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Empirical Study of Jury Trial Waiver
Clauses in Large Corporate Contracts

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Do Juries Add Value?: Evidence from an Empirical Study of Jury Trial Waiver Clauses in Large Corporate Contracts

Theodore Eisenberg and Geoffrey P. Miller*

Abstract:

We study jury trial waivers in a data set of 2,816 contracts contained as exhibits in Form 8-K filings by reporting corporations during 2002. Because these contracts are associated with events deemed material to the financial condition of SEC-reporting firms, they likely are carefully negotiated by sophisticated, well-informed parties and thus provide presumptive evidence about the value associated with the availability of jury trials. Only a small minority of contracts, about 20 percent, waived jury trials. An additional nine percent of contracts had arbitration clauses that effectively preclude jury trials though the reason for arbitration clauses need not specifically relate to juries. We explore three groups of factors to explain the pattern of jury trial waivers: (1) contract-specific factors: the subject matter of a contract, a measure of its standardization, choice of law, and choice of forum, (2) contracting-party factors: domestic vs. international status, place of business, place of incorporation, attorney locale, and industry, and (3) factors external to the contracts and parties: perceptions of local jury fairness in the forum specified in the contract and the relative length of jury and bench trial queues in that forum. Contract-type is significantly associated with jury trial waivers. For example, over 50 percent of security agreements and over 60 percent of credit commitments waived jury trials. In contrast, only five percent of employment contracts, two percent of bond indentures, and 3.5 percent of pooling service agreements waived jury trials. Choice of forum, greater contract standardization, and perceived fairness of juries are significantly associated with jury trial waivers. Over 80 percent of the contracts designating Illinois as a forum contained jury trial waivers whereas less than half the contracts designating New York as a forum, and only about one-third of the contracts designating California, Texas, or Florida as a forum contained waiver clauses. Jury trial waivers were not more common in international contracts. Our results suggest that, contrary to a widespread perception about the alleged inadequacies of juries in complex business cases, sophisticated actors may perceive that juries often add value to dispute resolution.

I. Introduction

Commercial contracts frequently contain agreements about how the parties wish to resolve disputes that may arise under the contract. One such *ex ante* provision for dispute resolution is an agreement to waive the right to a jury. Such waivers will

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ordinarily be enforced, provided they are found to be knowing and deliberate.¹ Given widespread beliefs that juries do not perform well in complex commercial cases,² we might suppose that *ex ante* jury trial waivers would be nearly universally observed in major business contracts.

¹ The Seventh Amendment provides parties litigating in federal court with a right to jury trial in civil cases. U.S. Constitution, Amend. VII. Many state constitutions also guarantee jury trial rights in civil cases. See, e.g., Cal. Const. art. I, §16. The right to a jury can be waived however, and such waivers will generally be recognized and enforced in American courts. Waivers of jury trial are routinely enforced in the context of civil and criminal litigation. In federal civil cases, for example, the right to jury trial is waived if not specifically demanded in timely fashion, and may be waived by consent of both parties. FRCP Rule 38, 39. Some states, however, provide the court with discretion to reject a jury trial waiver and impose a jury on the parties in a civil case. See, e.g., Miss. Rule of Civil Procedure 38(b) (“The court may, in its discretion, require that the action be tried by a jury notwithstanding the stipulation of waiver.”). Juries may also be waived in criminal cases, providing the waiver is knowing and deliberate; indeed, such waivers are implicit in plea bargaining, which is the principal means for resolving criminal charges. See *Boykin v. Alabama*, 395 U.S. 238 (1969).

Pre-dispute contractual waivers of jury trial are also enforced in federal court. Waivers of jury trial are implicit in the decision to submit disputes to arbitration, and courts, relying on policies under the Federal Arbitration Act, generally enforce such waivers under general principles of contract law without requiring any heightened showing of consent. See, e.g., *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005). But see *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 381 (6th Cir. 2005) (holding arbitration agreement waiver of jury right to higher standard than ordinary contract principles). Federal courts also enforce pre-dispute jury trial waivers outside the context of arbitration agreements, at least if the agreement is knowing and voluntary. See Debra T. Landis, *Contractual Jury Trial Waivers in Federal Civil Cases*, 92 A.L.R. Fed. 688 (2003) (“The cases . . . uniformly support the view that, with knowing and voluntary consent, the right to a jury trial in a federal civil action may be waived by a contract that was not made in, or as an incident of, any particular litigation.”); *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832 (4th Cir.1986); *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 755 (6th Cir.1985); *Rodenbur v. Kaufmann*, 320 F.2d 679, 683 (D.C.Cir.1963); *RDO Fin. Servs. Co. v. Powell*, 191 F.Supp.2d 811, 813 (N.D. Tex. 2002). But see Deborah J. Matties, *A Case for Judicial Self-Restraint in Interpreting Contractual Jury Trial Waivers in Federal Court* 65 *Geo. Wash. L. Rev.* 431, 462-63 (1997) (urging judicial restraint in enforcing *ex ante* jury waivers).

The majority of state courts also enforce pre-dispute jury trial waivers. See Jay M. Zitter, *Contractual Jury Trial Waivers in State Civil Cases*, 42 A.L.R.5th 53, 71 (1996); *In re Prudential Ins. Co. of America*, 148 S.W.3d 124 (Tex. 2004); *Mall, Inc. v. Robbins*, 412 So.2d 1197, 1200 (Ala.1982); *L & R Realty v. Connecticut Nat'l Bank*, 246 Conn. 1, 715 A.2d 748, 754-755 (1998); *Malan Realty Investors, Inc. v. Harris*, 953 S.W.2d 624, 626- 627 (Mo.1997) (en banc) (per curiam); *Lowe Enters. Residential Partners, L.P. v. Eighth Judicial Dist. Court*, 118 Nev. 92, 40 P.3d 405 (2002); *Rhode Island Depositors Econ. Prot. Corp. v. Coffey and Martinelli, Ltd.*, 821 A.2d 222, 226 (R.I. 2003). Two states — California and Georgia — reject pre-dispute waivers as inconsistent with applicable statutes. See *Grafton Partners L.P. v. Superior Court*, 36 Cal.4th 944, 116 P.3d 479, 32 Cal.Rptr.3d 5 (2005); *Bank South, N.A. v. Howard*, 264 Ga. 339, 444 S.E.2d 799 (1994).

² See text accompanying notes 59-79 *infra*.

This paper reports on the first large-scale empirical study of jury trial waivers in large commercial contracts.³ We find that such waivers are far from universal. Explicit jury trial waivers were contained in only about 20 percent of the more than 2,800 contracts in our data set. Another nine percent of contracts contained mandatory arbitration clauses. Such clauses may well be adopted for reasons other than a wish to avoid a jury; indeed, they almost certainly have other motivations because if their only purpose were to avoid a jury, this goal could be achieved more parsimoniously with a simple jury waiver.⁴ But even if arbitration clauses are classed as jury waivers, a substantial majority of the contracts in our study—over 70 percent—do not preclude juries.

What causes the relative paucity of jury trial waivers in our data? Possible explanations include agency costs, strategic considerations, and transactions costs. It is also possible—perhaps likely—that the parties omit jury trial waivers simply because they see the potential availability of a jury as adding value to the contract. Because the parties in our data set are sophisticated business entities negotiating over important contracts, their revealed preferences about jury trial waivers may provide evidence bearing on the ongoing debate about the value of civil juries in commercial litigation.

Given that jury trial waivers are not universally observed, the question arises whether one can explain the varying pattern of waiver clauses. Two major classes of factors—those internal to the contracts themselves and those external to the contracts—

³ See Robert E. Scott & George G. Triantis, *Anticipating Litigation by Contract Design*, 115 *Yale L.J.* 814, 857 (2006) (noting that contract law scholars “focus principally on the substantive terms” of contracts rather than on *ex ante* mechanisms for enforcement, and characterizing the investigation of such mechanisms as a “rich avenue for future research.”)

⁴ See J. Michael McGuire & Adam S. Belzberg, *Are Jury Trial Waivers Coming of Age?*, 38 *Maryland Bar J.* 25 (2006) (noting that employers can avoid juries by jury trial waivers without needing to include arbitration clauses in employment contracts).

might help explain the pattern. At the descriptive level, we find strong associations between internal contractual factors and the rate of jury trial waivers. The type of contract is in fact the most powerful factor in describing the variation in jury trial waiver rates. Credit contracts—credit commitments and security agreements—have the highest rate of jury waiver clauses, both over 50 percent. In contrast, for example, about five percent of employment contracts contain jury waivers and about ten percent of licensing contracts contain waivers. Another factor internal to the contracts, the degree of standardization, also is associated with jury trial waivers. Contracts with low standardization are associated with lower waiver rates. Choice of forum is also associated with jury trial waiver rates.

External forces on waiver clauses can be further subdivided. Some are characteristics of the contracting parties—place of business, place of incorporation, attorney locale, and industry all might relate to the waiver rate. Other external factors are more clearly exogenous to the contract relation being assessed. These external factors include the perceived fairness of juries in the locale in which adjudication is likely to occur. Parties may systematically shun juries in locales in which they perceive juries to be unfair. Expected costs of jury trials may also vary across geographical areas. Locales in which jury trials have a much longer queue than bench trials increase the cost of jury trials relative to bench trials and may be expected to be associated with higher jury trial waiver rates. We find an association between perceived jury fairness and jury trial waiver rates but no robust association between the difference in jury and bench trial queues and waiver rates.

Part II of this article describes the relevant background to studying jury trial waivers and articulates the hypotheses relating to internal and external influences that we test. Part III describes the data and Parts IV and V report the results. Part VI discusses the results and Part VII concludes.

II. Background and Hypotheses

Few issues in American law have sparked more academic and political debate than the question of the value and accuracy of juries, and in particular the issue whether juries can competently perform the fact-finding function in complex commercial litigation. The business community has been hostile towards juries in tort cases, viewing juries as one of the principal causes, along with greedy plaintiffs, unscrupulous attorneys, and activist judges, of a purported litigation explosion that is supposedly undermining the social fabric and harming the economy. Although this view has questionable empirical support,⁵ employers,⁶ large corporations,⁷ and residential landlords⁸ (among others) perceive themselves to be especially at risk of excessive or arbitrary jury verdicts based on hostility to deep-pocket defendants or sympathy for injured plaintiffs. According to the dominant view in the business community,⁹ juries increase the risks of trials because they decide the questions put to them on the basis of legally irrelevant factors rather than

⁵ For a discussion (and rebuttal) of this view, see Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 *Stan. L. Rev.* 1255, 1266 (2005). See also authorities cited in notes 74-79 *infra*.

⁶ See Mei L. Bickner et al., *Developments in Employment Arbitration*, *Disp. Resol. J.*, Jan. 1997, at 8, 78-79.

⁷ Galanter, *supra* note 5, at 1266.

⁸ Jury trial waivers are strongly recommended for landlords in residential lease agreements, on the theory that juries are likely to side with renters as against deep-pocket landlords. See Alvin L. Arnold & Jeanne O'Neill, *Real Estate Leasing Practice Manual* § 40:11 (2006) (“One type of waiver that invariably appears in most leases is the waiver by the lessee of a right to trial by jury in connection with disputes arising out of the lease.”).

⁹ This view appears to be widely shared among corporate executives and business lawyers. John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers’ and Executives’ Opinions*, 3 *Harv. Negot. L. Rev.* 1, 51-52 (1998).

according to the evidence and applicable law.¹⁰ Businesses' concerns about jury fairness are accompanied by the likely perception that jury trials are on average more costly than judge trials. In a jury trial, juries must be selected, jury consultants may be employed, evidentiary and *in limine* issues are likely to be more complex, and cases may take longer to come to trial.¹¹ Thus, independent of perceptions of the perceived quality of juries' performance, we suspect that most observers would regard jury trials as expected to be more costly than bench trials.

Much of the concern about jury trials is with respect to cases between injured plaintiffs and large businesses. Businesses may be especially fearful of juries' treatment of them in cases with sympathetic individual plaintiffs. Such cases are not likely to arise under the contracts in our sample, with the possible exception of employment contracts. The vast majority of the studied contracts are between substantial corporate entities. Nevertheless, fear of juries may well be observed even in corporate dominated contracts. Juries have awarded very large damages in disputes involving businesses,¹² and business

¹⁰ See Galanter, *supra* note 5, at 1266-67.

¹¹ The evidence in federal courts is that jury-tried cases are on the docket for shorter periods than judge-tried cases. Kevin M. Clermont & Theodore Eisenberg, Trial by Jury or Judge: Which is Speedier?, 79 *Judicature* 176 (Jan.-Feb. 1996); Kevin M. Clermont & Theodore Eisenberg, Trial by Jury or Judge: Transcending Empiricism: Trial by Jury or Judge, 77 *Cornell L. Rev.* 1124, 1135-37 (1992). State court jury trials are on the docket longer than federal court jury trials. Theodore Eisenberg, John Goerdt, Brian Ostrom & David Rottman, *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 *Seattle L. Rev.* 433, 449 (1996). Actual time in trial is on average longer in jury-tried cases than in judge-tried cases. Bureau of Justice Statistics Bulletin: Civil Justice Survey of State Courts, 2001: Civil Trial Cases and Verdicts in Large Counties, 2001 (April 2004), at 8 (4.3 days vs. 1.9 days).

¹² These awards, like many large awards, often are reduced or reversed. See, e.g., *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 464 (1993) (jury awarded \$10 million in business dispute); *Micro/Vest v. Computerland* (estimated \$400 million jury award), as reported in *Computerland*, N.Y. Times, June 4, 1985, and in *Joni Hersch & W. Kip Viscusi, Punitive Damages: How Juries Decide*, 33 *J. Legal Stud.* 1, 7-8 (2006); *50-Off Stores, Inc. v. Banques Paribas (Suisse), S.A.*, 180 F.3d 247 (5th Cir. 1999) (jury awarded in excess of \$150 million in compensatory, consequential, and punitive damages; punitive award struck on appeal); *City of Hope Nat. Medical Center v. Genentech, Inc.*, 123 Cal. App. 4th 306 (2004), review granted, 20 Cal. Rptr. 3d 234, 238 (2005) (\$300,164,130 compensatory damages and \$200 million in punitive damages awarded in patent royalty dispute); *Rubicon Petroleum Inc. v. Amoco Production Co.*, as reported in, *Amoco Loses Oilfield Suit*, N.Y. Times, Nov. 24, 1993 (\$417 million jury award); *Time Warner Entertainment Co. v. Six Flags Over Georgia, LLC*, 563 S.E.2d 178 (Ga. App. 2002)

litigants may fear that juries will be unable to understand the legal or factual issues in a complex civil case. For purposes of testing hypotheses in this article, we rely on the dominant view that businesses are on average expected to be anti-jury. But we also note that the real-world operation of the legal system casts doubt on any monolithic view of juries. Depending on the circumstances of a case, business defendants may choose jury trials and plaintiffs' attorneys may avoid them. For example, the plaintiffs' legal strategy in the tobacco cases that generated the largest settlement in litigation history¹³ was initially designed to employ Mississippi's Chancery division in which there would be no jury.¹⁴

A. Jury Trial Waivers Generally

Businesses' fear of juries, and jury trials' likely greater cost than bench trials, generates the hypothesis that, in a data set of contracts freely agreed to by sophisticated business entities, we will always, or nearly always, observe waivers of jury trial. Correspondingly, if a jury trial waiver clause is absent from an agreement, it is reasonable to infer that the parties viewed jury trial availability as a positive benefit or at least were

(sustaining \$257 million punitive award), cert. denied, 538 U.S. 977 (2003); Pioneer Commercial Funding Corp. v. American Financial Mortg. Corp., 855 A.2d 818 (Pa. 2004) (striking large jury award); COC Services, Ltd. v. CompUSA, Inc., 150 S.W.3d 654 (Tex. App. 2004), review denied, June 9, 2006 (striking large punitive damages award); Amoco Chemical Co. v. Certain Underwriter's at Lloyd's of London, 1996 WL 407855 (Cal. App.) (reversing large jury award); IGEN Intern., Inc. v. Roche Diagnostics GmbH, 335 F.3d 303 (4th Cir. 2003) (reducing award of about \$505 million by over 90 percent). In MMAR Group, Inc. v. Dow Jones & Co., a jury awarded \$220,720,000 in compensatory and punitive damages. A retrial was ordered based on plaintiff discovery abuse, see Felicity Barringer, Judge Says Record Libel Case Should Be Retried, N.Y. Times, Apr. 9, 1999, and it is reported that MMAR eventually chose not to pursue the case. David McHam, Law & the Media in Texas: Handbook for Journalists, available at <http://www.texaspress.com/Lawpress/LawMedia/Libel/TexasLibelCases.htm> (visited Aug. 9, 2006). Thomas Petzinger, Jr., Oil and Honor: The Texaco-Pennzoil Wars (1987) describes the multi-billion dollar award in a corporate control battle.

¹³ In the Master Settlement Agreement that ended the states' civil actions against tobacco company defendants, the defendants agreed to pay over \$200 billion, fully protected against inflation, to the states. See <http://www.naag.org/backpages/naag/tobacco/msa> (visited Oct. 30, 2006).

¹⁴ Richard P. Ieyoub & Theodore Eisenberg, State Attorney General Actions, the Tobacco Litigation, and the Doctrine of *Parens Patriae*, 74 Tulane L. Rev. 1859, 1860 n.2 (2000); Doug Rendleman, Common Law Restitution in the Mississippi Tobacco Settlement, 33 Ga. L. Rev. 847, 894 (1999).

indifferent as between jury trials and bench trials. The incidence of jury trial waivers, if it is significantly less than 100 percent, provides some rough measure of the degree to which preserving access to juries is perceived to provide greater efficiency or fairness in dispute resolution as compared to precluding access to juries.

Hypothesis: Sophisticated parties will (nearly) always opt to waive jury trials.

B. Contract-Specific Factors

We note elsewhere that commentators have suggested that arbitration clauses will be preferred, relative to litigation, when the rules of decision are clear and unambiguous.¹⁵ Similarly, contracting parties who seek certainty may prefer to commit to judicial adjudication to avoid “noisy” juries that are perceived as more likely to misjudge clear cases. Contracting parties may believe, *ex ante*, that their litigation positions will be reasonable and strong. A party who expects to have a strong case may opt for the presumably more reliable judge to vindicate his position.¹⁶ The tendency to assume the simple correctness of one’s position may be stronger in the case of standardized contracts than in the case of contracts open to more interpretation. This suggests that we would tend to observe jury trial waiver clauses in standardized contracts.¹⁷

¹⁵ For discussion of the arbitration clauses, see Theodore Eisenberg & Geoffrey Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in Publicly-Held Companies' Contracts* (October 11, 2006). Cornell Legal Studies Research Paper Series No. 06-023, available at SSRN: <http://ssrn.com/abstract=927423>, DePaul L. Rev. (forthcoming); see William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. Legal Stud. 235, 249 (1979).

¹⁶ Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 Stan. L. Rev. 1477, 1501 (1999); Clermont & Eisenberg, *Trial by Jury or Judge*, supra note 11, at 1135-37.

¹⁷ Another factor that may influence the appeal of jury trials is the degree to which a contract is relational. It has been observed that, “Presumably, expert juries are far superior to lay juries in recognizing and articulating customary practices that govern particular transactions.” Robert E. Scott, *The Case for Formalism in Relational Contract*, in *Relational Contract Theory: Unanswered Questions*, A Symposium in Honor of Ian R. MacNeil, 94 Nw. Univ. L. Rev. 847, 871 (2000). Expertise in the relevant contract field likely appeals to contracting parties when the customary practices associated with relational contracts are likely to be at issue. They might prefer bench trials to jury trials on the theory that judges are more like

More generally, it is reasonable to expect that different contract types provide varying incentives for the parties to welcome or reject possible jury adjudication. An employment contract may raise fears in an employer's mind (or hope in the employee's mind) of a runaway jury awarding huge amounts to a sympathetic employee. An underwriting agreement between a securities issuer and an underwriter may trigger less fear of a jury siding with a sympathetic plaintiff.

Hypotheses:

- 1. Jury waiver clauses will be more commonly observed when contracts are standardized than when they are individually negotiated.*
- 2. Jury waiver clauses will vary by contract type.*

A contract that designates a forum opts in to a jury pool. Expectations about the potential jury pool ought to be associated with including a jury trial waiver clause. We therefore expect jury trial waiver rates to vary by choice of forum. The state law chosen, like the forum, may reflect views about the characteristics of juries in the jurisdiction chosen compared to other jurisdictions. If the parties believe a state's jury system is

expert juries than are juries. But see Ian R. MacNeil, Relational Contract Theory: Challenges and Queries, in Symposium, *supra*, 94 Nw. U. L. Rev. 877, 906 (2000) ("Even in equity, such courts [of general jurisdiction with their nonspecialist judges] are relatively poorly equipped to deal with implementation of living-contract norms, as compared to mediators, arbitrators, or specialist administrative agencies."). It may be that contracting parties believe a group of jurors is more likely to implement "living-contract norms" than a nonspecialized judge. It is thus unclear whether one should expect relational contract status to be associated with the presence of jury trial waiver clauses. This theoretical ambiguity is accompanied by our inability to observe in the instant data set whether a contract is in fact relational. A settlement, for example, may mark the termination of a short-term or long-term relation or may be the harbinger of a continued relation.

We nevertheless crudely coded for relational status based on contract categories. We coded the following contract categories as more likely to be relational: credit commitments, employment, licensing, pooling service agreements, and security agreements, and the following categories as less likely to be relational: asset sales, bond indentures, mergers, securities purchase, settlements, and underwritings. In models not reported here, we found a positive significant association between relational contract status and jury trial waiver. The results are a bit difficult to interpret. For low standardization contracts, relational contracts waive juries less. For high standardization contracts, relational contracts waive juries more. The latter result trumps the former because many more contracts are characterized as relational than nonrelational.

highly efficient and fair, that might be viewed as reducing the costs of litigation, and provide a reason to designate a jurisdiction as the choice of law.

Hypotheses: Jury waiver clauses will vary by contract choice of forum and choice of law.

C. Party-Specific Factors

Juries are viewed as especially threatening to “outsiders.” Non-U.S. parties to contracts likely fear the U.S. legal system and may be especially fearful of U.S. juries. For example, one reason for the widespread use of arbitration in commercial contracts is that people distrust foreign countries’ legal systems.¹⁸ Foreign contracting parties, many of whom are unaccustomed to legal systems with civil jury trials, would be especially fearful of jury trials.

Hypothesis: Jury trial waivers will be observed more frequently for international contracts than for domestic contracts.

A party’s business location is a logical characteristic to consider for association with jury trial waivers because business location also relates to where events under a contract might occur. The location of events influences the governing law and expected adjudication forum and, therefore, influences the jury pool that contracting parties might expect to encounter. Similarly, a company’s state of incorporation should be associated with the likelihood of it being sued in that state. Many causes of action may be brought in a company’s state of incorporation.¹⁹ The state of incorporation thus should be

¹⁸ See, e.g., Christopher R. Drahozal, Privatizing Civil Justice: Commercial Arbitration and the Civil Justice System, 9 Kan. J.L. & Pub. Pol’y 578 (2000). But empirical evidence about U.S. court mistreatment of foreigners is lacking. Kevin M. Clermont & Theodore Eisenberg, Xenophilia in American Courts, 109 Harv. L. Rev. 1120 (1996).

¹⁹ E.g., 28 U.S.C. § 1391(c) (for venue purposes, a corporation is “deemed to reside in any judicial district in which it is subject to personal jurisdiction”).

associated with increased risk of adjudication in a state's courts, and exposure to the state's jury pools.

Choice of forum, choice of law, place of business, and place of incorporation can directly influence the expected jury pool. Each of these characteristics directly relates to the state in which adjudication will occur or in which events leading to adjudication will occur. Attorney locale likely exerts its influence indirectly, through its association with one or more of these four geographical factors. The contracting attorney's locale is especially likely to be associated with choice of law, choice of forum, and place-of-business.²⁰ For example, in merger contracts New York attorneys are more likely than other attorneys to specify a litigation forum.²¹ And an attorney's location could influence whether a jury trial waiver clause is used if local practice or custom influences use of such a clause.

Hypotheses: Jury waiver clauses will vary by place of business and place of incorporation.

It is less clear whether jury trial waiver rates should be expected to be associated with particular industries. But it is plausible to believe that some industries likely have developed more of a tendency than other industries to include jury waiver clauses. And the reasons for variation across industries likely mirror some of the reasons for inter-contract-type variation. An industry with more standardized contracts might seek to avoid purportedly noisy juries more than industries with more varying contracts.

Hypothesis: Jury waiver clauses will vary across industries.

²⁰ Theodore Eisenberg & Geoffrey P. Miller. Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements (July 20, 2006), NYU Law and Economics Research Paper No. 06-31, available at SSRN: <http://ssrn.com/abstract=918735>, Vanderbilt L. Rev. (forthcoming).

²¹ Id.

D. External Factors

Several factors might generate interstate variation in jury trial waiver rates. One motivation for waiving jury trials, the presumed cost savings of avoiding such trials, might vary across states. One observable proxy for costs is time to adjudication. Case processing time varies across locales.²² A busy metropolitan court system may take years longer to complete a jury-tried case compared to a bench-tried case and the delay attributed to jury trials has long been associated with the possibility of jury trial waiver.²³ More rural court systems may have little or no backlog for either kind of trial. Empirical evidence indicates that parties choose between judge and jury trial in part based on the difference in the two trial modes' time to final adjudication.²⁴ The local difference between the jury trial queue and the bench trial queue, holding other factors constant, should be associated with the rate of jury trial waivers. The greater the positive difference between expected jury and bench time to adjudication, the higher the expected jury trial waiver rate.

Independent of efficiency-based forecasted cost savings, one expects an association between the perceived fairness of a state's juries and the rate of jury trial waiver clauses in contracts connected to a state. The most obvious connection to a state's jury pool is through a choice of forum clause. Our data allow ranking states based on the jury trial waiver clause rates of contracts connected to the states. The Chamber of Commerce of the United States annually ranks states' juries' fairness.²⁵ One measure of

²² For example, our analysis of the Bureau of Justice Statistics data covering trials in 46 counties in 2001, discussed at text accompanying notes 48-53 *infra*, indicates that the mean number of months from filing to disposition was 44.4 in Worcester, Massachusetts and 11.3 in Fairfield, Connecticut.

²³ Hans Zeisel, *The Jury and Court Delay*, 328 *Annals Am. Acad. Political & Social Science* 46 (1960).

²⁴ Clermont & Eisenberg, *Trial by Jury or Judge*, *supra* note 11, at 1145-48.

²⁵ E.g., U.S. Chamber of Commerce *State Liability Systems Ranking Study*, Final Report, Jan. 11, 2002 (Study No. 14966). The Chamber and other business groups use the Chamber's ranking studies to try and

whether perceptions of jury fairness explains jury trial waiver rates is whether states that are perceived as having the least fair juries have the highest rates of jury trial waivers.

We note some limits on what can be expected of state level rankings. Juries are selected at the county or judicial district level, not at the state level. Treating states as the unit of observation groups, for example, rural upstate New York counties with the Bronx and Manhattan. It is straightforward to generate hypotheses as to why these geographic units differ in their litigation and jury characteristics. Nevertheless some perceptions of civil litigation performance, such as the Chamber of Commerce's ranking, exist at the state level and help supply empirically testable hypotheses.

Hypotheses:

- 1. Jury waiver clauses will be more commonly observed when adjudication will be in states with longer adjudication time for jury trials than for bench trials.*
- 2. Jury waiver clauses will be more commonly observed when contracts are connected to states perceived as having unfair juries.*

In addition, some important factors affecting the decision to include a jury trial waiver are not readily observable. For example, the decision in a specific contract about whether to waive a jury trial will depend on the parties' perceptions of the relative advantages to them of jury vs. judge adjudication. Potential advantages may stem from analysis of local characteristics and perceptions of judges and juries, from projections about where adjudication might occur, from contract-specific relative cost projections, and from other factors that are not available to us.

influence courts to restrict causes of action and constrain legal actions against the business community. E.g., Brief of Chamber of Commerce of the United States, 2004 WL 2125702, *Henry v. The Dow Chemical Co.*, 701 N.W.2d 684 (Mich. 2005); Amicus Curiae Brief of Wisconsin Manufacturers and Commerce, 2002 WL 32699975, *Wischer v. Mitsubishi Heavy Inds. America, Inc.*, 673 N.W.2d 303 (Wisc. App. 2002).

III. The Data

The data consist of eleven types of contracts contained as exhibits to Form 8-K “current report” filings with the Securities and Exchange Commission (SEC) for several months in 2002, plus a miscellaneous category of contracts designed as “other”. Form 8-K must be filed by reporting firms to disclose certain material corporate events or changes that have not previously been reported by the company. For eleven contract categories, six months of contracts, covering the period January 1 to June 30, 2002, were studied. For merger contracts, the study covered a seven-month period from January 1 to July 31, 2002.²⁶ We searched all Form 8-K filings and the resulting sample consisted of 2,816 contracts.

The types and numbers of contracts studied are listed in Table 1, together with the number of contracts for which we had information about the presence of a jury trial waiver clause. Most of the contract types are self-explanatory. “Pooling and servicing” contracts are used in mortgage pass-through and other asset-backed securities arrangements; they represent agreements under which an owner transfers receivables to a trustee which holds title to and collects the income from the assets and passes the funds through to investors.²⁷

²⁶ The expanded period for merger contracts exploits our earlier detailed work on choice of law and choice of forum in merger contracts. Eisenberg & Miller, Merger, *supra* note 20.

²⁷ E.g., Circuit City Credit Card Master Trust, Form 8-K, Exh. 4.2, Amended and Restated Master Pooling Service Agreement, Dated as of December 31, 2001, filed Jan. 31, 2002, Doc. No. 02523859, at 21-22. See generally Thomas E. Planck, The Security of Securitization and the Future of Security, 25 *Cardozo L. Rev.* 1655 (2004).

Trust agreements establish these trusts and define certain of their powers and responsibilities. E.g., First Consumers National Bank, Form 8-K, Exh. 4.3, Trust Agreement Between First Consumers Credit Corporation, as Seller, and Bankers Trust Company, as Owner Trustee, Dated as of March 1, 2001, and amended and restated as of December 31, 2001, filed Jan. 31, 2002, Doc. No. 02524022. One assumes that for many issues that might arise under trust agreements no jury-trial right exists because of trusts’

Table 1. Types of Contracts Studied (Number of contracts in parentheses)

Asset sale/purchase (314)	Other (464)
Bond indentures (155)	Pooling and servicing (173)
Credit commitments (217)	Securities purchase (461)
Employment (111)	Security agreements (37)
Licensing (48)	Settlements (72)
<u>Mergers (412)</u>	<u>Underwriting (352)</u>

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts.

Securities purchase agreements were the most frequent contract type (excluding the residual category “Other”) and accounted for 16.4 percent of the total of 2,816 contracts. Credit-related contracts—bond indentures, credit commitments, pooling and servicing agreements, and security agreements—accounted for about another 21 percent of the contracts. Merger contracts were about 15 percent of the sample but note that they had one extra month of coverage in the data. Together, the contract types offer a reasonably rich variety of relations. Several types, including the credit-related contracts, obviously involve substantial financial institutions. Others types, asset sale/purchase and merger contracts, involve corporate restructurings. Settlements involve resolution of disputes. Employment contracts offer insights into jury trial waiver clauses in agreements between key individual employees and large corporate employers.

IV. Bivariate Results

We test the hypotheses that waivers of jury trial will be: (1) regularly observed in contracts involving sophisticated business entities, (2) more frequently observed in

traditional link to equity jurisdiction. E.g., *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993) (“at common law, the courts of equity had exclusive jurisdiction over virtually all actions by beneficiaries for breach of trust”); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) (addressing relation between a claim’s historical origins and the right to jury trial). Drafters of trust agreements may feel less need to include jury trial waiver clauses than drafters of contracts that can be enforced by traditional actions at law. We therefore exclude trust agreements from this study on the ground that jury trials as a belief that jury trials would be unavailable for many trust-related disputes that sought traditional equitable relief.

standardized as compared with individually negotiated contracts, (3) associated with choice of forum or choice of law, (4) more frequently be observed in international contracts, (5) associated with place of business, place of incorporation, or attorney locale, (6) associated with industrial classification, (7) more frequently observed in states regarded as having less fair juries, and (8) will be more frequently observed in states with longer queues to jury trials relative to bench trials.

A. Frequency of Jury Trial Waivers by Contract-Specific Factors

1. Type of Contract

Table 2 reports initial results pertinent to the clause frequency hypothesis. The principal finding is that sophisticated actors do not systematically flee juries. As shown in column (2), only about 20 percent of over 2,800 contracts include clauses waiving jury trials. Substantial variation exists across contract types in the rate at which parties waive jury trials. Jury trials were waived in about two to six percent of bond indenture, employment, pooling service, and underwriting contracts but in about 65 percent of credit commitments and 51 percent of security agreements.

Table 2's third and fourth numerical columns account for the relation between arbitration clauses and jury-trial access. When parties agree to arbitrate, they implicitly waive any right to jury trial. However, unlike explicit jury trial waivers, which are clearly directed at, and hostile to, the jury as a trier of fact, an arbitration clause represents a decision to opt out of litigation altogether. So an arbitration clause may represent a dislike of judges as decision-makers instead of or in addition to juries, or a wish to avoid other aspects of civil trials not necessarily associated with the jury. Accordingly, an arbitration clause can be considered as a form of jury trial waiver, but

subject to the substantial caveat that the decision to forego trials in favor of arbitration is likely to be based on considerations other than the wish to avoid juries (otherwise the parties could simply waive the jury without resorting to an arbitration clause).²⁸

Table 2. Summary of Jury Trial Waiver Clauses by Contract Type

Contract type	No separate treatment of contracts with arbitration clauses		Arbitration clauses treated as jury trial waivers		Total
	(1)	(2)	(3)	(4)	
	No jury trial waiver	Jury trial waiver	No jury trial waiver	Jury trial waiver	
Asset sale purchase (N)	273	41	220	94	314
Percent	86.9	13.1	70.1	29.9	100.0
Bond indentures (N)	152	3	152	3	155
Percent	98.1	1.9	98.1	1.9	100.0
Credit commitments (N)	77	140	74	143	217
Percent	35.5	64.5	34.1	65.9	100.0
Employment contracts (N)	105	6	68	43	111
Percent	94.6	5.4	61.3	38.7	100.0
Licensing (N)	43	5	29	19	48
Percent	89.6	10.4	60.4	39.6	100.0
Mergers (N)	304	108	243	169	412
Percent	73.8	26.2	59.0	41.0	100.0
Other (N)	385	79	357	107	464
Percent	83.0	17.0	76.9	23.1	100.0
Pooling service (N)	167	6	167	6	173
Percent	96.5	3.5	96.5	3.5	100.0
Securities purchase (N)	339	122	291	170	461
Percent	73.5	26.5	63.1	36.9	100.0
Security agreements (N)	17	20	17	20	37
Percent	46.0	54.1	46.0	54.1	100.0
Settlements (N)	60	12	51	21	72
Percent	83.3	16.7	70.8	29.2	100.0
Underwriting (N)	334	18	333	19	352
Percent	94.9	5.1	94.6	5.4	100.0
Total (N)	2,256	560	2,002	814	2,816
Percent	80.1	19.9	71.1	28.9	100.0

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts. Columns (1) and (2) treat contracts with arbitration clauses no differently than other contracts. Columns (3) and (4) treat arbitration clauses as jury trial waivers. Row percents may exceed 100.0 due to rounding.

Columns (3) and (4) in Table 2 show results if one equates arbitration clauses with jury trial waivers. The rate of jury trial waiver then increases from 19.9 percent to 28.9 percent.²⁹ The vast majority of contracts thus continue not to waive jury trials. Characterization of the arbitration clauses does not materially affect the contract

²⁸ Interestingly, we find no significant difference in the rate of jury trial waivers based on whether an arbitration clause was included in the contract. 20.5 percent of 2,449 contracts without arbitration clauses waived jury trial compared to 17.0 percent of 295 contracts with arbitration clauses ($p=0.166$).

²⁹ Excluding contracts with arbitration clauses from the calculation yields a waiver rate of 20.5 percent.

³⁰ Eisenberg & Miller, Arbitration, *supra* note 15.

categories that most frequently expressly waive jury trials, credit commitments and security agreements. But other contract categories do materially change. Employment contracts go from 5.4 percent to 38.7 percent jury trial waivers. Other notable increases result for licensing and settlement agreements.

2. Contract Standardization

We hypothesized that increasing standardization of contract terms would be positively associated with rates of jury trial waivers. Our prior work found a strong inverse association between contract standardization and the use of arbitration clauses.³⁰ We again use an objective measure of standardization by examining the distribution of the choice of law pattern for each contract type. A class of contract that regularly chooses a single choice of law likely has achieved a degree of standardization beyond that of a class of contract that designates many different choices of law.³¹ And, as shown below, the results of categorizing using our standardization measure appear quite plausible. Highly regularized financial transactions such as pooling and servicing agreements and trust agreements score high in standardization. Less regularized contracts, such as settlements and licensing agreements score low by our standardization measure.

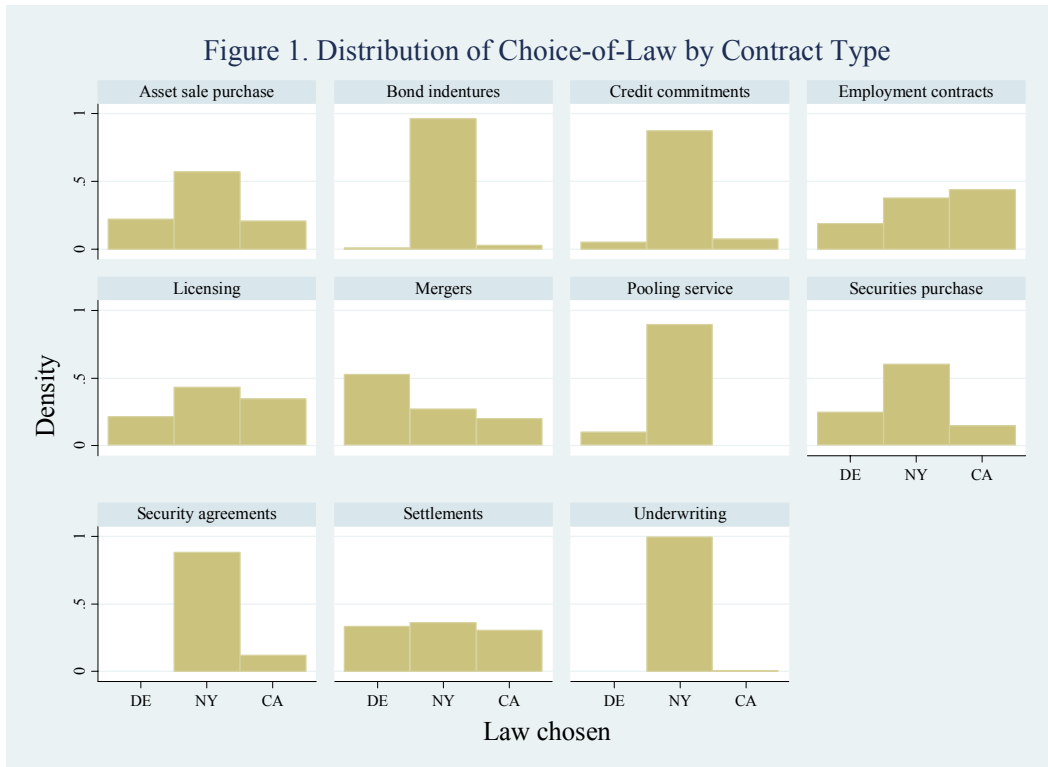
Choice of law-based concentration used to proxy contract standardization can be assessed by focusing on three states, New York, Delaware, and California. These three states account for the choice of law in approximately 70 percent of the contracts in our sample, with New York accounting for 47 percent, Delaware 14 percent, and California eight percent. The choice of law for other contracts is widely dispersed across many

³¹ As we earlier noted, it is theoretically possible for contracts to be completely standardized in all other terms and vary only in choice of law. But that is not likely to be the general tendency.

locales and these contracts can be excluded without sacrificing compromising our measure of concentration. No other locale accounts for even four percent of the choices of law. As before, we use the degree of concentration among the three leading states to classify contracts as having high, medium, or low rates of standardization.

Figure 1 shows, for each of eleven contract categories (the contract category “Other” is excluded from this analysis because of its heterogeneity), the distribution of choice of law among New, York, Delaware, and California. It shows that bond indentures, credit commitments, underwriting contracts, pooling service agreements, and security agreements all have high choice of law concentrations. For example, nearly all bond indentures and underwriting contracts designate New York law as the governing law.

We treat mergers, securities purchase agreements, and asset sale purchase agreements as having medium concentrations. Each has a concentration (or density) of over 0.5 in one state according to the histograms but these three contract types are not nearly as concentrated as the highly concentrated group. Settlements, employment contracts, and licensing agreements have low choice of law concentrations. None has a density of 0.5 in the histograms.

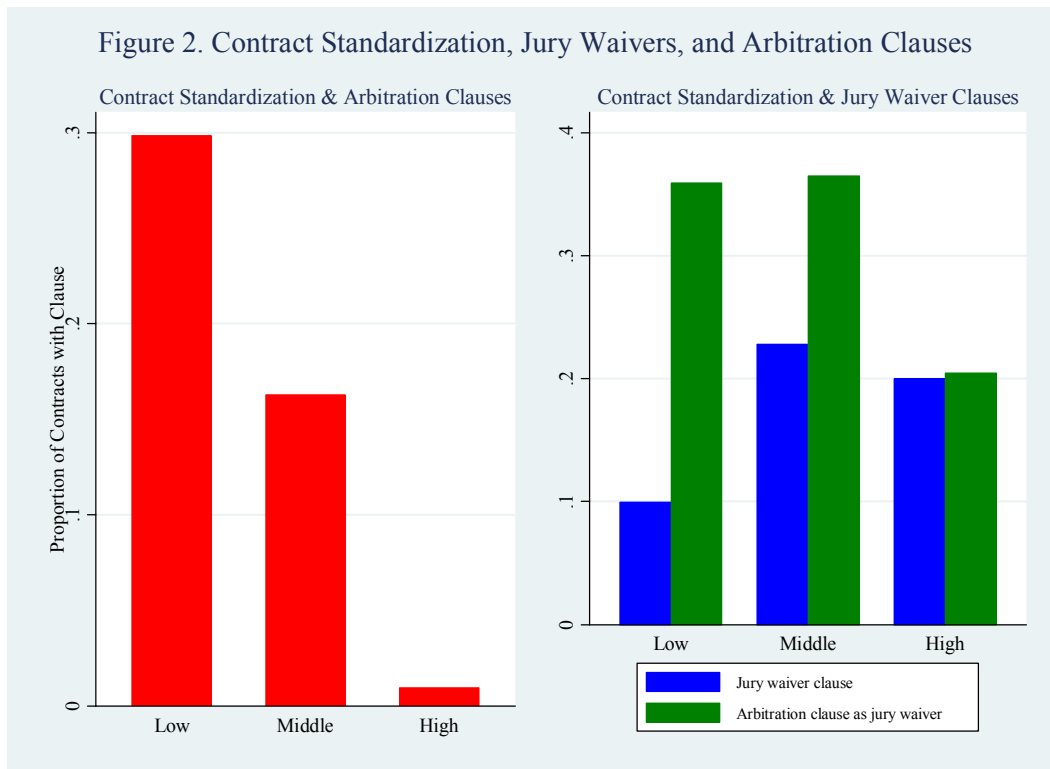


Source. SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts. Each histogram shows the distribution of contracts by choice of law. Contracts designating Delaware, New York, or California law are included. All other contracts are coded as designating an “Other” choice of law and not used in the standardization computation.

Figure 2 uses the measure of contract standardization to explore the relation between standardization and the rate of jury trial waiver clauses. The left-hand part of the figure shows the relation between contract standardization and the rate of arbitration clause use. As earlier reported,³² it shows a definite trend. The relation between standardization and jury trial waivers is less monotonic, as shown in Figure 2’s right-hand portion. Jury trial waiver rates are lowest in low standardization contracts and highest in contracts with mid-level standardization. Jury trial waiver occurs in 23 of 226 (10.2 percent) of low standardization domestic contracts and in 411 of 2,067 (19.9 percent) of medium or high standardization domestic contracts. The difference is highly

³² Eisenberg & Miller, *Arbitration*, supra note 15.

statistically significant ($p < 0.001$). A second set of bars in the right-hand portion of Figure 2 shows that the standardization-waiver pattern changes if one characterizes contracts with arbitration clauses as waiving jury trials. The strong arbitration clause pattern shown in the left-hand portion of the figure tends to override the pattern in non-arbitration-clause contracts. The resulting relation tends to be the opposite of that observed when arbitration clauses are not regarded as jury-specific trial waivers.



Source. SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts. Contract standardization is described in text and Figure 1. “Arbitration clause as jury waiver” codes the waiver as “1” when a contract contains an arbitration clause. Excludes contracts classified as “Other.”

If one excludes contracts with arbitration clauses from consideration (other than those expressly waiving jury trials), thereby treating them as neither jury trial waivers nor non-jury trial waivers, the initial pattern re-emerges. Then waiver rates are significantly different in low standardization contracts compared to medium or high standardization

contracts (14 of 159 (8.8 percent) vs. 413 of 1,870 (22.1 percent; $p < 0.001$)). Thus, of those who want to avail themselves of the court system, as evidenced by the absence of a contractual arbitration clauses, there is a tendency to opt for bench trials in more highly standardized contracts.

3. Contract Choice of forum

We hypothesized that jury trial waiver rates would vary by choice of forum. Table 3 reports the rate of jury trial waivers as a function of choice of forum. It aggregates all states chosen as a forum in fewer than 20 contracts as “Other.” Interstate variation exists, with contracts specifying Illinois as a choice of forum waiving jury trials over 80 percent of the time and contracts specifying California, Texas, or Florida as the forum waiving jury trials about one-third of the time. Delaware, Massachusetts, New York, and Ohio are between the extremes. Assuming that most major contracts in Illinois have a connection to the city of Chicago, the over-80 percent jury trial waiver rate likely reflects a view of Chicago juries (although note that there were only 37 total contracts specifying an Illinois forum).

Interstate variation notwithstanding, Table 3’s most revealing feature is the distinction it shows between contracts that do and do not specify a forum. All of the major states specified as a forum by contract have jury trial waiver rates of at least 33 percent. For contracts that do not specify a forum the jury trial waiver rate is only 6.4 percent. Thus, over 90 percent of lawyers who do not specify a forum do not include jury trial waiver clauses. They are, in a sense, opting in to the court system in all its glory with possible jury or bench trials. This is the single most dominant class of contracts—no forum choice and no jury trial waiver—and accounts for 1,607 of our 2,816 contracts.

A second group of lawyers and parties wants to control the forum but also wishes to preserve access to a jury trial: they make a forum choice but do not waive juries. Except for those contracts specifying Illinois as a forum, more than half the contracts that specify a choice of forum do not opt out of jury trials. This group accounts for 649 contracts. The difference in jury trial waiver rates between those contracts that specify a forum and those that do not is highly statistically significant ($p < 0.001$).

Table 3. Jury Trial Waiver Rates and Contract Choice of forum

Choice-of forum	No separate treatment of contracts with arbitration clauses			Arbitration clauses treated as jury trial waivers		
	N No jury trial waiver	N jury trial waiver	Rate (%)	N No jury trial waiver	N jury trial waiver	Rate (%)
CA	47	26	35.6	38	35	47.9
DE	67	53	44.2	58	62	51.7
FL	28	16	36.4	28	16	36.4
IL	7	30	81.1	5	32	86.5
MA	14	12	46.2	10	16	61.5
NY	236	223	48.6	220	239	52.1
OH	12	10	45.5	11	11	50.0
TX	32	16	33.3	27	21	43.8
Bankruptcy court	19	4	17.4	17	6	26.1
No forum specified	1607	110	6.4	1435	282	16.4
Other	146	57	28.1	119	84	41.4
Foreign forum	41	3	6.8	34	10	22.7
Total	2256	560	19.9	2002	814	28.9

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts. The first three numerical columns treat contracts with arbitration clauses no differently than other contracts. The second set of three numerical columns treats arbitration clauses as jury trial waivers.

A third group of lawyers and parties wants to specify the forum, and avoid juries, but preserve access to judges: they make a forum choice and waive jury trials. This group accounts for 450 contracts. A fourth, small group, consisting of 110 contracts does not specify a forum but does waive jury trials. Thus the vast majority who do not specify a forum fully opt into the legal system by preserving access to jury trials. A fifth group of contracts opts out of the court system altogether by including a contractual arbitration clause. Table 3's second set of three columns shows that this group is at work in about

nine percent of the contracts and one could appropriately reduce the number of members in the first four groups to reflect those fully opting out of the system.

Two of the forum choices in Table 3, though infrequent, merit additional comment. Twenty-three contracts specified bankruptcy courts as the forum, presumably because one or more of the parties was involved in a bankruptcy proceeding as debtor or creditor. In 1994, Congress amended Title 28 to resolve continuing doubt about bankruptcy courts' authority to conduct jury trials. If a right to a jury trial applies to a matter that may be heard by a bankruptcy judge, the judge "may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties."³³ The consent requirement does not necessarily mean that a contract specifying a bankruptcy court forum thereby assures avoidance of a jury trial. A proper jury demand may result in the withdrawal of the case from the bankruptcy court and adjudication by a federal district court.³⁴ It therefore is appropriate to include in the analysis contracts specifying a bankruptcy court forum. An additional 44 contracts specified a foreign forum. Jury trials in civil cases outside the United States are uncommon and one might not expect such contracts to systematically waive jury trial, because doing so would be unnecessary. But contracts specifying a foreign forum do not conclusively determine the forum because courts where an action is filed may not respect the choice. An express waiver of jury trial would further reduce the risk of a jury trial and the absence of such a waiver therefore can be of importance. In any event, including these few foreign-forum contracts does not have a material effect on the results.

³³ 28 U.S.C. § 157(e).

³⁴ E.g., *Michaelesco v. Shefts*, 303 B.R. 249 (D. Conn. 2004). Under 28 U.S.C. § 157(d), a district court may withdraw cases from the bankruptcy court for cause. The presence of a jury demand can influence the cause determination. *In re Orion Pictures Corp. v. Showtime Networks*, 4 F.3d 1095, 1101 (2d Cir.1993); *In re Kenai Corp. v. National Union Fire Ins. Co.*, 136 B.R. 59, 61 (S.D.N.Y.1992).

4. Contract Choice of law

As in the case of choice of forum, jury trial waivers may vary with choice of law. Because choice of law is concentrated in three states, we report the rates of jury trial waivers for four choices of law: Delaware, New York, California, and Other.³⁵

Table 4 shows the rate of jury trial waivers for the four values of choice of law. Unlike choice of forum, virtually every contract specifies a choice of law. And, unlike variation by forum chosen, rather little variation in jury trial waiver rates exists across choices of law. Table 4's first three numerical columns show that the jury trial waiver rate varies by about four percent with 23.7 percent of contracts specifying Delaware law waiving jury trial compared to 19.6 percent of contracts specifying New York law. The waiver rates do not differ significantly across the four groups ($p=0.357$). Greater and statistically significant variation exists if one regards arbitration clauses as jury trial waivers, as shown in the table's last three columns. Here nearly all of the variation is attributable to New York's rather low rate of arbitration clauses.³⁶

Table 4. Jury Trial Waiver Rates and Contract Choice of law

Choice of law	No separate treatment of contracts with arbitration clauses			Arbitration clauses treated as jury trial waivers		
	N No jury trial waiver	N jury trial waiver	Rate (%)	N No jury trial waiver	N jury trial waiver	Rate (%)
DE	289	90	23.7	245	134	35.4
NY	1047	255	19.6	1002	300	23.0
CA	175	44	20.1	136	83	37.9
Other	659	165	20.0	546	278	33.7
Total	2170	554	20.3	1929	795	29.2

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts. The first three numerical columns treat contracts with arbitration clauses no differently than other contracts. The second set of three numerical columns treats arbitration clauses as jury trial waivers.

³⁵ For contracts that designate more than one state's law (for example, New York law governs except where Delaware law applies), we use the first-mentioned state.

³⁶ See Eisenberg & Miller, *Arbitration*, supra note 15.

B. Party-Specific Factors

1. International Contracts Compared to Domestic Contracts

Prior research suggests that foreigners may fear domestic U.S. courts, and in particular U.S. juries, more than domestic parties, and therefore may prefer juries less than domestic parties.³⁷ Table 5 reports the rate at which domestic and international contracts have jury trial waivers. Columns (1) and (2) report results that include contracts with arbitration clauses without characterizing all arbitration clauses as jury trial waivers. About 20 percent of both domestic and international contracts contain jury trial waivers and the difference is not statistically significant.

Table 5. Summary of Jury-Trial Waiver Clauses by Party Status

	No separate treatment of contracts with arbitration clauses		Arbitration clauses treated as jury trial waivers		Total
	(1)	(2)	(3)	(4)	
	No jury trial waiver	Jury trial waiver	No jury trial waiver	Jury trial waiver	
No non-U.S. party (N)	2,034	507	1,829	706	2,541/2,535
Percent	80.1	20.0	72.2	27.9	100.0
Non-U.S. party (N)	219	53	166	106	270
Percent	80.5	19.5	61.0	39.0	100.0
Total (N)	2,253	560	1,995	812	2,813/2,807
Percent	80.1	19.9	71.1	28.9	100.0

p = 0.936 for columns (1) and (2); p < 0.001 for columns (3) and (4).

Source: SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts. Variation in Total column is due to missing values. Columns (3) and (4) treat arbitration clauses as jury trial waivers. Contracts in which either party is a non-U.S. entry are coded as Non-U.S. party contracts. Row percents may exceed 100.0 due to rounding.

Columns (3) and (4) in Table 5 characterize arbitration clauses as waivers of jury trial. As reported in previous work, arbitration clauses are significantly more common for international contracts, although still infrequent in absolute terms.³⁸ Treating

³⁷ Clermont & Eisenberg, *Xenophilia*, supra note 18, at 1120 (quoting statement that Japanese litigants cannot get a fair trial because of anti-Japanese bias among American jurors).

³⁸ Eisenberg & Miller, *Arbitration*, supra note 15.

³⁹ One could employ models that include two business locales for a contract. E.g., Eisenberg & Miller, *Arbitration*, supra note 15 (considering acquired and acquiring companies locales in study of mergers). But the instant analysis already accounts for several geographical dimensions—choice of forum, choice of law, place of dominant contracting party's business, incorporation, and attorney locale. The marginal contribution of a second place of business or incorporation is likely to be small.

arbitration clauses as jury waivers therefore affects international contracts more than domestic contracts. Column (4) shows that 39 percent of international contracts then contain waivers compared to about 28 percent of domestic contracts. The result is statistically significant at $p < 0.001$.

2. Place of Business

We code business location at the state level. Designating a single business locale per contract requires considering the nature of the contract.³⁹ For some types of contract, such as merger, two places of business are plausible, the acquiring company's and the acquired company's. For such contracts, we used what one might expect would normally be the dominant place of business. For example, for merger contracts, we use the acquiring company's place of business. Table 6 shows the business locale chosen for eleven types of contracts. Because of the varied nature of the contract category "Other," we exclude such contracts from this analysis.

Table 6. Place of Business Assigned to Each Contract Type

Contract type	Place of business used
Asset sale purchase	Buyer's place of notice location
Bond indentures	Issuer's place of business
Credit commitments	Principal lender's designated office
Employment contracts	Employer's place of business
Licensing	Licensor's place of business
Mergers	Acquiring company's place of business
Pooling and servicing	Depositor's place of business
Securities purchase	Issuer's place of business
Security agreements	Registrant's place of business
Settlements	Reporting company's place of business
Underwriting	Issuer's place of business

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts. Excludes contracts categorized as "Other".

Table 7 shows the pattern of jury trial waiver rates by place of business. Places of business are much more diffuse than choices of law so we report separate results for more states in the analysis. Like the previous tables, Table 7 reports the rate of express

jury trial waivers and also reports the rate of jury trial waivers if one equates an arbitration clause with a jury trial waiver.

Table 7. Jury Trial Waiver Rates and Place of Business

Place of business	No separate treatment of contracts with arbitration clauses			Arbitration clauses treated as jury trial waivers		
	N No jury trial waiver	N jury trial waiver	Rate (%)	N No jury trial waiver	N jury trial waiver	Rate (%)
AZ	31	1	3.1	24	8	25.0
CA	293	82	21.9	246	129	34.4
CAN	34	5	12.8	27	12	30.8
CO	45	7	13.5	38	14	26.9
CT	36	8	18.2	34	10	22.7
DC	11	1	8.3	10	2	16.7
DE	26	7	21.2	26	7	21.2
FL	85	27	24.1	75	37	33.0
GA	31	11	26.2	28	14	33.3
IL	66	26	28.3	64	28	30.4
LA	19	2	9.5	14	7	33.3
MA	48	26	35.1	45	29	39.2
MD	36	11	23.4	35	12	25.5
MI	20	0	0.0	19	1	5.0
MN	50	10	16.7	47	13	21.7
MO	19	6	24.0	17	8	32.0
NC	40	11	21.6	36	15	29.4
NH	10	2	16.7	9	3	25.0
NJ	63	17	21.3	55	25	31.3
NV	37	2	5.1	36	3	7.7
NY	208	75	26.5	187	96	33.9
OH	29	10	25.6	27	12	30.8
OR	10	8	44.4	8	10	55.6
PA	67	9	11.8	52	24	31.6
TX	169	42	19.9	153	58	27.5
UT	27	4	12.9	22	9	29.0
VA	51	5	8.9	50	6	10.7
WA	38	3	7.3	29	12	29.3
Other	272	63	18.8	232	103	30.7
Total	1871	481	20.5	1645	707	30.1

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts. Excludes contracts categorized as "Other". Place of business is assigned to a single state as described in Table 6.

The rates of jury trial waivers vary from zero for contracts associated with Michigan to 44.4 percent for contracts associated with Oregon. This variation persists if one equates arbitration clauses with jury trial waiver, now ranging from 5.0 percent in Michigan to 55.6 percent in Oregon. But both states have relatively few contracts associated with them.

For the states with substantial numbers of contracts—California, Florida, New York, and Texas each have more than 100 contracts—waiver rates are relatively stable. For these larger states, the jury trial waiver rates vary from 26.5 percent in New York to 19.9 in Texas. These two extremes do not significantly differ ($p=0.108$). If one equates arbitration clauses with waivers, the waiver rate ranges from 34.4 percent in California to 27.5 percent in Texas. That difference is only marginally statistically significant ($p=0.097$).

3. Place of Incorporation

For some types of contract, such as merger, two places of incorporation are plausible, the acquiring company's and the acquired company's (but they will often be the same—Delaware). Place of incorporation for a contract is assigned using the same criteria as was used for place of business above. For example, in merger contracts, the acquiring company's place of incorporation is used.

Table 8 reports the proportion of contracts with jury trial waiver clauses. To keep the output manageable and focus on the states with the most incorporations, we separately report results only for the six states with at least 50 contracts with a contracting party being incorporated in the state. States with fewer such contracts are included in the residual category, "Other."

The table confirms that Delaware of course dominates the number of incorporations and variation in place of incorporation can therefore only contribute a limited amount to explaining the overall pattern of jury trial waivers. Nevertheless, variation does exist with waiver rates varying from 12.2 percent in Nevada to 33.8

percent for those contracts with companies incorporated in New York. The differences in both sections of the table are highly statistically significant ($p < 0.001$).

Table 8. Jury Trial Waiver Rates and Place of Incorporation

Place of incorporation	No separate treatment of contracts with arbitration clauses			Arbitration clauses treated as jury trial waivers		
	N No jury trial waiver	N jury trial waiver	Rate (%)	N No jury trial waiver	N jury trial waiver	Rate (%)
CA	74	12	14.0	61	25	29.1
DE	916	194	17.5	822	288	25.9
FL	46	12	20.7	38	20	34.5
MD	73	14	16.1	71	16	18.4
NV	129	18	12.2	105	42	28.6
NY	49	25	33.8	47	27	36.5
Other	584	206	26.1	501	289	36.6
Total	1871	481	20.5	1645	707	30.1

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts. Excludes contracts categorized as “Other”. Separately reports only states with at least 50 contracts with the key contracting party being incorporated in the state.

4. Attorney Place of Business

Information about attorney locale is sketchier in our data than is information about the other geographic factors. Attorney locale is only available for law firms mentioned in the Form 8-K so we are limited to using whatever law firms appear in the form with useable addresses. And we could not always link an attorney mentioned with a principal party to the contract.

Table 9 reports the attorney locale and the rate of jury trial waiver clauses. It separately reports only states with at least 50 attorney locales. Attorney locale is more dispersed than choice of law. As shown above, Delaware, New York, and California account for almost 70 percent of the choices-of-law but they account for much less than 50 percent of the attorney locales. Delaware as a locale for attorneys was not extracted from even 50 contracts. Even taking into account the greater likelihood of missing data for attorney locale, New York and California are the leading attorney locales but they represent only a small portion of the contracts. Table 9 indicates that New York can be

identified as an attorney locale in 269 contracts and California can be identified as an attorney locale in 182 contracts. The large “Other” attorney-locale category makes us reluctant to conclude whether attorney locale is more or less concentrated than business locale.

Table 9. Jury Trial Waiver Rates and Attorney Locale

Attorney locale	No separate treatment of contracts with arbitration clauses			Arbitration clauses treated as jury trial waivers		
	N No jury trial waiver	N jury trial waiver	Rate (%)	N No jury trial waiver	N jury trial waiver	Rate (%)
CA	119	63	34.6	98	84	46.2
IL	34	17	33.3	30	21	41.2
MA	33	22	40.0	25	30	54.5
NY	197	72	26.8	180	89	33.1
PA	43	7	14.0	36	14	28.0
TX	66	24	26.7	59	31	34.4
Other	1379	276	16.7	1217	438	26.5
Total	1871	481	20.5	1645	707	30.1

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts. Excludes contracts categorized as “Other”. Separately reports only states with at least 50 contracts indicating the state is an attorney’s locale.

California’s 34.6 percent of contracts with jury trial waivers is higher than New York’s rate of 26.8 percent, but the difference is only marginally statistically significant ($p=0.076$). Table 9’s last three columns shows that the difference grows ($p=0.006$) if one regards arbitration clauses as jury trial waivers due to California contracts’ relatively greater use of arbitration clauses than New York contracts.⁴⁰ The lack of significance for New York attorneys is intriguing given our finding in an earlier study that New York attorneys were significantly more likely than attorneys in other states to include choice of forum provisions in merger contracts, thus suggesting that they pay close attention to *ex ante* dispute resolution considerations. But such attention apparently does not motivate them to waive jury trials for their clients at a significantly above-average rate.⁴¹

⁴⁰ Eisenberg & Miller, Arbitration, *supra* note 15.

⁴¹ Note also the prominence of merger contracts and attorney locale in the branch of Figure 5’s classification tree (below) when a contract does not specify a forum. Merger contracts are the highest node under the no-forum-specified node and attorney locale is the highest node under merger contracts.

5. Industry Groups

We hypothesized that jury trial waiver may vary by industry. A reporting company's SEC filing includes its Standard Industry Classification (SIC), which consists of a four-digit SIC code.⁴² The SIC system used in SEC filings yields many industry categories that contain too few firms to allow for reasonable statistical analysis. We therefore regroup the SIC categories into 17 reasonably-sized classifications.⁴³

Table 10 reports the rate of jury trial waiver clauses by these classifications. Waiver clause use varies by industry. The table as a whole yields statistically significant inter-industry differences ($p < 0.001$). The "Finance, insurance, real estate" grouping is the largest, accounting for over one-quarter of the contracts, and has a low rate (11.3 percent) of jury trial waiver clauses. The "Transportation and utilities" industry has the same low rate. The highest rate of jury trial waiver clauses, 33.1 percent, is in the "Electrical and electronic equipment" grouping. Comparing Table 10 to Table 2 indicates that the range of jury trial waiver rates is much smaller across industry (11.3 to 33.1 percent) than it is across contract type (1.9 to 64.5 percent). Industry practice thus appears to be less of a driving force on trial jury waiver rates than is the kind of contract.

⁴² See <http://www.sec.gov/info/edgar/siccodes.htm>.

⁴³ We started with the 28 industry groups used in U.S. Gen. Acct. Off., Public Accounting Firms: Mandated Study on Consolidation and Competition, GAO-3-864, at 111 (July 2003). These were reduced to the 17 industry groups used in Theodore Eisenberg & Jonathan R. Macey, Was Arthur Andersen Different?: An Empirical Examination of Major Accounting Firms' Audits of Large Clients, 1 J. Empirical Legal Stud. 263 (2004).

Table 10. Jury Trial Waiver Rates and Industry

Major industry groups	No separate treatment of contracts with arbitration clauses			Arbitration clauses treated as jury trial waivers		
	N No jury trial waiver	N jury trial waiver	Rate (%)	N No jury trial waiver	N jury trial waiver	Rate (%)
Mineral industries	83	18	17.8	72	29	28.7
Construction industries	19	7	26.9	16	10	38.5
Manufacturing	119	41	25.6	105	55	34.4
Transportation & utilities	94	12	11.3	91	15	14.2
Communications	82	25	23.4	76	31	29.0
Wholesale trade	57	28	32.9	50	35	41.2
Retail trade	69	28	28.9	59	38	39.2
Finance, Insurance, real estate Services	673	86	11.3	647	112	14.8
Services	405	149	26.9	333	221	39.9
Instruments & related products	50	18	26.5	43	25	36.8
Food & kindred products, agriculture, forest, fishing	24	10	29.4	23	11	32.4
Paper & allied products	18	3	14.3	16	5	23.8
Chemicals & allied products	123	33	21.2	102	54	34.6
Industrial machinery & equip.	78	23	22.8	58	43	42.6
Electrical & electronic equip.	87	43	33.1	70	60	46.2
Transportation equipment	23	5	17.9	19	9	32.1
No SIC listed or SIC missing	252	31	11.0	222	61	21.6
Total	2256	560	19.9	2002	814	28.9

Source: SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts.

C. Jury-Trial-Related Factors External to the Parties or the Contract

Jury-related factors external to the contracts and parties should influence jury trial waiver clause rates. These factors should mediate the effect of the contract-specific and party-specific factors discussed. The contract type is what it is and the parties are what they are. They likely do not acquire or modify their characteristics as the result of jury-related considerations.

In contrast, jury-related factors external to the parties and contracts may directly influence contracting parties considering jury trial waivers. If the parties perceive juries to be unfair, that could directly translate into a jury trial waiver regardless of party or contract characteristics. The parties can retain their choice of law, choice of forum, and other salient contract terms without the need to subject themselves to what they fear may be an unfair adjudicator. If the parties perceive jury trials to be relatively costly and inefficient, such trials can be avoided without altering other contract characteristics.

1. Perceived Fairness of States' Juries

The Chamber of Commerce of the United States annually ranks states' civil justice systems.⁴⁴ One measure of whether perceptions of juries are associated with the rate of jury trial waivers is whether states perceived to have the least fair juries have the highest rates of jury trial waiver clauses. Figure 3 shows the relation between a state's rate of jury trial waiver clauses and large corporations' (as surveyed by the Chamber of Commerce) perceptions of the fairness of a state's juries.⁴⁵ We associate states with contracts based on what we expect is the contractual term that most directly addresses the potential jury pool, the choice of forum.

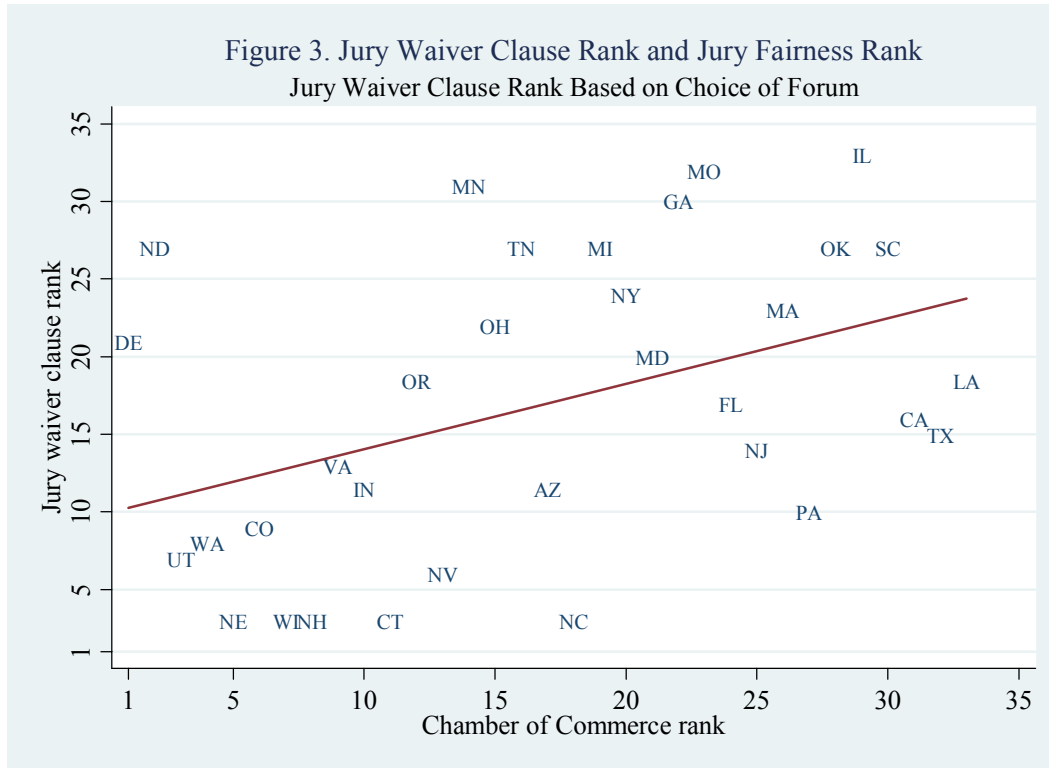
If a positive association exists between jury fairness perceptions and jury trial waiver clause rates exists, the data points in the figure should flow from lower left to upper right. The lower left of the figure, near the origin, corresponds with high, favorable rankings in perceived jury fairness and low rankings in arbitration clause rates. The upper right corresponds with low rankings in perceived jury fairness and high-ranking jury trial waiver clause rates. The expected relation is observed. Figure 3 shows a reasonably strong association between perceived jury fairness and rate of jury trial waivers. A measure of the linear correlation, as represented by the straight line in the figure, is statistically significant (ρ (correlation)=0.42; $p=0.014$).⁴⁶ If one drops contracts

⁴⁴ E.g., U.S. Chamber of Commerce, *supra* note 25. The Chamber and other business groups use the Chamber's ranking studies to try and influence courts to restrict causes of action and constrain legal actions against the business community. E.g., Brief of Chamber of Commerce of the United States, 2004 WL 2125702, *Henry v. The Dow Chemical Co.*, 701 N.W.2d 684 (Mich. 2005); Amicus Curiae Brief of Wisconsin Manufacturers and Commerce, 2002 WL 32699975, *Wischer v. Mitsubishi Heavy Inds. America, Inc.*, 673 N.W.2d 303 (Wisc. App. 2002). We use the 2002 Chamber Report because it corresponds to the year of our contracts.

⁴⁵ Chamber of Commerce, *supra* note 25, at 28 (tbl. 15 Juries' Fairness).

⁴⁶ This result is based on counting each state as an equal observation and using rankings. Using Kenall's tau yields $p=0.022$. Weighting by the number of contracts for each state reduces size and significance of the effect (ρ (correlation)=0.14; p (significance)=0.427). But limiting the sample to states with at least five

with arbitration clauses from the sample or counts arbitration clauses as jury trial waivers, the results do not materially differ.⁴⁷



Sources. U.S. Chamber of Commerce State Liability Systems Ranking Study, Final Report, Jan. 11, 2002 (Study No. 14966); SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts. Low numerical rankings in the Chamber’s system correspond to more fairly ranked jury trial systems. We include states specified as a forum in at least two contracts. The Chamber ranking for the remaining states is not included and the 33 included states were re-ranked from 1 to 33. Ties in rank are not broken.

2. Difference in Adjudication Time for Judge and Jury Trials

The second external influence on trial waivers considered is the relative length of the jury trial and bench trial queues in a state. We assess the time on the docket for jury

contracts yields a result similar to the unweighted correlation ($\rho=0.36$; $p=0.090$). Contract-level models that account for both the number of observations and other factors are discussed in Part V.

⁴⁷ Using the waiver rate resulting from treating arbitration clauses as waivers yields a correlation of 0.45; $p=0.009$.

⁴⁸ The 75 counties from which the sample was drawn include approximately 33 percent of the 1990 U.S. population; the actual 46 counties contributing data account for approximately 20 percent of the population. For a summary of the data and methodology, see Bureau of Justice Statistics Bulletin, *supra* note 1. The data include information of trial length in large counties in 16 states: Arizona, California, Connecticut, Florida, Georgia, Illinois, Massachusetts, Minnesota, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Texas, Washington.

and bench trials using trial data from the *Civil Justice Survey of State Courts*, a project of the National Center for State Courts and the Bureau of Justice Statistics (“BJS”). The data come directly from state court clerks’ offices and include information on judge and jury trials for all tort, contract, and property trials completed in 2001 in a random sample of 46 of the 75 most populous counties in the United States.⁴⁸

Due to data limitations, we can only partially explore the waiver-trial queue relation. One limitation is that the BJS sample includes only 16 of the states with a reasonable number of contracts. Second, the sample is limited to the counties in the BJS sample and is not a representative statewide sample. Nevertheless, the most populous counties, the geographical units used in the BJS study, likely are the dominant choices of forum, places of business, and the like. So these counties are more likely to be the anticipated places of litigation than are smaller counties.

Studying the relation between differences in jury and bench trial queues and jury trial waiver rates requires quantifying each state’s difference in time-to-adjudication for jury and bench trials. Comparing this difference across states requires accounting for the different mixes of case types in the states. If, for example, products liability cases are on the docket longer than promissory note trials,⁴⁹ the metric of jury-bench differences across states should account for the different proportions of each state’s trial docket that might consist of products liability and promissory note cases. We therefore ran a regression model of time-on-the-docket (log) and extracted from it a measure of the

⁴⁹ Available data indicate that time on the docket differs across case categories. Bureau of Justice Statistics Bulletin, *supra* note 11, at 8 (products liability tried cases last 35.1 months compared to an overall tort tried-case period of 25.6 months; contracts cases take 21.5 months).

difference between jury and bench trial queues in each locale, after accounting for the case mix.⁵⁰

Figure 4 shows the relation between the jury-bench queue difference measure, coded along the x-axis, and the jury trial waiver rate, coded along the y-axis. The figure uses only those observations in which the contract generated a choice of forum. Choosing a forum effectively identifies a jury pool and a basis for comparing the time of jury and bench adjudication.⁵¹ The figure's left-hand portion treats arbitration clauses as jury trial waivers. The right-hand portion provides no separate treatment of contracts with arbitration clauses. Neither portion of the figure shows the expected increasing relation. The lines in the figure are the lowess-smoothed best-fitting lines.⁵² No simple monotonic relation is observed between our measure of jury-bench trial time difference and the rate of jury trial waivers. If anything, for most of the states for which comparable data are available, there appears to be an inverse association between contractual jury trial waiver rates and the difference in jury and bench trial time-of-adjudication. But this inverse relation does not hold for Illinois. Perhaps the most striking feature of the figure is the relatively large difference between the jury and bench trial times-to-disposition in Illinois. Chicago litigants⁵³ must wait substantially longer, about 16 months, for jury-

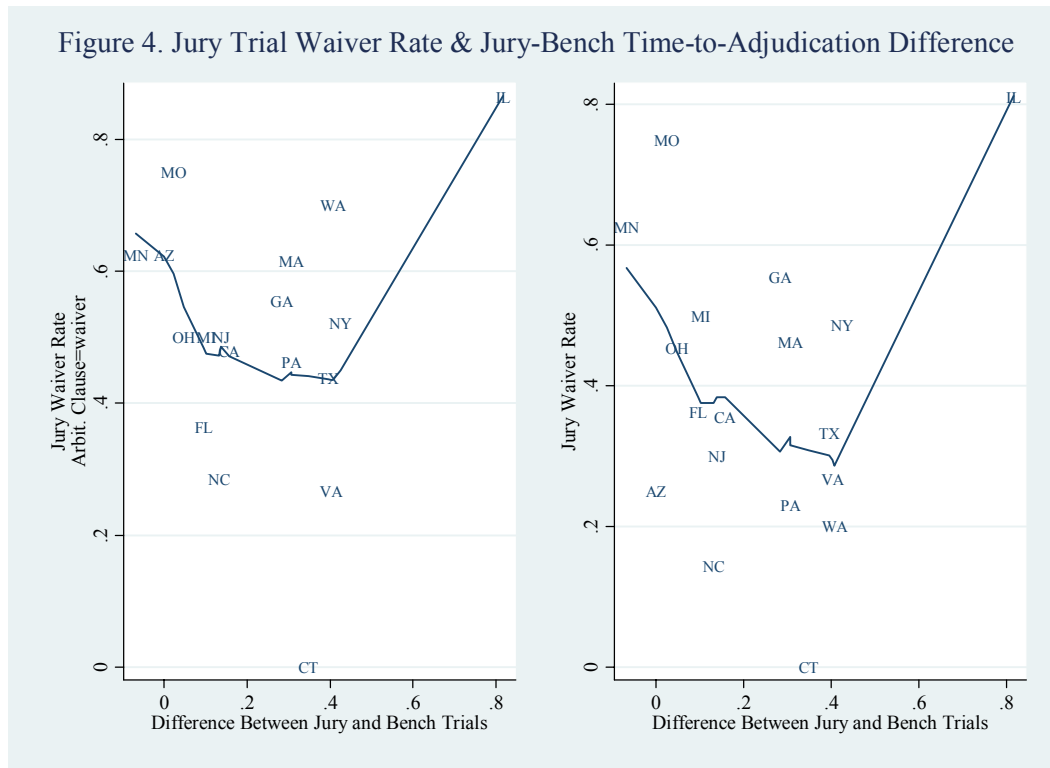
⁵⁰ For the case categories used, see Bureau of Justice Statistics Bulletin, *supra* note 11. The measure of difference is the regression coefficient on an interaction term consisting of a dummy variable for each state times a dummy variable for jury trials. The regression model included dummy variables for each of the many case categories in the BJS data. The interaction term coefficients are the x-axis values in Figure 4.

⁵¹ One could also reasonably explore the relation between other contract-specific geographic features (place of business, place of incorporation, attorney locale, choice of law) and the rate of jury trial waivers. We expected the link between waiver and geography to be strongest when a forum has been designated.

⁵² Lowess smoothing is locally weighted regression of the y-variable on the x-variable. Lowess is a desirable smoother because it tends to follow the flow in the data rather than allow remote extreme points to affect a local value. See W.S. Cleveland, *The Elements of Graphing Data* (1994).

⁵³ Cook County (Chicago) is the only Illinois county in the BJS data.

tried cases to terminate than for judge-tried cases. That difference becomes about 13 months if one adjusts for the different kinds of cases being routed to juries and judges.



Sources. BJS data on trial outcomes in 46 large counties, 2001; SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts. The x-axis is a measure, based on regression analysis of the BJS data, of the difference in time-to-adjudication between jury and bench trials in a state. The lines are the lowess-smoothed best-fitting values. The y-axis is based on the trial waiver clause data used in this study.

This assessment of the two external influences on jury trial waivers suggests that perceived jury fairness will help explain the waiver clause pattern in regression models explored below, but that the trial-queue information will not. We therefore use only the fairness factor in the models.

V. Regression Models

Preliminary regression models, not reported here, employed as explanatory variables the most frequently appearing places of business, places of incorporation, and choice of law. These variables were consistently statistically insignificant in models that

included what appear to be the variables most strongly associated with jury trial waivers. We therefore focus instead on choice of forum, domestic vs. international party status, perceived jury fairness, contract-type, and industry classification.

The dependent variable in all regression models is a dichotomous variable equal to one if a contract contains a waiver of jury trial and equal to zero otherwise. Additional preliminary logistic regression models, also not reported, yielded results largely consistent with Part IV's results except that, inconsistently with Table 3, there was no significant association between a contract specifying a forum and jury trial being waived. Table 3 suggests that the presence of a litigation forum clause is strongly associated with the presence of a jury trial waiver clause. Only 6.4 percent of the contracts not specifying a choice of forum contain a jury trial waiver clause compared to 40.9 percent of the contracts that do specify a choice of forum. It thus is likely that, for most contracts, a decision is made about whether to specify a forum, and that decision is made simultaneously with, or triggers a related decision about whether to avoid juries in that forum. A decision not to specify a forum is usually tantamount to not waiving jury trials.

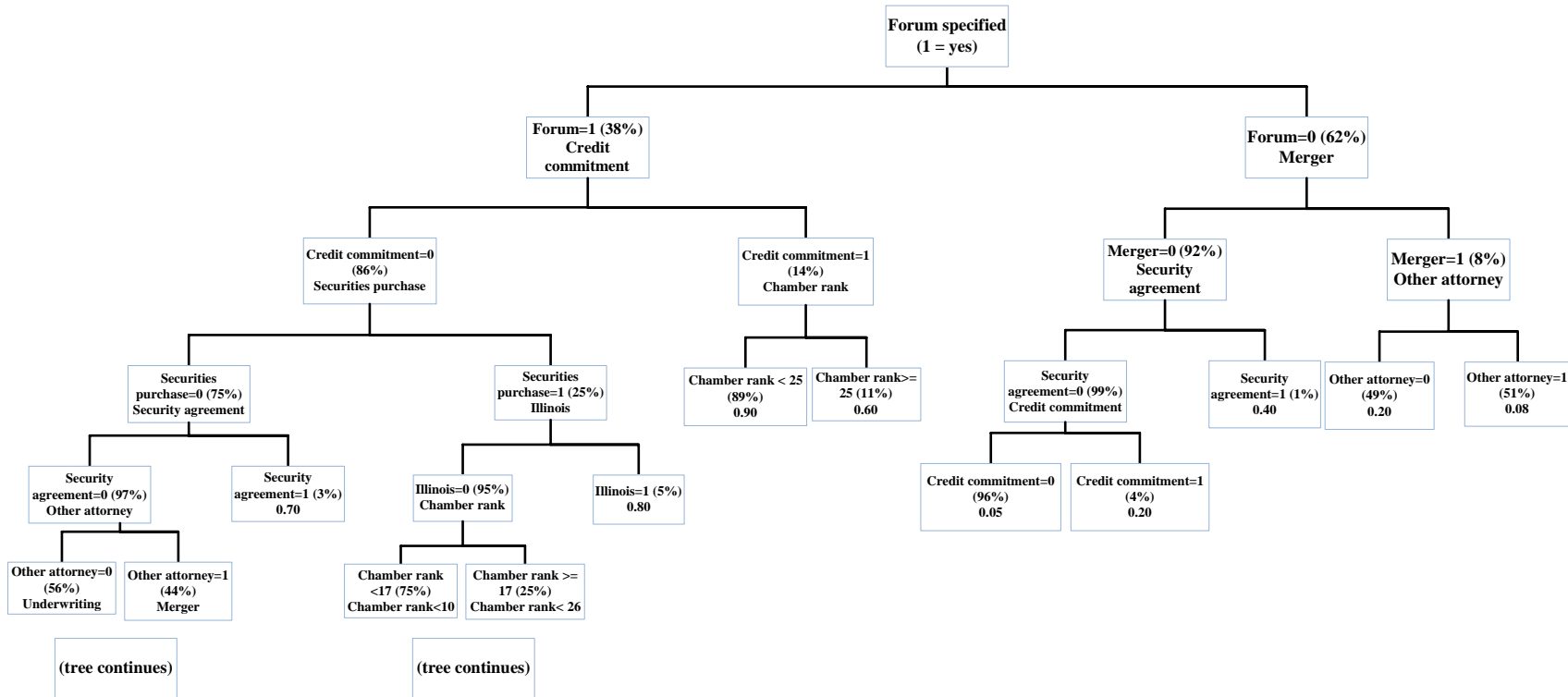
Further inquiry into the existence of a relation between between forum specification and jury trial waiver was therefore appropriate using methods less subject to the limitations of logistic regression analysis. Figure 5 is a classification tree of whether jury trial was waived as it relates to the variables of interest. Classification and regression tree (CART) analysis helps explore how decisions branch at what are believed to be relevant nodes (the variables).⁵⁴ Each node in a decision tree is split into two groups, and the data are partitioned into those groups to process the data farther down the

⁵⁴ Leo Breiman, Jerome Friedman, Charles J. Stone & R.A. Olshen, *Classification and Regression Trees* (1984).

tree. This binary partitioning process can be repeated, with “child” nodes generating their own sub-nodes. As seen in Figure 5, each node can be the parent of two nodes and the progenitor of subsequent nodes. CART has the advantage over logistic regression of being nonparametric and therefore not depending on underlying assumptions about the distribution of the explanatory variables.

Figure 5 confirms Table 3’s evidence of a strong association between a forum being specified and the presence of a jury trial waiver clause. A forum being specified is the highest node in the classification tree, suggesting that other factors influencing the decision whether to waive a trial are subordinate to the forum specification decision. This is further support for the common sense notion that the decision whether to waive a jury trial is not made independently of the decision whether to specify a forum. Common factors may affect both of these decisions but it is implausible that the decision to specify a forum is unrelated to whether to waive jury trials.

Figure 5. Classification Tree for Jury Trial Waiver



This classification tree provides a nonparametric analysis of the relation between hypothesized factors and the dependent variable, jury trial waiver, in 2,749 contracts. The prominence (first node) of the forum-specified variable in this tree supports the importance of the relation between a forum being specified and jury trial being waived. The proportions reported in the terminal nodes at the end of each branch are the proportion of contracts predicted to contain jury trial waivers. For example, of the 62% of contracts that did not specify a forum, 8% involved mergers, and 51% of that 8% had attorneys other than from CA, IL, MA, NY, PA, or TX. 0.08 of those contracts are expected to have jury trial waivers. Of the 38% of contracts that did specify a forum, 14% were credit commitment contracts. The proportion of those contracts that contained jury trial waivers is expected to be associated with the Chamber of Commerce fairness ranking.

The forum-specification decision, like the waiver-clause decision, is itself likely associated with contract-type. For example, 69.2 percent of 211 credit commitment contracts with information about forum specify a forum. That exceeds in rate and number the use of jury trial waivers in credit commitment contracts shown in Table 2. Virtually every security agreement that specifies a forum also waives jury trial. Appendix Figure 1 shows that, for every contract type other than settlement, a higher fraction of contracts that specify a forum include jury trial waivers than the fraction of contracts that do not specify a forum. It appears that, except for a small minority of contracts (the 6.4 percent shown in Table 3 to waive jury trial without specifying a forum), the jury trial waivers come out of the pool of contracts that designate a forum. Appendix Figure 1 also shows strong variation in the forum-specification/jury-trial-waiver relation across contract types.

The powerful contract-type effects likely influence the decision to designate a forum as well as the decision to waive a jury trial. That is, as the credit commitment and security agreement numbers suggest, contract type influences whether to designate a forum. And the greater frequency of forum selection than jury trial waiver supports the view that waiver clauses are largely conditional on specifying a forum. Thus, the “No forum” variable in simple logistic regression models likely is not exogenous. It depends on other explanatory variables, at least the contract types. A model of the decision to designate a litigation forum in a contract likely should be solved simultaneously with a model of jury trial waiver. We therefore simultaneously model jury trial waiver as a function, *inter alia*, of whether a forum is specified, and whether a forum is specified in part as a function of type of contract.

Table 11 reports these bivariate probit models. Each of the three models simultaneously estimates a jury trial waiver equation and forum-specification equation.

The variable representing whether a forum was specified, “No forum,” also appears as an explanatory variable in the waiver equation, as suggested by Table 3 and Figure 5. Models (1) and (3) provide for no special treatment of contracts with arbitration clauses. They are included in the sample and coded no differently than other contracts. Model (2) treats the presence of an arbitration clause as a waiver of jury trial.⁵⁵ Model (3) differs from model (1) in its treatment of contract-types. Model (1) uses our contract standardization measures as explanatory variables in the waiver equation. Model (3) uses dummy variables for the contract-types instead.

All models include the “Non-U.S. party” variable, the state forum dummy variables, and the Chamber of Commerce jury-fairness ranking as explanatory variables in the waiver equation. In the forum-specified equation, we add to the explanatory variables the attorney locales discussed with respect to Table 9 above. Previous work showed that New York attorneys specified a forum more frequently than other attorneys in merger contracts.⁵⁶ All models include in both equations, but we do not separately report, dummy variables for the major industry groups summarized in Table 11.

As suggested by Table 3 and Figure 5, the “No forum” variable is consistently statistically significant in forecasting the absence of a jury trial waiver. Table 11 also shows substantial choice of forum effects. In models (1) and (3), Delaware, Illinois, New York, and Ohio are significantly or nearly significantly more likely to contain jury waiver clauses than the reference state, California. These results are consistent with Table 3’s simple bivariate results. The size of the Illinois effect is striking. For example, a marginal effects estimate indicates that it increases the probability of a jury trial waiver

⁵⁵ Other models, not reported here, exclude from the sample contracts with arbitration clauses. These models explore whether the 80 percent of contracts that do not have arbitration clauses waive jury trials. They do not yield results materially different from those reported here.

⁵⁶ Eisenberg & Miller, *Arbitration*, supra note 15.

by 0.30, conditional on a forum having been specified in a contract.⁵⁷ The relatively low rate of jury trial waivers in California may be due to California's judicial limitation on the enforceability of jury waivers.⁵⁸ That limitation was established after the period of our study but may have been anticipated by sophisticated parties.

The Chamber of Commerce's ranking of jury fairness is significantly associated with jury trial waivers in models (1) and (3). As the Chamber ranks a forum less fair, contracts that designate that forum tend to waive jury trials, thereby confirming Figure 3's pattern. Industry effects, not separately reported, as a whole are statistically significant. In model (1), for example, a test of the hypothesis that the industry dummy variables are jointly zero yields a p-value of 0.011 in the waiver equation and 0.025 in the forum equation. Electrical and electronic equipment companies are the most likely to have jury trial waivers. Paper and allied products companies are the least likely.

Model (1) also includes our measures of contract standardization, as represented by the dummy variables "High standardization" and "Medium standardization," with "Low standardization" as the reference category. Both standardization variables are associated with increased likelihood of a jury trial waiver clause and the High standardization variable is statistically significant. But the sign on High standardization variable changes in model (2), in which arbitration clauses are treated as jury trial waivers. This is consistent with Figure 2's showing that the relation between contract standardization and arbitration clause rates differs from the relation between standardization and jury trial waiver rates. In model (3)'s waiver equation, several of the contract-type dummy variables are statistically significant and the results are largely

⁵⁷ Figure 5 suggests that the Illinois effect is felt most prominently, highest up in the classification tree, in securities purchase contracts.

⁵⁸ See note 1 *supra*.

consistent with Table 2's description of the relation between contract-types and jury trial waiver.

Some results change in size and/or direction in model (2), which treats arbitration clauses as the equivalent of jury trial waivers. Model (2)'s coefficient for "Non-U.S. party" shows that international contracts are marginally significantly more likely than domestic contracts to avoid jury trials by either arbitration clauses or jury trial waiver clauses. The opposite sign on this variable in models (1) and (3) shows that this effect is entirely attributable to the treatment of contracts with arbitration clauses. When they are not treated as jury trial waivers, international contracts are less likely than domestic contracts to contain jury trial waivers.

In the forum equations, many contract types are strongly and significantly associated with whether a forum is specified. These variables' prominence in both equations is consistent with many of the contract-type variables appearing in the upper nodes of Figure 5's classification tree. The forum equations' attorney locale dummy variables, most of which are statistically significant from the reference category, "Other or unknown attorney locale." In all three models, a parameter measuring the correlations of the residuals in the two equations, suggests that one can reject the hypothesis that the equations are independent ($p < 0.001$), thus supporting the use of the multiple equation models over single equation models.

Table 11. Bivariate Probit Models of Jury Trial Waiver, No Forum Selection

	(1) No separate arbitration clause treatment		(2) Arbitration clauses treated as waivers		(3) No separate treatment of arbitration clauses	
	Jury trial waiver	No forum	Jury trial waiver	No forum	Jury trial waiver	No forum
Non-U.S. party	-0.085 (0.84)	-0.012 (0.12)	0.178+ (1.78)	-0.022 (0.22)	-0.156 (1.53)	-0.043 (0.48)
No forum	-1.551** (5.68)		-1.035** (3.31)		-1.134** (2.79)	
DE forum	0.836** (3.15)		0.816** (2.62)		0.898* (2.52)	
FL forum	0.324+ (1.79)		0.086 (0.41)		0.254 (1.09)	
IL forum	0.901** (4.05)		0.974** (3.67)		1.105** (4.21)	
MA forum	-0.168 (0.71)		0.102 (0.37)		0.250 (0.92)	
NY forum	0.605** (4.25)		0.602** (3.61)		0.690** (3.71)	
OH forum	0.650** (2.60)		0.672* (2.31)		0.606+ (1.92)	
TX forum	0.030 (0.16)		0.097 (0.50)		-0.288 (1.24)	
Other forum	0.327+ (1.92)		0.364+ (1.80)		0.200 (0.88)	
High standardization	0.273* (2.19)		-0.488** (4.65)			
Medium standardization	0.122 (1.02)		-0.246* (2.40)			
Chamber fairness rank	0.022** (2.84)		0.022* (2.45)		0.023* (2.21)	
Asset sale purchase		0.401** (4.79)		0.369** (4.18)	-0.207 (1.54)	0.332** (3.20)
Bond indentures		1.204** (7.98)		1.269** (8.36)	-0.682** (2.69)	1.167** (7.36)
Credit commitments		-0.707** (6.86)		-0.717** (7.01)	0.643** (4.69)	-0.604** (5.29)
Employment contracts		0.497** (3.81)		0.417** (2.99)	-0.523* (2.32)	0.428** (2.91)
Licensing		0.601** (3.29)		0.525** (2.66)	-0.185 (0.53)	0.542* (2.38)
Pooling service		1.079** (7.10)		1.108** (7.12)	-0.362 (1.63)	1.041** (6.49)
Securities purchase		-0.010 (0.14)		0.033 (0.42)	-0.110 (1.09)	-0.055 (0.62)
Security agreements		-0.274 (1.34)		-0.310 (1.59)	0.741** (3.08)	-0.073 (0.32)
Settlements		0.128 (0.87)		0.368* (2.42)	-0.221 (1.03)	0.078 (0.47)
Underwriting		0.742** (7.99)		0.720** (7.51)	-0.641** (3.87)	0.594** (5.71)
CA attorney		-0.267** (2.87)		-0.285** (3.06)		-0.324** (3.26)
IL attorney		-0.227 (1.37)		-0.222 (1.34)		-0.321+ (1.82)
MA attorney		-0.585** (3.63)		-0.633** (3.74)		-0.664** (3.55)
NY attorney		-0.317** (3.95)		-0.320** (3.99)		-0.440** (4.90)
PA attorney		-0.046 (0.28)		-0.012 (0.07)		-0.081 (0.44)
TX attorney		-0.369** (3.19)		-0.410** (3.37)		-0.499** (3.63)
Other contract					0.030 (0.28)	0.208* (2.19)
Observations	2274	2274	2274	2274	2723	2723

Constants included in models but not reported; contract type "Other" omitted from models (1) and (2). Reference categories: choice of forum=California, contract type=mergers, attorney locale="Other." Robust z statistics in parentheses; + significant at 10%; * at 5%. ** at 1%. Models include probability weights to account for the one month of additional sampling of merger contracts and include, but do not report dummy variables for industry groups. Sources. U.S. Chamber of Commerce State Liability Systems Ranking Study, Final Report, Jan. 11, 2002 (Study No. 149666); SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for contracts other than mergers, Jan. 2002 to July 31, 2002 for mergers.

VI. Discussion of Results

Parts IV and V contain two separable classes of results. The first and principal result is that sophisticated parties tend to preserve access to jury trials when they could agree to avoid the risks of such trials. Second are a set of results suggesting the factors that influence the decision to include contract clauses waiving jury trials. These results can provide a deeper understanding of the minority of contracts in which sophisticated parties voluntarily shun juries.

A. Contracting Parties' Preservation of Access to Jury Trials

A rich academic literature explores the possible advantages and disadvantages of juries as finders of fact in American litigation. One set of studies raises questions about the efficiency or fairness of the jury. For example, studies suggest that juries may give undue weight to eyewitness testimony,⁵⁹ statements against interest⁶⁰ and expert opinions,⁶¹ and may unduly discount forensic evidence such as DNA matches.⁶² Juries may misunderstand circumstantial evidence⁶³ or fail to reach a correct result in circumstantial cases even when they understand the probative value of the evidence.⁶⁴ Jurors may be influenced by the personality of the lawyers, the physical appearance of

⁵⁹ See, e.g., J.C. Brigham & R.K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 *Law & Hum. Behav.* 19 (1983) (mock jurors predicted that eyewitness testimony was 71% accurate when actual accuracy rate was only 13%); Gary L. Wells, et. al., *Accuracy, Confidence and Jury Perceptions in Eyewitness Identification*, 64 *J. Applied Psychology* 440 (1979). Juries may be especially swayed if the expert couches his or her testimony in highly technical terms. See Irwin A. Horowitz, Kenneth S. Bordens, Elizabeth Victor, Martin J. Bourgeois & Lynne Forster Lee, *The Effects of Complexity on Jurors' Verdicts and Construction of Evidence*, 86 *J. Applied Psychol.* 641, 649 (2001).

⁶⁰ Saul M. Kassin, *The Psychology of Confession Evidence*, 52 *American Psychologist* 221 (1997).

⁶¹ Allan Raitz, Edith Greene, Jane Goodman & Elizabeth F. Loftus, *Determining Damages: The Influence of Expert Testimony on Jurors' Decision Making*, 14 *Law & Hum. Behav.* 385, 393 (1990).

⁶² Dale A. Nance & Scott B. Morris, *Jury Understanding of DNA Evidence: An Empirical Assessment of Presentation Formats for Trace Evidence with a Relatively Small Random Match Probability* (October 17, 2003), available at SSRN: <http://ssrn.com/abstract=462880> or DOI: 10.2139/ssrn.462880

⁶³ See, e.g., William C. Thompson & Edward Schumann, *Interpretation of Statistical Evidence in Criminal Trials*, 11 *Law & Hum. Behav.* 167 (66% of mock jurors significantly underestimated the probative value of blood evidence).

⁶⁴ See, e.g., Gary L. Wells, *Naked Statistical Evidence of Liability: Is Subjective Probability Enough?*, 62 *Personality and Social Psychology* 739 (1992).

the parties,⁶⁵ or the size of the requested damages award,⁶⁶ and may decide on the basis of inappropriate factors such as dislike for business litigants⁶⁷ or moral judgments about a party's conduct.⁶⁸ Jurors may be subject to cognitive shortcomings such as hindsight bias,⁶⁹ imperfect attention spans,⁷⁰ limited memories, confusion as to the identities of multiple plaintiffs,⁷¹ and inability to understand or implement the trial court's instructions on the law.⁷² In consequence, they may reach dramatically different results in similar cases, and, occasionally, award damages that are hard to justify based on the facts of a case.⁷³

Other studies evince a more optimistic assessment of the value and accuracy of jury decisions. For example, despite the widespread belief that jury awards of punitive damages are arbitrary and excessive, numerous studies find that jury awards of punitive damages are not increasing in frequency or size and are not arbitrary.⁷⁴ Treatment of

⁶⁵ See, e.g., Catherine T. Harris, Ralph Peeples & Thomas B. Metzloff, Placing "Standard of Care" in Context: The Impact of Witness Potential and Attorney Reputation in Medical Malpractice Litigation, 3 J. Empirical Legal Stud. 467 (2006) (when liability was rated as uncertain or unlikely, strategic variables such as perceived witness potential and the reputation of the plaintiff's counsel were significant predictors of case outcome); Robert J. MacCoun, The Emergence of Extralegal Bias During Jury Deliberation, 17 Crim. Just. & Behav. 303, 311 (1990) (finding that mock juries were more likely to acquit when the defendant was physically attractive).

⁶⁶ Cass Sunstein, et al., Punitive Damages: How Juries Decide (2002); Gretchen B. Chapman & Brian H. Bornstein, The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts, 10 Applied Cognitive Psychol. 519, 538 (1996).

⁶⁷ Sunstein et al., supra note 66.

⁶⁸ Edith Greene, Michael Johns & Alison Smith, The Effects of Defendant Conduct on Jury Damage Awards, 86 J. Applied Psychol. 228 (2001).

⁶⁹ Sunstein et al., supra note 66; Susan J. Lebine and Gary LaBine, Determinations of Negligence and the Hindsight Bias, 20 Law & Hum. Behav. 501 (1996) (study participants were more likely to find the therapist negligent when informed that the patient had in fact become violent).

⁷⁰ Phoebe C. Ellsworth, Some Steps Between Attitudes and Verdicts, in Inside the Juror: The Psychology of Juror Decision Making 42-43 (Reid Hastie ed., 1993).

⁷¹ Lynne Forster Lee, Irwin A. Horowitz & Martin J. Bourgeois, Juror Competence in Civil Trials: Effects of Preinstruction and Evidence Technicality, 78 J. Applied Psychol. 14, 19 (1993).

⁷² Sunstein et al., supra note 66; Judith L. Ritter, Your Lips are Moving... but the Words Aren't Clear: Dissecting the Presumption that Jurors Understand Instructions, 69 Mo. L. Rev. 163, 164 (2004).

⁷³ Sunstein et al., supra note 66.

⁷⁴ Stephen Daniels & Joanne Martin, Civil Juries and the Politics of Reform 214 (1995) ("punitive damage award activity suggests . . . the need for . . . skepticism with regard to claims about the increasing frequency of such awards"); U.S. Dept. of Justice BJS Bulletin, Civil Justice Survey of State Courts, 1996: Tort Trials and Verdicts in Large Counties (1996), p. 1 (August 2000) (about three percent of plaintiff winners in tort

corporations may also be more nuanced than critics suggest: juries do not always rule against “deep-pocket” defendants, even when the beneficiary of such a ruling would be a sympathetic individual plaintiff.⁷⁵ Moreover, the fact that juries may be imperfect is not, in itself, a sufficient reason for rejecting them as finders of fact, since judges are also subject to cognitive biases⁷⁶ and to the influence of emotion or prejudice.⁷⁷ Indeed, because there is only one judge and multiple jurors, the possibility of inaccurate results may in some respects be greater in a bench trial because the group decision process of a

trials were awarded punitive damages; median award was \$38,000); BJS Special Report, *Civil Justice Survey of State Courts, 1992: Civil Jury Cases and Verdicts in Large Counties* (1995), p.1 (about six percent of plaintiff winners received a punitive award; median award was \$50,000); U.S. GAO, *Product Liability Verdicts and Case Resolution in Five States*, GAO/HRD-89-90 (Sept. 1989) 24, 29 (punitive damages awarded in 23 of 305 cases decided in five states); James S. Kakalik et al., *Costs and Compensation Paid in Aviation Accident Litigation* 27 (RAND 1988) (“punitive damages were not paid on any of the 2,198 closed cases”); Erik Moller, *Trends in Civil Jury Verdicts Since 1985* 33 (RAND 1996) (“punitive damages are awarded very rarely”); Mark Peterson, Syam Sarma & Michael Shanley, *Punitive Damages: Empirical Findings* 10 (RAND 1987) (fewer than seven punitive damages awards per year in Cook County and fewer than six in San Francisco from 1960-1984); William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 304-07 (1987) (“insignificance of punitive damages in our sample is evidence that they are not being routinely awarded”); Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 *J. Empirical Legal Stud.* 263 (2006); Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 *Cornell L. Rev.* 743, 745 (2002); Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 *J. Legal Stud.* 623, 633-37 (1997) (summarizing studies on the decision to award punitive damages); Thomas Koenig & Michael Rustad, *The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability*, 16 *Justice System J.* 21 (1993); Michael Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not “Moral Monsters,”* 47 *Rutgers L. Rev.* 975, 981-92 (1995) (punitive damages rarely awarded in medical malpractice cases). A study that suggested no relation exists between punitive and compensatory damages in “blockbuster” cases is based on questionable statistical methodology. Theodore Eisenberg & Martin T. Wells, *The Significant Association Between Punitive and Compensatory Damages in Blockbuster Cases: A Methodological Primer*, 3 *J. Empirical Legal Stud.* 169 (2006).

⁷⁵ See Valerie P. Hans, *Business on Trial: The Civil Jury and Corporate Responsibility* (2000); Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the “Deep-Pockets” Hypothesis*, 30 *Law & Soc’y Rev.* 121, 143 (1996) (“existing evidence argues against a deep-pocket interpretation of jury verdict patterns”); Valerie P. Hans, in *The Jury’s Response to Business and Corporate Wrongdoing*, 52 *Law & Contemp. Probs.* 177, 202 (1989) (“even in cases involving some of the most negatively evaluated businesses around—the tobacco companies—juries show remarkable restraint in judging corporate culpability.”); Valerie P. Hans, *The Contested Role of the Civil Jury in Civil Litigation*, 79 *Judicature* 242, 248 (1996) (“The deep pockets explanation, even though it is highly popular in the boardrooms of America, does not fare well in this set of studies.”)

⁷⁶ Chris Guthrie et al., *Inside the Judicial Mind*, 80 *Cornell L. Rev.* 777, 802-03 (2001) (finding that judges are subject to hindsight bias).

⁷⁷ See David S. Abrams, Marianne Bertrand, and Sendhil Mullainathan, *Do Judges Vary in their Treatment of Race?* (manuscript, April 2006) (discussing evidence that judges may, in fact, display racial bias in criminal sentencing).

civil jury tends to control for outliers.⁷⁸ Thus, to the degree that juries and judges find facts differently, there is no *a priori* reason to conclude that judges are the more accurate.⁷⁹

Our study sheds light on this debate, at least as it pertains to the value of civil juries in cases involving large commercial contracts. As noted in our previous work,⁸⁰ the contracts in our sample have attractive features as objects of study. Because they constitute or are connected with events that are material to the financial conditions of publicly traded corporations, it is reasonable to assume that they receive care and attention during the negotiation and drafting phase, either from the reporting firm's employees or from outside counsel (or both). Because the contracts are negotiated before disputes arise, moreover, we can infer that in most cases the contracting parties did not anticipate the precise nature of any dispute that might arise, and therefore would not know whether a particular term would help or hurt them in the event of a conflict. Thus if jury trials create greater uncertainty or generate higher costs than other mechanisms for resolving disputes, well-informed and sophisticated parties may be expected to forego them as a matter of course. On the other hand, if jury trials are not perceived to be inferior to other dispute-resolution mechanisms, then such parties will not uniformly opt out. In the absence of significant transactions costs or third party effects, moreover,

⁷⁸ On the other hand, in the case of the jury there is the possibility that group pressures could negatively affect the reliability of decisions. See M. Neil Browne, Carrie Williamson & Garrett Coyle, *The Shared Assumptions of the Jury System and the Market System*, 50 *St. Louis Univ. L.J.* 425, 466 (2006).

⁷⁹ Empirical evidence suggests that there are systematic differences between judges and juries as factfinders, even though there is a large area of agreement between them. For example, judges tend to be more likely to convict in criminal cases, Theodore Eisenberg, Paula L. Hannaford-Agor, Valerie P. Hans, Nicole L. Waters, G. Thomas Munsterman, Stewart J. Schwab & Martin T. Wells, *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven & Zeisel's *The American Jury**, 2 *J. Empirical Legal Stud.* 171 (2005). But other studies find no systematic differences between judges and juries in the relation between punitive and compensatory damages. E.g. Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages*, supra note 74.

⁸⁰ Eisenberg & Miller, *Merger*, supra note 20; Eisenberg & Miller, *Arbitration*, supra note 15.

parties bargaining for mutual advantage will tend to agree to provisions that maximize the social surplus.⁸¹ Such bargaining includes provisions regarding the resolution of disputes that might arise under the contract.⁸² Thus the observed behavior of the contracting parties – such as the data presented in this study – provides information about the social benefits as well as the private value of jury trials.

We recognize that the evidentiary value of our study is contingent on several factors. First, the alignment between the outcome of private bargaining and social surplus will potentially be undermined if the outcome of that process affects the interests of third parties not present at the bargaining table. However, externalities would appear to be relatively modest in the case of the large commercial contracts under review here; and even when externalities are present, they have no obvious bearing on the issue of jury trial waiver.⁸³

Second, the observed contract terms may not align with social welfare if agency costs are significant – if the attorneys who negotiate and draft the contracts serve their own interests at the expense of their clients. It is possible to conjecture some agency costs. For example, if jury trials are more expensive and risky than bench trials, it may be in lawyers' self-interest to preserve them as a dispute resolution possibility in order to

⁸¹ Ronald J. Gilson, Value Creation by Business Lawyers: Legal Skills and Asset Pricing, 94 Yale L.J. 239 (1984). This is true even if a jury trial would predictably benefit one of the contracting parties at the expense of the other. See, e.g., David S. Steuer, A Litigator's Perspective on the Drafting of Commercial Contracts (PLI Dec., 2004–Jan., 2005) (If a client lacks significant bargaining power, or for some other reason would likely have the weaker legal position should litigation arise, its lawyer should retain the option of having a jury trial.) Even if it is known *ex ante* that a jury trial would benefit one party at the expense of the other, if overall it is more efficient than a bench trial, both parties can make themselves better off by agreeing not to waive the jury, with the disadvantaged party receiving a more than compensatory setoff in some other term of the contract.

⁸² See, e.g., Keith Hylton, Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis, 8 Sup. Ct. Econ. Rev. 209 (2000) (if option to litigate reduces the joint wealth of contracting parties, market forces will push them in the direction of alternative forms of dispute resolution); Steven Shavell, Alternative Dispute Resolution: An Economic Analysis, 24 J. Legal Stud. 1, 5 (1995) (“parties would tend to adopt ADR if it would lead to mutual advantages”).

⁸³ In general, an agreement to waive a jury trial would not bind third parties not party to or in privity with a party to the contract.

earn larger fees in the event the contract becomes disputed and the drafting attorney is chosen to litigate the matter. While this possibility cannot be ruled out, it seems strained to suggest that it often plays a decisive role in the attorneys' decisions, especially given that the contracting entities in our sample are sophisticated parties that usually have access to the advice of capable in-house counsel. Other than such speculative effects, it is hard to identify a strong self-interest that would induce an attorney to seek or eschew an agreement on jury trials that would harm the interests of his or her client.

Third, the observed outcomes in our sample may not provide reliable evidence of efficient dispute-resolution terms if the transactions costs of the bargaining itself prevent the parties from achieving an optimal substantive result. One hypothesis could be that the issue of jury trial waivers is one of *de minimis* importance, so that lawyers negotiating contracts do not actively consider or decide whether to include a waiver or not.⁸⁴ We cannot rule out the possibility that jury trial waivers are simple matters of "boilerplate" that receive no scrutiny or consideration by the contracting parties, but we consider this to be unlikely for contracts in our sample. These are large commercial contracts that constitute all or part of transactions deemed to be material to the affairs of SEC-reporting companies. The provisions for resolving disputes under the contract would appear important enough to receive attention from the attorneys. Jury trial waivers are included in a significant number of contracts that appear to be individually negotiated (for example, settlement of disputes). Even when contract in question is highly standardized

⁸⁴ In such cases, if no mention is made in the contract, a jury trial would ordinary be available in lawsuits for contract damages. Or if the attorney utilizes a model or form that contains a jury trial waiver, a jury may be foregone, although without active consideration by the parties. .Jury trial waivers are contained in some model contracts. See, e.g., Ted A. Donner, *Attorney's Practice Guide to Negotiations* § 14:22. Sample business agreement (2006) ("The parties agree that any dispute hereunder shall be resolved by bench trial and waive the right to any trial by jury hereunder."); 2 Model Agrmts for Corp Couns § 16:13 ("THE PARTIES HEREBY EXPRESSLY WAIVE ANY RIGHT THEY MAY HAVE TO A TRIAL BY JURY FOR ANY DISPUTE ARISING OUT OF OR RELATED TO THIS AGREEMENT.")

(for example, pooling and servicing agreements), it is likely that the model on which the contract is based has already been thoroughly reviewed and considered by sophisticated business lawyers. Jury trial waivers do, in fact, become important issues in litigation, and have generated a substantial number of judicial decisions.⁸⁵ Accordingly, we believe it likely that to some extent at least, the presence or absence of a jury trial waiver in a sophisticated commercial contract will reflect considered judgments about what arrangement best serves the joint interests of the contacting parties.

Another transactions-cost hypothesis for the paucity of jury trial waivers would be that even if jury trial waivers are important enough for lawyers to consider them, the lawyers do not have access at reasonable cost to information that would enable them to make a well-informed judgment about whether or not to waive the jury. Thus their failure to waive jury trials may provide no new information. It is certainly true, as noted above, that considerable dispute exists among informed opinion about the value of juries. Yet if business lawyers simply went by received wisdom, one might expect them to follow publicly expressed attitudes within the business community and preclude juries altogether. The fact they do not so do — and in fact reject juries far less than half the time — suggests that they may be acting according to some relatively reliable information that juries often do enhance the value of commercial contracts.

Finally, strategic factors may also need to be considered when assessing the degree to which the low rate of jury trial waivers in our sample provides evidence of the economic value of juries in commercial cases. For example, it could be that transaction

⁸⁵ See, e.g., cases cited at note 1 *supra*.

costs associated with jury trial are desired by the parties as penalties against too-easy breaches of contract.⁸⁶

Notwithstanding these caveats, we believe that the behavior of sophisticated contracting parties with respect to jury trial waivers provides information pertinent to the debate about the value of civil juries in commercial cases. Our data showing that such parties more often than not fail to opt out of jury trials suggests that the availability of a jury trial often enhances the joint welfare of the contracting parties. Thus, our data provide evidence that juries often provide economic value for the parties and for society as a whole, quite apart from other reasons that may exist for the institution of the civil jury.⁸⁷ If some of the world's best-advised, most sophisticated legal actors implicitly recognize juries' values, the case for anti-jury legal reform is weakened.

B. Explaining the Pattern of Jury Trial Waiver Clauses

Although jury trial waivers are relatively rare, they are strongly associated with type-of-contract. The high rates of waiver in credit commitments and security agreements may reflect lender beliefs that juries are more likely than judges to impose lender liability. The low rate in employment contracts may reflect doubt about underlying enforceability in contests between large corporations and individuals. The low rates of waiver in the least standardized contracts, employment, licensing, and settlements, may suggest that jurors' perspectives are especially valued when problems of contract interpretation are likely to be less mechanical. Perhaps the parties value the

⁸⁶ See, e.g., David M. Driesen & Shubha Ghosh, *The Functions of Transaction Costs: Rethinking Transaction Cost Minimization in a World of Friction*, 47 *Ariz. L. Rev.* 61 (2005).

⁸⁷ See, e.g., Hans, *The Contested Role*, *supra* note 75, at 248 (observing that at a time when the balance between corporate and individual responsibility is in flux, juries "reflect community notions of both individual and corporate responsibility," respond to changing norms, and convey information about the public's vision of sound corporate conduct.)

jury's perceived inclination to depart from strict contractual interpretations when they perceive themselves as possibly unfairly suffering from such interpretations.

A striking result is the 80 percent rate of jury trial waivers in contracts designating Illinois as a litigation forum. This far exceeds the waiver rate in other large, commercially important states. Two factors appear to contribute to this result. First, Figure 4 and the related discussion indicate that Illinois has an extremely long difference in time-to-adjudication between jury trials and bench trials. Jury trials take substantially longer to adjudicate in Illinois, relative to bench trials, than the relative time they take in other states. Although the difference in jury and bench trial time-of-adjudication was not helpful in explaining the overall pattern of jury trial waivers, the difference likely does contribute to the Illinois result. Second, Figure 3 suggests that large corporations perceive Illinois juries to be among the least fair. The combination of efficiency and fairness factors may explain the high Illinois jury trial waiver rate.⁸⁸

Finally, we are mindful that, like our study of arbitration clauses,⁸⁹ this is the first study of its kind and it is important to recognize its limitations. The contracts we study exist in a small slice of time so ideally we would like information for periods before and after the first half of 2002. The variation across our contract types in the rates of jury trial waiver also suggests that more information and more sophisticated modeling of the decision to include such clauses could be fruitful. The details of the relations between the

⁸⁸ Also of interest at the individual state level is the fairly high rate of jury trial waiver clauses in Georgia. See Figure 3 supra. This is noteworthy because Georgia's highest court in 1994 found such waivers to be unenforceable. *Bank South, N.A. v. Howard*, 264 Ga. 339, 444 S.E.2d 799 (1994). Yet five of nine contracts specifying Georgia as the litigation forum included jury trial waivers. Perhaps the attorneys who drafted these contracts considered that their clients had little to lose from a waiver because in the worst case it would simply not be enforced and the litigation would be treated as if no such waiver had been present.

⁸⁹ Eisenberg & Miller, *Arbitration*, supra note 15.

contracting parties and the motivations of those drafting the clauses could and should be studied.

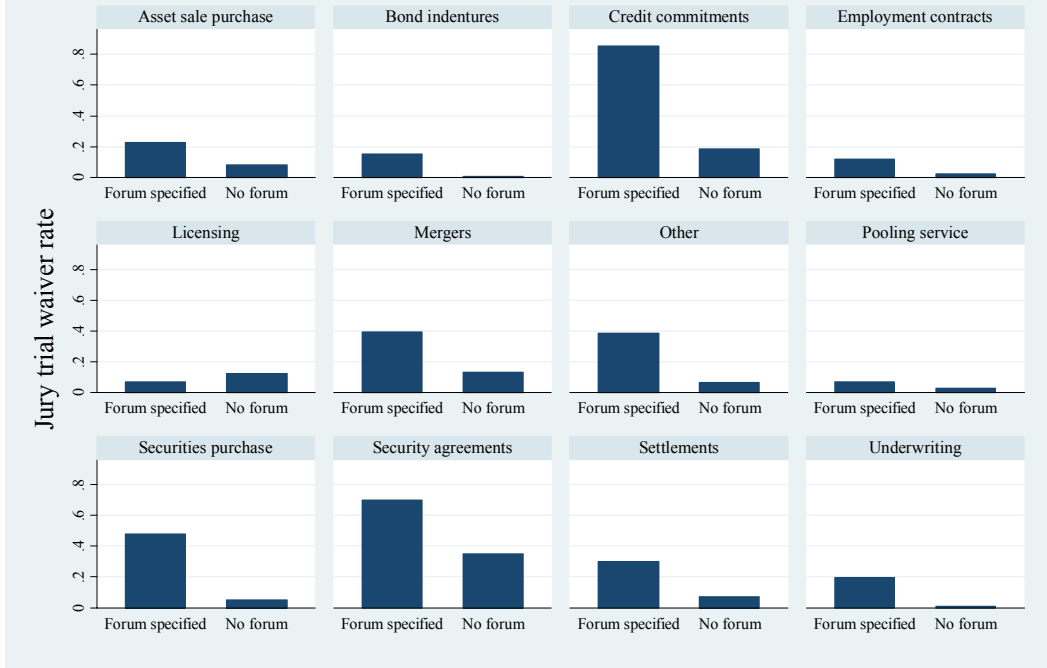
VII. Conclusion

We present evidence that large corporate actors do not systematically flee juries even though they have the ability to do so, at low expense, by waiving jury trials *ex ante* in their contracts. International contracts also include jury trial waivers at a surprisingly low rate. Contract types are strongly associated with jury trial waivers, with the waiver rate ranging from near-zero in bond indentures, employment contracts, pooling service agreements, and underwriting contracts to over 50 percent in credit commitments and security agreements. Parties appear to vary the decision whether to include a choice of forum in a contract and then to include a jury trial waiver based in part on the forum chosen. Contracts specifying Illinois as a forum waive jury trials 80 percent of the time while contracts designating New York, California, Texas, and Florida as a forum do so less than 50 percent of the time. Parties tend to waive jury trials more when the forum chosen is perceived to have unfair juries.

In the simple economic view, our results suggest that juries can add value to adjudication in complex commercial cases. The contracting parties appear to consider the desirability of waiving juries, as evidenced by the greater waiver rates in states that the Chamber of Commerce ranks as having less fair juries. This overt consideration of juries suggests that failure to waive jury trials is not accidental; the parties in such cases likely assign a positive value to the availability of jury trial. Because pre-dispute jury trial waivers occur *ex ante*, their relative infrequency provides evidence that juries may

often confer social as well as private benefits as compared with the available alternatives of factfinding by judges or arbitrators.

Appendix Figure 1. Jury Trial Waiver by Whether Forum Specified & Contract Type



Sources. BJS data on trial outcomes in 46 large counties, 2001; SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts.