# Ex Ante Choice of Jury Waiver Clauses in Mergers

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This paper examines empirically why sophisticated parties in some merger and acquisition deals choose to waive their right to jury trials and some do not. We examine merger agreements for a large sample of 276 deals for the 11-year period from 2001 to 2011. We exclude private company deals and those where the choice of forum and law is Delaware. First, we find that 48.2% of the deals have jury waiver clauses. Second, we find that deals in which New York is chosen as the governing law and forum state are more likely to include a jury waiver clause. No other state has such an effect. Third, we find that contracts negotiated by counsel from high reputation law firms tend to include jury waiver clauses, and this effect is more significant for the acquirer's law firm than for the target's law firm. Fourth, we find strong evidence for the bargaining power hypothesis wherein larger acquirers that take over smaller targets are more likely to include jury waiver clauses. Finally, we find no evidence that lawyer familiarity, industry effects, whether the acquirer was an international firm, or whether the deal was completed has a statistically significant impact on the likelihood of having a jury waiver clause. (*JEL*: K12, G34)

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## 1. Introduction

Legal scholars have long recognized that contracts should maximize the joint gains or contractual surplus from transactions between parties. In doing so, contracts should satisfy being ex post trade efficient (trade occurs only when the value to the buyer exceeds the value to the seller), and being ex ante investment efficient in the subject matter of the contract (Schwartz and Scott, 2003). Contracting parties can enhance the ex ante efficiency of their contract by shifting contracting costs between the front end of the transaction (the negotiation and drafting stage) and the back end (the contract enforcement and litigation stage) (Scott and Triantis, 2006). For example, a clause that waives the parties' right to a jury trial should litigation result reduces back end enforcement costs (by reducing the time and expense of a trial as well as errors made by inexperienced juries) and transfers corresponding contracting costs to the front end of the transaction (where the parties must negotiate such an agreement). Theory predicts that sophisticated parties will agree to such clauses when the savings in expected enforcement costs exceed the additional costs of negotiation and drafting. Any efficiency gains from jury waiver clauses would depend, inter alia, on the relative complexity of the contract: ceteris paribus, the more complex the factual context, the more cost savings might be realized from a jury waiver.

However, jury waiver clauses may also have distributional as well as efficiency effects. For example, some parties may believe that they have an advantage over others in persuading a jury rather than a judge of the merits of their claim.[1] This advantage might be particularly true, for example, for firms located in the forum from which the jury pool is drawn. As a consequence, a party may resist agreeing to an efficiency-enhancing jury waiver clause if its expected share of any efficiency gains are less than that its expected gain from exploiting its litigation advantage. Additionally, firms might draft jury waiver clauses because substantial ex post litigation costs might have to be incurred because juries have difficulties interpreting vague terms such as "reasonable best efforts" or "material adverse changes" which could lead to large errors (Choi and Triantis, 2010).

1. This advantage may derive, for example, from the firm's locational proximity to the jury pool.

Given the possible offsetting effects of jury waiver clauses in particular contexts, one would predict that some contracts would contain jury waiver clauses and others would not. This paper examines the variation in the use of jury waiver clauses in merger and acquisition agreements.[2] The agreement between target and acquirer firms to waive the right to a jury is one means of reducing expected litigation costs in large complex commercial contracts such as merger agreements. In addition to the expected reduction in litigation costs of having a bench trial rather than a jury trial, data show that many corporate managers and business lawyers believe that juries increase variance in trial outcomes because jurors do not fully take into account the evidence and applicable law (Lande, 1998). Juries are also often been viewed as less technically sophisticated and legally knowledgeable than judges, and are believed to be often swayed by extrinsic factors that can lead to larger errors and arbitrary awards.[3]

This study examines a large sample of 276 publicly traded deals[4] over an 11-year period (2001 to 2011) to determine the factors that explain the ex ante choice to include a jury waiver clause in a merger and acquisition deal. In an interesting inaugural study, Eisenberg and Miller (EM) examined jury trial waivers for 11 different types of commercial contracts for the six-month period from January 2002 to June 2002 (Eisenberg and Miller, 2007a, 2007b).[5] EM found that jury trial waivers were more likely with greater contract standardization, perceived fairness of juries, and by contract type. In their conclusion, EM state:

> We are mindful . . . this is the first study of its kind and it is important to recognize its limitations. The contracts we study exist in a narrow time period. Ideally, we would

2. For an excellent explanation of other merger and acquisition contract characteristics, see Coates (2015).

3. For example, jurors might suffer more from behavioral cognitive biases (Ellsworth, 1993; Lebine and Lebine, 1996; Sunstein et al., 2002); Jurors might also make moral judgments about the conduct of particular parties and the size of the requested damages award (Chapman and Bornsetin, 1996; Sunstein et al., 2002). Jurors might also be affected by the appearance of the parties and personality of the lawyers (MacCoun, 1990; Harris et al., 2006). Juries might also place too much emphasis on expert testimony and when the expert testifies in more technical terms (Raitz et al., 1990; Horowitz et al., 2001).

4. Publicly traded deals are defined as those where both the acquirer and the target firm are traded in U.S. capital markets.

5. For mergers, their sample ended in July 2002.

like information for periods before and after the first half of 2002. The variation across contract types in the rates of jury trial waiver also suggests that more information and more sophisticated modeling of the decision to include waivers would be fruitful. The details of the relations between the contracting parties and the motivations of those drafting the clauses should be studied.[6]

We address EM's concerns and extend their study by (a) examining a large sample that starts in January 2001 and ends in December 2011; (b) analyzing merger agreements only,[7] in order to overcome the heterogeneity problem in the EM study;[8] (c) analyzing new hypotheses relating jury waiver clauses to the parties' choice of governing law and choice of forum as well as characteristics of law firms representing both bidder and target firms (namely, their reputation and familiarity with each other); and (d) analyzing whether bargaining power is related to the probability of a jury waiver clause in the agreement. In doing so, we exclude all mergers that chose Delaware as their state of governing law and forum, given that the Delaware Chancery Court sits always without a jury. We also ensure that our results are not driven by five other states that have similar Chancery courts, namely, Arkansas, Illinois, Mississippi, New Jersey, and Tennessee.

We find the following results. First, we find that jury waiver clauses are quite ubiquitous in merger and acquisition deals as 48.2% of them have jury waiver clauses.[9] Second, we find that deals in which New York is chosen as the governing law and forum state are more likely to include a jury waiver clause. No other state has such an effect. Third, we find that contracts

6. Id at 586–7.

7. Merger contracts are highly negotiated, involve sophisticated parties, deal with large and material amounts, and are very enforceable. Litigation in this context is likely to be standardized about deal price, with litigation consisting of derivative suits involving whether the deal price is too high or too low, and whether the acquirer did not "close on the deal."

8. The contracts in the Eisenberg and Miller (2007a, 2007b) study include agreements involving asset sales, bond indentures, credit commitments, employment, licensing, pooling and servicing, settlements, mergers and underwriting. There is too much heterogeneity in these types of contracts to be captured by dummy variables for each contract type.

9. Using a larger sample, we find that jury waiver clauses correlate with higher announcement period stock returns for both the target and the combined firm (Palia and Scott, 2014). The result that jury waiver clauses are beneficial and Pareto efficient for the combined firms is consistent with Eisenberg et al. (2006), and Eisenberg and Wells (2006).

negotiated by counsel from high reputation law firms tend to include jury waiver clauses,[10] and this effect is more significant for the acquirer's law firm than for the target's law firm. Finally, we find strong evidence for the bargaining power hypothesis wherein larger acquirers that take over smaller targets are more likely to include jury waiver clauses in their merger agreements. We also find no evidence that lawyer familiarity, industry effects whether the acquirer was an international firm, or whether the deal was completed has a statistically significant impact on the likelihood of having a jury waiver clause.

It is important to note that our results are based on correlations between quantifiable variables using Probit regression analysis. In no way are we attributing our results to some form of causal claim. In order to do so, we need to identify an exogenous shock that was not expected by the various participants in the merger and acquisitions market place. Clearly, the choice of attorney, choice of jury waiver clause, and choice of forum and law clause are endogenously determined. It is extremely hard, and one might also say close to impossible, to identify natural exogenous events which affect one choice variable and not another choice variable. That said, our empirical approach is consistent with all other studies that examine mergers and acquisitions using regression analysis.

This paper proceeds as follows. Section 2 explains our hypotheses and Section 3 describes our data, empirical methodology, and variables. Our empirical results are reported in Section 4, and conclusions presented in Section 5.

## 2. Hypotheses

In this section we construct hypotheses that correlate with the probability of the merger deal having a jury waiver clause.

### 2.1. Choice of Forum and Choice of Law

Merging firms that choose a state for dispute resolution opt into a judicial system, a cohort of judges, and a jury pool. They accomplish this

10. Data support that including jury waiver clauses increases the value of the deal, see note 9.

by negotiating a choice of forum clause. If the merging firms believe a state's judges are experienced and knowledgeable when compared with other states, they will tend to choose that state as the forum for any litigation over the contract and will more likely negotiate for a jury waiver clause. Additionally, if the merging firms believe that the chosen state's jury pool is fair and balanced, when compared with other states, they will be less likely to negotiate a jury waiver (Eisenberg and Miller, 2007a; Cain and Davidoff, 2012).

The choice of using a jury rather than a judge to decide the facts may be influenced by the extent to which the jury will be required to evaluate evidence of the meaning of the agreement from sources extrinsic to the written agreement. Here the choice of forum can also implicate the parties' option to choose the rules of contract interpretation that will govern contract disputes. A choice of law clause in a merger agreement is typically paired with the choice of forum provision in a single contract term that designates the same state as the exclusive jurisdiction to hear disputes as well as the source of governing law.[11] Choices of law clauses permit parties to select either "textualist" or "contextualist" rules of interpretation. Textualist jurisdictions, such as New York, use a "hard" parol evidence rule that gives presumptively conclusive effect to merger or integration clauses, and, in their absence, presume that the contract is fully integrated if it appears

11. The typical merger agreement contains both choice of forum and choice of law provisions, most often combined in a single contract term. See e.g. Agreement and Plan of Merger and Reorganization among Chordiant Software, Inc., Puccini Acquisition Corp., and Prime Response, Inc., January 8, 2001.

9.5 Applicable Law: Jurisdiction. This agreement shall be governed by, and construed in accordance with, the laws of the State of Delaware, regardless of the laws that might otherwise govern under applicable principles of conflicts of laws thereof. In any action between any of the parties arising out of or relating to the Agreement: (a) each of the parties irrevocably and unconditionally consents and submits to the exclusive jurisdiction and venue of the state and federal courts located in the state of Delaware . . .

A random search in our sample of merger agreements yielded only five agreements where the choice of forum and choice of law terms appeared as separate terms of the contract. In each of the five cases, the agreements identified the same state as the forum state and the source of governing law.

final and complete on its face.[12] In the same spirit, the textualist approach bars context evidence, suggesting that parties intended to impart non-standard meaning to language that, read alone, is unambiguous.[13] From the textualist perspective, therefore, the parol evidence and plain meaning rules are tools with which the contracting parties can control the evidence courts will use to interpret the portion of their agreement that they intend to make legally enforceable. Contextualist jurisdictions, such as California,[14] reject the notion that words in a contract can have a plain or unambiguous—context free—meaning at all. By the same logic they favor a soft parol evidence rule. Here the test for integration admits extrinsic evidence notwithstanding an unambiguous merger clause declaring the contract to be an integrated writing or, absent such a clause, notwithstanding the fact that the writing appears final and complete on its face.[15] Courts in California regard the merger clause as merely creating a rebuttable presumption of integration that can be overridden by extrinsic evidence that the parties lacked any such intent.

Hypothesis: Jury waiver clauses vary with the forum state and with the choice of law for contract interpretation.

## 2.2. Attorney Familiarity

If attorneys for both the target and acquirer firm are from the same state, they might be more familiar with relevant state law and with each other. As a consequence of the pre-existing relationship of their representatives, the

12. See, e.g., *Norman Bobrow & Co. v. Loft Realty Co.*, 577 N.Y.S.2d 36, 36 (App. Div. 1991) ("Parol evidence is not admissible to vary the terms of a written contract containing a merger clause.").

13. The plain meaning rule addresses the question of what legal meaning should be attributed to the contract terms that the parol evidence rule has identified. As with the division over hard and soft parol evidence rules, courts have divided on the question whether express contract terms should be given a contextual or a plain meaning interpretation. Under the latter practice, when words or phrases appear to be unambiguous, extrinsic evidence of a possible contrary meaning is inadmissible (Schwartz and Scott, 2010).

14. Other states that have contextualist jurisdictions are Alabama, Alaska, Arizona, Michigan, New Jersey, New Mexico, Texas, Vermont, and Washington.

15. *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 645 (1968) ("[R]ational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties.").

merging firms may be less likely to litigate their disagreements and more likely to settle (Klausner, 1995; Kahan and Klausner, 1997; Johnston and Waldfogel, 2002). Settlement may be easier to achieve in a bench trial rather than a jury trial as the variance in the parties' estimation of their case is smaller in the former case.

Hypothesis 2(a): Jury waiver clauses will be more prevalent in deals where the attorneys are from the same state.

Additionally, it seems reasonable that local attorneys might expect a local jury to favor it over non-local counterparties. For example, an attorney from the same state where the firm is headquartered might prefer a jury from that state for beneficial jurisdiction over a non-local attorney.

Hypothesis 2.2(b): Jury waiver clauses will be more prevalent in deals where the attorneys and the firm's headquarters are from the same state.

## 2.3. Attorney Reputation

Attorneys associated in a law firm with a high reputation for legal skill and experience are likely to be more confident in their ability to negotiate merger deals that are favorable to their clients' interests. To protect the advantage that they anticipate being able to secure in negotiating the terms of the merger agreement, they would prefer to have the case litigated before a judge rather than a jury. A judge's superior understanding of legal issues increases the probability that any advantage gained through negotiating a (clearly written) agreement would be sustained in court. As noted above, juries increase the variance in outcomes and in making significantly costly errors thus reducing marginally any advantage secured in the merger negotiations. Additionally, more skilled and experienced attorneys are also more likely to be familiar with the jurisdictional divide between textualist and contextualist styles of contract interpretation and as a consequence cognizant of the expected efficiency gains from choosing to litigate in a textualist state. Both of these theories would present similarly in the desire to negotiate a jury waiver clause.[16]

16. Some papers have shown that lawyer reputation is important. In a finitely repeated prisoner's dilemma game, Gilson and Mnookin (1994) suggest that clients can

Hypothesis 2.3: Jury waiver clauses will increase with law firm reputation.

One might argue that transactional attorneys who are in partnership with high reputation litigation specialists might be confident of their colleagues' superior ability relative to opposing counsel to persuade a jury pool of the merits of their claim and would therefore prefer litigating in front of a jury. But this argument is likely to be unsupported by the facts because jury waiver clauses are designed by the merger transaction lawyer and not by the litigation specialist (who is brought into the deal only if there is a conflict between parties).[17]

## 2.4. Bargaining Power

Contracts are often based on the bargaining power of the parties involved. If both the acquirer and the target firm are of the same size, they might a priori believe that they have been fairly represented in merger negotiations. On the other hand, if, for example, the acquirer is of a larger size and consequently has greater bargaining power, such acquirers might insist that the smaller target firm waive its right to a jury trial.

Hypothesis: Jury waiver clauses will be more frequent when the bidding firm is of a much larger size than the target firm.

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use lawyers with strong reputation to credibly signal to the other side that they are cooperative; in an experimental setting, Croson and Mnookin (1997) find supporting evidence that principals will choose agents that sustain more cooperation than on their own; Gilson (1984) suggests that business lawyers create value by being transaction cost engineers that increase the market value of their clients' transactions; Okamoto (1995) suggests that law firm reputation is a credible bond or commitment device in the form of a legal opinion being made on behalf of the client firm; Krishnan and Masulis (2013) find that top law firms increase the takeover premium for their client firms, top bidder law firms have higher completion rates, and top target law firms have higher withdrawal rates; Coates (2012) finds that law firms with more M&A experience but less-private target firm experience are less likely to choose Delaware as the forum for dispute resolution, whereas firm with less M&A experience omit forum selection clauses; and Krishnan et al. (2013) find that top law firms representing both bidders and targets increase the probability of shareholder litigation.

17. Additionally, the Vault litigation and merger rankings are given only for a small sample of law firms. For example, litigation rankings are given for only five law firms, the merger rankings for 10 law firms, whereas the overall ranking was for 100 law firms.

### 2.5. International Acquiring Firms

Some studies have found that international firms prefer arbitration to litigation (Eisenberg and Miller, 2007b). To the extent that this preference reflects a reluctance to rely on non-expert juries to resolve commercial disputes, the fact that the acquiring firm is unfamiliar with and uneasy about relying on U.S. juries should be positively correlated with the frequency of jury waiver clauses in the merger agreement.

Hypothesis: Jury waiver clauses will be more frequent when the bidding firm is an international acquirer that is traded in the U.S. capital markets.

## 3. Data, Methodology, and Variables

### 3.1. Data

We begin creating our sample of merger and acquisition deals by examining Thomson Securities Data Company's (SDC) Domestic Merger Database from January 2000 through December 2011. This resulted in 109,098 observations. We dropped any transactions where we could not obtain stock return data from the Center for Research in Security Prices (CRSP). This resulted in an initial sample of 8,488 observations. We then dropped transactions wherein the target company's name was the same as the acquirer company's name as in the case of exchange offers between two classes of stock and stock buybacks (6,681 observations), if the transaction did not involve a merger as in equity carve outs, loan modifications, and recapitalization (281 observations), if we could not find a merger agreement filed as an exhibit in SEC Form 8-K filing from the SEC's Edgar database (351 observations) and where market value could not be calculated from CRSP before the merger due to missing data (28 observations).[18] Because we did not want our results to being driven by mergers that chose Delaware as the state of forum, we removed such mergers (603 observations). Our final sample for analysis consists of 276 observations. A summary of our data collection methodology is given in Table 1.

18. We could not determine why some deals had no merger agreements filed with Edgar.

**Table 1.** Sample Creation

| Sample Creation | No. of Observations |
|---|---|
| U.S. domestic mergers from SDC (2001–2011) | 109,098 |
| No stock return data from CRSP | (100,610) |
| Initial Sample | 8,488 |
| Dropped if acquirer name equal to target name (exchange offer or "buyback") | (6,681) |
| Dropped if the form is not "merger" (equity carve outs, loan modifications and recapitalizations) | (281) |
| Dropped if the merger is not filed with the SEC | (268) |
| Dropped if the merger does not have a merger agreement | (351) |
| Dropped mergers wherein forum clause is Delaware | (603) |
| Dropped mergers wherein relative size cannot be calculated because of missing data | (28) |
| Final sample | 276 |

## 3.2. Definitions and Sources for Variables

Our dependent variable is whether the deal had a jury waiver clause, or not. We manually examined merger agreements to collect this variable. We also collected data from the merger agreements on whether the deal had an arbitration clause. There were very few mergers with arbitration clauses (seven mergers), so we categorized it as a jury waiver clause.[19]

We describe below the definition, construction, and data source for the various independent variables used in our regression (see Table 2 for a summary). We examined the merger agreements for the choice of forum and the choice of law. If the merger agreement gave New York as the choice of forum and law we set a dummy variable *Forum-NY* to unity, and zero otherwise. If the merger agreement gave the following 10 states (namely, Alabama, Alaska, Arizona, California, Michigan, New Jersey, New Mexico, Texas, Vermont, and Washington) as the choice of forum and law, we set a dummy variable *Forum-restrictive* to unity, and zero otherwise. For deals in which the choice of forum and law are for states that are not from the above 11 states, we set the dummy variables *Forum-NY*, and *Forum-restrictive* to zero.

In order to get proxy variables for the acquirers and bidders law firm reputation, we use three definitions of law firm reputation. The first proxy

19. None of our results significantly change if we removed these mergers from our analysis.

**Table 2.** Definitions and Sources for Independent Variables

| Variable | Definition {Source} |
|---|---|
| *Forum-NY* | Dummy variable set to unity if the choice of forum is New York, and zero otherwise. {Merger agreement} |
| *Forum-restrictive* | Dummy variable set to unity if the choice of forum is either Alabama, Alaska, Arizona, California, Michigan, New Jersey, New Mexico, Texas, Vermont, or Washington, and zero otherwise. {Merger agreement} |
| *A_reputation_PPP* | Rank based on profits per partner for the acquiring firm's lawyer. Rank goes from high reputation [1], to low reputation [200]. If the law firm is not ranked we give it a rank of 201. {Merger agreement and Am Law 200 series} |
| *T_reputation_PPP* | Rank based on profits per partner for the target firm's lawyer. Rank goes from high reputation [1], to low reputation [200]. If the law firm is not ranked, we give it a rank of 201. {Merger agreement and Am Law 200 series} |
| *A_reputation_Vault* | Rank based on Vault for the acquiring firm's lawyer. Rank goes from high reputation [1], to low reputation [100]. If the law firm is not ranked, we give it a rank of 101. {Merger agreement and Vault 100 series} |
| *T_reputation_Vault* | Rank based on Vault for the target firm's lawyer. Rank goes from high reputation [1], to low reputation [100]. If the law firm is not ranked we give it a rank of 101. {Merger agreement and Vault 100 series} |
| *A_reputation_NY* | Dummy variable set to unity if the acquiring firm's lawyer is from New York, and zero otherwise. {Merger agreement} |
| *T_reputation_NY* | Dummy variable set to unity if the target firm's lawyer is from New York, and zero otherwise. {Merger agreement} |
| *Lawyer familiarity* | Dummy variable set to unity if attorneys for both the target and acquirer firm are from the same state, and zero otherwise. {Merger agreement} |
| *A_HQ-lawyer familiarity* | Dummy variable set to unity if the acquiring firm's headquarters and the acquiring firm's attorney are from the same state, and zero otherwise. {Merger agreement} |
| *T_HQ-lawyer familiarity* | Dummy variable set to unity if the target firm's headquarters and the target firm's attorney are from the same state, and zero otherwise. {Merger agreement} |
| *Relative size* | Natural logarithm of target's market value less natural logarithm of acquirer's market value. {CRSP} |
| *A_international* | Dummy variable set to unity if bidder is an international acquirer, and zero otherwise. {SDC} |
| *Completed* | Dummy variable set to unity if merger completed, and zero otherwise. {SDC} |

variable for law firm reputation is based on the idea that more reputable lawyers can charge higher fees. Accordingly, we use as our independent variable the dollar profits per partner for the top 200 law firms. These data are obtained for each year from the Am Law 200 series provided by ALM

Legal Intelligence. We define *A_reputation_PPP* as the law firm rank based on profits per partner (in $millions) for the acquiring firm's lawyer. Similarly, we define *T_reputation_PPP* as the law firm rank based on profits per partner (in $millions) for the target firm's lawyer. If the law firm is not listed in the top 200, we give it a rank 201.[20] Note that a lower number for both *A_reputation_PPP* and/or *T_reputation_PPP* indicates a more reputable law firm.

Our second proxy variable for law firm reputation is the prestige rank of the law firm by *Vault*. The top 100 law firms are ranked by *Vault* each year. We define *A_reputation_Vault* (*T_reputation_Vault*) as the law firm rank based on *Vault* for the acquiring (target) firm's lawyer, respectively. If the law firm is not listed in the top 100, we give it a rank 101. Our third proxy variable for law firm reputation is *A_reputation_NY*, and it is a dummy variable set to unity if the acquiring firm's lawyer is from New York. A similar variable, *T_reputation_NY*, is set to unity if the target firm's lawyer is from New York.

To examine the attorney familiarity hypothesis, we examined the merger agreements and created a dummy variable *Lawyer familiarity*, if attorneys for both the target and acquirer are from the same state, and zero otherwise. To examine whether an attorney from the same state where the firm is headquartered might prefer a jury from that state for beneficial jurisdiction over a non-local attorney, we create two dummy variables. The first dummy variable, *A_HQ-lawyer familiarity*, is set to unity if the acquiring firm's headquarters and their attorney is from the same state, and zero otherwise. The second dummy variable, *T_HQ-lawyer familiarity*, is set to unity if the target firm's headquarters and their attorney is from the same state, and zero otherwise.

To examine the bargaining power hypothesis, we need to calculate the relative size of the merging firms. In order to calculate this variable, we define the variable *Relative size* to be the natural logarithm of the market value of the target firm less the natural logarithm of the market value of the

20. When the rank of the bidder's or the target's law firm was not listed in the top 100, we also set dummy variables equal to unity, and *A_reputation_Vault* and *T_reputation_Vault* to zero. Our results did not significantly change, suggesting that law firm rank of the non-listed firm is not driving our law firm reputation results.

bidder firm. These market values are calculated from CRSP on the last day of the estimation period ($t = -60$).[21]

We define a dummy variable *A_international* which is set to unity if SDC states that the acquirer is an international bidder. For US bidders *A_international* is set to zero. We also include a number of control variables. The first is a dummy variable, *Completed*, that is set to unity if the deal was completed, and zero otherwise. We also include 18 dummy variables, 9 for acquirers, and 9 for target firms to control for the industry of each firm. We use the firm's four-digit SIC code to map into the 10 Fama-French industries.[22] The nine dummy variables for acquirers are: *A_cons_nondur* which is set to unity for consumer non-durables (food, tobacco, textiles apparel, leather and toys), and zero otherwise; *A_cons_dur* which set to unity for consumer durables (cars, tv's, furniture, household appliances), and zero otherwise; *A_manuf* which is set to unity for manufacturing industries, and zero otherwise; *A_energy* which is set to unity for the oil, gas and coal industries, and zero otherwise; *A_high_tech* which is set to unity for high-technology companies, and zero otherwise; *Telecom* which is set to unity for the television and transmission industries, and zero otherwise; *A_shops* which is set to unity for wholesale and retail shops, and zero otherwise; *A_health* which is set to unity for the healthcare industry, and zero otherwise; and *A_utilities* which is set to unity for the utilities industry, and zero otherwise. All other industries are set to zero in the above nine industry variables. A similar algorithm is implemented for target industries, with each industry name beginning with *T_*instead.

## 4. Empirical Results

### 4.1. Descriptive Statistics

We begin by documenting the incidence of jury waiver and arbitration clauses in our sample. We find that jury waiver clauses are quite ubiquitous in the merger agreements, with 133 out of 276 (48.2%) having a jury

21. This methodology has also been used by Asquith et al. (1983).
22. See industry classification definitions at Professor Kenneth French's web site http://mba.tuck.Dartmouth.edu/pages/faculty/ken.french/Data_Library/changes_ind.html.

**Table 3.** Descriptive Statistics for Independent Variables

| Variable | Mean | Median | Std. Dev. |
|---|---|---|---|
| *Forum-NY* | 0.25 | 0 | 0.43 |
| *Forum-restrictive* | 0.17 | 0 | 0.38 |
| *A_reputation_PPP* | 101.85 | 83 | 80.76 |
| *T_reputation_PPP* | 115.25 | 120 | 76.80 |
| *A_reputation_Vault* | 63.85 | 89 | 41.14 |
| *T_reputation_Vault* | 69.07 | 97 | 38.26 |
| *A_reputation_NY* | 0.31 | 0 | 0.46 |
| *T_reputation_NY* | 0.18 | 0 | 0.39 |
| *Lawyer familiarity* | 0.32 | 0 | 0.47 |
| *A_HQ-lawyer familiarity* | 0.84 | 1 | 0.37 |
| *T_HQ-lawyer familiarity* | 0.73 | 1 | 0.45 |
| *Relative size* | −2.17 | −2.06 | 1.58 |
| *A_international* | 0.06 | 0 | 0.23 |
| *Completed* | 0.92 | 1 | 0.27 |

See Table 2 for variable definitions.

waiver clause. In Table 3, we present the descriptive statistics of the independent variables that we will use in our regression.

We find that the choice of New York as the state of law and forum to be 25% (68 mergers out of 276) in our sample, and the 10 restrictive states that allow contextual interpretation to be 17% (47 mergers out of 276). We also find that the acquiring (target) firm's lawyers to have an average rank based on profits per partner of 101.9 (115.3), respectively, out of a maximum rank of 201. Similarly, we find that the acquiring (target) firm's lawyers to have an average rank based on *Vault* of 63.9 (69.1), respectively, out of a maximum rank of 101. New York based law firms are on average more heavily represented for acquirers (31%) than for target firms (18%).

We find that 32% or 88 out of 276 mergers have lawyers from the same state, with the median mergers having lawyers from different states. Eighty-four percent of the mergers have the lawyer of the acquiring firm from the same state where the bidder firm is headquartered, and 73% of the mergers have the lawyer of the target firm from the same state where the target firm is headquartered.

When we examine the relative size of the two merging firms, we find that the average target firm is 11.4% of the market capitalization of the bidder firm. We find that 6% of our mergers involved an acquirer that was an international firm that is traded in the U.S. capital markets. Most of our sample

**Table 4.** Spearman Correlation Coefficients of Lawyer Reputation Variables

| | *A_Reputation_Vault* | *A_reputation_NY* |
|---|---|---|
| *A_reputation_PPP* | 0.864 | −0.572 |
| *A_reputation_NY* | −0.608 | |
| | *T_Reputation_Vault* | *T_reputation_NY* |
| *T_reputation_PPP* | 0.824 | −0.535 |
| *T_reputation_NY* | −0.560 | |

See Table 2 for variable definitions. All Spearman correlations are statistically significant at the one-percent level.

(91%) involve deals that were completed. When we examine the various industries bidders are from, we find more bidders from high-technology and health industries. We also find target firms to be more concentrated in manufacturing, high-technology, and health industries.[23]

## 4.2. Determinants of Jury Waiver Clauses

Table 4 presents the Spearman correlation coefficients between the lawyer reputation variables. All the correlations are significant at the 1% level of significance. Given that the first two proxy variables, are ranks based on profits per partner and *Vault*, they are highly positively correlated; 0.86 for acquirers and 0.82 for targets, respectively. New York law firms are found to have a higher rank (a lower value denoting a higher rank; for example, the first ranked law firm gets the value one, the second ranked law firm gets the value two, and so on). Therefore, New York law firms have a negative correlation with the other lawyer reputation variables. Given the high correlations between the lawyer reputation proxy variables, we include them separately in the regressions.

We now estimate a Probit model to determine the ex ante choice of merger partners to include a jury waiver clause in their merger agreement. In doing so, we include a comprehensive list of independent variables in our regression specification, the results of which are given in Table 5. In column (1) law firm reputation is proxied by the rank of the law firm based on profits per partner, in column (2) law firm reputation is proxied by the

23. Industry characteristics are not reported in Table 2 but are available from the authors.

**Table 5.** Probit Model for Choice of Jury Waiver Clause

| | Reputation proxied by: | | |
|---|---|---|---|
| | Ranking of profits-per-partner (1) | Ranking of Vault Magazine (2) | Dummy for NY law firm (3) |
| Panel A: Regression estimates and standard errors | | | |
| *Forum-NY* | 0.312 (0.10)[a] | 0.322 (0.10)[a] | 0.302 (0.10)[a] |
| *Forum-restrictive* | −0.143 (0.11) | −0.136 (0.11) | −0.103 (0.10) |
| *A_reputation_PPP* | −0.002 (0.000)[a] | | |
| *T_reputation_PPP* | −0.001 (0.001) | | |
| *A_reputation_Vault* | | −0.003 (0.001)[a] | |
| *T_reputation_Vault* | | −0.002 (0.001)[b] | |
| *A_reputation_NY* | | | 0.258 (0.10)[a] |
| *T_reputation_NY* | | | 0.214 (0.11) |
| *Lawyer familiarity* | −0.107 (0.08) | −0.153 (0.08) | −0.141 (0.09) |
| *A_HQ-lawyer familiarity* | 0.030 (0.11) | 0.037 (0.11) | −0.003 (0.11) |
| *T_HQ-lawyer familiarity* | −0.142 (0.09) | −0.155 (0.09) | −0.160 (0.09) |
| *Relative Size* | −0.080 (0.03)[a] | −0.083 (0.03)[a] | −0.066 (0.03)[a] |
| *A_international* | 0.362 (0.21) | 0.382 (0.21) | 0.362 (0.20) |
| *Completed* | 0.074 (0.14) | 0.067 (0.15) | 0.032 (0.14) |
| *Constant* | 0.023 (0.54) | 0.284 (0.57) | −0.792 (0.48) |
| Panel B: *p*-values for variables jointly equal to zero | | | |
| *Forum* | 0.001[a] | 0.001[a] | 0.003[b] |
| *Attorney reputation* | 0.000[a] | 0.000[a] | 0.001[a] |
| *Lawyer familiarity* | 0.166 | 0.062 | 0.083 |
| *Industry effects* | 0.192 | 0.143 | 0.051 |
| Pseudo $R^2$ | 0.312 | 0.313 | 0.297 |
| *N* | 276 | 276 | 276 |

See Table 2 for variable definitions. Results are for the marginal effects of each variable. For each regression specification, 18 industry dummies are included for acquirers and targets (nine each), the results of which are not reported.
[a]Statistically significant at 1% level.
[b]Statistically significant at 5% level.

*Vault* rank of the law firm, and in column (3) whether the law firm is a New York law firm. Panel A presents the regression estimates and standard errors which are corrected using the Huber–White sandwich estimators that control for lack of normality and heteroscedasticity. For ease of explanation we do not provide the coefficients on the 18 industry dummy variables. It also turns out that they are not statistically significant. In Panel B, we present the results of an *F*-test that the multiple regression coefficients under the respective hypotheses are jointly equal to zero.

When we examine the choice of forum and choice of law variables, we find that merger agreements that showed New York as the forum state and state of governing law had a higher likelihood of a jury waiver clause. When we examine the restrictive law states that allow contextual interpretation of contracts we find a negative relationship in all three specifications, but this relationship is statistically insignificant. An *F*-test shows that we can reject the null hypothesis that the forum state variables are jointly equal to zero.

We next examine the lawyer reputation variable. In all three specifications, more reputable law firms of acquirers have a higher likelihood of including a jury waiver clause in the merger agreement. When the target law firm reputation variable is based on *Vault* rankings, more reputable law firms of targets have a higher likelihood of including a jury waiver clause in the merger agreement. An *F*-test shows that we can reject the null hypothesis that the lawyer reputation variables are jointly equal to zero. These results support the argument that attorneys from more reputable law firms prefer to have jury waiver clauses in order to reduce the variance in outcomes and errors made by less knowledgeable juries (as compared to judges). The results are also against the argument that more reputable law firms prefer juries because they are more confident of their litigation skill.

We find no evidence for the hypothesis that lawyer familiarity has a statistically significant impact on the probability of having a jury waiver clause in the merger agreement. These results show no support for lawyers from the same state, or lawyers who are from the same state where the firm is headquartered having a higher likelihood of a jury waiver clause. An *F*-test rejects the null hypothesis that lawyer familiarity has a statistically significant effect on the probability of having a jury waiver clause.

We find strong evidence for the bargaining power hypothesis across all three regression specifications. A large acquirer taking over a small target firm (*Relative Size* is low) generates a higher probability of having a jury waiver clause, or conversely, a merger between equal size firms lowers the probability of having a jury waiver clause.

We find no evidence that jury waiver clauses are more prevalent when the bidder is an international firm that is traded on the U.S. stock market. We also find that whether the deal was completed or not had a statistically insignificant effect on the likelihood of having a jury waiver clause. Finally,

**Table 6.** Parsimonious Probit Model of Statistically Significant Variables (in Table 5)

| | Reputation proxied by | | |
|---|---|---|---|
| | Ranking of profits-per-partner | Ranking of Vault Magazine | Dummy for NY law firm |
| | (1) | (2) | (3) |
| Panel A: Regression estimates and standard errors | | | |
| *Forum-NY* | 0.382 (0.08)[a] | 0.366 (0.08)[a] | 0.369 (0.09)[a] |
| *A_reputation_PPP* | −0.002 (0.000)[a] | | |
| *A_reputation_Vault* | | −0.003 (0.000)[a] | |
| *T_reputation_Vault* | | −0.003 (0.001)[a] | |
| *A_reputation_NY* | | | 0.330 (0.08)[a] |
| *Relative Size* | −0.066 (0.02)[a] | −0.073 (0.02)[a] | −0.063 (0.02)[a] |
| *Constant* | −0.062 (0.19) | 0.293 (0.23) | −0.845 (0.16) |
| Pseudo $R^2$ | 0.200 | 0.208 | 0.178 |
| *N* | 276 | 276 | 276 |

See Table 2 for variable definitions. Results are for the marginal effects of each variable.
[a]Statistically significant at 1% level.
[b]Statistically significant at 5% level.

we find statistically insignificant industry effects that are jointly uncorrelated with the probability of having a jury waiver clause.

We now construct a parsimonious model of the statistically significant variables that we found in Table 5, for modeling the choice of having a jury waiver clause. The results of this model are given in Table 6. Consistent with the results noted above, we find that merger partners who specify New York as the governing law and forum state, who are represented by high reputation law firms, and are unequal size merger partners, increase the probability of having a jury waiver clause. These results show strong support for the choice of forum and law, the lawyer reputation, and bargaining power hypotheses.

Although we removed all mergers wherein Delaware was chosen as the choice of forum and law, we examine whether other states have Chancery courts that sit without a jury. We find five other states that have such courts. These states are Arkansas, Illinois, Mississippi, New Jersey, and Tennessee. We find 14 mergers whose choice of forum and law is from these states. In Table 7, we repeat our regressions excluding these 14 observations and find no significant change in our results.

**Table 7.** Removing States with Chancery Courts (AR, IL, MS, NJ, and TN)

| | Reputation proxied by | | |
|---|---|---|---|
| | Ranking of profits-per-partner | Ranking of Vault Magazine | Dummy for NY law firm |
| | (1) | (2) | (3) |
| Panel A: Regression estimates and standard errors | | | |
| *Forum-NY* | 0.385 (0.08)[a] | 0.367 (0.09)[a] | 0.362 (0.09)[a] |
| *A_reputation_PPP* | −0.002 (0.000)[a] | | |
| *A_reputation_Vault* | | −0.003 (0.000)[a] | |
| *T_reputation_Vault* | | −0.003 (0.001)[a] | |
| *A_reputation_NY* | | | 0.353 (0.08)[a] |
| *Relative Size* | −0.069 (0.03)[a] | −0.078 (0.02)[a] | −0.069 (0.02)[a] |
| *Constant* | −0.081 (0.19) | 0.301 (0.24) | −0.881 (0.17) |
| Pseudo $R^2$ | 0.204 | 0.216 | 0.188 |
| *N* | 262 | 262 | 262 |

See Table 2 for variable definitions. Results are for the marginal effects of each variable.
[a]Statistically significant at 1% level.
[b]Statistically significant at 5% level.

In summary, we find that deals in which New York is chosen as the forum state and as governing law are more likely to have a jury waiver clause. No other state has such an effect. We also find that law firms that are more highly reputable are more likely to include a jury waiver clause, and this effect is more significant for the acquirer's law firm than for the target's law firm. Finally, we find strong evidence for the bargaining power hypothesis wherein larger acquirers that take over smaller targets are more likely to include jury waiver clauses in their merger agreements. We also find no evidence that lawyer familiarity, industry effects, whether the acquirer was an international firm, or whether the deal was completed has a statistically significant impact on the probability of having a jury waiver clause in the merger agreement.

## 5. Conclusions

This study examines a large sample of 276 publicly traded deals over an 11-year period (2001 to 2011) to determine the ex ante choice to include a jury waiver clause in a merger and acquisition deal. We extend and improve on the EM study. We find that jury waiver clauses are quite

common in merger agreements with 48.2% (133) of the deals having such a clause.

We find that deals in which New York is chosen as the forum state and as governing law are more likely to have a jury waiver clause. No other state has such an effect. We also find that law firms that are more highly reputable are more likely to include a jury waiver clause, and this effect is more significant for the acquirer's law firm than for the target's law firm. Finally, we find strong evidence for the bargaining power hypothesis wherein larger acquirers that take over smaller targets are more likely to include jury waiver clauses in their merger agreements. We also find no evidence that lawyer familiarity, industry effects, whether the acquirer was an international firm, or whether the deal was completed has a statistically significant impact on the probability of having a jury waiver clause in the merger agreement.

The most significant finding is that jury waiver clauses are positively correlated with the choice of New York as the governing law and New York as the forum state. This finding is consistent with the hypothesis that parties choose jury waiver clauses in order to reduce the back end costs of litigation, especially the costs of contract interpretation disputes. As noted above, New York follows the traditional, textualist approach to contract interpretation (Schwartz and Scott, 2010). Textualist interpretation permits legally sophisticated commercial parties to economize on contracting costs by shifting costs from the back end of the contracting process (the enforcement function) where a court would inquire broadly into context, to the front end of the contracting process (the negotiating and design function) where the parties specify the extent to which context will count.[24] Parties can do this, for example, by drafting a merger clause that integrates their entire understanding, including relevant context, into the written contract and then having the court apply a plain meaning interpretation to those contract terms that are facially unambiguous. Importantly, when parties fully integrate the agreement and use a merger clause, an interpretation dispute over contract terms may be resolved on summary judgment, thereby substantially reducing ex post enforcement costs (Schwartz and Scott, 2010).

24. For a discussion of how contracting parties can economize on total contracting costs by shifting costs between the drafting or front end of the contracting process and the adjudication or back end of the process, see Scott and Triantis (2006).

The reduction in the chance of an expensive trial, in turn, reduces the settlement value of a claim, and therefore the incentive for a disappointed party to pursue opportunistic litigation in the first place.

If instead a court decides to consider additional context evidence, it must necessarily deny a motion for summary judgment and set the case for full trial on the merits. Thus, if litigation cost is considered, there is a strong argument that in cases where uncertainty is low and risks can be allocated in advance, many legally sophisticated commercial parties prefer textualist interpretation so that disputes can be resolved without the punishing costs of a full trial and the skewed incentives that derive from the anticipation of these costs (Schwartz and Scott, 2010). Such parties will rationally invest in sufficient drafting costs to insure that a court interpreting the written document together with the pleadings and briefs will be able to arrive at the "correct interpretation" more often than not.[25] Here the simple comparison is between the costs of drafting and the costs of a trial. A jury waiver clause is an additional element in this strategy. Should a New York court deny the defendant's claim for summary judgment (say, for example, on the ground that the contract language is ambiguous), the trial will proceed without a jury thereby reducing, by some margin, total litigation costs.

The finding that jury waivers are positively correlated with New York as the choice of law and forum is also consistent with the hypothesis that New York, as the largest jurisdiction for commercial litigation in the United States, has a core of trial judges that, on average, have greater expertise in resolving commercial disputes. The absence of a similar correlation in the case of Delaware, another prominent textualist jurisdiction with an expert judiciary, is explained by the fact that the jury issue is moot in that jurisdiction. Indeed, our finding that Delaware is the dominant choice among

25. This argument is premised on the claim that firms behave as if they are risk neutral. Assume, for example, that there is a distribution of possible judicial interpretations of a particular contract. A risk neutral party wants the mean of this distribution to be at the correct interpretation; that is, for the court to be right "on average." Thus, risk neutral firms prefer to limit enforcement costs—say by resolving interpretation disputes by summary judgment—so long as the courts interpretations are correct on average. It follows that sophisticated parties (i.e., firms) are more reluctant to expend resources to shrink the variance around the correct mean. Conditional on the quality of the court, variance falls as more evidence is introduced. Thus, such parties prefer to limit the evidence that is introduced in litigation. See Schwartz and Scott (2003, 2010).

merger partners to govern both law and forum supports the efficient cost-shifting hypothesis since Delaware is a textualist jurisdiction with rules of interpretation similar to those in New York.[26]

The inference that jury waivers are linked to the design choice to shift contracting costs from the enforcement stage to the negotiation stage is also consistent with the finding that jury waivers are positively correlated with more experienced merger attorneys with larger reputations. More reputable firms are likely to employ transactional lawyers who are more familiar with the differences between textualist and contextualist jurisdictions and thus are better able to advise clients of the efficiency benefits of choosing New York as the governing law and forum together with a jury waiver provision.

This is consistent with the finding that the positive correlation between law firm reputation and jury waivers is driven by New York law firms. In addition, the capacity of a lawyer to mount sophisticated legal arguments that are more likely to persuade a judge during a bench trial is increasing in the lawyer's skill and experience and thus increasing in the reputation of the law firm. Additional support for this inference is provided by the finding that jury waiver clauses are positively correlated with a large acquirer taking over a smaller target. The relative size of the acquirer is increasing in its ability, ceteris paribus, to bargain for a jury waiver clause both for efficiency reasons and also to negate any distributional advantage that might attend a small target's ability to persuade a jury that they were exploited by the large acquirer in the merger agreement.

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26. *Pellaton v. Bank of New York*, 592 A.2d 473 (Del. 1991) (if the instrument is clear and unambiguous on its face, neither this Court nor the trial court may consider parol evidence "to interpret it or search for the parties' intent [ions]. . .") (quoting *Hibbert v. Hollywood Park, Inc.*, Del.Supr., 457 A.2d 339, 343 (1983)) See Schwartz and Scott (2010).

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