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SIDE 2021 Submission

*This paper was prepared as part of the EDLE academic program.*

*“Since it costs a lot to win, and even more to lose”: Implications for competition law from the use of arbitration for tort claims and the possibility of collusion to subvert due care standards.[[1]](#footnote-1)*

Abstract

*There is tension between the goals of tort law, contract law, antitrust law and legal systems when firms collusively use arbitration for tort claims. Competition law is designed to limit the abuse of market power and conspiracies to restrain trade. Contracts to arbitrate tort claims, including claims for torts related to consumer, service, medical, and employment contracts, may lead to an underproduction of efficient due care standards which are produced by courts in the adjudicating of tort claims alongside other public goods such as information, rule interpretation and gap filling. Arbitration is private and does not produce public goods from adjudicating tort claims. In the United States (US) there has been an expanding interpretation of the Federal Arbitration Act (FAA) to treat contracts to arbitrate the same as other contractual terms with a strong preference to enforce arbitration for nearly all claims including tort claims, including terms found in commonly used adhesion contracts which are often entered into without being fully read or understood by consumers, patients and employees. In the Europe Union (EU) many contracts to arbitrate must meet additional contractual formation requirement to be considered valid, which in practice limits the extent of the use of arbitration between businesses and consumers. Arbitration clauses are often found alongside terms favorable to defendants which limit potential damages from victims and other potentially pro plaintiff procedural rights in litigation. Judicial or regulatory arbitrage may occur when repeat players (firms facing multiple similar claims, RP) and industries coordinate efforts to take advantage of the differences between arbitration and litigation in order to: 1) act strategically using information, resource and opportunity advantages over one shotters (single claim claimants, OS) in the arbitration of tort claims to avoid liabilities for torts and avoid taking due care as required by law; 2) avoid judicial oversight of bad acts including, tortious acts, collusive behavior, price fixing (including the indirect price fixing effects which collusion to use arbitration may result in), and other anticompetitive or otherwise illegal behavior; 3) play for rules by strategically influencing the production of public goods from litigation in order to avoid the adjustment of inefficiently low due care standards to an efficient standard, and strategically waive arbitration in order to adjust inefficiently high due care standards to an efficient standard. Courts should be wary of becoming involved as “instruments” of a collusive scheme to divert tort claims to arbitration as the collusive use of arbitration for tort claims may lead to inefficient market outcomes which may decrease social welfare. This paper aims to: 1) Identify the tensions between, contract, tort, and competition law within the context of contracts to arbitrate tort claims. 2) Highlight potential anticompetitive effects from the use of arbitration for tort claims using a law and economics approach; and 3) Consider if current legal instruments in the EU and US are capable of smoothing the tension between laws and the alleviating of harms caused from the collusive use of arbitration for tort claims.*

1. Introduction

The use of mandatory arbitration clauses in a consumer, service or employment contracts may result in tort claims being arbitrated in a private tribunal. The arbitration of tort claims has implications for competition law, as firms’ use of ex ante arbitration clauses in their standard contracts may undermine free markets. Particularly, the private arbitration of tort claims may enable or facilitate firms to: *1) collude in setting market conditions and prices both directly and indirectly; 2) collude to avoid state regulatory or judicial oversight of: all forms of collusive behavior, anticompetitive practices in an industry, or the strategic taking of less than due care, and; 3) collude over the development of law, including efforts to selectively litigate claims which will benefit colluding firms or prevent claims in litigation which could lead to increased care or liability costs for firms in an industry*.

The secretive nature of arbitration makes it difficult, perhaps impossible, to know exactly which disputes have been arbitrated, the outcome of the claims, the economic impact arbitration has on prices in consumer, service and employment contracts, and how arbitration of tort claims interferes with the production of public goods. This analysis will explore some theoretical aspects of collusive behavior in the use of arbitration for domestic tort claims from a law and economics perspective, specifically how the use of arbitration for tort claims may create opportunities for firms to behave strategically as a consequence of deference towards arbitration.[[2]](#footnote-2) The contracts to arbitrate considered here can be further differentiated as only those contracts to arbitrate which have not be individually bargained over, rather they are found within a standardized contract or contract of adhesion. A positive analysis concerning some aspects of collusion to use arbitration will also be discussed, however much this discussion focuses on how legal deference towards arbitration has shifted, specifically in the US, while in the EU this has not been the case. This article is not all encompassing, although it does demonstrate a need for further research concerning the use of arbitration of tort claims and it identifies several potential issues which are particularly deserving of further research. Another topic which this paper does not examine is the use of arbitration by firms in a dominate position, rather the focus is on collusive efforts to use arbitration across firms in an industry in which there is an option for collusive behavior.[[3]](#footnote-3) This paper does not address the use of arbitration for anticompetitive claims which concern anticompetitive behavior unrelated to the use of arbitration, i.e. traditional antitrust claims such as abuse of dominate position, direct price fixing, and collusion on other terms of business.

There are problems associated with firms acting in unison or collusively to including mandatory arbitration clauses in their consumer, service, or employment contracts.[[4]](#footnote-4) While much of this collusion results in typical antitrust injuries, some of the harms caused by the collusive use of arbitration for tort claims is not typical of antitrust claims. Arbitration clauses generally cover all claims between the contracting parties, including tort claims.[[5]](#footnote-5) The collusive efforts to use arbitration for tort claims creates an opportunity for strategic behavior by firms seeking to gain private utility through the imposition of transaction costs or barriers to the use of public goods on counterparties, and creates pressure to push tort due care standards towards being inefficient, which may lead to negative externalities for both individuals and society.

The fixing of market conditions and prices is one of the hardcore competition infringements which both the EU and the US actively enforce.[[6]](#footnote-6) Collusion to use arbitration across an industry has price effects. The right to arbitrate has a value as does the right to litigate in court, as do all the other rights found in a contract. The value of the right to arbitrate is thus different from the value of the right to litigate. Despite price fixing being such a hardcore infringement, when price fixing is accomplished through tacit collusion rather than explicit collusion, the firms involved in the price fixing may be able to avoid sanctions while continuing their collusive behavior.[[7]](#footnote-7)

There may be objectives in collusions to use arbitration for tort claims which would benefit firms beyond the initial pricing effects of using arbitration.[[8]](#footnote-8) There are potential competition law infringements beyond price fixing in collusions to use arbitration which are related to the arbitration of tort claims involving agreements: to restrict trade, to manipulate the rules of competition in the market, and to subvert the power of the judiciary to produce public goods which specifically related to the regulation of firms in an industry. In addition to the possibility of collusion enabling indirect price fixing and the distortion of free markets (each contributing to welfare inefficiency) the arbitration of tort claims combined with collusive behavior by firms seeking to avoid judicial oversight of their tortious acts may contribute to an underproduction of, or under investment in, public goods from adjudication.[[9]](#footnote-9) Firms may use market power and coordination to mandate private contractual terms which enable this type of collusive behavior, which in turn results in not only a distortion of the market in which they conduct business but also a distortion in the market for adjudication.[[10]](#footnote-10) Effects on the market for adjudication also include potential effects on third parties, which may contribute to a market failure, if for instance these are negative externalities. There is also the potential these effects represent positive externalities, if for instance there is no potential for a given claim to lead to the production of public goods and the use of arbitration indirectly provides increased opportunities to adjudicate claims in court which could lead to the production of public goods. The selective litigation of claims within an industry may provide benefits for private interests which are not in line with public interests and may undermine the legitimacy of the law and legal institutions. The potential for market restraints from the use of arbitration for tort claims is thus very dependent on the judicial enforcement of contracts to arbitrate tort claims and the nature of the claim.

Having an efficient due care standard should provide parties with the right incentives to take care, given the activities they undertake may produce negative externalities.[[11]](#footnote-11) Due care standards are public goods, which limit the costs of accidents across society.[[12]](#footnote-12) The use of courts to adjudicate tort claims leads to the production of public goods including rule making and information production, while the adjudication of tort claims in a private arbitral tribunal generally does not lead to the production of these goods.[[13]](#footnote-13) Arbitration produces a private dispute resolution of a claim and does not contribute to the development of efficient due care standards directly.[[14]](#footnote-14) Arbitrating tort claims limits the inputs necessary for courts to produce public goods because it limits the courts role in developing and maintaining efficient due care standards.[[15]](#footnote-15)

When arbitration is used to adjudicate tort claims unilaterally, it may lead to a restriction in both the use of public goods and the production of public goods.[[16]](#footnote-16) Court fees can also be seen as a restriction on the access to public goods, however, as courts are subsidized from public funds, the restriction on the use of the public good is lower than if users paid the full price of the good. In arbitration the use of public goods is incidental to the payment for a private good (a decision rendering by the arbitrators). The input of rules from public courts is not entirely paid for by the parties to the dispute, rather the parties in a dispute are free riding to a certain extent off of the public goods of laws, while also inhibiting the ability of courts to create these public goods.[[17]](#footnote-17)

Collusive behavior in the use of arbitration may divert an entire class of claims away from courts and may lead to persistent market failures, including failures within the market for adjudication of disputes. For instance, if a certain class of claims tends to lead to the production of public goods from litigation then the removal of these claims from public adjudication forums will lead to an underproduction of public goods from courts related to the class of claims.[[18]](#footnote-18) On the other hand, the arbitration of tort claims which are incapable of leading to the production of public goods from litigation may lead to lower accident costs and be welfare enhancing when arbitrators reach similar outcomes as courts. It thus seems a possibility that for some types of tort claims, the collusive use of arbitration may lead to welfare improvements so long as the claims being diverted from courts are wholly incapable of leading to the production of public goods from adjudication and the parties share in the benefits of using arbitration. If the gains from diverting tort claims to private adjudication forums does not outweigh the lost benefits from the production of public goods resulting from adjudication of tort claims in a public forum, or if the benefits from using arbitration are captured entirely by one party, then the use of arbitration cannot be said to be either efficient or welfare maximizing.[[19]](#footnote-19)

In domestic settings, where choice of law is not an issue which arbitration could resolve, if the law allows firms to act in unison to mandate arbitration clauses which cover tort claims it may prevent the development of efficient due care standards in tort law, it may allow firms to avoid care cost and liability for tortious behavior, it may distort the market the firms operate in as well as the market for adjudication, and it may act as a private method to coopt the government into restricting the use and availability of public goods.

This article looks at the issue of arbitration and competition law from a unique perspective, specifically regarding the adjudication of domestic tort claims in arbitration and the potential anticompetitive effects the use of arbitration for tort claims may produce. There is a dedicated line of literature addressing the competence of arbitration tribunals to adjudicate antitrust claims, and the validity of contracts to arbitrate antitrust claims.[[20]](#footnote-20) This article is distinguishable from the literature concerning the arbitrability of antitrust claims because of the focus on the arbitration of tort claims and implications of the use of arbitration for tort claims. Furthermore, this article adds to the literature concerning to the collusive use of arbitration and the literature concerning the use of arbitration for tort claims specifically. To a large extent, this analysis is limited in scope to domestic arbitration contracts, which may include arbitration between employers and employees as well as arbitration contracts between product and service providers and consumers. Additionally, this analysis may be of limited use for considering arbitration between employees and employers when the relationship is the result of collectively bargained labor agreements. Business to business contracts to arbitrate are also not included under this analysis because these parties can be considered to be on more equal bargaining grounds and can be thought of as more sophisticated than consumers and the average employee. While some of the issues discussed here may also have implications for the arbitration of non-tort claims between business and consumers, the scope of the article is narrow and the focus is purely on the use of arbitration for tort claims, with specific focus on the efficient use of arbitration for tort claims, the impact of the use of arbitration in setting due care standards, and how firms may behave strategically and collusively in order to influence the setting of due care standards through the use of arbitration.

The article is structured as follows: Section two is an introduction to conspiracies to use arbitration, specifically with examples from the US. Section three concerns the Goals of Law, specifically contract, tort, competition, and judicial institutions as well as the production of public goods from litigation and the efficient use of arbitration for tort claims. Section four addresses how a conspiracy to use arbitration for tort claims may function, specifically regarding: court error, the market for adjudication, strategic behavior, bias in adjudication, tacit and explicit collusion, and focal point theory. Section 5 addresses the difference in the legal restraints on conspiracies to arbitrate in the US and EU. Section 6 addresses the strategic use of arbitration and conspiracies to use arbitration for tort claims, including the objectives of the conspiracy. Section 7 contains brief concluding remarks and following the bibliography is Appendix A which explores some game theoretical insights for conspiracies to use arbitration for tort claims and focuses on the possibility of tacit collusion given focal points in the market.

2. Conspiracies to use Arbitration in the US: motives and methods.

A conspiracy to use arbitration may seem an odd topic, especially when considering the implications for tort law.[[21]](#footnote-21) Efforts to arbitrate tort claims are not purely hypothetical. Numerous examples of tort claims being arbitrated can be found in the US, while a more limited set of examples can be found in the EU. It is also evident that the use of arbitration for tort claims may be due to the use of standardized contracts which may be applicable to an entire class of consumers or laborers and may even be spread across an entire industry.[[22]](#footnote-22)

There are two important pieces of legislation which need to be identified as being central to the development of the Supreme Court of the United States (SCOTUS) approach to antitrust and arbitration, The Federal Arbitration Act (FAA) and the Sherman Antitrust Act (Sherman Act). Under the FAA, passed in 1925, “[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”[[23]](#footnote-23) The scope of the FAA has steadily expanded under a series of rulings from the SCOTUS which have found that the FAA preempts state law.[[24]](#footnote-24) The preemption of the FAA over state laws has, arguably, enabled firms to protect otherwise impermissible contract terms through the inclusion of arbitration clauses. The Sherman Act, enacted in 1890, provides both civil and criminal penalties for “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations”.[[25]](#footnote-25) Each of these pieces of legislation has been the subject of numerous judicial interpretations, and each has been amended over the years.[[26]](#footnote-26)

It may be helpful to look at two examples of conspiracies to arbitrate from the US in order to understand what collusion to arbitrate might look like, and how US courts have addressed this collusive behavior over time. Two cases, *Paramount Famous Corp. v. US. (Lasky)* (1930) and *In re: Universal Service Fund Telephone Billing Practices Litigation* highlight the interaction between the use of arbitration and its potential to be anticompetitive, and how this integration between arbitration and antitrust law have been treated by U.S. courts.[[27]](#footnote-27) While the underlying claims in each case were not necessarily in tort the cases are still useful to consider when examining conspiracies to use arbitration for tort claims because they demonstrate the motives and methods such a conspiracy would use.

The 1930 *Paramount Famous Lasky Corporation v. U.S.* (*Lasky*) case involved a conspiracy among film producers and distributors to mandate arbitration on film exhibitors in a “block booking” scheme using standardized arbitration clauses, apparently as part of a larger scheme to vertically integrate the film industry.[[28]](#footnote-28) According to the SCOTUS, “the arraignments existing between the parties cannot be classed among ‘those normal and usual agreements in aid of trade or commerce’.”[[29]](#footnote-29) This can be considered a classic example of how the SCOTUS once applied a *per se* rule to the use of conspiracies to use arbitration.[[30]](#footnote-30) According to LESLIE “[i]n condemning” the arbitration clause in “the standardized contracts, the Supreme Court in *Lasky* appeared to hold that conspiracies to arbitrate are *per se* illegal.”[[31]](#footnote-31) Furthermore, “the court both conceded and rejected the possibility that the conspiracy to arbitrate improved the efficiency of the motion picture industry” and dismissed any “good motives” which the film industry brought before the court.[[32]](#footnote-32) Even though the court found that “[i]t may be that arbitration is well adapted to the needs of the motion picture industry” the court also found that “when under the guise of arbitration parties enter into unusual arrangements which unreasonably suppress normal competition, their action becomes illegal” under the Sherman Act.[[33]](#footnote-33) The SCOTUS further found that “[i]n order to establish violation of the Sherman Anti-Trust Act, it is not necessary to show that the challenged arrangement suppresses all competition between the parties or that the parties themselves are disconnected with the arrangement”.[[34]](#footnote-34) However, the film studios continued to take steps to keep the production and distribution of film vertically integrated until a court mandated divestiture in 1948.[[35]](#footnote-35) The issue of conspiracies to arbitrate “essentially went dormant for several decades” following the *Lasky* case.[[36]](#footnote-36)

More than seven decades after the *Lasky* case, the issue of conspiracies to arbitrate was looked at by the US District Court of Kansas in the *In re: Universal Service Fund Telephone Billing Practices Litigation* case concerning an alleged conspiracy between telephone operators AT&T and Sprint “to raise, fix, or maintain the charge they asses their long distance customers” under a “Universal Service Fund” and “to implement similar dispute resolution clauses requiring their customers arbitrate all disputes”.[[37]](#footnote-37) The plaintiffs alleged the phone companies “violated Section 1 of the Sherman Act, 15 U.S.C. §1, by colluding to implement similar arbitration clauses to shield themselves from liability and to eliminate potential competition among themselves with respect to the imposition of those agreements".[[38]](#footnote-38) The court took into account years of precedent since *Lasky*, which represented a significant change of judicial acceptance of arbitration clauses in consumer contracts. While the case came out of a district court, it highlights how the federal courts attitude toward the Federal Arbitration Act (FAA) shifted from a per se approach in *Lasky* toward a position that “[t]he FAA requires that courts enforce arbitration clauses in contracts the same way they would enforce any other contractual clause” as part of the effort to “achieve the policy goal of eliminating prior hostility to arbitration” from the judiciary.[[39]](#footnote-39) The expansion of the FAA to cover all types of contracts occurred over a series of SCOTUS rulings. The district court in *In re: Universal Service Fund Telephone Billing Practices Litigation* did “not believe that the arbitration clauses in question… are intrinsically illegal on the face such that enforcement of the clauses would make this court party to the precise conduct forbidden by the Sherman Act” and that even if “an anti-competitive conspiracy existed” which gave rise to damages, “[i]nvalidating the arbitration clauses…is not an appropriate remedy because the terms of the arbitration clauses are not themselves anti-competitive”.[[40]](#footnote-40) The court noted how the case was distinct from *Lasky* in several respects, including: *Lasky* was pursued by the state, arbitration was viewed differently at the time, and the terms of the arbitration clause being used were, according to the court, “significantly…distinct” from *Lasky*.[[41]](#footnote-41) Importantly, this demonstrates the tension between contract and antitrust law and shows how the district court was unwilling to use the *per se* approach from *Lasky*, and was deferential to the use of arbitration under the preemption of the FAA.[[42]](#footnote-42)

The different treatments of conspiracies to use arbitration in the *Paramount Famous Corp. v. US* and *In re: Universal Service Fund Telephone Billing Practices Litigation* cases reflects what LESLIE describes as a “reimagining” of the FAA by the SCOTUS.[[43]](#footnote-43) SZALAI comments extensively on how the SCOTUS has “erroneously interpreted” the FAA.[[44]](#footnote-44) SZALAI traces the expansion of the FAA to a “manufactured” ruling that the FAA was applicable to state courts under the *Southland Corp. v. Keating* case.[[45]](#footnote-45) One recognizable result of these changing attitudes toward the FAA from the federal judiciary is that the use of mandatory arbitration clauses being used in standard contracts in the U.S. has grown rapidly over the past three decades.[[46]](#footnote-46) Notwithstanding questions concerning the legitimacy of the SCOTUS’s reasoning in the *Southland* case, it is clear that the change in interpretation of the FAA has implications for conspiracies to mandate arbitration.

3. Contracts to Arbitrate Tort Claims and the Goals of Law

A contract to arbitrate tort claims is likely to be agreed upon *ex ante*, before a harm has occurred.[[47]](#footnote-47) It is these *ex ante* contracts which are particularly relevant to conspiracies to arbitrate since an *ex post* contract to arbitrate does not have any impact on incentives to take care.[[48]](#footnote-48) In the US, a contract to arbitrate tort claims is generally embedded within a sales, service, medical treatment, or employment contact which covers all claims arising from the contractual relationship. In the EU, the use of arbitration for tort claims arising from consumer contracts may be limited by either being forbidden or through formation requirements which demand a separate contract to arbitrate be signed simultaneously with the underlying contract and many EU member states have further limited the applicability of arbitration clauses to certain claims, some of which are tort claims.[[49]](#footnote-49) Contracts to arbitrate tort claims involve different areas of law. The claims considered here are torts claims, which emanate from underlying contracts between a firm and multiple parties, when the firm’s rivals have also agreed either explicitly or tacitly to standardize and use arbitration clauses in their contracts. In this sense we need to consider the goals of not only tort law, but also contract law, competition law and the role of the judiciary in creating public goods related to these underlying goals.

Under the traditional law and economics methodological framework which focuses on efficiency, the goal of law should be to maximize societal welfare by having efficient laws in place.[[50]](#footnote-50) Tort, contract, competition, and the structure of judicial systems each seek to further this goal, through sometimes complimentary and sometimes contradicting methods. Rule makers need to consider how there may be unintended consequences from implementing laws which may create externalities.[[51]](#footnote-51) Additional solutions for negative externalities emanating from these unintended consequences may be necessary.[[52]](#footnote-52) Rule makers must also consider the problems or market failures the rules they produce address and the potential for spillover effects on rules designed to address related market failures. In a sense, the compartmentalization of the law into separate issues may only be useful to a certain extent, beyond which a wholistic view would be best used to promote efficiency. This implies that legal rules are best, i.e. more efficient, when they complement each other rather than compete with each other.

3.1 Goals of Tort Law- Limit the costs of accidents.

According to the law and economics view, tort law is designed to minimize the primary, secondary and tertiary costs of accidents.[[53]](#footnote-53) We can also think of the minimization of the costs of accidents also in terms of maximizing the benefits of tort law to some extent. When considering the potential costs of accidents, the standard law and economic theory points to the Hand formula, or more specifically the marginal Hand formula, where the marginal benefits of care equal the marginal costs of care which results in the minimization of the costs of accidents.[[54]](#footnote-54) When considering bilateral accidents in which both victims and injurers can take precaution, SHAVELL comments that “[t]he optimal levels of care of injurers and of victims will reflect their joint possibilities for reducing accident risks and their costs of care”.[[55]](#footnote-55) Although, many legal scholars also find that there is corrective justice rational for tort law, however this can be explained as part of the deterrence function of tort law, in that being held liable for the harm one causes is a deterrent.[[56]](#footnote-56) According to FAURE and WEBER, “[f]rom a law and economics perspective tort law is to serve two important functions: deterrence of wrongdoers and victim compensation”.[[57]](#footnote-57) Because there are both benefits and costs of using the law to determine due care, there is a need to weight the costs and benefits of using arbitration or courts to adjudicate tort claims with consideration of its impact on due care. An efficient liability rule creates the right incentives for potential injurers and victims to take care.[[58]](#footnote-58)

The use of a private arbitration tribunal to adjudicate tort claims can have the immediate effect of lowering the tertiary costs the public incurs from the adjudicating tort claims, in that public subsidies are not used or are decreased to provide the administrative needs of adjudicating a particular claim as they become private tertiary costs. However, the use of arbitration for tort claims is not costless to states. Domestic arbitration tribunals will often rely on the laws of the state to adjudicate tort claims. States spend resources to develop and enforce laws, but at the same time courts require an input of disputes in order to develop undeveloped areas of law particularly concerning technological advances. Arbitration tribunals rely on courts to enforce arbitral awards, thus states still incur costs by enforcing arbitral awards. Beyond arbitration resulting in the shifting of tertiary costs from public to private, there is a need to consider all the costs of accidents.[[59]](#footnote-59)

There are not only costs to accidents, but also benefits. Accidents may result in harm, but knowledge of accidents helps society to identify where private actors create negative externalities and knowledge of methods to avoid known risks.[[60]](#footnote-60) Accidents may be the inspiration for developing safer and more cost-effective production methods, technologies and safety precautions.[[61]](#footnote-61) Disputes concerning accidents may lead to the creation of new laws and regulations designed to limit the costs of future similar accidents. State courts produce public goods from litigation in order to lower the cost of future accidents. A known and efficient due care standard which is consistently enforced should provide the right incentives for parties to take due care. In this way the law also looks to decrease future accident costs by prescribing a known and public standard. An efficient due care standard should also consider the foreseeable future accidents costs avoidance associated with rule making and the possible effects it may have on subsequent legal doctrine.[[62]](#footnote-62) Judge made law may be perspective, in that it is not only considering the case at hand but other potential cases with a similar nexus of facts in the future.[[63]](#footnote-63) By having more certainty in due care standards, parties are enabled to make more efficient decisions about their behavior given the expectation of how a due care standard will be reviewed by a court. By opening up the possibility for liability for taking less than due care, tort law also serves as a source of continued deterrence to potential tortfeasors through private legal actions rather than state intervention.[[64]](#footnote-64) Limiting the costs of accidents is thus not merely an exercise of limiting the cost of accidents now, but also the costs of accidents in the future. The benefits of judicial review of tort claims must also be taken into account when considering the costs of administering courts, which includes the impact judicial review has on the primary and secondary costs of torts.

We can see that maximizing the expected benefits of public good creation from courts may indeed promote the mitigation of accident costs, or in other words if courts are efficient at setting due care standards, then the primary and secondary costs of accidents should decrease. If an increase in tertiary costs related to the courts production of public goods is more than offset by the lower primary and secondary costs then the increased tertiary costs can be viewed as having the effect of minimizing the costs of torts, and thus can be considered as welfare maximizing. We can consider the production of public goods from litigation the same way we think about care. Here we can think of tertiary costs as “care costs” which the state can undertake and primary and secondary costs as “externalities” which fall on different parties.The public goods from litigation should be produced at the efficient level, where the marginal benefits of having an efficient rule are equal to the marginal costs of developing the efficient rule. This may mean that some rule production is inefficient given the cost of producing the rule and the benefits resulting from the rule.

If state courts lack the necessary input of disputes which allow the opportunity for the judiciary to set efficient due care standards, then state courts are incapable of setting efficient due care standards given a changing world. If state courts are only seeing a selected type of cases because of the strategic shielding of claims from review in court, then there is also an increased possibility that due care standards are inefficient or that efficient due care standards become inefficient more quickly over time as the world changes. In a sense, due care standards may become “stale” and should be replaced when, due to changed circumstances, the existing standard becomes inefficient for present-day claims.[[65]](#footnote-65)

3.2 Goals of Contract Law and Contracts to Arbitrate

Contract law should increase certainty in entering into agreements. Parties can rely on the promises made in a contract, and in relying on these promises they can seek to maximize their own welfare. According to POSNER “the basic aim of contract law (as recognized since Hobbes day) is, by deterring people from behaving opportunistically toward their contracting parties, to encourage the optimal timing of economic activity and (the same point) obviate costly self-protective measures”.[[66]](#footnote-66) According to SCHWARTZ and SCOTT “efficiency is the only institutionally feasible and normatively attractive goal for a contract law that regulates deals between firms.”[[67]](#footnote-67) SHAVELL identifies how contracts should not be enforced under some circumstances due to the existence of externalities.[[68]](#footnote-68) A standard economic rationale for enforcing contracts is that it promotes efficiency by providing parties with more certainty when they make promises.[[69]](#footnote-69)

Contracts to use arbitration in the case of disputes between the contracting parties can provide benefits to the parties, and the goals of laws concerning arbitration should be considered as a subcategory of the goals of contract law.[[70]](#footnote-70) However, arbitration may also allow repeat players to act strategically in order to avoid judicial oversight, care costs, and liability.[[71]](#footnote-71) It is often argued that arbitration allows parties to choose experts in the dispute, saves time from waiting for a long court cue, is “less adversarial”, is private and confidential, the parties can choose the substantive law which will govern the contract, and it may “denationalize” a dispute when parties are contracting across international borders.[[72]](#footnote-72) Important differences between international commercial arbitration and purely domestic arbitration impact these benefits. There is no benefit from having to denationalize a claim or facilitate the collection of a foreign award in domestic disputes. In the ideal situation the benefits from the use of arbitration can be realized, yet there remains the possibility these benefits are in fact costly, and or these perceived benefits create additional opportunities for a repeat player involved in disputes to behave strategically.

A contract to use arbitration for tort claims can be seen as a part of the bundle of rights the contract signer holds, including a right to a remedy upon the good or service causing some harm to the user or purchaser for which a remedy is only available in tort.[[73]](#footnote-73) The right to arbitrate in a contract may be a sort of transitory stick which may be beneficial in some instances and may be costly in others.[[74]](#footnote-74) Disavowing the right to use the public judiciary to adjudicate tort claims, or any dispute, has value and thus a price. Which means the collusive use of mandatory arbitration in consumer, service, medical and employment contracts may be a form of indirect price fixing. Contracts to arbitrate results in the stick representing the right to use courts to adjudicate potential claims being removed from the bundle and being replaced with a stick which represents the right to use arbitration in the courts place as adjudicator. If for instance the use of arbitration was value creating, then it could be argued that an arbitration agreement adds a more valuable stick to the bundle of rights than the one it replaced. The instance in which arbitration would be value creating in the context of tort claims is likely limited to circumstances where using arbitration lowers transaction costs when compared to litigation, and leads to an increase of claims from plaintiffs because the change in transaction costs move individual claims from being negative in value to being positive in value.[[75]](#footnote-75) This may lead to a decrease in enforcement errors if arbitration produces accurate results, which in a sense makes the underlying contract more valuable. Over time the increased value of the contract should be reflected by a higher price for the good or service which takes into account the increased value. The possibility for liability under a right to remedy is analogous to an insurance policy which is included in the contract over a good or service.[[76]](#footnote-76) The price of this “insurance policy” should be reflected in the price of the underlying contract. Being able to contract over rights which have value, such as a dispute resolution process, may be welfare enhancing if parties are well informed and have equal bargaining power.[[77]](#footnote-77)

In any specific context it should be considering if the stick representing the right to use arbitration is more valuable for one party than the other, or conversely, more costly. If arbitration does not lead to an increased number of legitimate claims being filed, then the lower transaction costs are not sufficient to make negative value claims worth pursuing. If firms know the use of contracts to arbitrate will in a certain context tend not to reduce the transaction costs of filing a claim, or only slightly reduce transaction costs, then firms can shirk from taking efficient care so long as the inefficiently low care taken does not result in claims the firm faces becoming positive in value given the transaction costs of pursing a claim.

The SCOTUS has found that the goal of the Federal Arbitration Act is to put arbitration on equal footing with other contract terms.[[78]](#footnote-78) In the EU and individual EU member states, contracts to arbitrate are often treated differently than other contracts, especially when the contract is not international, involves no choice of law issues, and involves the sale of goods or services to consumers.[[79]](#footnote-79)

The unilateral choice to use arbitration by industry should be considered detrimental to public welfare if it enables firms to take advantage of the difference between the public and private legal systems in a way which is “socially undesirable”.[[80]](#footnote-80) The possibility that contracts to arbitrate tort claims will be welfare reducing is more likely to occur if consumers are uninformed, such as when there is a high degree of information asymmetry between parties. According to HYLTON, “one of the biggest criticism of arbitration is that firms that are repeat-players take advantage of inexperienced…one shot players” who have an “informational deficit” in that they have either “incomplete or asymmetric information” or that there is the presence of “misperception or misinformation”.[[81]](#footnote-81) This implies that “if the parties are informed, they will enter into waiver agreements when and only when the option to litigate reduces wealth”, such “as when the deterrence benefits provided by the threat of litigation are less than expected litigation costs” and they should “enter into arbitration agreements when and only when the margin between deterrence befits and dispute resolution costs is larger under the arbitration regime”.[[82]](#footnote-82) It may also be that parties are uninformed because of rational apathy, especially when parties already have little to no chance to enforce legal rights against the counter party due to high transaction costs.[[83]](#footnote-83) A lack of salience over the terms of a contract may also contribute to a problem of inefficient contracting.[[84]](#footnote-84)

Ideally, a mix of private and public legal systems will allow for firms and individuals to best contract over how to resolve their disputes and maximize the gains from trade. If parties can mutually agree *ex ante* on the forum in which future disputes will be adjudicated and this *ex ante* contracting makes the parties better off and no third parties are worse off, then the use of arbitration should be considered socially desirable.[[85]](#footnote-85) The law should seek to encourage beneficial types of contracts to arbitrate while limiting contracts to arbitrate which are welfare reducing. The difference in approaches to the use of arbitration between the US and EU highlights how different legal systems weigh the costs and benefits of using arbitration. Each approach has its own unique consequences from the enforcement of competition law relating to the collusive use of arbitration for tort claims.

3.3 Goals of Antitrust Law- meaningful competition in the market

In the US the goal of competition law has been seen by the SCOTUS, at times, to prevent the harms from the “destruction of competition” in the free market.[[86]](#footnote-86) The Chicago School played a significant role in shaping the debate over what the goals of competition law should be.[[87]](#footnote-87) According to VAN DEN BERGH and CAMESASCA “[s]cholars working in the Chicago School tradition have rejected the propriety of any other goals than allocative and productive efficiency for competition policy” and “this may explain why economic considerations in recent decades have played a more important role in the United States than in Europe”.[[88]](#footnote-88) The difference in goals across the Atlantic can be attributed to the uniqueness of the European Union.[[89]](#footnote-89) In Europe “competition policy embraces a multitude of political goals” including “market integration…consumer welfare…freedom of action and fairness” which “must be understood in the context of the need to break down the national boundaries between member states and the Community”.[[90]](#footnote-90) The community goals of the EU are not completely in line with the goals of US law and vice versa. Because of this divergence we should expect to see state action which is biased to promoting community integration in the EU, while across the Atlantic we should expect to see state action which promotes economic efficiency in the US. In so far as state action in the EU promotes economic efficiency, the goals of community integration may actually be seen as part of an effort to promote economic efficiency within the EU single market.

Because the public enforcement of competition comes at a cost to society, regulatory agencies tasked with prosecuting anticompetitive behavior face budget constraints which limit the options. Public enforcement of competition law is thus selective and targeted when public competitions authorities face budget constraints, while private enforcement of competition law may be available for those individuals who suffer damages, even indirectly, due to a violation of competition laws.[[91]](#footnote-91) Private individuals may have more information and a greater incentive to pursue a claim against a firm for competition law violations than the state in some circumstances, and vice versa.[[92]](#footnote-92) Private enforcement of anticompetitive behavior only occurs when the private cost of the rational victim bringing a claim are outweighed by the private benefits of filing, and is described in terms of positive value claims or negative value claims.[[93]](#footnote-93) When a type of harm affects a class of claimants, and the individual damages are low but the aggregate damages high, a claim may only be economically feasible if there is a collective action procedure available, or some other rule such as punitive damages or fee shifting, which change the value of the claim or limit the transaction costs of pursuing a claim, which results in making the claim worth pursuing for the rational victim.[[94]](#footnote-94) Claims in the US alleging violations of competition law are often collectivized under the Federal Rules of Civil Procedure Rule 23.[[95]](#footnote-95) According to VAN DEN BERGH, “[i]n marked contrast with the United States of America… where the vast majority of cases under antitrust law are brought by private parties, European competition law has been enforced mainly by public bodies.”[[96]](#footnote-96) In the EU there have been recent efforts to provide a collective action procedure for some private antitrust claims.[[97]](#footnote-97) In addition to the collective action procedure available in the US under FRCP 23, the Sherman Antitrust Act also incentivizes victims to file meritorious claims by providing for treble damages.[[98]](#footnote-98) When treble damages and claim collectivization are combined, it creates a significant deterrent to firms seeking to engage in anticompetitive behavior. Some have argued the possibility of facing a firm bankrupting claim has resulted in so called “blackmail settlements” where firm settle rather than risking liability which is higher than the value of the firm.[[99]](#footnote-99) Because of the lack of plaintiff friendly rules for collectivizing competition claimants in the EU when compared to the US, we should expect to see firms seeking to avoid private claims against them through arbitration and class waivers more often in the US than in the EU.[[100]](#footnote-100)

Private enforcement of competition law can also be considered as a substitute for public enforcement if the public and private interests align.[[101]](#footnote-101) The public costs of enforcing competition laws can be balanced with the private incentives to pursue competition law claims in such a way to maximize the benefits of having competition laws in place. However, the complementary nature of private and public enforcement of competition law makes it is difficult to determine the efficient combination of private and public enforcement of competition law.[[102]](#footnote-102)

3.4 Public Goods from Litigation

Laws are public goods, including judge made law through precedent, rule interpretation, and gap filling. Precedent has a value for individuals and firms, since it signals information about the law and how the law will be interpreted and applied by courts. According to POSNER, “[t]he body of precedents in an area of law can be thought of as a stock of capital goods—specifically, a stock of knowledge that yields services over many years to potential disputants in the form of information about legal obligation”, however, “the value of the services that they yield declines over time”.[[103]](#footnote-103) As older precedent becomes less valuable “new ones are added to the stock through litigation”.[[104]](#footnote-104) Courts adjust due care standards through the production of judicial public goods, which include precedent, gap filling, and interpretation. Another public good which is produced by courts is information about the claim which becomes publicly available and part of a public record.[[105]](#footnote-105) Arbitration generally does not produce precedent, gap filling, interpretation or public information, although institutional precedents and norms may develop, particularly when a claim involves international trade.[[106]](#footnote-106) According to HYLTON “[t]he parties to waiver and arbitration agreements have incentives to take into account potential effects on new law development, to the extent they alter deterrence benefits”.[[107]](#footnote-107) However business and consumer have different stakes in the law and there may be information asymmetry which leads to consumers discounting these “potential effects”. The discounting of OS of the potential stakes in the law may lead to the development of asymmetric laws when RP can accurately account for these “potential effects” and they can allocate resources to amplify those effects, leading to a potentially biased legal treatment. RP firms should be able to identify when there is there is a lack of deterrence and act in a way to maximize their welfare, potentially by taking less than efficient care, given they have contracted to use arbitration.

We can see that maximizing the expected benefits of public good creation from courts may indeed promote the mitigation of accident costs, or in other words if courts are efficient at setting due care standards, then the primary and secondary costs of accidents should decrease.[[108]](#footnote-108) If an increase in tertiary costs related to the courts production of public goods is more than offset by the lower primary and secondary costs then the increased tertiary costs can be viewed as having the effect of minimizing the costs of torts, and thus are welfare maximizing. As discussed, we can consider the production of public goods from litigation the same way we think about due care standards, the public goods from litigation should be produced at the efficient level, where the marginal benefits of public goods from litigation are equal to the marginal costs of developing them.

Questions before third party adjudicators have two dimensions, first questions of fact (did an event happen or not), and second questions of law (which rules or standards apply to the legal process). Arbitration is best designed to resolve questions of fact, particularly where arbitrators have relative expertise in a given industry from which questions of fact arise. Judges sitting in courts of general jurisdiction may not necessarily be experts in an industry from which a claim arises, and thus more dependent on the parties and expert witnesses to help determine questions of fact.[[109]](#footnote-109) Questions of law may be better suited for judges who have expertise in the law, as questions of law can lead to the production of public goods from litigation which requires an expertise in interpreting the law and promulgating law. Arbitration may still benefit from expertise in questions of law, dependent on the individual arbitrator’s background, however because the selection of arbitrators is a private decision the composition of individual arbitral tribunal may have a mixed set of expertise in factual or legal backgrounds. Questions of fact may still lead to the production of public goods in litigation, such as the production of information which would not have otherwise been disseminated publicly and in a more limited sense contribute to precedent, gap filling, or interpretation which may be related to evidentiary rules in the course of interpretation of evidentiary facts. This type of public good production is less open to manipulation from a conspiracy to use arbitration, as rules related to evidence may be less likely to be limited to a specific industry. Generally, appeals courts will not take into account only questions of fact, but rather questions of law, although there are often mixed questions of fact and law which may also be considered on appeal. The important difference between question of fact and questions of law is that only questions of law can lead to the adjustment of due care standards.

While the problem of underproduction of public goods discussed here addresses the potential for due care standards found in tort to be frustrated, similar problems concerning the production of public goods from the judiciary related to contracts and competition law should also be considered as factors. However, the production of public goods related to contract claims and traditional competition law claims do not face the same restraints which contracts to arbitrate tort claims may have, as the demand for efficient rules related to contract and competition law involve legal claims which cannot be wholly captured under a conspiracy to use arbitration. For example, contractual disputes with the state will continue to be litigated as will state initiated competition claims. The significance of tort claims is that some due care standards may be industry specific and thus private claims against a specific industry are susceptible to being entirely captured under an adhesion contract which demands arbitration. Only to the extent that contractual terms are industry specific can a conspiracy to arbitrate preclude the development of public contract laws, although in such a scenario there may be some development of private contract laws, which over time may influence public law. Competition law can be seen as more dynamic in its ability to withstand conspiracies to arbitrate than tort or contract law, as competition law is itself the standard for competition claims, and competition laws are less likely to be seen as developing completely within the vacuum of a specific industry. Rather, competition law is designed to review the actions of all private industries. In sum, we should expect conspiracies to arbitrate to be more effective in limiting the production of public goods from litigation related to tort disputes, while contract law and competition law are less susceptible to conspiracies with regards to the production of public goods from litigation,

3.5 Efficient use of Arbitration

Recall that in order to minimize the costs of accidents, the primary secondary and tertiary costs must all be considered. This goal of tort law should apply to all tort claims regardless of the forum in which the claim is adjudicated as these costs are interrelated. The use of arbitration for tort claims may change the overall costs of accidents as well as the distribution of the costs. The potential for arbitration for tort claims to be welfare enhancing, given the costs of accidents, is largely dependent on several factors: the competency of judges, arbitrators and legal institutions, the transaction costs associated with litigating or arbitrating disputes, the characteristics of the tort claims being arbitrated (for example the potential for these claims to lead to the production of public goods from litigation, the value of a claims and the scope of dispersion of losses), the externalities which flow from the claim (both positive and negative), and the level of competition in a given market which would induce firms to pass on potential efficiency benefits of arbitration to consumers or employees.[[110]](#footnote-110) As due care standards also impact third parties to contracts, we should also think of efficiency in terms of limiting the costs of accidents.

If due care rules are set efficiently and are easily identifiable, then an efficient situation could develop where arbitral tribunals merely need to apply the facts of the case to well settled and uncontroversial due care standards. If arbitration tribunals reach similar outcomes as courts in adjudicating tort claims, or are more accurate in adjudicating claims than courts, then the use of arbitration for tort claims can be welfare enhancing. This is more likely to occur when there is not a significant disparity between the skills of judges and arbitrators.

If the use of arbitration does tend to enforce the exiting standard, then the use of arbitration for tort claims is capable of promoting either efficient or inefficient due care standards, depending on the particulars of the claims being arbitrated and the rules in place. If there is a novel legal question concerning a due care standard which courts have not considered, or a new practice or technology for which an existing due care standard is being applied inefficiently, then the use of arbitration is more likely to undermine the production of public goods from adjudication as there is little or no stock of precedent for the new practice or technology for judges or arbitrators to look to.

The use of arbitration for tort claims may be efficient even when there is a future cost created by the lack of development of the law so long as the future losses in welfare are less than the present welfare gains.[[111]](#footnote-111) When these future costs are more than the present welfare gains, then efficiency cannot be a justification for using arbitration. When considering future losses, it is necessary to consider the potential lost value from unproduced public goods from litigation and the potential for the value of precedent to depreciate or appreciate over time.[[112]](#footnote-112)

The purported private benefits of arbitration may be forgone, depending on the circumstances. In a purely domestic dispute, the benefits of arbitration do not include any “denationalization” of disputes. The benefits of arbitration are not guaranteed, as arbitrators may be unexperienced in aspects of a claim, arbitration may be more costly than litigation, and arbitration may take longer to adjudicate than a claim in court. The availability of collective actions also impacts the costs and benefits of arbitration. The secretive nature of arbitration may lead to an increase in information asymmetry between parties, which impacts how firms and individuals make decisions. The private benefits of arbitration are very much dependent on the quality of the arbitrators, the type of claim being arbitrated and the procedural rules which parties have agreed to. If arbitration produces disparate outcomes than in litigation resulting in a higher enforcement error rate in arbitration than would occur in courts, the argument that arbitration is more efficient disappears.

A middle of the road approach by arbitrators may result in a truncation of a firm’s liability when arbitrators are very good at quickly filtering out meritorious claims from non-meritorious claims.[[113]](#footnote-113) In a competitive market the benefits of truncated liability will be passed onto consumers, in the form of a lower price tag or otherwise increase value of the contract. The cost reduction for firms may not necessarily lead to a cost reduction for consumers or for a wage increase or improved working conditions for employees. The potential benefits of arbitration related to the pricing of goods and services is dependent on several factors, perhaps most importantly competition in the market. Consumers and employees benefit from efficient care being taken by firms and employers because it will help minimize the expected accident costs.[[114]](#footnote-114) The purported benefits of arbitration may come with costs, especially when the subject of the claim involves due care standards. It is possible for consumers to benefit from a reduction in liability costs to firms, if cost savings are passed onto consumers.[[115]](#footnote-115) Some consumers would never exercise their legal rights if they were to be harmed, and these customers essentially subsidize other consumers who are willing to exercise their legal rights.[[116]](#footnote-116) In a competitive market, if cost “savings are not passed on to the consumer, they represent supra-competitive return”.[[117]](#footnote-117) If due to the use of arbitration consumers suffer from having to pay a higher price for a lower quality good and suffer from having to face increased costs from accidents due to the taking of low care, then there is a serious question as to whether the use of arbitration for tort claims efficient given other potential cost reducing or cost increasing effects which arbitration may have.

Governments facing budget constraints may support the use of arbitration as a cost cutting technique, or at least a technique to shift costs away from the public sector, which may have the immediate effect of lowering the tertiary costs of accidents which the public must subsidize while increasing private tertiary costs. When a state favors the use of arbitration the courts and states allow some of the cases in which jurisdiction could be asserted over to be diverted into a competing private forum for adjudication. If cost cutting by courts leads to an underproduction of public goods from adjudication, such as precedent, rule interpretation and gap filling, then the overall costs of accidents may actually be increasing as the lower court costs are offset by the higher primary and secondary costs of accidents which results from having inefficient due care rules in place. The use of arbitration for tort claims may contribute to the declining value in the stock of precedent.[[118]](#footnote-118) If competition over the adjudication of claims leads to inefficiently lower due care standards which are persistent, then the use of arbitration for tort claims may contribute to lasting inefficiencies in the law. This may further contribute to enforcement errors as the life of inefficient due care standards is prolonged and applied inefficiently to an increasing number of claims in arbitration over time.

If there is an efficiency improvement for the private parties involved in a tort claim, it is important to distinguish how efficiency has improved. If there is an overall increase in welfare but the share of the improvements lead to an increased cost to one party while the counter party realizes all of the gain, we can consider this to be a Kaldor Hicks improvement in efficiency.[[119]](#footnote-119) If parties are able to redistribute the efficiency gains from using arbitration and both parties benefit, it may be a Pareto efficient improvement.[[120]](#footnote-120) The willingness of a firm to pass an efficiency improvement to consumers so that the improvement is Pareto cannot be assumed. Only if market forces are efficiently competitive, will one sided benefits of arbitration be passed on to the counter party.[[121]](#footnote-121) Beyond the primary cost of the accident, these efficiency improvement criteria must also account for costs to third parties and the state.

4. How the Conspiracy Work

Repeat players (RP) litigants behave strategically in litigation in order to maximize their private utility.[[122]](#footnote-122) GALANTER addressed how RP in litigation have several advantages over one shotters (OS), including resource, information and opportunity advantages.[[123]](#footnote-123) CHE AND YI found that in repeated litigation: 1) a “defendant is more willing to settle when an unfavorable precedent is more likely to be set, resulting in a higher settlement rate”; 2) “the parties will engage in preemptive campaigns to turn the precedent in their favor, which could be socially wasteful”; 3) “the existence of precedents tends to penalize plaintiffs with low winning probabilities and discourage nuisance suits” and; 4) “correlated damage awards provide a valuable learning opportunity to the defendant, allowing him to make a more tailored offer after experiencing an initial trial”.[[124]](#footnote-124) Firms may behave strategically in additional ways when options to use arbitration for tort claims are available.[[125]](#footnote-125) Some of the options to behave strategically in litigation are limited by remedial rules and procedures.[[126]](#footnote-126) For instance, there may be fee shifting rules, collective action procedures, punitive damages, and a number of other tools which states can use to preventor mitigate strategic behavior.[[127]](#footnote-127) Private contracting allows firms to circumvent these remedial rules and procedures. Private contracting over the use of arbitration for tort claims may provide firms with persistent opportunities to behave strategically in ways which are unavailable in litigation. If firms have market power or if firms collude with other firms in the market, they may be able to impose arbitration in their contracts across an industry.

Unilaterally mandated arbitration by industry is less likely to occur when buyers have market power. According to STIGLER, “oligopolistic collusion will often be effective against small buyers even when it is ineffective against large buyers”.[[128]](#footnote-128) If efficient outcomes are related to bargaining power, then we should expect to see more inefficient contracts between parties with divergent bargaining power.[[129]](#footnote-129) This may be one reason why the use of arbitration may lead to efficient outcomes between parties with equal bargaining power, which is to say we should expect business to business contracts to be more efficient than business to consumer contracts.[[130]](#footnote-130) Conspiracies to use arbitration for tort claims may be successful precisely because potential victims are small buyers.

4.1 Market for Adjudication and Court Error

The market for dispute resolution includes state courts, private courts, and informal means of dispute resolution.[[131]](#footnote-131) The market for judicial services includes public and private courts.[[132]](#footnote-132) Competition between courts and arbitration may lead to some benefits. According to SZALAI, “[l]itigation and commercial arbitration are intertwined” where “[c]ross-pollination can easily occur, and procedural developments in one system can influence the other and lead to innovations and improvements in dispute resolution”.[[133]](#footnote-133) The market for dispute resolution may be distorted when firms collude, either explicitly or tacitly, in using arbitration for tort claims. If arbitration and litigation “cross pollinate”, is it also possible that the strategic use of arbitration and litigation may act as an inhibiting factor on cross pollination. The market for adjudication may lead to underproduction of public goods from litigation and the underproduction of regulations when strategic behavior and/or collusion distorts market mechanisms.

In the market for rule making, elected officials, judges, and private parties, each play a role.[[134]](#footnote-134) Judges interpret and add to legislative decrees. Regulators and elected officials use information as an important input in the rule making process.[[135]](#footnote-135) Private parties use public information to help estimate the costs and benefits of contracting specific terms and to make decisions concerning the care they take. Arbitration is the only ADR procedure which leads to a third party adjudication. In the market for third party decision making parties have litigation and arbitration to choose from. Other forms of ADR may be facilitative in nature. If we further look at how public rule making can occur through administrative, executive, legislative and judicial processes, we also see that judicial rule making is the only mechanism which inherently is adversarial.[[136]](#footnote-136) This highlights how parties to a dispute have a private demand for rules which may be asymmetrical between defendants and plaintiffs.[[137]](#footnote-137) Disputes over the law can only lead to rule making through the judiciary, while efforts to pressure the executive, legislative and administrative rule makers often take place outside the adversarial process found in litigation.[[138]](#footnote-138) However, it is not uncommon for a state to be party to a civil suit or for the state to seek a rule change through the courts.

Figure 1. Rule Making and Dispute Resolution



4.2 Enforcement Errors

The use of arbitration for tort claims may lead to a lower rate of enforcement of legal rights, when there is a decrease in individuals seeking redress for harms they have suffered.[[139]](#footnote-139) An enforcement error occurs when tortfeasors are not forced into fully internalizing the costs of their tortious acts.[[140]](#footnote-140) Enforcement errors of under enforcement benefit the economic interests of tortfeasors because they are not forced into internalizing the negative externalities they create, which could in turn benefit consumers through lower prices if the lower expected liability of firms is reflected in the price, however the enforcement error itself is detrimental to consumers. Still, there is the possibility that some underenforcement resulting in enforcement errors may benefit some consumers in the form of a lower price tag.[[141]](#footnote-141) However, the consumer class as a whole should be considered when analyzing due care standards, as the efficient standard will minimize the costs of accidents for the whole group of consumers, although there may be different types of consumers in terms of the benefits of litigation. Enforcement errors of over enforcement will clearly not benefit either tortfeasors or consumers of their products, as the price for the underlying good will be higher than under optimal enforcement as the price of the good reflects the cost of over enforcement.

The use of arbitration may be contributing to enforcement errors. An error may be due to a problem of scattered losses, the prevalence of negative value claims, errors in calculating damages or errors in applying the correct legal rules or standards, among others.[[142]](#footnote-142) However, an enforcement error may also be due to the strategic behavior of repeat players or the collusive efforts by repeat players to influence the error rate. The lower the enforcement of legitimate claims, the larger the enforcement error is likely to be, unless there is some other mechanism which forces tortfeasors to fully internalize the harm they create. An enforcement error may be aggravated by a problem of scattered losses, information asymmetry or rational apathy.[[143]](#footnote-143) Potential tortfeasors may take steps to decrease the salience of contract terms which increases the search costs for their customers. The increased search cost for information may also contribute to rational apathy. Efforts to increase search costs on consumers may also include the dissemination of misinformation about the values of claims and the transaction costs associated with pursuing those claims. Industry trade groups often provide a counter narrative to consumer rights groups.[[144]](#footnote-144) If the losses caused from torts are widespread and diffused, once collectivized into a positive value claims they may increase deterrence by creating incentives for injurers to take care.[[145]](#footnote-145) Antitrust claims can be substantially more complex than other types of claims, and this may contribute to sentiments of rational apathy in victims who suffer diffused harm from anticompetitive practices.[[146]](#footnote-146) This may be particularly true when an individual considers the cost associated with pursing a competition law infringement claim on their own.[[147]](#footnote-147)

Some states have recognized the problem of scattered losses in mass torts and have provided procedural rules which enable a class of claimants to collectivize their claims, which provides efficiencies of scale which lower the cost of administering litigated claims.[[148]](#footnote-148) In the United States, it is not uncommon for private antitrust suits to be collectivized into a mass claim under FRCP 23.[[149]](#footnote-149) In the EU there have been increased efforts to provide a collective action mechanism for some types of claims and the overall use of collective actions remains limited, although a new procedure has recently been enacted.[[150]](#footnote-150) When a collective action is available in a state, and firms mandate not only arbitration of tort claims in their contracts, but also that any right to a collective action being waived, the firms can skirt procedural rules, such as a collective action procedure, designed to lower an enforcement error. If there is a consistent error of arbitration tribunals either providing deficient damages or in making deficient legal standard errors, it should result in injurers taking deficient precaution.[[151]](#footnote-151)

4.3 Judicial and Arbiter Bias

Parties may take into account the reputation of the forums from which they can choose to direct the adjudication of their disputes. Parties should prefer to be in a favorable forum in which they perceive they may be advantaged by judicial bias. Judicial bias may mean a court is a somewhat favorable forum for plaintiffs.[[152]](#footnote-152) There have been some studies concerning bias in arbitration, which tend to suggest some bias towards defendants.[[153]](#footnote-153) The bias of judges or arbitrators may impact enforcement errors. When arbitration is mandated by firms on consumers, an existing bias towards defendant firms in arbitration should lead to either an error of deficient damages or an error of deficient legal standards being applied or both, and these errors could induce deficient precaution being taken by injurers.[[154]](#footnote-154) Conversely, if bias in arbitration leads to overcompensation or over deterrence on average, then we should expect to see firms opting out of arbitration and favoring litigation in public courts so long as the perceived bias in court is lower than in arbitration.

Some critiques of the tort system claim it is only in place to serve as a wealth transfer, or that it is a “zero sum game”, which does not transfer any gain to society, rather private lawyers gain from imposing transaction costs on the parties.[[155]](#footnote-155) Much of the effort to reform tort law in the US has been advocated “on behalf of business and professional interests...claiming that American tort law is out of control, imposing unjustified costs on defendants amounting to billions and billions of dollars annually” which undermines “US business efforts to compete in the global marketplace” and discourages “technological innovation on the ground that enterprises find it foolhardy to risk introducing new products for fear of potential tort law-induced bankruptcy”.[[156]](#footnote-156) Others have framed the use of arbitration in consumer contracts as waiver of liability.[[157]](#footnote-157) It may also be thought of as a form of private tort reform initiated by defendants or as a way to avoid a pro plaintiff bias in courts.[[158]](#footnote-158) However, it may be that the pro plaintiff bias in court may be the result of efforts to correct for an error of underenforcement. The purpose for including one of the pro plaintiff procedures and the use of punitive damages is to help correct for enforcement errors, which may be due to the presence of many negative value meritorious claims which are never brought to court.[[159]](#footnote-159)

Arbitration should have a propensity to be middle of the road, meaning the arbitrators should not show a bias to one party or the other.[[160]](#footnote-160) Parties whom expect to be sued may mandate arbitration, since having “middle of the road” arbitrators appointed may “reduce the party’s expected liability” if the arbitrators can dismiss meritless claims easily, as the “middle of the road propensity” will “truncate the defendants liability” for meritorious claims.[[161]](#footnote-161) This “middle of the road” approach should lead to an increase in enforcement errors if it does in fact result in a truncation of defendants liabilities. Since there is a demand for arbitration by firms, we can infer that arbitration is not biased towards plaintiffs. If it was, then there would be little reason for firms to mandate the use of arbitration. Rather, we can assume that arbitration is either unbiased with a middle of the road propensity or biased towards defendant firms.[[162]](#footnote-162)

The possibility of arbitrators considering whether their involvement in the arbitration of tort claims which are the result of the collusive use of arbitration in and industry is itself an infringement of antitrust law places the arbitrator in a precarious position, one in which their own self-interests may impact their decision making. In such a situation, the arbitrator must determine if their very presence as an adjudicator is anticompetitive or not, placing the arbitrator in a situation in which their own interests may be conflicting with the interests of the parties involved in a dispute, may make the arbitration tribunal into a tool of a conspiracy to arbitrate which brings into question the legitimacy of the procedure.[[163]](#footnote-163) Judges are not free from this dilemma either. If a conspiracy to arbitrate does in fact exist, and courts knowingly enforce the anticompetitive behavior of firms, then courts risk becoming a mere “instrument” of the conspiracy.[[164]](#footnote-164)

The perception of bias or corruption in public and private adjudication forums may lead defendants or plaintiffs to favor one forum over the other. The demand for adjudication should reflect perceptions of bias, where the party demanding a forum for adjudication will seek to maximize their chances of winning on a given claim, or multiple similar claims, by choosing the forum in which bias is perceived to favor them. Corruption may also play a role in the desire to use arbitration, as the presences or perception of corruption in the courts may be a factor which parties consider when entering into arbitration contracts.[[165]](#footnote-165) There is also the possibility that arbitrators in a given case may be corrupt and parties may also take this into account.

4.4 Tacit versus Explicit Collusion

Firms can act in unison in an effort to dictate the terms of accessing or entering the market they operate in. Often, this form of collusive behavior takes the shape of a cartel which agrees to restrict production in the market and charge monopoly prices to consumers, thus creating a deadweight loss, decreasing consumer surplus, and increasing producer surplus. When firms agree to charge minimum prices for their products it facilitates the earning of monopoly profits.[[166]](#footnote-166) Firms can also agree on non-price terms, and these non-price terms may have pricing effects or may contribute to barriers to entry into a market.[[167]](#footnote-167)

Explicit collusion occurs when firms communicate with each other in order to facilitate their coordinated behavior in the market.[[168]](#footnote-168) Tacit collusion does not involve direct communication between firms to enter into a conspiracy.[[169]](#footnote-169) Tacit collusion can be further distinguished between “conscious parallelism and concerted action”, where conscious parallelism may lead to a “equilibrium with higher market prices” without direct communication, while concerted actions fall “between explicit collusion and conscious parallelism” as “these actions involve some form of direct communication” without the “firms expressing their intent to reach a collusive agreement”.[[170]](#footnote-170) Both tacit collusion and explicit collusion can lead to market failures which may be indistinguishable.[[171]](#footnote-171) While explicit collusion is considered one of the hardcore violations of competition law in both the US and the EU, tacit collusion has been treated differently across the Atlantic.[[172]](#footnote-172) One notable issue involving tacit collusion is the treatment of alleged infringements of competition law involving the publication of prices, which may have ambiguous implications.[[173]](#footnote-173)

4.5 Focal Point theory

Focal points can be created through legal decisions and may be used by firms or individuals to help them determine how best take make decisions give the law.[[174]](#footnote-174) It is possible for firms in an industry to act in unison without explicitly agreeing to act collusively.[[175]](#footnote-175) Standard contracts can convey information about a firm’s focal point, as well as commitment to cooperate within a cartel. According to SCHERER “in a wide variety of problems, when behavior must be coordinated tacitly…there is a strong tendency for choices to converge on some such focal point”. [[176]](#footnote-176) SCHERER further identifies “[s]everal specific ways by which focal points enter into oligopolistic price determination” including “price lining”, such as “[i]n setting one's price at a focal point”, where a firm “in effect asks rhetorically, ‘If not here, where?’ implicitly warning rivals of the danger of downward spiraling”.[[177]](#footnote-177)

Industry trade groups may provide firms with an opportunity to collude and the actions taken by trade associations may show evidence of a common position within the group. The US telecom lobby group now known as CTIA, originally called the Cellular Telecommunications Industry Association then Cellular Telecommunications and Internet Association, routinely sends out position letters to legislators and submits legal briefs to courts advocating for the use of arbitration in the wireless communications industry with unsubstantiated claims that without arbitration consumers “would be unable to navigate the complex rules of civil litigation and would have no remedy at all”.[[178]](#footnote-178) CTIA points to SCOTUS rulings concerning the FAA which favor the use of arbitration, including *At&t Mobility LLC v. Concepcion, American Exp. v. Italian Colors Restaurant.* , *DirecTV, Inc. v. Imburgia*, and *Koontz v. St. Johns River Water Mgmt. Dist*., some of the cases in which the SCOTUS has expanded the scope of arbitration in the U.S. in recent decades.[[179]](#footnote-179) If the firm provides public or private information they know will reach their competitors about their use of arbitration in their terms, then it may signal to other firms a strategy. If each firm in the industry identifies how they benefit from the whole industry using arbitration in their terms and the terms of the individual firms can be monitored, then the firms can more easily act in unison through conscious parallelism.[[180]](#footnote-180) The letters from CTIA demonstrate that firms in the telecom industry have identified a course of common action to use arbitration and the firms can also monitor their rivals for their support of pursuing this common course through their use of arbitration and potentially through their involvement with the CTIA.[[181]](#footnote-181)

The actions of a “maverick” firm can serve as a focal point for other firms in the industry. According to GILO and PORAT, “operating with rigid standard-form contracts and raising the transaction costs of negotiating the contract with buyers can serve as a credible commitment by” a firm “not to cut prices, since it makes the price cut more transparent to” the firm’s “rivals”, and “[t]his could facilitate tacit collusion” across an industry when the firm “is an industry maverick.”[[182]](#footnote-182) If an “industry maverick” unilaterally adopts the use of arbitration clauses in their contracts, then through tacit collusion, the other firms in the industry could follow suit with the maverick. Even though the firms have not communicated with each other, they have seen what the leader in the industry is doing and mimic that behavior, essentially leading to collusion within the industry.[[183]](#footnote-183)

The SCOTUS trend is toward an expansive view of the FAA, starting with the *Southland Corp. v. Keating* case in 1984.[[184]](#footnote-184) The extension of the scope of the FAA through *Southland* and other cases concerning the scope of the FAA have likely served as focal points for private industry.[[185]](#footnote-185) By expressly stating the contractual elements necessary to include in an arbitration clause for it to fall under the SCOTUS view of the FAA (which includes SCOTUS rulings on class waivers and a number of other pro defendant arbitration terms) firms can readily observe the strategic benefits of using arbitration and how to mandate for arbitration in their standard contracts to fall in line with the court’s interpretation.[[186]](#footnote-186) The expressive function of the SCOTUS rulings in creating focal points is further supported by other third parties, such as industry trade groups.

The laws in Europe have also sever as a focal point. The decrees of EU law through treaties, directives and court rulings have shown there is a skepticism of the use of arbitration in Europe, particularly regarding to consumer contracts.[[187]](#footnote-187) Individual EU member states also create such focal points through law.

5. Conspiracies under the EU and US

The ability of the law to address or prevent market failures due to the collusive behavior of firms in using arbitration to settle tort claims is very much questionable. Courts in the US and EU have found that antitrust claims can be arbitrated, provided that the contract to arbitrate sufficiently provides for the claim to be arbitrated.[[188]](#footnote-188) However, a contract to arbitrate antitrust claims with a firm does not cover the firm’s coconspirators due to a lack of contract privity.[[189]](#footnote-189) This leaves open the possibility of adjudication of antitrust claims against coconspirators in the cartel in a public forum. This option may be eroding. LESLIE identifies how some courts in the US have used the doctrine of equitable estopple to mandate arbitration on antitrust claims against co-conspirators of a cartel when the individual had a contract to arbitrate with only one of the conspiring firms.[[190]](#footnote-190) Others have pointed to the changing attitude of the SCOTUS as a source for relaxing the requirements that “an arbitration agreement to be in writing” since “the Supreme Court's conclusion in *Doctor's Ass'n, Inc. Casarotto v.* that an arbitration clause may not be treated differently from any other contractual language has accelerated the development of legal and equitable principles whereby a nonsignatory to an arbitration agreement can be compelled to arbitrate based upon implied consent to such an agreement.”[[191]](#footnote-191) Implied consent under EU law would be unavailable in consumer contracts under community laws.[[192]](#footnote-192) A comparison of the per se, rule of reason, presumption of anti-competitiveness and the use of effects test, as legal doctrines show how these judicial doctrines result in different deterrent effects from the law, and indeed if they are designed to have different deterrent effects. These doctrines then must be understood as part of the greater goals of the Sherman Act and TEFU 101.

5.1 US doctrinal approaches to collusive behavior

Courts in the United States consider the anti-competitive practices under several standards. In the most hardline of standards, concerted efforts can be considered as illegal per se, meaning that there is no further need for the court to consider the effects of the concerted effort, rather the simple fact that a concerted effort exists makes it illegal. A less hardline approach is the rule of reason, which takes into account the effects of the constraints.

5.1.1 per se, rule of reason standards in the US

The US courts have found horizontal restraints to be unreasonable under one of two categories.[[193]](#footnote-193) First, restraints which “always or almost always tend to decrease competition and reduce output”, or which are “manifestly anticompetitive” are seen by the courts as unreasonable ‘per se’, or on their face these practices tend to distort the free market.[[194]](#footnote-194) The ‘per se’ approach has narrowed since its inception. The SCOTUS has been cautious “to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious”.[[195]](#footnote-195) The SCOTUS has also found use of the per se standard is appropriate when the “surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct”.[[196]](#footnote-196) Restraints on trade can “only” be considered per se illegal when they are “so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality”.[[197]](#footnote-197)

Notwithstanding a per se violation of the Sherman Act, the second standard which the court uses falls under a rule of reason test. According to the SCOTUS “[o]rdinarily, whether particular concerted action violates § 1 of the Sherman Act is determined through case-by-case application of the so-called rule of reason”.[[198]](#footnote-198) This underscores the courts view that the per se standard is not the “ordinary” standard, rather the rule of reason is the ordinary standard and the per se approach is appropriate only for the most flagrant of violations. The rule of reason test used by US courts involves “a fact-specific assessment” designed to determine the actual effects of a restraint and accounts for both the structure of the market in question and a determination of market power.[[199]](#footnote-199) Under a rule of reason test, some restraints may be seen as reasonable, such as “restraints stimulating competition that are in the consumer’s best interests” while only those “restraints with anticompetitive effect that are harmful to the consumer” being considered illegal.[[200]](#footnote-200) This also shows how the SCOTUS consideration is focused on “consumer welfare” as the object which is either being harmed or enhanced by a particular restraint.

US Courts may take into account plus factors, which may have probative value to the court in assessing if a restraint resulting from parallel conduct is the result of an agreement between competitors. This is significant because “the line that distinguishes tacit agreements (which are subject to section 1 scrutiny) from mere tacit coordination stemming from oligopolistic inter dependence (which eludes section 1’s reach), is indistinct”.[[201]](#footnote-201)

Plaintiffs in US antitrust cases alleging illegal collusion prohibited by section 1 of the Sherman Act bear the burden of proof and courts will consider both direct and circumstantial evidence of collusion.[[202]](#footnote-202) This is because through a series of antitrust cases the SCOTUS developed a “doctrine governing the use of circumstantial evidence to prove an agreement”, which includes, (1) “courts would characterize as concerted action interfirm coordination realized by means other than a direct exchange of assurances”, (2) “courts would allow agreements to be inferred by circumstantial proof suggesting that the challenged conduct more likely than not resulted from concerted action”, and (3) “courts would not find an agreement where the plaintiff showed only that the defendants recognized their interdependence and simply mimicked their rivals’ pricing decisions”.[[203]](#footnote-203) According to the SCOTUS in the *Monsanto Co v. Spray-Rite Service Corp*. “there must be direct or circumstantial evidence that reasonably tends to prove that (the parties) had a conscious commitment to a common scheme designed to achieve an unlawful objective”.[[204]](#footnote-204) According to KOVACIC et al. “[n]either Monsanto nor any earlier case provides a useful basis for identifying concerted action” as they “offer no useful operational means for determining when the defendants have engaged in something that is more than consciously parallel conduct”.[[205]](#footnote-205) The SCOTUS further distinguished that a plaintiff “must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed” the plaintiff, in what KOVACIC et al. describes as the court seeking “to reduce error costs associated with the excessively broad application of liability standards”.[[206]](#footnote-206) The heightened standard for plausibility was further extended to pleadings alleging conspiracies under § 1 of the Sherman Act where the “court reiterated the principle that proof of conscious parallelism alone is inadequate to establish conspiracy”[[207]](#footnote-207) The SCOTUS “observed that a more rigorous examination of the plaintiff’s pleadings was necessary to limit the plaintiff (and classes of plaintiffs) from setting in motion the costly process of civil discovery and extracting unjustified settlements from defendants” in the Twombly case.[[208]](#footnote-208) There are “six key elements of a competition law system” in which collusion claims may be shown as “interdependent” according to KOVACIC et al.. These elements include “the substantive scope of the legal command, the volume and quality of evidence required to prove a violation, the means for detecting violations, the prosecution of violations, the adjudication process that determines innocence or guilt, and the sanctions imposed for infringements.”[[209]](#footnote-209) KOVACIC et al. point to “[p]erceived excesses with private rights of action (the prosecution element) and the mandatory trebling of damages for victorious plaintiffs (the remedy element)” as issues which have prompted the “Court to engage in ‘equilibration’ -the adjustment of one element of the antitrust system (namely, the evidentiary standard) to offset imperfections in other elements.”[[210]](#footnote-210)

Plus factors which KOVACIC et al. identify as being “chief plus factors” include: “[a]ctions contrary to each defendant’s self interests unless pursued as part of a collective plan”; “[p]henomena that can be explained only as the result of concerted action”; “[e]vidence that the defendants created the opportunity for regular communication”; “[i]ndusty performance data… that suggest successful coordination”; and “[t]he absence of a plausible, legitimate business rationale for suspicious conduct (such as certain communications with rivals) or the presentation of contrived rationale for certain conduct”.[[211]](#footnote-211) Despite courts identifying these factors, “the absence of a methodology for ranking plus factors according to their likely probative value” is completely absent from judicial doctrine.[[212]](#footnote-212) Another issue which creates a problem for judicial consideration of these plus factors concerns the “economic literature regarding repeated games” has shown how “market outcomes associated with collusive schemes can result from interdependent, consciously parallel conduct in some industries”.[[213]](#footnote-213)

5.2 EU doctrinal approach to collusive behavior

The doctrinal approach with the EU takes to collusive behavior reflects the goals of EU competition law, which focus on the integration of EU members states into the EU internal market and goals such as “fairness” and the promotion of the “four freedoms”, as well as other goals found in the EU’s treaties and directives.

5.2.1 Presumption of anticompetitive effects

Under the European approach found in TEFU 101, some forms of restraints are “presumed to have anticompetitive effects”.[[214]](#footnote-214) According to WITT, “Article 101(1) … as interpreted by the Court of Justice… contains an inbuilt recognition that certain types of contractual clauses may be presumed to have anticompetitive effects on the basis of their wording, purpose and the broader economic context of the agreement.”[[215]](#footnote-215) A agreement may be considered as having the objective of restriction, where “contractual restrictions… are so likely to have negative effects on competition that it would be redundant to prove their actual effects”.[[216]](#footnote-216) Those restraints which have been presumed to be anticompetitive include “horizontal price fixing, output reduction, and customer allocation, but also resale price maintenance, absolute territorial protection and agreements designed to restrict parallel trade between EU Member States”.[[217]](#footnote-217)

The “presumption of anti-competitiveness” approach is similar but distinct from the “per se” approach the US adheres to, however the difference has “not been overly significant”.[[218]](#footnote-218) Under the per se approach the agreement or conduct is held illegal and the infringer has no grounds to rebut the holding other than appeal to a higher court, while under the presumption approach there may be an exception under TFEU 101(3) which defendants may plead. However, in practice 101(3) defenses do not appear to be a serious factor as there is a “presumption that restrictions that are blacklisted in Block Exemption Regulations are unlikely to fulfil the conditions of Article 101(3)” and the “Commission applies a high standard of proof for the efficiency defence”.[[219]](#footnote-219)

5.2.2 Economic Effects Test

Those restraints which are not found illegal under a presumption of anti-competitiveness standard, “need to be assessed as to their actual or likely effects on competition.”[[220]](#footnote-220) For this the EC has published guidelines which concern the assessment of economic effects on competition.[[221]](#footnote-221) According to WITT, these four guidelines were promulgated in order to create a “coherent theoretical framework for assessing the effects of agreements that do not have an anticompetitive object”.[[222]](#footnote-222) The two step process for assessing the effects on competition entails, (1) “the enforcing body needs to demonstrate that the investigated agreement leads to a restriction of competition either through coordination or foreclosure”, and (2) the enforcing body “needs to prove on the basis of cogent evidence that this restriction of competition has the effect of reducing consumer welfare, for example in the form of higher prices, reduced output, lower quality or diminished levels of innovation”.[[223]](#footnote-223) The economic effects test and the rule of reason test are clearly distinct, but still have some similar criteria.

6. Strategic use of Arbitration

Individuals contracting with firms are often at a bargaining disadvantage, especially when firms have market power. These bargaining disadvantages may reflect other disadvantages which individuals have when being involved in disputes with firms with market power who are repeatedly involved in similar disputes. Market power can lead to other bargaining advantages, such as an information advantage. GALANTER has identified how RP firms benefit from several advantages in litigation, including resource, intelligence, and opportunity advantages.[[224]](#footnote-224) Repeat player firms can exploit these advantages to influence the outcomes of disputes. The RP will also have these same advantages in arbitration, however the of arbitration may contribute to these advantages as judicial limits on strategic behavior may not be available in arbitration.

Bargaining asymmetry may lead an excessive number of inefficient contracts for consumers, especially when there is a rampant problem of signing without reading.[[225]](#footnote-225) According to CHOI AND TRIANTIS, there are “ways in which the shift in bargaining power might lead to a deviation from efficient contract design” including: 1) parties “engage in value-claiming rather than value-creating strategies”; 2) “the party with greater bargaining power has better incentives to invest …in innovating and developing contractual opportunities to create value”; 3) the exercise of bargaining power” in contracting to “distort the agreement on non-price terms”; and 4) “in negotiations characterized by information asymmetry, unequal bargaining power might encourage excessive signaling or screening activity in the design of nonprice terms”.[[226]](#footnote-226) Adhesion boilerplate or standard form contracts, give little for the individual bargaining with the firm to actually bargain over. Widespread use of standardized terms in an industry may leave consumers or employees with little choice over the terms of contracts for potentially necessary goods, services, medical treatments, or employment.

If an entire industry adopts the same nonnegotiable contractual terms which include mandatory arbitration, then individuals contracting with the firm have only two options. First, accept the universally used terms, with no choice over arbitration as the forum to enforce their legal rights against the firms in the industry, or, second, reject them and forego accessing the benefits of a market.[[227]](#footnote-227)

Conspiracies to use arbitration may be undertaken in pursuit of a number of goals. LESLIE distinguishes between primary and secondary conspiracies to use arbitration, where the primary conspiracy concerns only the mandated use of arbitration and/or the standardization of arbitration contracts, while secondary conspiracies include using arbitration to “conceal an underlying conspiracy”, “undermining pro-plaintiff aspects of antitrust law” and “alleviating settlement pressure”.[[228]](#footnote-228) According to LESLIE, in the United States conspiracies to use arbitration may allow firms to avoid “pro plaintiff” aspects of the antitrust laws “designed to encourage private plaintiffs to pursue antitrust litigation”, such as “a means to de-treble antitrust damages”, “preclude any injunctions against their interests”, “nullify antitrust law’s fee-shifting mandate”, “truncate statutes of limitations”, and use “class action waivers in arbitration clauses” to “immunize themselves from private antitrust liability”[[229]](#footnote-229) In addition to the primary and secondary conspiracies which LESLIE identifies, conspiracies to mandate arbitration of tort claims may allow or enable firms to: strategically choose judicial forums in an effort to benefit from arbitrage strategies, strategically take less than due care thus avoiding care costs, avoid regulatory compliance costs, indirectly fix prices using non price terms (through making contracts less valuable under the same sales price), switching the demand side economics of litigation from being pro plaintiff to pro defendant, and developing future options to behave strategically.[[230]](#footnote-230) It cannot be forestalled that the indirect price fixing is not the actual aim of a primary conspiracy to arbitrate, as the conspiracy may result in increased profits for firms without any further goal, however there may also be incentives for firms to coordinate on other terms of business in relation the use of arbitration.

Firms can use the terms of their contracts to enable their collusive behavior and anticompetitive strategic behavior. According to GILO and PORAT, there are situations where “boilerplate language and the artificial imposition of transaction costs do create asymmetry of information between the supplier and its consumers, as in the classic discussions of boilerplate language, but the asymmetry is used as a cartel facilitation tool, an anticompetitive signal device, or a tool for creating the appearance of a fair contract, rather than to merely extract surplus from uniformed consumers.”[[231]](#footnote-231) When arbitration clauses are included in these boilerplate contracts, the opportunities to conceal anticompetitive behavior from regulators may be persistent, meaning firms are enabled to behave strategically due to the terms of the arbitration contract being robust against a challenge for anticompetitive behavior.

The use of boilerplate arbitration clauses in contracts may enable collusion across an industry. If this occurs, the market for dispute resolution may be distorted by a lack of competition and a lack of options for courts to review anticompetitive behavior. Collusion to restrict the market for adjudication may result in a lower amount of consumer welfare, a lower production of public goods from courts, and arguably lower social welfare. These losses may be analogous to the dead weight loss associated with monopoly pricing.[[232]](#footnote-232)

6.1 The Private Cost and Benefits of Using arbitration

It is necessary to consider how private parties to a dispute may either incur costs or benefits from the use of arbitration for tort claims. The RP and the OS have different costs and benefits, that is to say, the attributes of arbitration which provide benefits the RP may not result in benefits the OS. If the benefits or costs of arbitration are disproportionate between RP and OS, then it will be an advantage to one party over the other to have arbitration be mandated to cover their contractual disputes. Interestingly, the advantage to an RP against an OS in individual claim may not be large, however when the benefits of that advantage are considered in aggregate when the RP faces may OS in individual claims, they may be significant.

Disputes can generate transaction costs for the parties of disputes. There are transaction costs in litigation, as lawyers, judges and a whole host of legal support services may be used. There are also transaction costs of arbitration, and for any other form of dispute resolution for that matter. The degree of the transaction costs depends on the nature of the dispute, the forum in which resolution is sought, and the dispositions of the parties. A few of the potential benefits of using arbitration over litigation in courts may include: lower transaction costs, a shorter time frame for the process to be completed, it may help to enable a continued relationship after the dispute is resolved, and it may allow for the parties to choose arbitrators with expertise relevant to the claim.[[233]](#footnote-233) However, these benefits cannot and should not be assumed or guaranteed.[[234]](#footnote-234) According to SHAVELL, parties in “an accident between a individual and a firm…may decide that it is in their best interests to elect arbitration for its simplicity and speed, but that may mean the firm escapes with inadequate liability or that the firm’s fault is never properly investigated and made known to the public” which may lead to underdeterrence “if firms anticipate often being able to reach such agreements to arbitrate”.[[235]](#footnote-235)

Only those disputes in which at least one of the parties have wrongly estimated the potential outcome in adjudication will be pursued, as having an accurate estimation of the outcome should lead to settlement in order to minimize the private costs the parties incur due to the dispute.[[236]](#footnote-236) Parties have a zone of possible agreement to use arbitration given each parties minimum and maximum asking or taking price and parties should account for litigation costs and deterrence effects when determining pricing.[[237]](#footnote-237) In such a scenario the *ex post* use of arbitration clauses should lead to more efficient uses of arbitration as the total litigation costs can be more accurately estimated by both parties, while in *ex ante* arbitration contracts the estimation of expected litigation costs is less clear.[[238]](#footnote-238) However, the RP is more accurate than OS in estimating both *ex post* and *ex ante* costs of litigation due to their informational advantage.

The use of mandatory arbitration by a firm may lead to reduction in firm’s liability costs either through their taking of strategic care or through the protection of an inefficient rule. The arbitration of tort claims may allow RP firms to protect an inefficient rule which they benefit from, from being adjusted by a court to an efficient rule. It matters if the inefficient rule is inefficiently high or inefficiently low. When an inefficiently low rule is replaced by an efficient rule, it will result in increased care costs to the firm. The increased care costs should be reflected in the price of the product. The increased price should reflect the full value of the product, including the costs of taking the efficient level of care and the cost of potential accidents.[[239]](#footnote-239) Under an inefficiently high rule the increased expected liability costs of the firm should also be reflected in the price of the good, and firms may have an incentive to adjust the inefficiently high rule to an efficient rule in order to avoid excessive care costs.

Firms may have private incentive to strategically take low care which results in no positive value claims given the transaction costs of dispute resolution. In litigation there may be remedial rules which address this type of strategically low care taking which may be unavailable in arbitration, such as collective actions or punitive damages. The taking of strategic care or use of liability waiver leads to a reduction in transaction costs (as well as expected liability) associated with tort claims for RP firms, while only the efficient waiver of liability leads to a reduction in transaction costs (or minimization of expected harm) for potential OS plaintiffs.[[240]](#footnote-240)

The efficient use of arbitration for tort claims is dependent on the type of claim being adjudicated, the existing efficient due care rules being applied to the claim and the potential for claims to lead to the production of public goods. If a claim is incapable of leading to the production of public goods from courts, then the use of arbitration may lead to lower tertiary costs which society subsidizes and may be welfare increasing. If it is inefficient to use arbitration for a tort claim, it may be due to an underproduction of public goods from litigation, an increase in enforcement errors, or an increase in accident costs.[[241]](#footnote-241) While there are questions concerning the social desirability of the use of arbitration for any given tort claim, when there is a conspiracy or coordination in the use arbitration for specific tort claims there is little room for argument that such coordination to manipulate a market is socially desirable.

Firms will take into account the costs and benefits of joining a conspiracy and the cost and benefits of defecting after joining a conspiracy. The use of arbitration to conceal anticompetitive activities will lead to a lower deterrence to enter into a conspiracy to arbitrate. A price cut may not necessarily deter all firms in a market from defecting from the strategy of using arbitration to protect an inefficiently low due care standard by using contracts to arbitrate in order to limit the litigation of a tort claim involving an inefficiently low due care standard. In actuality, the risk which the firm takes by defecting is to create a price increase for every firm in the market which is caused by increased care costs and increased liability costs as a result of an adjustment of due care standards to the efficient rule. Price fixing may also lead to less innovation by firms and may be a form of rent seeking, or part of a rent seeking strategy.[[242]](#footnote-242) If the use of arbitration for tort claims leads to diminished investments in innovation by industry, this may negatively inhibit what SCHUMPTER described as a process of “creative destruction” by which capitalist markets evolve.[[243]](#footnote-243)

The strategic or collusive use of arbitration may lead to several types of injuries. LESLIE identifies higher prices, lower quality, the deprivation of procedural or substantive due process rights, quantity restraints including fewer options to choose from and the benefits of competition, as the injuries which occur due to a conspiracy to use arbitration.[[244]](#footnote-244) LESLIE also identifies how injunctive relief from courts may lead to the prevention of future injuries from illegal conduct, by stopping the illegal activity, limiting the private benefits of illegal conduct and promoting competition.[[245]](#footnote-245) When injunctive relief is not available, injuries may continue to mount up while the illegal activity continues.

There are also the benefits of judicial review besides injunctive relief which may be forgone due to the use of arbitration, including the value of appeal, the production of public goods from litigation such as efficient due care standards, precedent, rule interpretation and gap filling.[[246]](#footnote-246) These benefits may also be costly due to externalities from litigation.[[247]](#footnote-247) However, the benefits may also be substantial yet still more difficult to quantify. According to SHAVELL, “if private adjudication is employed where contracts would have harmful external effects… it would obviously not be desirable for courts to enforce the private adjudicative findings.”[[248]](#footnote-248) If an under production of public goods from litigation results from the use of arbitration, then it may “reduce the deterrence benefits of arbitration over time”.[[249]](#footnote-249) The lack of deterrence effects harms third parties when the externalities of accidents fall outside the defendant and plaintiff, such as insurance companies or state services incur costs from the accidents. Family and social networks of victims may also incur costs from accidents.

One result of having known rules and standards is that parties will more accurately be able to identify the outcome of a dispute in litigation and thus will prefer to settle the dispute and avoid the transaction costs of litigation.[[250]](#footnote-250) This can be extended to argue that parties will also be able to more accurately estimate the expected litigation costs of their disputes when rules and standards are well defined. The certainty effects of the law are also related to the extent to which third parties are harmed by externalities. An efficient and certain standard should limit negative externalities for third parties, as the limiting of the expected costs of accidents should also limit the expected cost of externalities from accidents falling on third parties.

6.2 Arbitrage strategies and the stock of precedents (par of protecting inefficient rule)

When firms have a choice over the judicial forum which will adjudicate claims they are parties to, the firm can choose the forum which provides them with the most benefits, be they legal or economic. Given that courts have the ability to adjust due care standards through the production of precedent, gap filling, and interpretation, firms can choose *ex ante* to avoid jurisdictional oversight by mandating a strategic choice of law and forum in their contracts. This type of arbitrage takes advantage the difference between public and private adjudication forums and can be considered as a type of domestic forum arbitrage.

Influencing the stock of precedent may be one of the aims of the arbitrage strategies. Firms may be seeking to strategically influence how precedent is developed and the value of existing precedent. Precedent has a value, like stocks, which can increase or decrease over time.[[251]](#footnote-251) The salience and use of the precedent is related to how often the precedent is cited to, or how often the precedent influences the private settlement of disputes.[[252]](#footnote-252) Precedent, rule interpretation and gap filling may have value similar to precedent, in so far as the gap filling and interpretation are considered public goods which are produced by courts which may have depreciating values.

The competition in the market for adjudication may lead to a unique form of jurisdictional arbitrage when firms which can dictate contractual terms concerning choice of adjudication forum. This type of arbitrage is a form of regulatory arbitrage. Regulatory arbitrage is a “planning technique used to avoid” regulation in order to exploit “the gap between the economic substance of a transaction and its legal or regulatory treatment.”[[253]](#footnote-253) Jurisdictional arbitrage can be seen as a broader form of arbitrage under which a more distinct form of arbitrage being discussed here should be considered.[[254]](#footnote-254) An accurate term for this unique type of arbitrage is “Domestic Forum Arbitrage” because it implies there is no choice over state jurisdictions, but rather the choice is over competing private and public domestic adjudication forums.[[255]](#footnote-255)

Firms will take advantage in differences in regulation in order to avoid costs associated with regulation. All other costs being equal, when there are multiple states in which a firm can choose to incorporate and one of the states has a lower regulatory burden, the firm may have a financial incentive to incorporate in the state with lower regulatory burden.[[256]](#footnote-256) Likewise, if there are competing judicial forums (each with unique burdens for the firm) in which a firm can avail themselves of jurisdiction, the firm can avail themselves of the forum with the lower regulatory burden in order to take advantages of the differences between forums.[[257]](#footnote-257)

There is a market for resolution of legal disputes which includes both private and public forums and processes.[[258]](#footnote-258) Courts, arbitration tribunals, mediators, conciliation and private negotiation are all options for parties looking to resolve a dispute. The only forums in which disputes are adjudicated by a third party are public judiciaries (including quasi-judicial government institutions) and private arbitration. According to Dilanni, “competition between courts has characterized many legal systems throughout history, and has played a significant role in the development of our own modern legal system.”[[259]](#footnote-259) Because there are no complete contracts, parties can try to lower the transaction costs of dispute resolution by *ex ante* determining how future disputes will be resolved, including which forum, rules and procedures which will be used if a dispute developed.[[260]](#footnote-260) Institutions affect the competition for judicial services, and this may lead to bias which distorts outcomes.[[261]](#footnote-261) A reputation for a bias should influence the choice of adjudication forum by contracting parties. In a litigation setting, it is the plaintiff who determines the forum to file in and it is the plaintiff that drives the demand for adjudication, absent an *ex ante* contract over choice of forum. When firms have market power, they can mandate *ex ante* the adjudication forum used in the event of a dispute. If firms are more likely to be defendants in such contractual settings, they can choose to mandate arbitration in the boilerplate contracts they use, but they should only do so if arbitration is expected to provide an economic advantage which is higher than alternative forums.[[262]](#footnote-262)

Assuming the demand for litigation and arbitration is influenced by bias, or perceived bias, parties can strategically choose a forum they perceive to be pro plaintiff, pro defendant or neutral, depending on their expected position in future disputes. A party who expects to be involved in disputes as both a plaintiff and defendant equally, will seek a neutral forum. Arbitration may have the effect of changing neutral or pro plaintiff bias in litigation into a bias towards defendants in arbitration.[[263]](#footnote-263) This may be caused by the timing of the demand as potential defendants’ *ex ante* for arbitration, while potential victims only demand litigation *ex post*. This reverses the demand side of litigation, where plaintiffs have the initial choice of potential forums *ex post*, into an *ex ante* demand by firms to choose among arbitral forums of their choice.

6.3 Price Fixing Effects and Cartel Enforcement

Collusion to use arbitration changes the rights and duties associated with the underlying good or service, here the legal rights related to enforcement of the contract and claims arising out the contract, which can be analogous to a stick within the bundle of sticks metaphor used to describe property rights.[[264]](#footnote-264) Although the use of arbitration clauses in a contract can be considered a non-price term, its presence changes the value of the bundle of sticks associated with the good or service, so it can also be considered as an indirect price term.[[265]](#footnote-265) The price of a product or service should include all the potential costs associated with using the product or service, including the costs of accidents.[[266]](#footnote-266) The market for labor should also adjust to working conditions.[[267]](#footnote-267) If the use of arbitration leads to lower care costs or lower liability cost for firms, the lower costs should be reflected in the price of the product or service being sold or the cost of labor, so long as there is competition in the market.[[268]](#footnote-268) If there is a lack of competition in the market, firms lack economic pressure to change the costs of goods, services or labor, to reflect the lower care and liability costs realized from the use of arbitration. In an oligopolistic market, no market force pressures firms to pass on the savings from using arbitration onto consumers or employees, rather, these saving can be wholly or substantially captured by the firm. According to POSNER “[e]xclusive sales agencies, revenue pooling, production quotas, customer and territorial allocations, provisions for arbitration of disputes, and fines for violating the cartel agreement are among the mechanisms by which cartels seek to maximize the profits from price fixing.”[[269]](#footnote-269) Indirect price fixing may even be the objective of the coordinated use of arbitration, since the cost savings being passed onto consumers is largely dependent on competition in the market and the market has proven to be acting in unison in their use of arbitration.[[270]](#footnote-270)

The strategic use of arbitration for tort claims across an industry may allow firms to essentially price fix. The presence of an arbitration agreement for tort claims can be seen as an indirect non-price element of the underlying good or service being contracted over, which actually impacts the price of the underlying good or service. According to STIGLER, a “price cut will often take the indirect form of modifying some non-price dimension of the transaction”.[[271]](#footnote-271) By including an arbitration clause, the firm can credibly provide information that they are continuing with the colluded behavior. The removal of mandatory arbitration clauses can be seen as a price increase, because it prevents the firm from using arbitration to affect price and it provides consumers with a more valuable bundle of sticks, than the product, services, or labor contract of their industry rivals who use arbitration as an indirect form of price fixing.

Although collusion to prevent litigation of tort disputes in order protect an inefficiently low due care standard is not necessarily direct price fixing, it does not mean there is no price fixing due to the collusion. STIGLER found his analysis that detecting secret price reductions could be “extended to non-price variables, subject to two modifications”.[[272]](#footnote-272) First, there is “a definite joint profit-maximizing policy upon which the rivals can agree,” and second, “the competitive moves of any one firm will differ widely among non-price variables in the detectability by rivals” where “some forms of non-price competition will be easier to detect than price-cutting because they leave visible traces…but some variants will be elusive”.[[273]](#footnote-273) If there is a primary conspiracy to arbitrate, such as the one identified by LESLIE, then it is possible that firms will still compete or collude over other product variables. STIGLER identified how “non-price variables” such as advertising, may be the topic of collusion within an industry.[[274]](#footnote-274)

The inclusion of an arbitration clause in a boilerplate contract which is used by firms in an industry is easy to observe by rival firms in the market, especially given the emergence of the online digital marketplace. A claim in state courts is public knowledge and firms can monitor for claims arising in a public forum, while a claim in arbitration remains private information.

A waiver of mandatory arbitration may be seen as a sign there is an inefficiently high due care standard which is being targeted or that the firm is price cutting. The inclusion of arbitration in consumer contracts can be easily monitored for by co-conspiring firms who could respond to waiver with retaliation. The reaction of other firms to the indirect price cut will be context specific as to why arbitration was waived and the scope of the waiver. For instance, if other firms recognize the waiving firm is challenging an inefficiently high due care standard which all firms incur costs from, the firms in the industry may not necessarily view this context specific waiver as defecting. However, if the firms in an industry which are colluding to use arbitration for tort claims expect to be retaliated against for defecting, then in the long run the collusive behavior can be sustained.[[275]](#footnote-275) If firms collude to protect an inefficient due care standard from being changed by courts through the use of arbitration agreements, and one of the colluding firms defects, the remaining firms may try to punish the defector the same way in which they would when the firms were colluding to fix prices, and this potential for punishment may make the agreement stronger.

This collusive behavior may not only have price effects due to moral hazard, in that a lower value in the good being provided at certain price which does not change while the quality does change, but it may also have quality effects due to adverse selection, in which a product or service is provided with a lower quality although at the same price as a higher quality good. This may also contribute to a situation where a market for lemons exists, where higher quality goods and lower quality goods cannot be distinguished from each other in the market.[[276]](#footnote-276) Under competitive conditions, where there is not a prevalence of information asymmetry, firms should differentiate products based on not only the features of the products, but also the bundle of rights which are tied to the products, such as warranties, service guarantees, or the use of arbitration, in order to more fully capture the demands of the market and thus potential profit. If firms can perfectly discriminate through product differentiation, other potential issues involving competition law may come into play, although this is beyond the scope of this article. Firms may have power to change the characteristics of a good or service, including the attached rights, unilaterally and this may be part of a price fixing scheme or other abuse of market power.

An indirect price fixing scheme involving arbitration may also lead to increased secondary costs of torts, as third-party insurers and state social services may be burdened with covering the costs of accidents which firms avoid liability for through their collusive behavior. Because the colluding firm may still have an incentive to use arbitration when there is an economic incentive to use arbitration below the full benefit of using arbitration across an industry, firms looking to price cut or retaliate may need to do so using other price cutting techniques than abandoning the scheme to use arbitration.

6.4 Avoiding Liability and Care Costs

The use of arbitration for tort claims may allow for the avoidance of liability, especially when individuals contracting with firms are unknowledgeable, uninformed, or un-savvy.[[277]](#footnote-277) Avoidance of liability through the use of arbitration can be accomplished through a combination of several contractual devices. Contracts to arbitrate are often combined with contractual terms which cap damages, limit punitive damages, limit consumer or labor friendly procedures and rules, limit collective actions, narrow the application of statutes of limitations, and apply these terms retroactively through the adoption of new terms of service in prolonged contractual relationships.[[278]](#footnote-278) Firms can take these strategic steps to lower the payoff from filing a claims against them. Firms may also seek to use an arbitration process which is costly for victims to use.[[279]](#footnote-279) This may be the difference between a claim being positive in value and negative in value. It may also allow firms to strategically take less than due care when the firm is able to recognize the transaction costs which a potential victim will face when pursuing a tort claim against the firm.[[280]](#footnote-280)

If firms can identify the transaction costs which are required to bring a claim against them and can identify when a claims moves from being positive in value to negative in value relative to the care being taken by accounting for the transaction costs a victim will face when bringing a claim, then the firm can take strategic care which is below due care.[[281]](#footnote-281) Firms can use information, resources, and opportunity advantages in the arbitration process to enable the strategic taking of care. Firms can decollectivize mass tort claims by including class waivers alongside arbitration clauses. This creates an asymmetric increase in litigation costs for plaintiffs, who can no longer benefit from the transaction costs efficiencies of using a collective action to bring a claim on behalf of an entire class of similarly situated individuals. When a firm is able to identify the cost of individual plaintiffs bringing a single claim, they can take this into account when determining how much care to take. If a firm can identify the point where a claim goes from being positive in value to being negative in value relative to the amount of care being taken, the firm can strategically take less than due care without having to worry about facing claims for the accidents which the low care taking resulted in. This is because the individual suffering a harm has suffered an amount of harm which is below the amount of harm which would be necessary for a claim to be positive in value, given that the enforcement of legal rights under the contract has costs. If there is also an inefficient due care standard in place, the firm may be able to identify an even lower amount of care to take than under an efficient rule, while still keeping individual claims negative in value.

The potential for strategic care taking is not only preset in the arbitration setting but also present in the litigation setting, although in a court the risk of being discovered may be higher as it may influence the adjudication of other similar claims against the tortfeasor while in arbitration the possibility of a single claim influencing other similar claims is lower due to the secretive nature of the arbitration process. By taking strategic care the firm can gain from having lower care costs without having to face tort claims from rational plaintiffs with only negative value claims.

6.5 To protect or defeat an inefficient due care standard.

Potential injurers, who are repeat players and benefit from an inefficiently low due care standard have an incentive to prevent a challenge in court to the rule in order to limit the opportunities for a court to change the rule to the efficient one. Using arbitration for tort claims can keep a firm who benefits from an inefficiently low due care standard from facing a challenge to the rule in a public forum and prevent the court from adjusting the care level to the efficient care standard.

Firms which have included arbitration clauses in their consumer contracts should demand arbitration when a claim has the potential to lead to an adjustment of an inefficiently low due care standard by a state administered court, since an adjustment by the court to an efficient standard will lead to the firm incurring additional care costs. The firm should waive arbitration when a claim could lead to an adjustment of an inefficiently high due care standard by a state administered court which would lead to lower care costs for the firm.

If only a single firm in an industry uses arbitration, claims against the other firms may lead to an adjustment of the care standard which is common for all the firms in the industry. The protection of an inefficient rule thus requires some coordination, either explicitly or tacitly, within an industry to prevent claims going to court. Simply put, an inefficient due care standard cannot be protected through the use of arbitration unless everyone “plays ball”.

If victim care is a substitute for injurer care, then an inefficiently low due care standard will provide benefits for potential injurers in the form of lower care costs and lower liability for accidents, while creating costs to potential victims in the form of increased care costs and an increased burden of costs of accidents. This is because the inefficiently low standard will require less care than is efficient for potential tortfeasors and more care than is efficient for potential victims. Potential victims will either incur costs of taking care to make up for the low level taken by tortfeasors or may incur damages which tortfeasors are not legally liable for given the inefficiently low due care standard. An inefficiently low due care standard provides a perverse incentive for injurers to take less than efficient care and an inefficient incentive for potential victims to take excessive care. The combination of the two leads to an increase in accident costs and lowers welfare.

An inefficiently low due care standard allows firms to gain more utility or welfare by avoiding care costs and liability. If the inefficiently low due care standard could be changed by a court, a change which would impact the industry as a whole, then firms may coordinate to include arbitration clauses in their boilerplate contracts to prevent claims from going to a court, thus preventing a change to the inefficient rule arising out of a claim against the firm. The whole industry has the same economic incentive to include arbitration as the single firm. The interests of individual firms align and each can identify an identical course of action which results in private benefits.

An inefficiently high due care standard brings additional care costs to potential injurers and may lower the care taken and care costs of potential victims if they have knowledge of the excessive precaution being taken by potential tortfeasors.[[282]](#footnote-282) This the inefficiently high care standard is more costly for potential injurers than the efficient care standard and potential victims may react by taking less than due care. The result is inefficient because the total accident costs and care costs are higher than when the rule is set efficiently. Parties will weigh the costs and benefits of going to court, as potential tortfeasors who repeatedly face excessive care costs have an economic incentive to challenge an inefficiently high care standard in a public forum until the rule is changed to the efficient level.[[283]](#footnote-283) Arbitration does not lead to the adjustment of state mandated due care standards, and this may in fact be the objective of engaging in conspiracies to arbitrate or not.[[284]](#footnote-284)

7. Conclusion

There may be a market failure which occurs when the use of private contracts to arbitrate result in a lack of substantive deterrence to anticompetitive behavior of firms. The use of private contracting to conceal anticompetitive practices can be combined with contractual terms which also make the enforcement of legal rights by tort victims more difficult and costly. If the arbitration agreement is the instrument by which the cartelist or monopolist is able to conceal its anticompetitive practices, then the enforcement of such an agreement by state courts will result in a persistent opportunity for firms to behave collusively and insulate themselves from regulatory oversight. Using arbitration may allow a firm to protect an inefficient rule which it benefits from. Firms can avoid care costs by using arbitration strategically to prevent courts from reviewing their behavior and thus from adjusting an inefficiently low due care standard, and firms can strategically waive arbitration when there is an inefficiently high due care standard in order to have their care costs lowered through the adjustment to the efficient standard. Individual OS claimants may be willing to accept the waiver of an RP if they estimate, either rationally or irrationally, that litigation in court will lead to an increased expected value of a claim. When firms have information about the transaction costs which potential victims will incur from pursuing a claim, firms can use arbitration to conceal their taking of strategically low care costs when there is an efficient due care standard in place, which allows them to take only the care necessary to ensure no claim against them will be positive in value. Colluding firms can thus minimize their expected liability costs and care costs through a combination of taking strategic care and collusively using arbitration as a form of indirect price fixing as well as a method to protect an inefficiently low due care standard which they benefit from and a method to keep courts from having oversight of other forms of collusive behavior.

Since the use of arbitration for tort claims can influence the setting of due care standards and the price of goods, services and labor, there are clear implications for competition law. EU and US competition authorities have taken different approaches to mixing private and public enforcement of competition law and have unique goals which may result in some divergence. These divergent approaches in competition law have made the incentives to conspire to use arbitration for tort claims greater in the US than in the EU, or in other words the likelihood of success of such a conspiracy and the expected payoffs are greater in the US than in Europe. Divergent approaches for statutory limits on arbitration and judicial deference to arbitration have also resulted in greater incentives to conspire to use arbitration for tort claims in the US than in the EU. Despite these divergent approaches and payoffs, firms in an industry should use contracts to arbitrate tort claims when they will gain financially. Even without overt collusion, if the potential gains from using arbitration for tort claims are identifiable by all firms in an industry, then we should expect for their actions to converge in unison.

Rather than adding to the existing literature regarding the arbitrability of antitrust tort claims, this article examines how firms may collude to mandate the use of arbitration for tort claims in private contracts in order to avoid care costs, avoid liability costs, or reap revenue in excess of what a competitive market would allow. The use of contractual terms which facilitate the avoidance of care and liability costs may have price fixing effects, and/or may hamper the development of efficient due care standards resulting in their underproduction, both of which are welfare reducing for consumers and society. When arbitration is used as a mutually agreed upon method to resolve disputes where the benefits of lower transaction costs are shared, efficiencies can be realized over litigation. When arbitration is used to enable collusive behavior and other strategic behavior such as avoidance of care and liability costs, the potential efficiencies of lower transaction costs from arbitration will be distributed asymmetrically in favor of the colluding firms and thus individuals and society will suffer a welfare loss, which is only increased if the collusive behavior leads to an underproduction of public goods from litigation.

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Appendix A- Game Theoretical Analysis

Consider the following game involving two firms in a duopoly, firms A and B, and the ability to use arbitration to protect an inefficiently low due care standard. Firm A and B are the only two firms in a market supplying product X. There is a due care standard with regards to the sale and production of X, as there is a possibility for X to create some harm to its users which may give rise to a claim in tort. This is likely to occur under a negligence claim or other related claims which have a rule in place which utilizes the calculus of negligence. Care can be taken by A and B in the production and distribution of product X, which if taken at the correct level will lead to a minimization of accident costs associated with product X. However, the existing due care standard is inefficient in that it does not set the due care standard correctly in relation to the marginal costs and marginal benefits of precaution.[[285]](#footnote-285) Firms A and B benefit from having to pay lower care costs and having lower expected liability costs under an inefficiently low standard than under an efficient standard. The law is a public good, and when there is an inefficient due care standard in place it will not create the right incentives to take care for firms A and B in the production and sale of product X. Here A and B both benefit from the underproduction of a public good, in this case the setting of due care standards. This leads to a decrease in social welfare, as victims and society suffer from inefficiently high total accident costs and increased losses due to torts as a result of the underproduction of efficient due care standards. This underproduction is due to the law setting the lower due care standard as opposed to the efficient due care standard. A and B both have the option to include an arbitration agreement in their consumer contracts. Arbitration allows A and B to prevent tort claims from the purchasers of X from challenging the inefficient due care standard in court. Additionally, X is a good or service which cannot be easily transferred to a third party, meaning X will only create negative externalities to direct purchasers of product X whom have also agreed ex ante to use arbitration for all claims, including tort claims, arising out of the use of product X.[[286]](#footnote-286) Firms A and B must decide if they want to protect the inefficient rule through the use of arbitration. Protecting an inefficient rule will only work if both A and B use arbitration in their boilerplate contracts and the inefficient due care rule is one which originated from previous litigation involving the firms, or if the activities are specific to the industry. This is because tort claims against either A or B in court could result in an adjustment to the due care standard which impacts both firms. Even if only A and not B included arbitration clauses, the underlying contract would also likely include a choice of law clause which requires that the arbitration tribunal apply the substantive laws of the choice state in a private adjudication forum, and if a claim against B in court results in a change in the substantive law, it affects A in arbitration and *vice versa*. In this scenario the inefficient due care standard comes at a cost of 1 and the efficient due care standard comes at a cost of 2. The goal for both A and B is to keep their total costs as low as possible which includes the sub goal of keeping care costs as low as possible. If either A or B does not include an arbitration clause, or if neither uses an arbitration clause, then the inefficient due care standard will change to the efficient due car standard over time through court review and once that happens both A and B will incur a care cost of 2. If both A and B include an arbitration clause then the inefficient due care standard can be protected from court review, and the care costs remain 1. Both A and B should recognize the private benefits of coordinating to use arbitration. The only way in which both A and B can avoid the additional care costs which come with an efficient due care standard is if both choose to use arbitration. Further assume that A and B cannot, or do not, explicitly communicate with each other to coordinate their contracts to arbitrate and there are also no option to communicate indirectly other than through market observations available to the public, although this may be unrealistic given an increasingly connected world. Without communicating, both A and B should recognize: 1) They benefit from the inefficient due care standard; 2) They both benefit from using arbitration to prevent a claim against them leading to an adjustment of the due care standard in court, and; 3) they both know that to protect the standard, it is not enough for them alone to use arbitration, but also the other party must use arbitration or the rule may be challenged in court. Because both A and B have been able to identify a rule they benefit from and how to protect the rule from change, they will tend towards this objective as though it were a focal point. This same reasoning can be applied across an industry with many firms, as the benefit of using arbitration to protect an inefficiently low due care standard holds only if all firms choose to use arbitration.

Figure 2. Incentives to cooperate to protect an inefficiently low due care standard.

|  |  |
| --- | --- |
| Care Costs in a duopoly under options to protect an inefficient due care standard from court review | Firm B |
| No Arbitration | Arbitration |
| Firm A | No Arbitration | -2, -2 (efficient due care standard) | -2, -2 (efficient due care standard) |
| Arbitration | -2, -2 (efficient due care standard) | -1, -1 (inefficiently low due care standard) |

If this game were adjusted so that unilateral use of arbitration provides the firm with options to take strategic due care even with a change in the due care standard to the efficient rule, the strategy to cooperate is strengthened. When strategic care is taken, the firm is able to use their information advantage to identify transaction costs for the counterparty in a tort claim and the point at which a tort claim moves from being a negative value claim to a positive value claim relative to the amount of care being taken by the firm.[[287]](#footnote-287) A and B can further ensure the claims value will remain negative by mandating a class waiver alongside the arbitration clause. Here both A and B can identify how through the use of mandatory arbitration clauses and class waivers, they can strategically spend only 1.5 on care while keeping all claims against them from becoming positive, thus they will not face any claims against them from rational plaintiffs. The individual firm would still have an incentive to behave collusively, as the focal point of protecting the inefficient rule through the use of arbitration is identifiable. Even if one of the firms does not decide to use arbitration, the other firm will still benefit from using arbitration because it will enable them to take strategic care, thus lowering their care costs below the efficient due care costs, but still above the inefficient due care costs which were previously in place before the rule was adjusted.[[288]](#footnote-288) Figure 3, shows how the unilateral benefit from taking strategic care which strengthens the incentives for the firm to use arbitration since the weakly dominant strategy found in figure 2 is replaced with a dominant strategy equilibrium.

Figure 3. Incentives to cooperate to protect an inefficiently low due care standard with strategic care taking

|  |  |
| --- | --- |
| Care Cost for a duopoly under options to protect an inefficient due care standard from court review and options to take strategic care | Firm B |
| No Arbitration | Arbitration w/strategic care |
| Firm A | No Arbitration | -2, -2 (efficient due care standard) | -2, -1.5 (efficient due care standard with strategic care under arbitration) |
| Arbitration w/strategic care | -1.5, -2 (efficient due care standard with strategic care under arbitration) | -1, -1 (inefficiently low due care standard) |

Now suppose the opposite situation, where there is an inefficiently high due care standard which costs 3. Here instead of A and B having an incentive to cooperate to use arbitration, they have an incentive to waive arbitration regardless of what the other party does. If the RP is playing a long-term game for rules, then they have an incentive to trade off short term losses for long term gains. In the long run the RP has a continued incentive to litigate until the inefficiently high due care rule is adjusted to an efficient rule, provided the cost of litigation are lower than the net present value of the reduction of future care costs.

Figure 4. Incentives to waive arbitration to challenge an inefficiently high due care standard.

|  |  |
| --- | --- |
| Care Cost for a bilateral duopoly under options to protect an inefficient due care standard from court review | Firm B |
| No Arbitration | Arbitration |
| Firm A | No Arbitration | -2, -2 (efficient due care standard) | -2, -2 (efficient due care standard) |
| Arbitration | -2, -2 (efficient due care standard) | -3, -3 (inefficiently high due care standard) |

According to the focal point theory, “individuals are sometimes able to coordinate their behaviour, to their mutual advantage, by drawing on shared perceptions that particular ways of coordinating are 'prominent' or 'salient'.”[[289]](#footnote-289) The focal point is more important when there are potentially multiple Nash equilibrium, however, the lack of multiple equilibrium increases the likelihood of coordination among the firms as the salience of a strategy are more easily recognizable.[[290]](#footnote-290) Because the fixing of rules through the use of arbitration is an indirect form of price fixing, the equilibrium will reflect the cost avoidance of the duopoly. Because both A and B can clearly see it will be mutually advantageous to use arbitration to protect an inefficiently low due care standard both will focus on taking steps to minimize their care and liability costs by protecting the low due care standard. In the situation where there is an inefficiently high due care standard, A and B will both focus on taking steps to lower their long term care costs by waiving arbitration and having the courts adjusts the inefficiently high standard.

This game shows how collusion to protect an inefficiently low due care standard in order to avoid future care costs associated with a rule adjustment to an efficient rule, is unique from other forms of collusive behavior. In the classic cartel example, there is an incentive to defect from the cartel to gain an increased share of the market and increased revenues. This is one of the several reasons why cartels may be inherently instable.[[291]](#footnote-291) Here there is a weakly dominate strategy for firms to cooperate to protect an inefficiently low due care standard which they mutually benefit from and to waiver arbitration only if there is an inefficiently high due care standard, and there is a dominant strategy to coordinate when the option to take strategic care is introduced. Importantly, there is no potential incentive to defect from this collusive behavior in order to gain extra ordinary profit, as the use of arbitration in this case represents an indirect price coordination rather than through direct price fixing as the payoff from direct and indirect price fixing are divergent.

1. Title is a lyric from the song Deal: GARCIA and HUNTER 1972. [↑](#footnote-ref-1)
2. Many law and economics scholars point to COASE’s 1960 article “The Problem of Social Cost” as signaling a modern turn in legal analysis toward a “new law and economics” approach, which focused on issues of transaction costs and efficiency in legal research. According to COASE “Once the costs of carrying out market transactions are taken into account it is clear that such a rearrangement of rights will only be undertaken when the increase in the value of production consequent upon the rearrangement is greater than the costs which would be involved in bringing it about.” Furthermore, COASE comments “the initial delimitation of legal rights does have an effect on the efficiency with which the economic system operates. One arrangement of rights may bring about a greater value of production than any other. But unless this is the arrangement of rights established by the legal system, the costs of reaching the same result by altering and combining rights through the market may be so great that this optimal arrangement of rights, and the greater value of production which it would bring, may never be achieved.” COASE 1960. 10.

According to POSNER “Coase’s article introduced the Coase Theorem…and more broadly, established a framework for analyzing the assignment of property rights and liability in economic terms. This opened a vast field of legal doctrine to fruitful economic analysis. An important, though for a time neglected feature of Coase’s article was its implications for the positive economic analysis of legal doctrine. Coase intimated that the English law of nuisance had an implicit economic logic. Later writers have generalized this insight and argued that many of the doctrines and institutions of the legal system are best understood and explained as efforts to promote the efficient allocation of resources.” POSNER 2014, 30. [↑](#footnote-ref-2)
3. It may be reasonable to assume that a single firm in a monopoly position using a similar arbitration strategy would reach a similar outcome as a cartel acting in unison. [↑](#footnote-ref-3)
4. This paper focuses on the use of mandatory arbitration terms in contracts, however, there are many settings in which arbitration may be agreed upon through bargaining, and “mandatory” may have different meanings attached. According to HYLTON, “it is important to distinguish voluntary and mandatory (i.e., state-imposed) arbitration. Informed contracting parties will voluntarily enter into arbitration agreements only when the agreements increase the difference between deterrence benefits and expected litigation costs. However, a law mandating arbitration may impose arbitration even when this condition does not hold. Mandatory arbitration also may have the effect of *increasing* litigation cost by requiring victims to go through an initial stage of pre-trial arbitration or mediation. Mandatory arbitration therefore may reduce overall deterrence benefits.” HYLTON 2000. Page 230. While HYLTON includes state-imposed arbitration as falling under mandatory arbitration, mandatory arbitration may also refer to mandatory terms which a firm has placed in their standard boilerplate contracts which may not be bargained over, rather they are a mandatory contract term for a mandatory process of dispute resolution for any party contracting with the firm. [↑](#footnote-ref-4)
5. For a list of cases which have been forced into arbitration in the US after judicial challenge to the arbitration clause, including tort claims for wrongful death, assault, negligence, fraud, invasion of privacy, racial and gender discrimination, and wage theft among others, see: CENTER FOR JUSTICE AND DEMOCRACY 2019. [↑](#footnote-ref-5)
6. Under US Antitrust Law “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” Sherman Antitrust Act.

Under EU competition law, “The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

Article 101 Treaty on the Functioning of the European Union. [↑](#footnote-ref-6)
7. For a more detailed discussion on the judicial review of tacit collusion see the discussion below in section 4.4. [↑](#footnote-ref-7)
8. When considering the benefits to firms in light of the US Supreme Court decisions which favor the use of arbitration, WARDABAUGH found: “The examination of these benefits is primarily an economic task, the results of which suggest that the industries involved in recent Supreme Court consumer arbitration matters have a structure that facilitates collusion and cartel formation. As cartels not only fix prices, but also collude on terms of service, I suggest that a consequence of the use of such exclusions is not to benefit consumers. Rather, the use of arbitration may have the very opposite effect, namely the facilitation of appropriation of consumer surplus.” WARDHAUGH 2013. 430. [↑](#footnote-ref-8)
9. According to LANDES and POSNER, when considering the optimal production of precedent “an optimal investment would be one that maximized the present value… of the difference between the value of the flow of services and the costs of investment with respect to investment in each period” provided it meets some criteria. LANDES and POSNER 1976. 264-265. [↑](#footnote-ref-9)
10. For a discussion about the market for arbitration and judicial services see: WAGNER 2014.. [↑](#footnote-ref-10)
11. According to the Hand formula which identifies the calculus of negligence, “if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL.” *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (C.A.2 1947). Brow further identified how the marginal cost of care should be equal to the marginal benefits of care. BROWN 1973. According to SHAVELL, in unilateral accidents “This socially optimal level of care will clearly reflect both the costs of exercising care and the reduction in accident risks that care would accomplish.” SHAVELL 2009. 178. [↑](#footnote-ref-11)
12. According to COOTER AND ULEN “A public good is a commodity with two very closely related characteristics: 1. *Nonrivalrous consumption:* consumption of a public good by one person does not leave less for any other consumer. 2. *Nonexcludability:* the costs of excluding nonpaying beneficiaries who consume the good are so high that no private profit-maximizing firm is willing to supply the good.” COOTER AND ULEN 2016. 40. [↑](#footnote-ref-12)
13. According to LANDES and POSNER “Precedent has "public-good" aspects that may result in underproduction in a private market.” LANDES and POSNER 1979. 261. HYLTON has described precaution as a type of public good “in the sense that the potential defendant’s investment in precaution…reduces the probability of harm to all potential plaintiffs simultaneously.” HYLTON 2000. 238. [↑](#footnote-ref-13)
14. LANDES and POSNER comment that “arbitration awards are not a source of rules or precedents.” Which “is understandable in the case of general commercial arbitration because of the public-good character of precedent.” Furthermore, “[a] system in which arbitrators wrote opinions would be at a competitive disadvantage vis-h-vis one in which they did not write opinions; the former would cost more but would yield no greater private benefits and, being private, could not coerce the necessary financial support by invoking the state's taxing powers.” LANDES and POSNER 1979. 248. There may be benefits from the production of public goods from litigation when a claim arbitrated lacks a quality which could result in the production of public goods. [↑](#footnote-ref-14)
15. HYLTON has argued that “if a waiver would inhibit the development of new law in a manner that is detrimental to plaintiffs, then a potential plaintiff presumably would take this into account in setting the terms of the agreement. The existence of spillover benefits to other plaintiffs, leading to a divergence between private and social incentives to waive, is an insufficient argument against enforcement because such spillovers are likely to be negligible.” HYLTON 2000. 214. [↑](#footnote-ref-15)
16. According to DRAHOS, “Public goods have specific regulatory contexts that affect their provision as well as their distribution and uptake. The benefits of some public goods (for example, cleaner air) flow automatically while the benefits of other (for example, technical knowledge) do not. One consequence of this is that even if the problem of provision is solved for a given public good, the problem of distribution may not be. Restricting access to a public good is sometimes a deliberate choice. Moreover, such restrictions can be done by regulating the movement of private goods.” DRAHOS 2004. 322. [↑](#footnote-ref-16)
17. See: LANDES and POSNER 1979. [↑](#footnote-ref-17)
18. The impact of collusive use of arbitration for tort claims should be seen as creating a different economic effect than settlement. HYLTON has commented that the effects of settlement and arbitration on limiting the development of the law is similar. However, the collusive abuse of market power to limit access to courts may have the effect of precluding an entire class of claims with industry specific implications on precedent imposed by potential defendants, which can be seen as a strategic decision. Importantly, settlement of disputes based on economic interests alone cannot reasonably preclude an entire class of claims. HYLTON 2000. [↑](#footnote-ref-18)
19. One limiting issue in this analysis is that it is difficult to place a monetary value on precedent. According to LANDES and POSNER, “Even though… the number of citations in subsequent judicial opinions may be a tolerably accurate proxy for the precedential value of a decision, it would be difficult to attach dollar values to citations so as to weight them against the number of disputes resolved.” LANDES and POSNER 1979. 242. [↑](#footnote-ref-19)
20. There is extensive literature addressing the arbitrability of antitrust claims, including: LOEVINGER 1969. VON ZUMBUSCH 1987. BAKER and STABILE 1993. BREWER 1997. BLANKE AND LANDOLT 2011. This is only a small sample of literature addressing the arbitrability of antitrust claims. [↑](#footnote-ref-20)
21. The only article which the author has found is one which directly addresses the use of conspiracies to arbitrate is from LESLIE, however LESLIE neglects to address several potential objectives of conspiracies to arbitrate, specifically LESLIE does not address conspiracies to arbitrate tort claims, which are identified here. See: LESLIE 2017. In this article LESLIE identifies primary and secondary conspiracies to arbitrate. [↑](#footnote-ref-21)
22. In the US contracts to arbitrate can be embedded within much larger consumer, service, medical, or employment contracts, and parties only need to agree to a single contract for arbitration clause to be valid. In the EU contracts to arbitrate consumer, sales, and service contracts are limited when compared with the US. According to COLE et al. “The fairness of consumer arbitration clauses within European Union Member States is controlled by domestic legislation that derives from each State’s implementation of the Unfair Terms Directive (Directive 93/13/EC).” Furthermore, “European legal systems usually take into consideration the concerns expressed by the Court of Justice of the European Union as to the conscionable choice of consumers to submit to arbitration and thus set forth some special provisions in this regard. Two approaches are mainly followed: the first possible solution is to prevent consumer arbitration agreements in the form of arbitration clauses. In jurisdictions falling under this model, consumers cannot submit to arbitration before a dispute has arisen: as a result, arbitration clauses included in consumer contracts are null and void…. In other legal systems, consumers are free to conclude an arbitration agreement before the dispute has arisen, but the arbitration clause is deemed abusive unless it has been individually negotiated and subscribed. In other words, the arbitration agreement is valid only where it has been subscribed separately from the rest of the contract it is attached to, thus demonstrating a specific will to submit to arbitration. The rationale of these provisions is to separate the consent to the main contract from the consent to arbitration, thus ensuring that consumers are not forced to waive their right to access State courts in order to conclude the main contract.” COLE et. al. 2015. Page 207, 53. [↑](#footnote-ref-22)
23. Federal Arbitration Act. 9 U.S.C. §2. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate. [↑](#footnote-ref-23)
24. See: SZALAI 2016. [↑](#footnote-ref-24)
25. Sherman Antitrust Act, 15 U.S.C.A. § 1. § 1. Trusts, etc., in restraint of trade illegal; penalty. [↑](#footnote-ref-25)
26. See: SZALAI 2016. [↑](#footnote-ref-26)
27. LESLIE uses these two cases to highlight the changing approach of courts in examining allegations of conspiracies to arbitrate. *Paramount Famous Corp. v. US.* and *In re: Universal Service Fund Telephone Billing Practices Litigation*. [↑](#footnote-ref-27)
28. *Paramount Famous Corp. v. US.* According to GIL, “The sentence was never enforced due to the Great Depression and in 1933 the distributors looked for protection under the National Industry Recovery Act. The government nullified the decree and suspended the antitrust case. As a result, the studios and distributors were allowed to remain vertically integrated and to use temporarily block booking while they recovered financially from the Great Depression.” GIL 2010. 173. [↑](#footnote-ref-28)
29. *Paramount Famous Corp. v. US.* at 43, Quoting to *Eastern States Lumber Ass'n v. US.*  [↑](#footnote-ref-29)
30. LESLIE 2017.402. [↑](#footnote-ref-30)
31. LESLIE 2017.402. [↑](#footnote-ref-31)
32. LESLIE 2017.403. [↑](#footnote-ref-32)
33. *Paramount Famous Corp. v. US*.at 43. [↑](#footnote-ref-33)
34. *Paramount Famous Corp. v. US*.at 44. [↑](#footnote-ref-34)
35. See: GIL 2010. [↑](#footnote-ref-35)
36. LESLIE 2017.405. [↑](#footnote-ref-36)
37. *In re: Universal Service Fund Telephone Billing Practices Litigation*. 1, 2. [↑](#footnote-ref-37)
38. *In re: Universal Service Fund Telephone Billing Practices Litigation*.1, 2. [↑](#footnote-ref-38)
39. *In re: Universal Service Fund Telephone Billing Practices Litigation..* 2, 3.

Federal Arbitration Act. [↑](#footnote-ref-39)
40. *In re: Universal Service Fund Telephone Billing Practices Litigation.* 3, 6. [↑](#footnote-ref-40)
41. *In re: Universal Service Fund Telephone Billing Practices Litigation.* 6. [↑](#footnote-ref-41)
42. LESLIE also points to a similar case involving conspiracies to mandate arbitration in consumer credit card contracts, *Ross v. Citigroup, Inc*.as an example of a recent case which also refused to extend the per se approach. However, the court in *Ross* did not consider Lasky (*Paramount Famous Corp. v. US*) in its analysis of the FAA. See: LESLIE 2017. 441-451. [↑](#footnote-ref-42)
43. This change in attitude by the court has been criticized for being an overreaching interpretation of the FAA. LESLIE opines that “courts have misapplied arbitration law in ways that make conspiracies to arbitrate profitable and perhaps inevitable in some markets. Prior to the Supreme Court’s pro arbitration decisions, firms had little reason to conspire to impose arbitration clauses on their consumers. Now, relying on the false premise that Congress created a federal policy favoring arbitration, federal courts have employed seemingly neutral doctrines in ways that actively enforce conspiracies to arbitrate.” According to LESLIE “In the 1980s, the Supreme Court reimagined a different legislative intent behind the FAA, which the Court claimed had created an "emphatic federal policy in favor of arbitral dispute resolution," pursuant to which "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.” LESLIE 2017. 386 and 390. Citing to *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, Inc., and *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*. [↑](#footnote-ref-43)
44. According to SZALAI, “the Supreme Court has grossly erred in interpreting the statute. The history of the FAA's enactment helps demonstrate that the FAA was originally intended to provide a framework for federal courts to support a limited, modest system of private dispute resolution for commercial disputes, not the expansive system that exists today involving both state and federal courts and covering virtually all types of non-criminal disputes. When one examines the FAA through the lens of history, the Supreme Court's modem, expansive view of the FAA collapses. As former Justice Sandra Day O'Connor lamented, ’the [Supreme] Court has abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation.’ The Supreme Court, through erroneous interpretations of the FAA, has created an expansive, relatively unsupervised system of dispute resolution touching almost every aspect of American life. Current and former Justices have admitted that the Court's flawed interpretations of the FAA are overly expansive and are causing ongoing constitutional problems.'" Yet, the Supreme Court has continued to expand its erroneous interpretations of the FAA.” SZALAI 2016. 117-118. Quoting *Allied-Bruce Terminix Cos. v. Dobson*.(O'Connor, J., concurring). [↑](#footnote-ref-44)
45. SZALAI further finds that, “in *Southland Corp. v. Keating, the* Supreme Court unequivocally held that the FAA is a ‘substantive rule applicable in state as well as federal courts.’ The *Southland* Court found, in connection with a state court proceeding, that the FAA preempted a state law banning the arbitration of franchise disputes. The *Southland* Court relied on a manufactured ‘federal policy favoring arbitration’ to hold that the FAA ‘withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration’." SZALAI 2016. 118. Citing to *Southland Corp. v. Keating,* 465 U.S. 1 (1984). [↑](#footnote-ref-45)
46. See: SZALAI 2018. [↑](#footnote-ref-46)
47. SHAVELL discusses how only ex ante contracts to arbitrate have the potential to influence the incentive to take due care, as ex post contracts to arbitrate will have no impact on the accident occurring or not, only on where the costs of the harm will fall. See: SHAVELL 2009. 447-448 [↑](#footnote-ref-47)
48. SHAVELL 2009, 447-448. [↑](#footnote-ref-48)
49. For a discussion of the use of arbitration in consumer contracts in the EU see: COLE et. al. 2015. [↑](#footnote-ref-49)
50. According to PARISI “much research in law and economics is concerned with either determining whether a law (or set of laws) is efficient or, alternatively, with designing laws that effect efficient results. In such cases, “efficiency” denotes maximal social welfare.” PARISI 2013. 319. [↑](#footnote-ref-50)
51. German economist SIEBERT coined the term ‘cobra effect’ to describe how laws may produce unintended consequences, such as when a British law in colonial India designed to eradicate cobras had the unintended consequence of increasing the cobra population. See: SIEBERT 2001. [↑](#footnote-ref-51)
52. According to KEETON, a “legal system, to remain viable over a span of time, must have the flexibility to admit change. To find solutions for a succession of differing problems in a continuously changing context, it must be creative. On the other hand, a group of institutions and their methods of operation cannot constitute a system in the absence of strong elements of stability and predictability. Creativity must build upon a solid foundation of continuity.' Modern developments in tort law present acutely the problems of accommodation of these competing demands for change and stability.” KEETON 1962. 463. [↑](#footnote-ref-52)
53. CALABRESI 2008. [↑](#footnote-ref-53)
54. See: *United States v. Carroll Towing Co*. and BROWN 1973. [↑](#footnote-ref-54)
55. SHAVELL 2009. 182. [↑](#footnote-ref-55)
56. According to THORNBURG “Modern tort law performs multiple functions, and it has achieved its current balance through centuries of development. These functions include achieving corrective justice in individual cases, promoting optimal deterrence for would-be tortfeasors and narrating the values of society at large. All three, as well as the courts' ability to shape their relative importance to fit an evolving culture, could be threatened by mandatory arbitration of personal injury claims.” THORNBURG 2004. 270. From a law and economics perspective, deterrence may occur through the tort liability system. According to COOTER AND ULEN “tort law often aims to internalize costs, such as the risk of accidents. Once costs are internalized, actors are free to do as they please, provided that they pay the price. Internalization, however, is not the proper goal when perfect compensation is impossible in principle or in practice, or when people want law to protect their rights instead of their interests, or when enforcement errors systematically undermine liability. In these circumstances, law’s proper goal is deterrence. When deterrence is the goal, actors are not free to pay the price and do as they please. Instead, punishments are calibrated to deter those actors who prefer to do the act in spite of its price.” COOTER AND ULEN 2016. 462. [↑](#footnote-ref-56)
57. FAURE and WEBER 2015. 163. As commented on in a previous chapter on the strategic use of arbitration for tort claims, FAURE and WEBER identify potential legal procedures in court and private solutions outside of court, which seek to solve the problem of scattered losses, including: expense insurance, legal aid, transferring of claims to third parties, third party funding, contingency or conditional fees for lawyers, ADR, class actions, representative actions, punitive damages, administrative legal enforcement, and criminal sanctions, with each solution involving a unique set of costs and benefits. FAURE and WEBER 2015. throughout. [↑](#footnote-ref-57)
58. While much this discussion is focused on unilateral accidents, there are also implications from the use of arbitration for bilateral accidents as well. Tort claims related to an accident may include several claims related to a single underlying accident depending on the claims which are available in the specific jurisdiction and these may include strict liability, strict liability with the defense of contributory negligence and negligence. It is not uncommon for numerous theories of liability to be claimed. With a strict liability rule there may be the potential for courts to create public goods related to a due care standard if there is an option for the defense of contributory negligence when there is a bilateral accident being considered. If repeat player firms do use arbitration in their underlying contracts and there is a strict liability rule with a defense of contributory negligence, then firms have an incentivize to seek an adjustment of victims care standards when they are inefficiently low, as an inefficiently low victims due care standard will lead to increased liability for the firm. This incentive may lead to the waiver of arbitration by firms seeking to adjust the victims due care standards for a rule of strict liability with a contributory negligence defense. For a discussion on the comparison of strict liability and negligence rules and the impact a rule has on incentives to take care see: SHAVELL 1980. [↑](#footnote-ref-58)
59. See: CALABRESI 2008. [↑](#footnote-ref-59)
60. According to SHAVELL, customer’s knowledge of the risk associated with the products they buy is imperfect, and if “customers do not have enough information to determine product risks at the level of individual firms… [t]hen firms will not take care in the absence of liability.” SHAVELL 2009. 214. [↑](#footnote-ref-60)
61. DARI-MATTIACCI and FRANZONI considered “how due-care standards should be conditioned on the technology adopted by the parties in order to improve adoption decisions” arguing that “standards should be biased upwards or downwards, depending on whether the new technology reduces or increases expected harm” DARI-MATTIACCI AND FRANZONI 2014. 333. [↑](#footnote-ref-61)
62. When examining the relative advantages and disadvantages of legal change, KEETON found that when considering the “magnitude of the change” it “may be viewed not only in terms of the immediate impact of the proposed change upon particular decisions and thus upon future legal relations, but also in terms of its relation to the larger doctrinal context, its consistency with major currents of doctrine, and its potential impact upon future doctrinal developments.” KEETON 1962. 476.

According to POSNER “Precedent projects a judge’s influence more effectively than a decision that will have no effect in guiding future behavior” POSNER 2014. 745. It may be argued that the SCOTUS has discounted these future effects when expanding the scope of the FAA. [↑](#footnote-ref-62)
63. KEETON 1962. 476. [↑](#footnote-ref-63)
64. According to POSNER, “[m]aintaing the credibility of the tort system requires that a defendant who is found liable must pay damages at least as great as L in the Hand Formula…for otherwise the victim will have no incentive to sue, and that incentive is essential to the maintenance of the tort system as an effective credible deterrent to negligence.” POSNER 2014. 223. [↑](#footnote-ref-64)
65. For a discussion about the relevance of precedent see LANDES and POSNER 1976. [↑](#footnote-ref-65)
66. POSNER 2014, 97. Additionally POSNER identifies how “contract law has five distinct economic functions: (1) to prevent opportunism, (2) to interpolate efficient terms either on a wholesale or a retail basis (gap filling versus ad hoc interpretation), (3) to punish avoidable mistakes in the contracting process, (4) to allocate risk to the superior risk bearer, and (5) to reduce the cost of resolving contract disputes.” POSNER 2014. 102. Referencing HOBBES 1651. [↑](#footnote-ref-66)
67. SCHWARTZ and SCOTT 2003. 546. [↑](#footnote-ref-67)
68. SHAVELL comments “A basic rationale for legislative or judicial overriding of contracts is the existence of harmful externalities. Contracts that are likely to harm third parties are often not enforced, for example, agreements to commit crimes, price-fixing compacts, liability insurance policies against fines, and sales contracts for certain goods (such as for machine guns). In such cases, the harm to third parties must tend to exceed the benefits of a contract to the parties themselves for it to be socially desirable not to enforce a contract.” SHAVELL 2009. 320. [↑](#footnote-ref-68)
69. According to SCHWARTZ, “the state should enforce promises in two cases: (1) when enforcement encourages parties to make investments whose value is highest in the particular relationship at issue; and (2) when enforcement permits parties to allocate the risk of changing economic circumstances.” Additionally, “the state should supply parties with efficient rules to flesh out incomplete contracts. An efficient rule either maximizes the parties’ joint gains under the contract or encourages the better informed party to reveal information that facilitates the maximization of joint gains.” SCHWARTZ 2003. 142. [↑](#footnote-ref-69)
70. HYLTON has argued that notwithstanding “substantial harm” to uninformed parties resulting from agreements to arbitrate, “ordinary contract law should suffice” in interpreting arbitration contracts. HYLTON 2000. 252. [↑](#footnote-ref-70)
71. According to CHE AND YI, “[f]or a repeat player… going to trial means not only facing a particular court decision, but also setting a good or bad precedent for future cases” and by “[r]ecognizing this, the players will alter their strategies in pretrial bargaining, based on their expectation of the precedent.” CHE AND YI 1993. 400. The repeat player advantage in litigation is also present in arbitration, although in arbitration it is potentially less restrained. It can be argued that firms using arbitration for tort claims agreed upon *ex ante* take into account long periods of time in which they may face claims and will alter their strategies in pre accident bargaining as well. This means that the nuances of arbitration contribute to the repeat player advantage. [↑](#footnote-ref-71)
72. VAN AAKEN and BROUDE 2016. 7-8.

For the domestic tort claims considered here there is no issue of “denationalization”. [↑](#footnote-ref-72)
73. See: OSTROM 2008. [↑](#footnote-ref-73)
74. It may be useful to think an analogy found in computer software markets, where firms have often bundled different products into a software package which are then sold as a whole to consumers. While the software package represents the whole right purchased, each of the individual pieces of software represent an individual product which was purchased. [↑](#footnote-ref-74)
75. According to HYLTON “in many settings one potential defendant (e.g., employer) will enter into arbitration agreements with several potential plaintiffs (e.g., employees). In these cases, overall deterrence benefits are often linked with litigation costs in that the plaintiff's litigation cost has the effect of barring claims where the expected judgment falls below the cost of litigation. If arbitration reduces this bar by lowering litigation costs then it will lead to an increase in the number of victims who will litigate their claims, which in turn enhances the potential defendant's incentive to take care. Put another way, in many settings arbitration will increase deterrence benefits *because* it reduces litigation costs.” HYLTON 2000. 229. [↑](#footnote-ref-75)
76. According to EPSTEIN “the existence of the *direct* contract between the parties allows the warranty provisions to exhibit all the complex characteristics found in pure insurance contracts.” Furthermore, “[t]he current doctrines of products liability law can be understood as a form of mandatory insurance that is tied to the sale of” goods, such as “an automobile”. EPSTEIN 1985. 656 and 668. [↑](#footnote-ref-76)
77. See SCHWARTZ 2003 about efficiency in contracting. [↑](#footnote-ref-77)
78. See; SZALAI 2016. [↑](#footnote-ref-78)
79. EU limits on arbitration in consumer contracts can be found in Unfair Terms in Consumer Contracts Directive. Included in the directive is a list of terms which prohibited, including “excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.” Unfair Terms in Consumer Contracts Directive. Article 3. 1.(q). [↑](#footnote-ref-79)
80. According to SHAVELL “We can first dispense with the possibility that unilateral choice of a private legal system by a party to a dispute would tend to be socially desirable. It would not, for the party would select a system that favored him, reducing or eliminating the capacity of the law to channel behavior or to remedy loss desirably. For example, a rule of tort law requiring injurers to pay for harm, which could be beneficial due to the incentives it provides to take care, would be robbed of force if defendants could select their own legal system. They would choose a different rule that allowed them to escape responsibility, or if they were permitted only to elect the method of adjudication, they would select a tribunal that watered down the ability of plaintiffs to collect. Converse problems, involving excessive liability, would arise if plaintiffs could unilaterally choose liability rules or methods of adjudication. It is plain, therefore, that permitting unilateral modification of the public system of law is socially undesirable.” SHAVELL 2009. 446. [↑](#footnote-ref-80)
81. HYLTON 2000. 250, 251. Additionally, HYLTON finds that “the implications for the informational asymmetry problem are not as serious as legal commentators suggest because the uninformed party enters into a pre-dispute arbitration contract only when the expected value of the deal is positive” and “informational asymmetry, standing alone, does not present a compelling case for a general policy of non-enforcement, or for applying selective non-enforcement rules that differ from those already embodied in contract law”. Rather, “[t]o justify extraordinary regulation, there must be some evidence that the agreements that turn out bad ex post for the uninformed party cause substantial harm, and that the regulatory authority has sufficient information to target its corrective instruments to contracts that are ex post bad deals”. HYLTON further finds “that non-enforcement of pre-dispute agreements should be limited to instances in which potential claimants are unlikely to get information to correct their prior beliefs regarding the likelihood of harm.” HYLTON 2000. 251-252, 254. [↑](#footnote-ref-81)
82. HYLTON 2000. 263. [↑](#footnote-ref-82)
83. For a discussion of rational apathy see: DE GEEST 2015. [↑](#footnote-ref-83)
84. See: DE GEEST 2015 [↑](#footnote-ref-84)
85. According to SHAVELL “it will be socially desirable to allow modification of the public legal system in many circumstances where the decision is made by the parties who are affected by the legal system. An important example is where the parties to a contract stipulate that they want a private system to govern contractual problems that may arise. The reasons that allowing them to choose a private system is socially desirable are twofold. First, if each of the contracting parties agrees to the private system, it must make each of them better off. Second, no one else will be made worse off, presuming that the parties to the contract are the only people affected by it.” SHAVELL 2009. 446-447. [↑](#footnote-ref-85)
86. The Sherman antitrust act “seeks to protect the public against evils commonly incident to the unreasonable destruction of competition”. Paramount Famous Corp. v. US.43. [↑](#footnote-ref-86)
87. According to PARISI “one of the characteristics often attributed to the Chicago methodology is the use of economics as a tool of positive analysis.” PARISI 2013. 43-44. [↑](#footnote-ref-87)
88. VAN DEN BERGH and CAMESASCA 2001. 1. [↑](#footnote-ref-88)
89. For a comprehensive analysis of the functioning of European Union Government, see: NUGENT 2017. [↑](#footnote-ref-89)
90. VAN DEN BERGH and CAMESASCA 2001. 1-2. [↑](#footnote-ref-90)
91. According to VAN DEN BERGH “Criteria for making a choice between public and private enforcement include the type of sanction that is deemed appropriate, the existence of information advantages and the difference between the private and social motive to sue. Also, the focus on the compensation goal rather than the deterrence goal will have an impact on the design of the optimal enforcement system. A preliminary requirement to achieve optimal deterrence and/or compensation is that indirect buyers are given the right to claim damages.” VAN DEN BERGH 2013. 15. [↑](#footnote-ref-91)
92. According to PARISI, asymmetric information is “a form of market failure in which one party has access to more relevant information than the other” which has “undesirable consequences” including “adverse selection and moral hazard”. PARISI 2013. [↑](#footnote-ref-92)
93. According to COOTER AND ULEN, “the rational plaintiff files a complaint if its expected net payoff is positive: EVC≥ FC 🡪 file legal complaint; EVC< FC 🡪 do not file the complaint.” COOTER AND ULEN 2016. 390. [↑](#footnote-ref-93)
94. According to Cooter and Ulen “The efficiency loss due to enforcement error can be offset by augmenting compensatory damages with punitive damages.” COOTER AND ULEN 2016. 260. [↑](#footnote-ref-94)
95. F.R.C.P. 23. [↑](#footnote-ref-95)
96. VAN DEN BERGH 2013. 13. [↑](#footnote-ref-96)
97. Under the “New Deal for Consumers” which the European Commission proposed in 2018, a uniquely European Representative Action procedure is being advocated. According to the Commission “Under the New Deal for Consumers it will be possible for a qualified entity, such as a consumer organisation, to seek redress, such as compensation, replacement or repair, on behalf of a group of consumers that have been harmed by an illegal commercial practice. In some Member States, it is already possible for consumers to launch collective actions in courts, but now this possibility will be available in all EU countries.” EC PRESS RELEASE 2018.

According to VAN DEN BERGH, there has been a reluctance in the EU to adopt collective procedure similar to the one found in FRCP 23. VAN DEN BERGH comments “The dominant scepticism towards US-style class actions is due to alleged abuses and the prevailing image of an attorney acting as a private entrepreneur maximizing personal profits without sufficiently taking care of the interests of the members of the class. The aversion towards American class actions in Europe is so great that it has become politically incorrect to use this term. Instead, policy makers have proposed to rely on 'collective actions' and 'representative actions' brought by consumer associations.” VAN DEN BERGH 2013. 13. [↑](#footnote-ref-97)
98. For a discussion on the some of the negative attributes of treble damages see: EASTERBROOK 1985. [↑](#footnote-ref-98)
99. For discussions on the issue of Blackmail settlements see:

PRIESTT 1999. 483;

Judge Posner’s opinion in *Matter of Rhone-Poulenc Rorer Inc.* at 1298; and

KANNER and NAGY 2005. [↑](#footnote-ref-99)
100. See: Mostaza Claro v. Centro Móvil Milenium SL. Still, we should expect to see the use of a new collective action procedure in the EU should create new paths of research. [↑](#footnote-ref-100)
101. SOKOL comments, “If in fact a lawsuit creates the same interests for government as it does for the private plaintiff, then private rights can be seen as the outsourcing of government litigation resulting from budget constraints. In this sense, private rights are a substitute for government enforcement.” SOKOL 2011. 691, 691-692. [↑](#footnote-ref-101)
102. According to SOKOL, “The law and economics literature regarding private rights of action in antitrust conceptualizes private rights of action as a binary decision of one of a complement or substitute to government enforcement. Complement in this context is value neutral and may either positively or negatively add to public enforcement. Behind this dichotomy is a broader theoretical discussion about the optimal mix of antitrust enforcement in the U.S. antitrust system. What is optimal antitrust enforcement is not sufficiently clear. Some theoretical work suggests that private antitrust rights have a neutral effect on total antitrust enforcement. In other theoretical models, private rights may lead to a more optimal antitrust system. In contrast, there are those that argue against any private rights within the antitrust system because they negatively affect total antitrust enforcement.” SOKOL 2011. 691. [↑](#footnote-ref-102)
103. POSNER 2014. 759 [↑](#footnote-ref-103)
104. POSNER 2014. 760

POSNER considers the differences between horse drawn buggies and modern automobiles to highlight how precedent may decrease in value over time as technology and practices change. According to POSNER “accident law that was developed to deal with collisions between horse-drawn wagons will be less valuable when applied to automobile collisions”. POSNER 2014. 760.

I will argue that one potential way to measure the effects of collusions to use arbitration for tort claims is to adapt the model which LANDES and POSNER used to analyze the capital stock of precedent by looking at industry specific precedent concerning due care standards both before and after the *Southland* case, which signaled the shifting attitude towards arbitration in the US and can be considered as a type of shock which would affect subsequent precedent production, then compare this information with other industries and other areas of law which are not susceptible to being strategically developed through the use of arbitration. It should be noted that arbitration for non-tort claims may also have been influenced by the use of arbitration. In LANDES and POSNER’s study they treated “the body of legal precedents created by judicial decisions in prior periods as a capital stock that yields a flow of information services which depreciates over time as new conditions arise that were not foreseen by the framers of the existing precedent. New (and replacement) capital is created by investment in the production of precedents”. LANDES and POSNER used two “techniques for using the age distribution of citation to estimate rates of depreciation or obsolescence of legal capital,” first: “exclusive use of the mean of the age distribution,” and; second “makes use of the entire frequency distribution of citations to earlier decisions, not just the mean.” Pages 275. LANDES and POSNER 1976. 250-251. This may be one way to solve a problem which HYLTON identifies as justifying “the desirability of subsidizing litigation in order to enhance the stock of legal capital” HYLTON 2000. 247. [↑](#footnote-ref-104)
105. According to THORNBURG, “The public nature of litigation, and its status as a function of government, is a way in which society enunciates its values, and in which it creates and enforces the rules that govern primary behavior.” THORNBURG 2004. 272. [↑](#footnote-ref-105)
106. According to HYLTON, “An arbitral forum may have an advantage in developing and interpreting that institutional common law. The oldest example of this is the "law merchant" (or "lex mercatoria") that Blackstone described in the late 1700s as the law governing commercial transactions.” HYLTON 2000. 245. In some forms of arbitration, particularly when it involves similarly situated parties such is the case in commercial arbitration, a written decision is rendered and some form of institutional precedent may be developed, but the use is limited, as is the precedential value of the written decision on other arbitrators. This type of precedent creation from arbitration tribunals is a characteristic of international commercial arbitration, while the development of institutional precedent in domestic arbitration is arbitral association and state specific. One noteworthy example of private institutional precedent developing is the Lex Mercatoria, which has actually been substantially incorporated in many states’ public laws. Interestingly, the doctrine of *ex aequo et bono* allows an arbitration tribunal to only examine disputes based on fairness and equity provided the parties to the dispute agree. See: TRAKMAN 2008. [↑](#footnote-ref-106)
107. HYLTON 2000. 263. However, HYLTON also comments that his “analysis largely rejects the claim that waiver and arbitration agreements should not be enforced because of their inhibitory effects on legal evolution.” Page 263. [↑](#footnote-ref-107)
108. CALABRESI 2008. [↑](#footnote-ref-108)
109. Some courts, however, are known for having specialized knowledge or expertise in specific types of claims, a factor which may contribute to forum shopping in U.S. federal districts or states. One can easily point to Delaware corporate law and the Court of Chancery as one such example in a state. [↑](#footnote-ref-109)
110. This is a non-exhaustive list. [↑](#footnote-ref-110)
111. According to HYLTON “whenever litigation is socially undesirable because the expected benefits from deterrence are less than the expected litigation costs, informed potential litigants have an incentive to sign a waiver agreement” and “[s]imilalrly, informed parties have an incentive to enter into an arbitration agreement when and only when the margin between the deterrence benefit and expected total litigation costs is greater under the arbitration regime.” HYLTON 2000, 213.

For a discussion on the differences between Pareto and Kaldor-Hicks efficiency see: COOTER AND ULEN 2016. 42. [↑](#footnote-ref-111)
112. For a discussion on the capital stock like nature of precedent see: LANDES and POSNER 1976. 249-307. [↑](#footnote-ref-112)
113. POSNER 2014. 823. [↑](#footnote-ref-113)
114. See: CALABRESI 2008. [↑](#footnote-ref-114)
115. See: HYLTON 2000. 252. [↑](#footnote-ref-115)
116. BEN-SHAHAR has commented on the potential for liability to be subsidized by one class of consumers which benefits another class of consumers. According to Be-Shahar “The greater the uncertainty about the outcome of litigation, the less beneficial it is for risk-averse plaintiffs, who would prefer lower settlements to the uncertainty of litigating the case fully. It is widely accepted that poorer individuals exhibit higher degrees of risk aversion, and thus value the prospect of the litigation “damages lottery” less.” BEN-SHAHAR further comments how “Mandated compensation can fail to generate protective benefits to weak consumers because of the utility handicap and the affordability handicap. Consider first the utility handicap. Tort compensation for injuries arising from defective products requires manufacturers to pay for the losses suffered by victims. The cost of this liability regime is spread to all consumers through the increased price of products. How much each victim gets in compensation depends on how large her losses are, and - not surprisingly - the measurable losses to the poor tend to be smaller than those that accrue to the wealthy. Property-rich and high-income consumers receive greater awards, because damages in tort law are correlated with lost income and with consequential harm to property.” Furthermore, “if arbitration indeed reduces consumers' access to redress, this effect is potentially favorable not only to firms, but also to the weakest subgroups of consumers.” BEN-SHAHAR 2016. 1798. [↑](#footnote-ref-116)
117. WARDHAUGH 2013. 453. [↑](#footnote-ref-117)
118. According to LANDES and POSNER, “although a precedent does not “wear out” in a physical sense, it depreciates in an economic sense because the value of its information content declines over time with changing circumstances.” LANDES and POSNER 1976. 263. [↑](#footnote-ref-118)
119. See: COOTER and ULEN 2016. 45. [↑](#footnote-ref-119)
120. See: COOTER and ULEN 2016. 45. [↑](#footnote-ref-120)
121. See: HYLTON 200. 252. [↑](#footnote-ref-121)
122. For a discussion on how repeat players have an advantage over one shotters in litigation see: GALANTER 1974. [↑](#footnote-ref-122)
123. See: GALANTER 1974. [↑](#footnote-ref-123)
124. CHE AND YI 1993. 417-418. [↑](#footnote-ref-124)
125. In a previous chapter, the author addressed how the strategic use of arbitration may allow repeat players to use mandatory arbitration terms to avoid care costs and liabilities. See Chapter 3: Aubrecht, Paul “Marching Without Memory: How the use of arbitration in tort claims may complicate incentives to take due care” EDLE chapter Presented in March of 2019, Rotterdam Netherlands. [↑](#footnote-ref-125)
126. According to FAURE and WEBER, there are “a variety of solutions to remedy the (rational) cost aversion of

the individual, which could thereby potentially increase access to justice and cure the market failure” when there is a problem associated under enforcement due to scattered losses. FAURE and WEBER 2015. 168. [↑](#footnote-ref-126)
127. It may be useful to also examine some remedial rules which look to limit the problem of scattered losses. See: FAURE and WEBER 2015. [↑](#footnote-ref-127)
128. STIGLER 1964. 47. [↑](#footnote-ref-128)
129. For a discussion on how bargaining power may lead to inefficient contract terms see: CHOI AND TRIANTIS 2012. [↑](#footnote-ref-129)
130. Business to Consumer (B2C) may be less efficient than Business to Business (B2B) contracts to arbitrate, and many states have limited to B2C contracts to arbitrate over “concerns regarding asymmetry of power, enforcement of public rights, and competence of private arbitrators and arbitral institutions.” SCHMITZ 2012. 83. [↑](#footnote-ref-130)
131. See: WAGNER 2014. [↑](#footnote-ref-131)
132. LANDES and POSNER 1979. 236 [↑](#footnote-ref-132)
133. SZALAI 2016. 134. [↑](#footnote-ref-133)
134. See: WAGNER 2014. [↑](#footnote-ref-134)
135. Legislators rely on a number of sources for information, including other branches of government, such as the judiciary. According to MOONEY, “Legislative information sources can be classified into three categories according to how similar their professional experience is to the legislator's. "Insiders" are a legislator's colleagues and staff members. These people are in daily contact with legislators and have many of the same pressures and experiences. "Outsiders" are those whose professional experience is least like that of a legislator, those who know little about legislative life and have little on-going contact with legislators, including constituents, officials of other units of government, the mass media, and academics. In between these two extremes lay "middle range" sources-interest groups and representatives of executive agencies. These people regularly interact with lawmakers and strive to understand them but operate under different constraints and have different experiences in the legislative process than do legislators.” MOONEY 1991. 447. [↑](#footnote-ref-135)
136. Often, administrative adjudication generally does not include an opportunity for rule making or has limited rule making authority, and can be considered a quasi judicial procedure as far as the administrative court is considered to be exercising delegated judicial and legislative authority. [↑](#footnote-ref-136)
137. According to PRIEST and KLEIN “It is not implausible in product liability actions, for example, that the stakes are greater, in general, to manufacturer-defendants than to victim-plaintiffs. A product liability judgment, of course, may lead to an appeal establishing an adverse precedent. A trial court judgment may serve to support an estoppel. An adverse judgment might influence subsequent product sales. It might inform other injured parties that a case is worth bringing or increase their estimates of success and thus their settlement demands. Furthermore, it is often alleged that firms that deal over time with a substantial number of claimants invest to establish and preserve a reputation for tough bargaining to reduce further settlement demands.” PRIEST and KLEIN 1984. 40. [↑](#footnote-ref-137)
138. According to GALANTER in his analysis of repeat player advantages in litigation, “breaking the interlocked advantages of the “haves” requires attention not only to the level of rules, but also to the institutional facilities, legal services and organization of parties” which “suggests that litigating and lobbying have to be complemented by interest organizing, provisions of services and invention of new forms of institutional facilities”. GALANTER 1974. 150. [↑](#footnote-ref-138)
139. Consumer and employees may be misinformed or uninformed about the probability of harm arising out of the contractual relationship. According to HYLTON, “One explanation for misperception is that it is costly to discover information about the probability of loss, and the expected rewards for discovering such information are too low to justify the research costs. The expected rewards may be too low because either the probability or the severity of harm, even after the lawsuit threat is removed, is extremely low. In other words, this is a case of *rational apathy.* If consumers and employees suffer from an informational deficit because of rational apathy, there is no justification for prohibition or regulation of pre-dispute arbitration agreements beyond what inheres in contract law. Rational apathy exists because, in equilibrium, consumers or employees rationally discount the deterrence benefits connected to their right to sue. In other words, they do not expect a significant change in the firm's conduct if the parties agree to resolve their disputes in the arbitration regime.” HYLTON 2000. 252. [↑](#footnote-ref-139)
140. According to COOTER AND ULEN “the ratio of compensated victims to total victims” is the “enforcement error.” COOTER AND ULEN 2016. 260. [↑](#footnote-ref-140)
141. This is a similar argument to that made by BEN SHARAR about how some victims will never bring a claim no matter the circumstances, which essentially results in a subsidy to those customers who will bring claims. BEN-SHAHAR 2016. [↑](#footnote-ref-141)
142. For a discussion on enforcement errors see: COOTER AND ULEN 2016. 260-261. [↑](#footnote-ref-142)
143. According to VAN DEN BERGH and VISSCHER “From a deterrence perspective, private enforcement of consumer law can be insufficient for several reasons. Individual consumers may find it too costly to start a lawsuit ('rational apathy') or they may not even know that an infringement has occurred ('information asymmetry'). If public enforcement is not available, or if the budget of public authorities is limited and used for other purposes, the problem of under-enforcement will persist.” Furthermore, “In diffuse interest cases, where the expected utility is too low to start an individual claim, the possibility of collective actions could make a claim feasible. After all, the costs per person are lower with a collective action, so that the net expected benefits (the expected benefits minus the costs) might turn out positive. In some cases, however, the diffuse interests are so immaterial to the injured parties involved that even the possibility of collective actions does not lead to a lawsuit.” VAN DEN BERGH and VISSCHER 2007. 5, 19. [↑](#footnote-ref-143)
144. See: CTIA LETTER TO COLORADO HOUSE JUDICIARY COMMITTEE 2019. CTIA LETTER TO NJ CONSUMER AFFAIRS COMMITTEE 2019. [↑](#footnote-ref-144)
145. According to VAN DEN BERGH and VISSCHER “Besides the high litigation costs, the rational apathy may also be due to the fact that the size of the expected damages is low. Collective actions not only decrease litigation costs in the way described above but also increase the prospective damages awards. Every collective action that is initiated in cases where no individual suits would have been brought increases the total sanction faced by a potential law infringer.” VAN DEN BERGH and VISSCHER 2007. 5. 19. [↑](#footnote-ref-145)
146. VAN DEN BERGH and VISSCHER 2007. [↑](#footnote-ref-146)
147. According to VAN DEN BERGH, “Victims of competition law infringements, such as consumers who paid excessively high cartel prices, may not bring an action in court because the costs of doing so are higher than the expected benefits. This is called rational apathy; it would be irrational to bear the high costs of legal proceedings if no offsetting benefits can be expected.” VAN DEN BERGH 2013. 14. [↑](#footnote-ref-147)
148. For discussions on blackmail settlements see: KANNER and NAGY 2005 and PRIESTT 1999. [↑](#footnote-ref-148)
149. When considering federal antitrust filings from 2009 to 2018, DAVIS finds “Compared to other years in the last decade, filings of antitrust class action complaints were down in 2017 and 2018 (307 and 318, respectively), and were well below the mean (420) during the last 10 years. Over the decade, two years fall outside of one standard deviation from the mean: in 2011, 233 complaints were filed, and in 2015, 660 complaints were filed.” DAVIS and KOHLES 2019. 6. [↑](#footnote-ref-149)
150. EC PRESS RELEASE 2018. According to a release from Linklaters, “The draft directive was adopted by the Parliament in March 2019 and by the Council in November 2019” and the legal formalities formalizing the directive is expected to be “completed by June 2020” and “member states will have a set period of time, typically 18-24 months, in which to give effect to the new measures.” STRIK et. al. 2020. Representative Actions Directive. [↑](#footnote-ref-150)
151. COOTER AND ULEN 2016. 221 [↑](#footnote-ref-151)
152. For an article relating to judicial bias toward plaintiffs see: RUIZ 2014. [↑](#footnote-ref-152)
153. For empirical Studies on Arbitration which address issues of bias see: BINGHAM 1997. 44.

EISENBERG et. al. 2007. [↑](#footnote-ref-153)
154. For a discussion on court error see: COOTER AND ULEN 2016. 221. and KORN and ROSENBERG 2012. [↑](#footnote-ref-154)
155. HYLTON has identified this as the “*Bleak House* view of litigation, paying respect to Charles Dickens.” HYLTON further adds that “The *Bleak House* view ignores litigation's role in deterring socially harmful conduct, which is the key social benefit from litigation. For example, consider torts. Prohibiting tort litigation would put an end to much of the work of retail-level trial lawyers. However, preventing tort litigation (e.g., through tort reform legislation) can weaken the enforcement of tort law by removing an important deterrent to potential tortfeasors. In theory, this could increase the number and cost of tortious injuries.” HYLTON 2000. 218. With reference to: DICKENS 1853 [↑](#footnote-ref-155)
156. SUGARMAN 2002. 849. According to SUGARMAN “Defence-oriented tort reform efforts have been prompted, at least in part, by earlier plaintiff gains. Throughout the 1960s and into the 1970s tort law became increasingly pro-victim. First, the reach of negligence law was much broadened. Not only were many rules that previously strictly limited a defendant’s ‘duty’ overturned, but also commercial actors were given new duties to take affirmative steps to protect their customers from harms caused by third parties. Second, the acceptance of ‘enterprise liability’ thinking meant that liability without fault was imposed on the makers of defective products and on an increasing number of behaviors labelled ‘abnormally dangerous’ activities. Third, an increasingly talented plaintiffs’ bar proved itself capable of winning larger and larger damage awards from juries. Finally, victim groups achieved success on the legislative front. Most important there was the overturn in nearly all States of the old rule that contributory negligence was a complete defence, and its replacement with comparative negligence law. This new regime, at a minimum, assures substantial compensation to a victim whose minor fault combined with the greater fault of the defendant to bring about the victim’s injury. Upset by these trends, defence interests began pushing back, and tort reform quickly became a largely politically partisan matter. Republicans lined up with the business community on the defence side, and Democrats lined up with plaintiffs, especially as plaintiff lawyers became among the most generous contributors to Democrats’ political campaigns nationwide.” SUGARMAN 2002. 850. [↑](#footnote-ref-156)
157. See: HYLTON 2000. [↑](#footnote-ref-157)
158. For a discussion on arbitration may lead to a form of private tort reform see: THORNBURG 2004. [↑](#footnote-ref-158)
159. To see how pro plaintiff procedures can be used to address enforcement errors see: COOTER AND ULEN 2016. 255. [↑](#footnote-ref-159)
160. See: POSNER 2014. 803. [↑](#footnote-ref-160)
161. According to POSNER, “the contract party who expects to be sued rather than be suing if the contractual relationship breaks down may want an arbitration clause in the expectation that the middle-of-the-road propensity of arbitrators will reduce the party’s expected liability” POSNER 2014. 803 [↑](#footnote-ref-161)
162. Some studies have shown a bias toward defendants in arbitration. See: BINGHAM 1997. [↑](#footnote-ref-162)
163. See: LESLIE 2017. [↑](#footnote-ref-163)
164. LESLIE has commented that when courts enforce arbitration when there is a conspiracy to arbitrate the court is acting as an instrument of conspiracy. LESLIE 2017. 427. [↑](#footnote-ref-164)
165. Transnational legal indicators may be useful when considering the prevalence of corruption in a given states legal system. The Rule of Law Index published by the WORLD JUSTICE PROJECT is one such indicators and includes data on the corruption. WORLD JUSTICE PROJECT 2019. [↑](#footnote-ref-165)
166. For a discussion on tacit collusion and price fixing see: POSNER 2014. 378-380 [↑](#footnote-ref-166)
167. See: STIGLER 1968. [↑](#footnote-ref-167)
168. According to REES “The word collusion describes a type of conduct or form of behaviour whereby decision-takers agree to co-ordinate their actions. This in general would seem to involve two elements: a process of communication, discussion, and exchange of information with the aim of reaching an agreement; and, where there are gains to reneging on the agreement given that the others comply, some kind of mechanism for punishing such violations and so enforcing the agreement. In the economics of oligopolistic markets the distinction between 'explicit' and 'tacit' collusion turns on the first of these elements. It is possible that firms could agree to co-ordinate their actions in some way without explicit communication and discussion.” REES 1993. 27. [↑](#footnote-ref-168)
169. According to IVALDI et al. “‘Tacit collusion’ need not involve any ‘collusion’ in the legal sense, and in particular need involve no communication between the parties. It is referred to as tacit collusion only because the outcome (in terms of prices set or quantities produced, for example) may well resemble that of explicit collusion or even of an official cartel.” IVALDI et. al. 2003. 4-5. [↑](#footnote-ref-169)
170. BOSHOFF et. al. 2018. 2. Furthermore, “Conscious parallelism, sometimes called oligopolistic price coordination, is described as the process ‘not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a prefixed maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions’.” In re Baby Food Antitrust Litigation. at 121. Citing to Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. [↑](#footnote-ref-170)
171. See: POSNER 2014 on economic effects of tacit and explicit collusion, Section 10.1-10.2. [↑](#footnote-ref-171)
172. According to the SCOTUS, “Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.” Furthermore, “Because relying on tacit coordination among oligopolists as a means of recouping losses from predatory pricing is "highly speculative," … competent evidence is necessary to allow a reasonable inference that it poses an authentic threat to competition.” Additionally, “Especially in an oligopoly setting, in which price competition is most likely to take place through less observable and less regulable means than list prices, it would be unreasonable to draw conclusions about the existence of tacit coordination or supracompetitive pricing from data that reflect only list prices.” Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.227, 232 & 236. According to the ECJ, “tacit coordination is more likely to emerge if competitors can easily arrive at a common perception as to how the coordination should work, and, in particular, of the parameters that lend themselves to being a focal point of the proposed coordination. Unless they can form a shared tacit understanding of the terms of the coordination, competitors might resort to practices that are prohibited by Article 81 EC in order to be able to adopt a common policy on the market. Moreover, having regard to the temptation which may exist for each participant in a tacit coordination to depart from it in order to increase its short-term profit, it is necessary to determine whether such coordination is sustainable. In that regard, the coordinating undertakings must be able to monitor to a sufficient degree whether the terms of the coordination are being adhered to. There must therefore be sufficient market transparency for each undertaking concerned to be aware, sufficiently precisely and quickly, of the way in which the market conduct of each of the other participants in the coordination is evolving.” P Bertelsmann and Sony Corporation of America v Impala. 123. [↑](#footnote-ref-172)
173. According to BOSHOFF ET AL. “[t]he Horizontal Guidelines of the European Commission (2011) take account of this ambiguity by classifying binding advance price announcements as in accordance with competition law, whereas private non-binding advance price announcements are considered likely to violate competition law and public non-binding advance price announcements constitute a grey area.” BOSHOFF et. al. 2018.

In reviewing the case law concerning price announcements the SCOTUS has noted “in Sugar Institute v. United States, 297 U. S. 553, 601-602 (1936), the Court held unlawful an agreement to adhere to previously announced prices and terms of sale, even though advance price announcements are perfectly lawful and even though the particular prices and terms were not themselves fixed by private agreement. Similarly, an agreement among competing firms of professional engineers to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer was held unlawful without requiring further inquiry. *National Society of Professional Engineers v. United States, supra, at 692-693*. Indeed, a horizontal agreement among competitors to use a specific method of quoting prices may be unlawful*. Cf. FTC v. Cement Institute, 333 U. S. 683, 690-693 (1948)*.” Catalano, Inc. v. Target Sales, Inc.647-648. National Society of Professional Engineers v. United States., and Cf. FTC v. Cement Institute. Also see: Container Shipping Comm’n Decision. In re Precision Moulding Co. [↑](#footnote-ref-173)
174. According to MCADAMS, “Sanctions can solve coordination problems, but so can clear, well publicized, third-party statements, including the legal pronouncements of judges and legislatures” as “law can make focal one means of coordinating and thereby induce individuals to select that means” which “has the advantage of publicity and uniqueness” over other “third-party pronouncements” MCADAMS 2008. 1728. Also see HART and MOORE 2008. [↑](#footnote-ref-174)
175. According to POSNER “it is entirely possible that some market settings permit collusive pricing with so little actual communication among the sellers as not to expose them to an appreciable danger of being prosecuted for price fixing. Moreover, whether a case involves oligopolistic pricing without explicit collusion, or overt conspiracy under such favorable conditions as to generate no evidence of conspiracy, is a distinction without a policy difference. From the standpoint of the trier of facts, both are cases of oligopolistic pricing, or "tacit collusion," which is my term for any form of collusion not detectable by means of the conventional, noneconomic approach to proving culpable price fixing.” POSNER 1975. 904. [↑](#footnote-ref-175)
176. SCHERER 1967. 496. [↑](#footnote-ref-176)
177. SCHERER 1967. 497, 498. [↑](#footnote-ref-177)
178. CTIA LETTER TO NJ CONSUMER AFFAIRS COMMITTEE 2019.

CTIA LETTER TO COLORADO HOUSE JUDICIARY COMMITTEE 2019. [↑](#footnote-ref-178)
179. CTIA LETTER TO NJ CONSUMER AFFAIRS COMMITTEE 2019. CTIA LETTER TO COLORADO HOUSE JUDICIARY COMMITTEE 2019. Both Letters citing to:

*At&t Mobility LLC v. Concepcion. American Exp. v. Italian Colors Restaurant. DirecTV, Inc. v. Imburgia* *Koontz v. St. Johns River Water Mgmt. Dist.*  [↑](#footnote-ref-179)
180. According to TURNER “conscious parallelism is never meaningful by itself, but always assumes whatever significance it might have from additional facts. Thus, conscious parallelism is not even evidence of agreement unless there are some other facts indicating that the decisions of the alleged conspirators were *interdependent,* that the decisions were consistent with the individual self-interest of those concerned only if they all decided the same way.” TURNER 1962. 658. [↑](#footnote-ref-180)
181. According to SCHULDT and TAYLOR “The presence of a trade association could theoretically impact cartel

effectiveness by improving channels of communication and information sharing within the industry.” Furthermore, “[a] trade association could also help with the coordination and monitoring of the cartel.”

SCHULDT and TAYLOR 2018. . 1-2.

It should also be noted that monitoring of the use of arbitration can be accomplished indirectly through monitoring of firms involvement of claims in the court system. [↑](#footnote-ref-181)
182. GILO and PORAT 2005. At 1020. Definition of Industry Maverick. [↑](#footnote-ref-182)
183. For a discussion on the role of mavericks in creating focal points see: GILO and PORAT 2005. 1020. [↑](#footnote-ref-183)
184. The court found “[i]n creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements”, thus state laws which curtail the use of arbitration contrary to the Federal Arbitration Act. “violates the Supremacy Clause” of the US Constitution. *Southland Corp. v. Keating*, 465 U.S. 1 (1984). 16. For a more detailed review of the expansion of the FAA see: SZALAI 2016. [↑](#footnote-ref-184)
185. LESLIE 2017. 381. [↑](#footnote-ref-185)
186. According to LESLIE, “the Supreme Court’s pro-arbitration jurisprudence encourages and protects conspiracies to arbitrate.” Furthermore, “The Supreme Court’s incorrect claim of a congressional policy favoring arbitration makes primary conspiracies to arbitrate rational” as “pro-arbitration decisions created the legal environment necessary for arbitration conspiracies to thrive”. LESLIE 2017. 384, 424. [↑](#footnote-ref-186)
187. The two most salient examples of this are the Unfair Terms Directive and the ECJ ruling in the Mostaza case, which found that EU member states national courts “seised of an action for annulment of an arbitration award had to determine whether the arbitration agreement was void and annul that award where that agreement contained an unfair term, even though the consumer had not pleaded that invalidity in the course of arbitration proceedings, but only in that of the action for annulment.” SEIN 2011. 59. Mostaza Claro v. Centro Móvil Milenium SL. Also see: Eco Swiss China Time Ltd v Benetton International NV., and Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. – OJ L 95, 21.4.1993, p. 29. [↑](#footnote-ref-187)
188. See: NAZZINI 2018; and BLANKE and LANDOLT 2011.

Also see:

American Exp. v. Italian Colors Restaurant.and Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV et al.

The Amsterdam Court of Appeal in Kemira Chemicals Oy v CDC Project 13 SA,

Microsoft Mobile OY (Ltd) v Sony Europe Limited & Ors

Notable case from NL: Rechtbank Rotterdam. [↑](#footnote-ref-188)
189. NAZZINI 2018. 11. [↑](#footnote-ref-189)
190. For a discussion on the use of equitable estopple by US courts see: LESLIE 2017.428-432. [↑](#footnote-ref-190)
191. ULOTH and RIAL 2002. 593.Also see: Doctor's Associates, Inc. v. Casarotto.Continental Television v. GTE Sylvania. [↑](#footnote-ref-191)
192. Consumer Rights Directive. [↑](#footnote-ref-192)
193. See:*Business Electronics Corp. v. Sharp Electronics Corp.,* and *Ohio v. American Express Co.* 2283-2284 [↑](#footnote-ref-193)
194. Business Electronics Corp. v. Sharp Electronics Corp. [↑](#footnote-ref-194)
195. FTC v. Indiana Federation of Dentists. [↑](#footnote-ref-195)
196. National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla. 103-104 [↑](#footnote-ref-196)
197. See: Business Electronics Corp. v. Sharp Electronics Corp. and National Society of Professional Engineers v. United States. [↑](#footnote-ref-197)
198. Business Electronics Corp. v. Sharp Electronics Corp. 723. [↑](#footnote-ref-198)
199. Ohio v. American Express Co.2283-2284 [↑](#footnote-ref-199)
200. Leegin Creative Leather Products, Inc. v. PSKS, Inc. [↑](#footnote-ref-200)
201. KOVACIC et. al. 2011. 405 [↑](#footnote-ref-201)
202. KOVACIC et al. 402 [↑](#footnote-ref-202)
203. KOVACIC et al. 401 [↑](#footnote-ref-203)
204. Monsanto Co. v. Spray-Rite Service Corp. [↑](#footnote-ref-204)
205. KOVACIC et al. 401. Monsanto Co. v. Spray-Rite Service Corp. [↑](#footnote-ref-205)
206. KOVACIC et al. 402. Citing to Matsushita Elec. Industrial Co. v. Zenith Radio Corp. [↑](#footnote-ref-206)
207. KOVACIC et al. 403 [↑](#footnote-ref-207)
208. KOVACIC et al. referencing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). [↑](#footnote-ref-208)
209. KOVACIC et al. 404 [↑](#footnote-ref-209)
210. KOVACIC et al. 404, citing to Calkins, Stephen. "Summary judgment, motions to dismiss, and other examples of equilibrating tendencies in the antitrust system." *Geo. LJ* 74 (1985): 1065.1065 (1986). [↑](#footnote-ref-210)
211. KOVACIC et al. 405-406. [↑](#footnote-ref-211)
212. KOVACIC et al. 406 [↑](#footnote-ref-212)
213. KOVACIC et al. 406. [↑](#footnote-ref-213)
214. WITT 2018. 9. [↑](#footnote-ref-214)
215. WITT 2018. 9. [↑](#footnote-ref-215)
216. WITT 2018. 18. [↑](#footnote-ref-216)
217. WITT 2018. 4. [↑](#footnote-ref-217)
218. WITT 2018. 9. [↑](#footnote-ref-218)
219. WITT 2018. 9. [↑](#footnote-ref-219)
220. WITT 2018. 9. [↑](#footnote-ref-220)
221. See: WITT 2018. 2. [↑](#footnote-ref-221)
222. WITT 2018. 3. [↑](#footnote-ref-222)
223. WITT 2018. 10. [↑](#footnote-ref-223)
224. For a discussion on strategic behavior in litigation see: GALANTER 1974. [↑](#footnote-ref-224)
225. For a discussion on the signing without reading problem and its relation to rational apathy see: DE GEEST 2015. [↑](#footnote-ref-225)
226. For a further discussion on how bargaining power influences contract design see: CHOI AND TRIANTIS 2012, 1671-1672 [↑](#footnote-ref-226)
227. See: LESLIE 2017. [↑](#footnote-ref-227)
228. LESLIE 2017. 406, 412-423. [↑](#footnote-ref-228)
229. LESLIE 2017. 414, 415, 416, 417 and 418. [↑](#footnote-ref-229)
230. These strategic uses of arbitration were discussed in the chapter “Marching Without Memory” [↑](#footnote-ref-230)
231. GILO and PORAT 2005. 1030. [↑](#footnote-ref-231)
232. In so far as there is a price fixing scheme or tacit collusion occurring there is a deadweight loss. Consumer surplus will decrease when the benefits of using arbitration for tort claims are wholly captured by the firm, as the consumer is now burdened with a less valuable product or service if there is no corresponding change in price. If the cost savings were to be passed onto consumers then the price point for the product of service will reflect the value more accurately, and additional consumer may be willing to purchase. In terms of quality, the presence of a contract to arbitrate makes the underlying contract less valuable and this loss in value should be reflected in the price. If there is no change in price it may be considered an indirect price fix, with a deadweight loss associated with it. [↑](#footnote-ref-232)
233. For a lobbyist view about the potential benefits of arbitration see: CTIA LETTER TO COLORADO HOUSE JUDICIARY COMMITTEE 2019. CTIA LETTER TO NJ CONSUMER AFFAIRS COMMITTEE 2019.VAN AAKEN and BROUDE 2016.

SHAVELL 2009. 323. [↑](#footnote-ref-233)
234. DRAHOZAL found in 2008 that “the available empirical evidence suggests the following tentative conclusions. First, the upfront costs of arbitration will in many cases be higher than, and at best be the same as, the upfront costs in litigation. Whether arbitration is less costly than litigation thus depends on how attorneys' fees and other costs compare, and the evidence here is inconclusive. Second, for employees and consumers with small and mid-sized claims, the availability of low-cost arbitration makes arbitration an accessible forum, and possibly a more accessible forum than litigation. But for consumers with large claims, and for employees not able to use low-cost arbitration, the evidence is less clear. For such claimants, administrative fees and arbitrators' fees likely will exceed court filing fees. The question is whether other cost savings in arbitration offset the higher upfront costs. Moreover, even if arbitration is more affordable on net, it still may not be a more accessible forum than litigation.” DRAHOZAL 2007. 816-817.

Furthermore, a survey study of plaintiffs’ attorneys conducted by GOUGH in 2014, found a review “of approximately 700 contemporary employment discrimination cases shows outcomes in arbitration are starkly inferior to outcomes reported in litigation: employees are nearly forty percent more likely to win and receive average awards nearly twice as large in cases adjudicated in the civil litigation system compared to those that are arbitrated”. GOUGH 2014. 112. [↑](#footnote-ref-234)
235. SHAVELL 2009. 448. [↑](#footnote-ref-235)
236. PRIEST and KLEIN 1984. [↑](#footnote-ref-236)
237. According to HYLTON, “the minimum asking price demanded by the party who will be disadvantaged by committing to the alternate court will be less than the maximum offer price of the party who will be advantaged when, and only when, the difference between the deterrence benefit and the expected total litigation costs is greater in the alternate than in the default court.” HYLTON 2000. 225. [↑](#footnote-ref-237)
238. SHAVELL 1995. 3. [↑](#footnote-ref-238)
239. According to SHAVELL “a customer will buy a product only if the utility of the product to him exceeds its perceived *full* price – the price actually charged in the market plus the perceived expected accident losses that liability payments would not cover and thus that he would have to bear. The expected accident losses that a customer perceives that he would have to sustain will depend on his information about the product risks.” SHAVELL 2009. 212-213. [↑](#footnote-ref-239)
240. According to HYLTON, similarly to arbitration, waiver can be used as “the fundamental Coasean result suggests that parties will enter into waiver agreements in settings where litigation reduces wealth in the sense that the deterrence benefits are less than total litigation costs-that is, whenever litigation is likely to be of the rent-seeking variety depicted in *Bleak House.*” HYLTON 2000. 222. [↑](#footnote-ref-240)
241. HYLTON has made a case that the “general argument against arbitration agreements is that they contribute to the erosion of the publicly accessible stock of common-law rules and hinder the development of new rules” is dependent “on the desirability of subsidizing litigation in order to enhance the stock of legal capital.” However, a prohibition of “arbitration would have no more effect on the legal capital stock than prohibiting settlement” and “it is doubtful that either” prohibition or subsidization “will improve the legal capital stock”. Furthermore, “[i]n certain settings, parties may develop an institutional common law through repeated dealings” and “even if capital-erosion did occur…it is still not clear that the private incentive to arbitrate deviates from the social incentive.” HYLTON 2000. 244, 245. [↑](#footnote-ref-241)
242. If arbitration is used for tort claims and if the benefits of costs savings are fully captured by firms without any passing on of benefits, this could be considered rent seeking in the sense that this is a manipulation of the judicial deference to arbitration, it will allow firms to extract value from consumers or employees without making a contribution to the production of the underlying activity and without compensation to the consumers. Firms in a conspiracy may also not have to face the market pressure which prompts the search for new technologies and methods.

According to MCNUTT, “The computation of rent as a geometric measure requires information on two prices, the real competitive price and the monopoly price. The latter would generate the largest geometric measure on the presumption that the monopoly price represents the greatest divergence in price from the real competitive price. If we are to continue with the monopoly premise, then we should refer to the long run prices and the long run costs.” Furthermore, MCNUTT finds that “With more competition, the economy will inevitably witness a greater incidence of rent-seeking games *viz* inefficient firms may opt to become complainants, efficient firms acquire a dominance that they wish to protect, a greater frequency of price games will emerge as potential offenders abandon mergers in favour of price as a strategy to maintain and acquire greater market shares. Such firm-specific activities and strategies will impose higher opportunity costs *viz* the real resources of the economy as individual firms adjust to the new competitive equilibria, arrived at competitively, but with only a few dominant players remaining in the market.” MCNUTT 2002. 8 and 20. [↑](#footnote-ref-242)
243. According to SCHUMPTER, “Capitalism, then, is by nature a form or method of economic change and not only never is but never can be stationary. And this evolutionary character of the capitalist process is not merely due to the fact that economic life goes on in a social and natural environment which changes and by its change alters the data of economic action; this fact is important and these changes (wars, revolutions and so on) often condition industrial change, but they are not its prime movers. Nor is this evolutionary character due to a quasiautomatic increase in population and capital or to the vagaries of monetary systems of which exactly the same thing holds true. The fundamental impulse that sets and keeps the capitalist engine in motion comes from the new consumers’ goods, the new methods of production or transportation, the new markets, the new forms of industrial organization that capitalist enterprise creates.” SCHUMPTER 1942. 82-85. 82-83. [↑](#footnote-ref-243)
244. LESLIE 2017.410 [↑](#footnote-ref-244)
245. Additionally, LESLIE explains how “[t]hrough a conspiracy to arbitrate, antitrust violators may draft arbitration clauses that deny arbiters the authority to grant injunctive relief.” LESLIE 2017. 415 [↑](#footnote-ref-245)
246. See chapter “Marching without Memory”. [↑](#footnote-ref-246)
247. According to LANDES and POSNER, “Much of the social benefit of litigation, viewed as a rule creating activity, is received by people who may never be involved in litigation” and “[t]he existence of this external benefit may justify externalizing some of the costs of litigation by financing judges’ salaries out of general tax revenues and keeping litigation fees low” LANDES and POSNER 1979. 241. [↑](#footnote-ref-247)
248. SHAVELL 2009. 323 [↑](#footnote-ref-248)
249. HYLTON 2000. 246. [↑](#footnote-ref-249)
250. LANDES and POSNER have addressed how “the parties decision calculus may be affected by the precedential character of their case, if the case is litigated to judgement”. This is because “[a] decision in plaintiff’s favor will increase the probability of the plaintiff’s winning similar cases in the future, and a decision for the defendant will increase the probability of his winning similar cases in the future.” The judgement in the underlying dispute “will alter (though, in an incremental, common law system, we assume slightly) the ration of favorable to unfavorable precedents applicable to the parties’ future activities”. LANDES and POSNER 1979. 260. [↑](#footnote-ref-250)
251. For a discussion on the capital stock nature of precedent see: LANDES and POSNER 1976. [↑](#footnote-ref-251)
252. For a discussion on how precedent influences the behavior of individuals and firms see: POSNER 2014.759. [↑](#footnote-ref-252)
253. Regulatory arbitrage is defined by FLEISCHER as “a perfectly legal planning technique used to avoid taxes, accounting rules, securities disclosure, and other regulatory costs. Regulatory arbitrage exploits the gap between the economic substance of a transaction and its legal or regulatory treatment, taking advantage of the legal system's intrinsically limited ability to attach formal labels that track the economics of transactions with sufficient precision.” FLEISCHER 2010. 229.

Similarly, POSNER comments, “ ‘Regulatory arbitrage’ refers to the practice of firms’ configuring their business in such a way as to bring them within the regulatory jurisdiction of an agency likely to favor the firm, perhaps because the agency is supported by fees of the firms it regulates and therefore, to increase its budget, seeks to entice firms by an implicit promise of lighter regulation.” POSNER 2014. 856.

A type of regulatory arbitrage has also been framed this in terms of Jurisdictional Arbitrage. Jurisdictional Arbitrage is defined by USLegal.com as “Jurisdictional arbitrage means the act of taking advantage of the disagreements between competing legal jurisdictions. It takes its name from arbitrage. For instance, the practice of hiring legal service for a lower value in one jurisdiction and offering it for a higher value in another jurisdiction is a jurisdictional arbitrage. Just as in financial arbitrage, the attractiveness of jurisdiction arbitrage depends largely on its costs of switching legal service providers from one government to another. Jurisdictional arbitrage is an important concept in modern free market anarchist schools of thought. Jurisdictional arbitrage is often employed by the transnational criminals such as terrorists, money launderers, cyber-attackers to hinder attempts at governmental prosecution include. Jurisdictional arbitrage often helps in tax avoidance.” USLEGAL.COM 2020. [↑](#footnote-ref-253)
254. According to DINE, Multinational Companies (MNCs) use their market power to make “accountability very difficult especially when they hide their irresponsibility in complex structures in other jurisdictions” through the “use jurisdictional arbitrage.” DINE 2012. 77. DINE has also found that jurisdictional arbitrage and regulatory arbitrage are interlinked, where firms seek “out the jurisdiction with the fewest protections in order to maximize profits”. DINE 2012. 49. [↑](#footnote-ref-254)
255. The defining difference between the arbitrage strategy discussed here which I call Domestic Forum Arbitrage and Jurisdictional Arbitrage is that Domestic Forum Arbitrage involves taking advantage of differences in third party judicial forums, both public and private. This may or may not involve Jurisdictional Arbitrage as part of a strategy to take advantage of the differences between competing states jurisdictions. For instance, in a purely domestic dispute options for Jurisdictional Arbitrage may not exist while options for arbitrage strategies concerning the choice or public or private adjudication may exist, or there may be no possibility to take advantage over differences in various jurisdictions laws because of a convergence across states, yet there remain options to take advantage of the differences between private and public judicial forums. [↑](#footnote-ref-255)
256. The motivation for regulatory arbitrage was identified in courts as far back as the 1930s by Justice Brandeis. See: Dissenting opinion of Justice Brandeis in Louis K. Liggett Co. v. Lee.

Importantly, transaction costs may make the movement of firms which are already incorporated more costly. [↑](#footnote-ref-256)
257. This analogous to the classic example of regulatory arbitrage, and the impetus for a race to the bottom. [↑](#footnote-ref-257)
258. According to BOOKMAN “the fundamental distinction between litigation and arbitration is often thought of as the difference between public and private adjudication, or between state-mandated procedures and party-designed or designated ones, or between confidential proceedings and public ones, or between consent-based jurisdiction and state-power-based ones.” BOOKMAN 2010. 54. [↑](#footnote-ref-258)
259. DILANNI 2010. 206. [↑](#footnote-ref-259)
260. DILANNI 2010. 206. [↑](#footnote-ref-260)
261. According to DILANNI “The potential for competition in the market for adjudication services is natural and automatic. In theory at least, any third party can adjudicate a dispute. The presence of a public court system does not alter this fact in itself. However, the institutions that guide disputants in the process of choosing whether to adjudicate, and the choice between different venues, can affect the way in which different adjudicators compete with each other. This in turn can affect the outcome of the adjudication process, i.e. whether there will be a pro-plaintiff bias.” DILANNI 2010. 211. [↑](#footnote-ref-261)
262. See SHAVELL 2009. 447-448. [↑](#footnote-ref-262)
263. See BINGHAM for a discussion of the repeat player effect in employment arbitration and the potential for arbitration bias. BINGHAM 1997. 189. [↑](#footnote-ref-263)
264. OSTROM framed the property rights related to common pool resources “in terms of bundles of rights rather than a single right”. These rights included access, withdrawal, management, exclusion and alienation. Furthermore, different combinations of these property rights create different incentives to invest in or make use of the property. OSTROM 2008. 28.

Contracts can also be thought of in terms of bundles of rights. PENNER has framed both tort and contract law in terms of bundles of rights. According to PENNER “We tend to study the law of contract not as the "right to make contracts," but the rights and duties which arise under contracts, and the ways contracts are formed. The disintegrative urge applied to contracts is thus likely to appear as a program to divide contract into different kinds of contract, such as sales, employment contracts, credit agreements, etc., rather than to say that the "right to contract" is a bundle of rights to trade goods, to employ, to be employed, to lend money at interest, and so on. Similarly, in the law of torts the general *duty* "not to harm others" appears better placed than a *right* "not to be harmed" to work some unification over the subject as a whole, given the emphasis placed on the nature and scope of the duty in negligence, which occupies a large part of any tort syllabus.” PENNER 1995. 740. [↑](#footnote-ref-264)
265. STIGLER 1968. 149-154. [↑](#footnote-ref-265)
266. Tort liability for defective products is sometimes viewed as analogous to accident insurance, as all potential victims pay for the price of potential accidents. See: EPSTEIN 1985. [↑](#footnote-ref-266)
267. Hazardous working conditions often lead to an increased demand for pay from labor in the form of hazard pay. See: COUSINEAU et. al. 1992. 166-169. [↑](#footnote-ref-267)
268. STIGLER 1968. 149-154 [↑](#footnote-ref-268)
269. POSNER 1975. 903. [↑](#footnote-ref-269)
270. According to HYLTON, “the savings generated by an arbitration clause are passed on to consumers in the form

of a lower price” in a competitive market. HYLTON 2000. 252. [↑](#footnote-ref-270)
271. STIGLER 1964. 47. [↑](#footnote-ref-271)
272. STIGLER 1964. 55. [↑](#footnote-ref-272)
273. STIGLER 1964. 55-56. [↑](#footnote-ref-273)
274. STIGLER 1968. 149-154. Additionally, STIGLER comments that “The common belief of economists that price competition is much more effective in increasing output and reducing profits than non-price competition is now seen to rest upon an empirical judgment: Marginal costs of production do not rise so rapidly as marginal costs of advertising, quality competition, and other non-price variables. Perhaps the following reformulation is more suggestive. An increment of output has a given marginal production cost. If the increment of output is sold by a price reduction, there is also the cost of reducing price on the units already being sold. If the increment of output is sold by increasing a non-price variable (advertising, durability, etc.), there is also the cost of the additional amount of the non-price variable. The common view, which is very plausible, is that the marginal non-price variable cost is larger than the marginal price- reduction cost, if one starts from a monopoly position.” STIGLER 1968. 151-152. [↑](#footnote-ref-274)
275. The homogeneity of the market will also impact the formation and stability of a cartel. According to DAVIDSON, “If competitors are few enough, it may be possible to develop a durable price fixing system without either explicit agreement or ‘conscious parallelism’,” however “homogeneity may also undermine price fixing schemes” DAVIDSON 1983. 452. [↑](#footnote-ref-275)
276. In a market for lemons, the quality of the goods traded decreases as the firms or sellers use information asymmetry in order to pass off low quality goods as standard or high quality goods. See: AKERLOF 1978.. [↑](#footnote-ref-276)
277. SHAVELL 2009. 213 [↑](#footnote-ref-277)
278. LESLIE identifies breaking collective actions, capped damages, de trebling damages and truncating the statute of limitations as potential motives to conspire to use arbitration. LESLIE 2017. 407-419. [↑](#footnote-ref-278)
279. According to WARDHAUGH “[i]mposing an arbitration process which requires consumers to incur costs, whether in the form of filing or other fees or services or cost shifting (i.e. “loser pays”) will deter a significant number of claims.” WARDHAUGH 2013. 444. [↑](#footnote-ref-279)
280. This particular type of transaction costs can be considered as the costs which a rational victim will include in their determination if a claim is negative in value and thus not worth pursuing or positive in value a thus worth pursuing, which includes the consideration of transaction costs directly related to the “price of litigation” as well as costs indirectly related to the price of litigation which a victim must also account for. According to VISSCHER, “[e]conomic analysis of civil procedure centers on the issue how different procedures affect the sum of *direct costs* and *error* costs and how they influence the behaviour of the parties involved in the dispute resolution process” where “[d]irect costs are the costs of adjudication itself, so the time invested by the various actors involved (parties, lawyers, judges, (expert) witnesses), their wages, as well as the material costs (offices, office supplies, et cetera).” VISSCHER 2012. 72. [↑](#footnote-ref-280)
281. [↑](#footnote-ref-281)
282. According to COOTER AND ULEN, the consequences of an error of an excessive legal standard by courts under a negligence rule are that injurers will error in overestimating the legal standard and take excessive precaution COOTER AND ULEN 2016. Interpreted from table 6.3 at 221. [↑](#footnote-ref-282)
283. This is consistent with the efficiency of the common law theory, however the “tendency of the common law to generate efficient rules” is “weaker…when parties stakes are asymmetrical.” LANDES and POSNER 1979. 280. According to the PRIEST KLEIN selection hypothesis “the determinants of settlement and litigation are solely economic, including the expected costs to parties of favorable or adverse decisions, the information that parties possess about the likelihood of success at trial, and the direct costs of litigation and settlement. The most important assumption of the model is that potential litigants form rational estimates of the likely decision, whether it is based on applicable legal precedent or judicial or jury bias. From this proposition, the model shows that the disputes selected for litigation (as opposed to settlement) will constitute neither a random nor a representative sample of the set of all disputes.” PRIEST and KLEIN 1984. 4. [↑](#footnote-ref-283)
284. For a discussion on why it is problematic for private judges to produce precedent see: LANDES and POSNER 1979. 238-240. [↑](#footnote-ref-284)
285. Recall that the efficient due care standard is when the marginal benefits of precaution are equal to marginal costs of precaution. See: BROWN 1973. [↑](#footnote-ref-285)
286. This is consistent with economic models addressing how externalities on third parties may incentivize manufactures to take more care. According to DAUGHETY and REINGANUM “firms that face liability for third-party harms will increase investment in safety effort in response to increases in the exposure rate when such increases reduce the firm’s total losses due to settlement and litigation with third parties” DAUGHETY and REINGANUM 2006. 318. [↑](#footnote-ref-286)
287. It might be helpful to think of this in terms of a strategically inefficient investment in precaution. According to HYLTON “Suppose precaution is a public good in the sense that the potential defendant's investment in precaution, such as monitoring the level of workplace safety, reduces the probability of harm to all potential plaintiffs simultaneously. There is a danger in this setting that the potential defendant might purchase waivers from a subset of potential plaintiffs, and then, having reduced the total potential liability, stop taking precautions against harm.” HYLTON 2000. 238. [↑](#footnote-ref-287)
288. It is also possible the taking of strategic care may make the collusive use of arbitration among many firms less stable, as the potential increased care cost due to an adjustment of an inefficient due care standard to an efficient due care standard may be lower than without the option to use arbitration because arbitration may still provide some benefits. [↑](#footnote-ref-288)
289. SUGDEN 1995. [↑](#footnote-ref-289)
290. DASKALAKIS et. al. 2009. [↑](#footnote-ref-290)
291. [↑](#footnote-ref-291)