial itself. Furthermore, starting from the analysis of the theory which ascribe procedural law to a branch of public law, the author claimed that civil procedure has its own specific features, which prevent it from belonging to any of the classic categories.

Indeed, civil procedure stands alongside public law and private law, not merely identifying itself with one or the other category.

The study moved forward addressing increasingly common phenomena: flight from courts and the privatization of civil justice.

Such ongoing and evident phenomena require national legislators to identify a valuable solution to avoid what is nowadays de-centralising and fragmenting the public justice system, whose rules are fundamental to any democratic state.

The second chapter dealt with the definition of procedural agreements as conventions (to which the judge is not a party) which produce theirs effects in the sphere of procedural law, being it a direct or an undirect effect, as the outcome of the parties will and investigated their nature.

Indeed, even if their notion is instantly intelligible, the same cannot be said on their nature.

After presenting the different theories on the topic, the author concluded that procedural agreements are intrinsically dualistic.

As a result, it is necessary to evaluate its nature according to civil law, but falling within the scope of procedural law in its effectiveness.

Such conclusion implies that even if their validity shall be assessed in light of substantial law, the limits of their effectiveness are to be found in the compliance with the mandatory principle of procedural law.

Markedly, the concrete and atypical cause of any procedural agreements have on the one hand to serve the same purpose as that for which the proceedings is intended by the legislator, and on the other hand to comply with public policy and the general principles of procedural law.

Such analysis led the author to conclude that in order to effectively response to the described phenomenon of the flight from civil courts, the most reasonable solution is, in the view of the author, to implement in the

procedural realm a soft/controlled form of privatization of the public trial. This shall be reflected in the reduction of a strict public approach in the conduct of the proceedings, in order to liberalise it and to grant the parties the possibility to satisfy their needs and interests within the system of guarantees imposed by the public power. However, such liberalization still needs to preserve the public nature of the trial and, most importantly, the position of the third and impartial judge, pre-established by law.

The only instruments which seem tailored for such a scope are precisely procedural agreements: they could be used as instrument to grant the parties with a public trial, whilst promoting and maximizing the private interest of the parties.

The negotiation of the rules of the proceedings may grant parties with an opportunity to establish a format of trial that suits better their interest, in view of the growing needs of a fast and cost-efficient justice.

After presenting such conclusion, chapter three has demonstrated that atypical agreements are not per se invalid. Indeed, the very essence of the trial is to give effect to a private right through the principle of party dispositions.

Indeed, if the introductory phase of the proceedings and, indeed, also the following procedural phases are subject to the initiative of the parties, it is necessary to consider that it is precisely that impulse and that autonomy of the parties that can govern the course of the proceedings and its rules.

Concerning the Italian legal system, it is in light of art. 111 Italian Costituzione that atypical procedural agreements shall be welcomed by procedural law, whether complying with mandatory rules, public order, legal certainty and due

process. Thus, procedural agreements might contribute to a better realization of due process and to strengthened the efficiency of the procedure.

TABLE OF AUTHORITIES

- AKAHASHI K., Damages for Breach of a Choice-of-Court Agreement, Yearbook of Private International Law, Munich, Vol. 10, European Law Publishers & Swiss Institute of Comparative Law, 2008;
- ANDREWS N., Abuse of process and obstructive tactics under the Brussels jurisdictional system: Unresolved problems for the European authorities Erich Gasser GmbH v MISAT Srl Case C-116/02 (9 December 2003) and Turner v Grovit Case C-159/02 (27April 2004), Zeitschrift für Gemeinschaftsprivatrecht, 2005;
- ANDREWS N., Andrews on Civil Processes: Court Proceedings, Vol I, Cambridge/ Antwerp / Portland, Intersentia, 2017;
- ANDREWS N., Procedure, Party agreement, and Contract, Giustizia Consensuale, I, 2021;
- ARANGIO-RUIZ V., Istituzioni di diritto romano, Napoli, Casa Editrice dott. Eugenio Jovenne, XIV ed., 2006;
- ARCANGELO G.A., Gli Angusti Confini dell'Autonomia Privata, available at: http://www.altalex.com/documents/news/2007/04/13/gli-angusti-confini-dell-autonomia-contrattuale;
- ARENS P., Die Grundprinzipien des Zivilprozeßrechts, in GILLES P., Humane Justiz, Frankfurt, Athenaum, Kronberg, 1977;
- ASPARELLA C., Dell'accordo processuale, ovvero della derogabilità convenzionale delle fasi che scandiscono il processo ordinario, Giurisprudenza di Merito, 4-5, 1999;

- BARLETTA A., La disponibilità dei diritti nel processo di cognizione e nell'arbitrato, Rivista di diritto processuale, 4, 2008;
- BECHIS C., Profili della tutela individuale dei consumatori e della riforma di quella collettiva – la tenuta processuale delle clausole probatorie nei rapporti consumeristici, Giurisprudenza Italiana, I, 2021;
- BELOHLAVEK A.J., The Definition of Procedural agreements and the Importance to Define the Contractual Nature of the Arbitration Clause in International Arbitration, 2 Y.B. on Int'l Arb. 21, 2012;
- BERIZONCE R.O., Entre el publicismo y la autonomía de la voluntad : un nuevo modelo de proceso civil, Anales de la Facultad de Ciencias Jurídicas y Sociales, año 17, no. 50, 2020;
- BESSO C., Il Processo Civile, nozioni generali, II ed., Torino, Giappichelli, 2015;
- BIANCA C.M., Diritto civile: la norma giuridica i soggetti, II ed., Milano, Giuffrè, 2016;
- BIAVATI P., Deroghe alla giurisdizione statuale e fungibilità dei sistemi giudiziari, Rivista Trimestrale di Diritto e Procedura Civile, 2, 523-549, 2009;
- BILLINGSLEY B., Civil Justice, Privatization, and Democracy, by Trevor C.W. Farrow, 54 Osgoode Hall Law Journal, 317, 2016;
- BLACK V./PITEL S.G.A., Forum selection clauses: beyond the contracting parties, Journal of Private International Law, 12, I, 2016;

- BORK R., § 38, in F. Stein- M. Jonas, Kommentar zur Zivilprozessordnung, ed. 23, Auflage, Tübingen, 2013;
- BRIGGS A., Agreements on Jurisdiction and Choice of Law, Oxford, Oxford University Press, 2008;
- BRIGGS A., Private International Law in English Courts, Oxford, Oxford university Press, 2014;
- BRIGGS A., Civil Jurisdiction and Judgements, New York, VI ed., Informa Law by Routledge, 2015;
- BRIGUGLIO A., Conciliazione e arbitrato. Conciliazione dell'arbitrato. Appunti sparsi tra diritto, psicologia e prassi, Giustizia Consensuale, I, 2021;
- BÜLOW O., Dispositives Civilprozessrecht und die verbindliche Kraft der Rechtsordnung, Archiv für die civilistische, Praxis, 1881;
- CABRAL A./NOGUEIRA P.H., Negócios processuais, Grandes temas do novo CPC, Salvador, Editora JusPodivm, 2015;
- CABRAL A., Convenções processuais, Salvador, JusPODIVM, 2016;
- CABRAL A., Accordi processuali nel diritto brasiliano, Rivista di diritto processuale, Vol. 3, 2016;
- CABRAL A., New trends and perspectives on case management: proposals on contract procedure and case assignment management, Introductory report, Tianjin Conference of the International Association of Procedural Law, 2017;
- CABRAL A, Per un nuovo concetto di giurisdizione, avaiable at

http://www.judicium.it/wp-content/uploads/2017/02/3-Per-un-nuovo-concetto-di-giurisdizione.pdf, 2017;

- CADIET L./HESS B./REQUEJO ISIDRO M., Approaches to procedural law. The Pluralism of Methods, Baden-Baden, Nomos Verlagsgesellschaft, 2017;
- CADIET L, Les conventions relatives au procès en droit français. Sur la contractualisation du règlement des litiges, Rivista Trimestrale di Diritto e Procedura Civile, supplement to no. 3, 2008;
- CALAMANDREI P., Il processo come giuoco, Rivista di diritto processuale, Vol. I, 1950;
- CAMON A., Accordi processuali e giustizia penale: la prova patteggiata, Rivista di diritto processuale, Vol. 63, 1, 2008;
- CANELLA M.G., Gli accordi processuali francesi volti alla regolamentazione collettiva del processo civile, Rivista Trimestrale di Diritto e Procedura Civile, 2, 2010;
- CAPONI R, In tema di autonomia e certezza nel processo civile, Il Foro Italiano, I, Vol. 136, 2006;
- CAPONI R., Autonomia privata e processo: gli accordi processuali, Rivista Trimestrale di Diritto e Procedura Civile, supplement to no. 3, 99-121, 2008;
- CARBONE S.M., La (nuova) disciplina italiana della deroga alla giurisdizione, Diritto del commercio internazionale, 1995;
- CARBONE S.M./TUO C.E., Il Nuovo Spazio Giudiziario Europeo in

Materia Civile e Commerciale il Regolamento UE N. 1215/20012, in Trattato di Diritto Privato dell'Unione Europea, Torino, edited by Ajani G. and Benacchio G.A., Giappichelli, 2016;

- CARNELUTTI F., Lezioni di Diritto Processuale Civile, Introduzione, Padova, CEDAM, 1930;
- CARNELUTTI F., Sistema del diritto processuale civile, II atti del processo, Padova, CEDAM,1938;
- CARNELUTTI F., Istituzioni del processo civile itliano, V ed., Roma, Società editrice del Foro Italiano, 1956;
- CARNELUTTI F., Diritto e processo, Napoli, Morano,1958;
- CARPI F., Accordi di parte e processo, Rivista Trimestrale di Diritto e Procedura Civile, supplement to no. 3, 1-7, 2008;
- CARRATTA A., Funzione sociale e processo civile fra XX e XXI secolo, Rivista Trimestrale di Diritto e Procedura Civile, Vol. 71, 2, 2017;
- CARRATTA A. / MANDRIOLI C., Corso di diritto processuale civile, II – il processo di cognizione, Torino, Giappichelli, 2019;
- CARRATTA A. / MANDRIOLI C., Corso di diritto processuale civile, I – nozioni introduttive e disposizioni generali, Torino, Giappichelli, 2020;
- CHASE O.G./HERSHKOFF H./SILBERMAN/SORABJI J./STÜRNER R./TANIGUCHI Y./VARANO V, Civil litigation in comparative Context, II ed., St. Paul (MN), West Academic Publishing, 2017;
- CHIOVENDA G., Istituzioni di diritto processuale civile, volume II, sez. I, i rapporti processuali – il rapporto processuale ordinario di cognizione,

II ed., Napoli, Casa Editrice dott. Eugenio Jovenne, 1936;

- CHIOVENDA G., Principi di diritto processuale civile – Le azioni. Il processo di Cognizione, III ed., Napoli, Casa editrice dott. Eugenio Jovenne, 1980;
- CHIZZINI A., Konventionalprozess e poteri delle parti, Rivista di diritto processuale, 1, 45, 2015;
- CIPRIANI F., Il Codice di procedura civile tra gerarchi e processualisti, Edizioni Scientifiche Italiane, 1992;
- CIPRIANI F., Per un nuovo processo civile, Il Foro Italiano, vol 124, 2001;
- CONFORTINI M., Clausole negoziali. Profili teorici e applicativi di clausole tipiche e atipiche, Milano, Fori Assago (MI), Utet Giuidica, 2017;
- D'ALESSANDRO E., Inutilizzabilità ex lege delle informazioni acquisite nel procedimento di mediazione ed accordi processuali sulla prova: convivenza possibile?, Giusto processo civile, 4, 2012;
- D'ALESSANDRO E., Danno da inadempimento dell'accordo di scelta del foro esclusivo: un'importante sentenza del Bundesgerichtshof, Rivista di diritto processuale, 2, 2020;
- DALLA BONTÀ S., Giustizia consensuale, Giustizia Consensuale, I, 2021;
- DAVIS K.E. / HERSHKOFF H., Contracting for procedure, William and Mary Law review, 53, 2, 507-565, 2011;
- DE CRISTOFARO, Case management e riforma del processo civile, tra

effettività della giurisdizione e diritto costituzionale al giusto processo, Rivista di diritto processuale, 2, 2010;

- DE MAESTRI M.E., La Proroga di Giurisdizione nel Nuovo Regolamento UE n. 1215/2012, Diritto del Commercio internazionale, 3, 2014;
- DE NOVA G., The law which governs this agreement is the law of The Republic of Italy: il contratto alieno, Rivista di diritto privato, 7-17, 2007;
- DE NOVA G., Accordi delle parti e decisione, Rivista Trimestrale di Diritto e Procedura Civile, supplement to no. 3, 59-69, 2008;
- DE STEFANO G., Studi sugli accordi processuali, Milano, Giuffrè, 1959;
- DENTI V., Negozio processuale, Enciclopedia del diritto, XXVIII ed., Milano, Giuffrè, 1978;
- DICKINSON A., A Charter for Tactical Litigation in Europe?, Lloyd's Maritime and Commercial Law Quarterly, 2004;
- DIDIER F. JR., Curso de Direito Processual Civil, Salvador, Jus Podivm, vol.1, 9a Ed., 2008;
- DIDIER F. JR, Negotios juridicos procesales atipicos en el nuevo codigo procesal civil brasilero, International journal of procedural law, 7, 1, 2017;
- DONÀ G., Del negozio giuridico processuale, Milano, Subalpina, 1933;
- DRAGUIEV D., Unilateral Jurisdiction Clauses: the Case for Invalidity, Severability or Enforceability, Journal of International Arbitration 31, no. 1, Kluwer Law International, 2014;

- DRAHOZAL C.R., Privatizing Civil Justice: Commercial Arbitration and the Civil Justice System, 9 Kan. J. L. & Pub. Pol'y 578, 2000;
- FABBI A., preliminary draft of the presentation on "Privatizing' civil justice through procedural agreements: a comparative law analysis, New York University, 2013, available at http://www.law.nyu.edu/sites/default/files/upload_documents/AlessandroFabbi2.pdf ;
- FABBI A., Appunti sugli accordi processuali nel diritto federale statunitense, in Briguglio, Martino, Panzarola, sassani, Scritti in onore di Nicola Picardi, Pisa, Pacini editore, 2016;
- FABBRINI TOMBARI G., Pactum de non exsequendo, Il Foro Italiano, I, 1846, 1992;
- FANELLI G., Accordi e processo esecutivo, Rivista dell'esecuzione forzata, 267, 2013;
- FERNANDES DE MOURA LEITE O., Negócios jurídicos processuais e tutela arbitral: possibilidade de servir como forma de tutela de direito de humanidade?, Revista de Direito Privado, Vol. 74, 2017;
- FERRARA L., Udienza 17 Novembre 1906, Pres. Masi, P. P., Est. Bianco, P. M. Borrelli (Concl. Conf.); D'Avalos, (Avv. Fadda, Simeoni, Cutillo) c. Caturano (Avv. Grippo, De Roberto, Ferrara). Il Foro Italiano, vol. 32, 1907;
- FOLLIERI L., Clausola di rinuncia preventiva, in Confortini, Clausole negoziali. Profili teorici e applicativi di clausole tipiche e atipiche,

Milano, fiori Assago (MI), Utet Giuidica, 2017;

- FONSECA J.P., The changing role of courts between the privatization of adjudication and the privatization of procedure, in Cadiet/Hess/Requejo Isidro, Approaches to procedural law. The Pluralism of Methods, Baden-Baden, Nomos Verlagsgesellschaft, 2017;
- FRUS G., Il ricorso per cassazione c.d. "per saltum", Rivista Trimestrale di Diritto e Procedura Civile, I, 2000;
- GABOARDI M., Il trasferimento del processo in sede arbitrale e ruolo della volontà delle parti, Rivista di diritto processuale, 3, 2015;
- GALLO P., Contratto e Buona Fede, Torino, UTET, 2014;
- GIABARDO C.V., Private law in the age of the vanishing trial in Private law in the 21st century, Oxford and Portland, Hart Publishing, 2017;
- GRASSO E., La collaborazione nel processo civile, Rivista di Diritto Processuale, 21, 1966;
- GROSSO G., Lezioni di Storia del Diritto Romano, V. ed., Torino, Giappichelli, 1965;
- GRUSON M., Forum Selection Clauses in International and Interstate Commercial Agreements, University of Illinois Review, 1982;
- HESS B. /KRAMER X.E., From common rules to best practices in European Civil Procedure, Baden-Baden, Nomos Verlagsgesellschaft, 2017;
- ILLMER M./NUYTS A./FITCHER J., Scope and Definition, in Dickinson A./Lein E. The Brussels I Regulation, Oxford, Oxford University Press,

2015;

- KERN C.A., Procedural Contract in Germany, in CABRAL A./NOGUEIRA P.H., Negócios processuais, Grandes temas do novo CPC, Salvador, Editora JusPodivm, 2015;
- KEYES M./MARSHALL B.A., Jurisdiction Agreements: Exclusive, Optional and Asymmetrical, Journal of Private International Law, Vol. 11, No. 3, 2015;
- KISTLER A.R.E., Effect of exclusive choice of court agreements in favour of third states within the Brussels I Regulation Recast, Journal of Private International Law, 14, I, 2018;
- KOHLER J., Über prozessrechtliche Verträge und Creationen, in Gesammelte Beiträge zum Zivilprozess, Berlin, 1894;
- KOHLER J., Prozesshandlungen mit Civilrechtwirkung, Manheim – Berlin – Leipzig, 1925;
- KRAMER X.E. / THEMELI E., The Party Autonomy Paradigm. European and Global Developments on Choice of Forum, in Lazić/Stuij, Brussels Ibis Regulation. Changes and Challenges of the Renewed Procedural Scheme, The Hague/Heidelberg, Asser Press/Springer, 2017;
- KRAMER X.E. /VAN RHEE C.H., Civil Litigation In A Globalising World, The Hague/Heidelberg, Asser Press/Springer, 2012;
- LAZIĆ V. / STUIJ S., Brussels Ibis Regulation. Changes and Challenges of the Renewed Procedural Scheme, The Hague/Heidelberg, Asser Press/Springer, 2017;

- LEIPOLD D., in Stein, Jonas, *Kommentar zur Zivilprozessordnung*, XXII ed., 3, Mohr Siebeck, Tübingen, 2005;
- LENHOFF A., The Parties' Choiche of a Forum: Prorogation Agreements, Rutgers Law Review, no. 414, 1960-1961;
- LIEBMAN E.T., Risoluzione convenzionale del processo, Rivista di Diritto Processuale Civile, 1, 1961;
- LIEBMAN E.T., Fondamento del principio dispositivo, Rivista di Diritto Processuale Civile, 15, 1960;
- LIEBMAN E.T., Manuale di diritto processuale civile, II ed., Milano, Giuffrè, 1968;
- LINDBLOM, The privatization of justice: Some aspects of recent developments in American and Swedish procedural law, in Voskuil/ Sumampouw, Law and Reality, Essays on national and international procedural law, Dordrecht, Nijhoff, 1992;
- LLOPIS-LLOMBAR M.D.B., I contratti processuali, Reale Collegio di Spagna a Bologna, 2013;
- LUCARELLI P., Mediazione dei conflitti: una spinta generosa verso il cambiamento, Giustizia consensuale, Giustizia Consensuale, I, 2021;
- LUISO F.P., Diritto processuale civile, Vol. I, Principi generali, Milano, Giuffrè, 10° ed., 2019;
- LUISO F.P., Diritto processuale civile, Vol. II, Il processo di Cognizione, Milano, Giuffrè, 10° ed., 2019;
- LUZZATO G.I., Procedura civile romana, esercizio dei diritti e difesa

privata – Vol. 1, Bologna, Zuffi, 1948;

- MANKOWSKI P., Just how free is a free choice of law in contract in the EU, Journal of Private International Law, 13, II, 2017;
- MANKOWSKI P., The role of party autonomy in the allocation of jurisdiction in contractual matters, in Ferrari/Ragno, Cross border litigation in Europe: the Brussels I Recast Regulation as a Panacea?, Padova, CEDAM, 2016;
- MENCHINI S., Il rito su accordo delle parti ai sensi dell'art. 70 ter disp. att. c.p.c., Il Foro Italiano, Vol. 128, no. 10, 2005;
- MERLIN E., Le anti-suit injunctions e la loro incompatibilità con il sistema processuale comunitario, Il Corriere giuridico, 2005;
- MERRETT L., Interpreting non-exclusive jurisdiction agreements, Jurnal of Private International Law, Vol. 14, 2018;
- MUKARRUM A./ BEAUMONT P., Exclusive choice of court agreements some issues on The Hague Convention on choice of court agreements and its relationship with the Brussels I recast especially anti-suit injunctions, concurrent proceedings and the implications of BREXIT, Journal of Private International Law, 13, II, 2017;
- MURRAY P.L., Privatization of Civil Justice, 15 Willamette J. Int'l L. & Dis. Res., 2007;
- MURRAY P.L., The flight from public civil justice, in Essays in honour of Konstantinos D. Kerameus I, Athens/Brussels, Ant. N. Sakkoulas/Bruylant, 2009;

- NYGH P.E., Autonomy in International Contracts, in Oxford Monographs in Private International Law, New York, Clarendon Press Oxford, 1999;
- ORESTANO R., Azioni, diritti soggettivi, persone giuridiche, Bologna, Il Mulino, 1978;
- ORLANDI M., Clausole riduttive, in Confortini, Clausole negoziali. Profili teorici e applicativi di clausole tipiche e atipiche, Fiori Assago (MI), Utet Giuridica, 2017;
- OUDIN M., Evidence in civil law - France, Institute for Local Self-Government and Public Procurement Maribor, Maribor, 2015;
- PATTI S., La disponibilità delle prove, Rivista Trimestrale di Diritto e Procedura Civile, supplement to no. 1, Varese, Giuffè Editore, 2011;
- PATTI S., Diritto civile e diritto processuale civile: frammenti di un percorso, Rivista Trimestrale di Diritto e Procedura Civile, I, 2013;
- PENASA L., Gli accordi sulla giurisdizione tra parti e terzi, I, Natura e legge regolatrice, Padova, CEDAM, 2012;
- PENASA L., Gli accordi sulla giurisdizione tra parti e terzi, II, Profili soggettivi, Padova, CEDAM, 2017;
- PERGOLESI F., I negozi giuridici come fonte normativa, Il Foro Italiano, Vol. 62, 1937;
- PEZZANI T.M., Il regime convenzionale delle prove, Milano, Giuffrè, 2009;
- PROTO PISANI A., La nuova del processo ordinario di cognizione di primo grado e d'appello, Il Foro Italiano, Vol. 114, Parte V: Monografie

e Varietà, 1991;

- PROTO PISANI A., Il codice di procedura civile del 1940 fra pubblico e privato, Il Foro Italiano, Vol. 123, no. 3, 2000;
- QUEIROLO I., Gli Accordi Sulla Competenza Giurisdizionale tra Diritto Comunitario e Diritto Interno, in Studi e Pubblicazioni di Diritto Internazionale Privato e Processuale n.51, Padova, CEDAM, 2000;
- RIGHETTI R., La Deroga alla Giurisdizione, Milano, Giuffrè, 2002;
- ROCCA R., La Teoria dell'autonomia della volontà in diritto internazionale privato, Dattilo-litografia A. Viretto, Torino, 1914;
- ROPPO V., *Il Contratto*, II ed. Milano, Giuffrè Editore, 2011;
- ROSENBERG L. / SCHWAB K. H./ GOTWALD P., Zivilprozessrecht, 18 Auflage, München, 2018;
- RUSSO E., Norma imperativa, norma cogente, norma inderogabile, norma indisponibile, Rivista di Diritto Civile, 5, 10573, 2001;
- SANGERMANO F., L'interpretazione del contratto, profili dottrinali e giurisprudenziali, Milano, Giuffre, 2007;
- SATTA S., Contributo alla dottrina dell'arbitrato (1931), reprint Milano, Giuffrè, 1969;
- SATTA S., Accordo (diritto processuale civile), in Enciclopedia del Diritto, I, Milano, 1958;
- SATTA S., Il mistero del processo, Milano, Adelphi,1994;
- SATTA S./ PUNZI C., Diritto processuale civile, Padova, CEDAM, XIII ed., 2000;

- SCHIEDERMAIR G., Vereinbarungen im Zivilprozeß, Bonn, 1935;
- SCHLOSSER, P., Einverständliches Partei handeln im Zivilprozeß, Tübingen, 1968;
- SCIALOJA V., Procedura civile romana: esercizio e difesa dei diritti, Roma, Anonima romana editoriale, 1936;
- SELLITO A., Architetture processuali, Pisa, PHD thesis, department of lae, 2014/2014;
- SERGIO, Il processo senza lite, Padova, CEDAM, 1930;
- STRONG S.I., General Principles of procedural law, Penn st l rev., 2018;
- TAN Y.L., Post dispute agreements on choice of law, Journal of Private International Law, 13, I, 2017;
- TARELLO G., Dottrine del processo civile: studi storici sulla formazione del diritto processuale civile, Bologna, Il Mulino, 1989;
- TARUFFO M., Diritto processuale civile nei paesi anglosassoni, in Digesto delle discipline privatistiche, sezione civile, IV, Torino, 1997;
- TISCINI R., Il rito convenzionale: note a margine dell'art. 70-ter disp. Att. C.p.c., Giurisprudenza Italiana, 2, 519, 2007;
- TOMMASEO F., Sulle clausole della gestione della lite nei contratti di assicurazione, in Carnacini, Studi in onore di Tito Carnacini, Milano, Giuffrè, 1984;
- TORRENTE A. / SCHLESINGER P., Manuale di diritto privato, XXIII ed., Milano, Giuffrè, 2017;
- TYLER C.W., Lawmaking in the Shadow of the bargain/ contract

procedure as a second best alternative to mandatory arbitration, The Yale Law Journal, 122, 1560, 2013;

- VAN RHEE C.H. / YULIN F., Civil Litigation in China and Europe, Springer, Dordrecht/Heidelberg/New York/London, 2014;
- VIDAL, The important function of procedural conventions in changing the culture of litigation: the interconnection between consensuality and conventionality, Revista dos Estudiantes de Direito da UNB, available at http://periodicos.unb.br/index.php/redunb/article/download/28376/19967;
- VIDAL L.C.D., Convenções processuais: no paradigma do processo civil contemporâneo, Rio de Janeiro, Gramma, 2017;
- WACH A., Das Geständniss. Ein Beitrag zur Lehre von dem prozessualischen Rechtsgeschäft, in AcP, LXIV, 1881;
- WACH A., Grundfragen und Reform des Zivilprozesses, Berlin, Verlag von Otto Liebmann, 1914;
- WAGNER G., Proze8vertr5ge: Privatautonomie im Verfahrensrecht, Tubingen, Mohr Siebeck, 1998;
- WALKER L., Party autonomy inconsistency and the specific characteristics of family law in the EU, Journal of Private International Law, 14, II, 2018;
- WILKE F.M., The impact of the Brussels I Recast on important Brussels case law, Journal of Private International Law, 11, I, 2015;
- WOLF C. / ZEIBIG N., Evidence in civil law – Germany, Institute for Local

Self-Government and Public Procurement, Maribor, 2015;

- YEO T.M., Part Autonomy in International Civil Litigation: Singapore Law, CDAMS Workshop, 2004;
- ZUCKERMAN A., Adjudication of civil dispute, Rivista Trimestrale di Diritto e Procedura Civile, supplement to no. 3, 121-126, 2008.

TABLE OF CASES

Court of Justice of The European Union case law

- CASE 24/76, *Estasis Salotti di Colzani Aimo e Gianmario Colzani s.n.c. v Rüwa Polstereimaschinen GmbH*, [1976] ECR;
- Case 150/80, *ElefantenSchuh GmbH v Pierre Jaqmain*, [1981] ECR 01671;
- Case 38/81, *Effer SpA v Hans-Joachim Kantner*, [1982] ECR 825;
- Case 26/91*, Jakob Handte & Co. GmbH v Traitements Mécano-chimiques des Surfaces SA*, [1992] ECR I-3967 ;
- Case C-125/92, *Mulox IBC Ltd v Hendrick Geels*, [1993], ECR I-4075;
- Case C-159/02, *Turner v. Grovit* [2004] ECR I-03565;
- Case C-456/11, Gothaer Allgemeine Versicherung AG v Samskip GmbH, [2012].

European Court of Human Rights

- *De Haes and Gijsels v. Belgium*, ECHR 24 February 1997.

German case law

- BGH, 30.1.1957 - V ZR 80/55, BGHZ, 23, 198, 200;
- BGH, 28.11.1963 - VII ZR 112/62, BGHZ, 40, 320, 322;
- BGH, 22.05.1967 - VII ZR 188/64, BGHZ, 48, 35, 46;
- BGH, 29.02.1968 – VII ZR 102/65, BGHZ, 49, 384, 386;
- BGH, 17.05.1972 - VIII ZR 76/71, BGHZ 59, 23, 26;
- BGH, 20.01.1986 - II ZR 56/85, NJW, 1986, 1438, 1439;

- BGH., 24.11. 1988 – III ZR 150/87, NJW, 1989, 1431,1432;
- BGH, 18.03.1997 – XI ZR 34/96, NJW, 1997, 2885, 2886;
- BGH, 17.10.2019 - III ZR 42/19.

Italian case law

- Corte di Cassazione, no. 899/1962;
- Corte di Cassazione, no. 3104/1963;
- Corte di Cassazione, no. 4480/1986;
- Corte di Cassazione, no. 8774/1991;
- Corte di Cassazione, no. 4397/1998;
- Pretura di Verona, 22.09.1998;
- Corte di Cassazione, no. 7707/2004;
- Corte di Cassazione, no. 16993/2006;
- Corte di Cassazione, no. 16993/2006;
- Corte di Cassazione, no. 3321/2008;
- Corte di Cassazione, no. 22956/2010;
- Consiglio di Stato, no. 3371/2012;
- Corte di Cassazione, no. 55190/2018;
- Corte di Cassazione, no. 20152/2019;
- Corte di Cassazione, no. 15032/2020.

Spanish case law

- Tribunal Supremo, Sala de lo Civil, Seccion I, sentencia num. 6/2009.

Uk case law

- Union Discount Co Ltd v Zoller and Others, [2001] EWCA Civ. 1755;
- Arkin v Borchard Lines Ltd (no 2 and 3) [2005];
- EWCA Civ 655, [2005] 1 WLR 3055;
- Sunrock Aircraft Corporation Ltd v Scandinavian Airlines System Denmark-Noeway-Sweden, [2007] EWCA Civ. 882;
- A v B [2007] EWHC 54;
- Excalibur [2016] EWCA Civ 1144;
- Julie Anne Davey [2019] EWHC 997 (Ch);
- ChapelGate Credit Opportunity Master Fund Ltd v James Money [2020] EWCA Civ 246.