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\*\*\*Author’s Note\*\*\*

\*\*\*The Following Submission is a draft chapter which is part of my doctoral dissertation for the EDLE program, and which was originally presented internally at Erasmus University. This draft version is incomplete and further work is being taken to finalize this chapter as part of my final EDLE dissertation. This version may contain some notes from internal reviewers. It is advised to read the submission with “No Markup” in the “Tracking” review options. I anticipate having the editing, appendix, bibliography and final revisions finished within the next few weeks\*\*\*

**“A Comparative Analysis of the Arbitrability of Tort Claims and the Demand for Adjudication”**

*Abstract: Six states (nations), England and Wales, France, Germany, Italy, the Netherlands, and the United States (U.S.), are examined using a comparative law and economics methodology. This research focuses on theses state's source of laws on the use of arbitration for tort claims, publicly available information concerning he use of arbitration for tort claims and the consumption of legal services are identified. The acceptance of ex ante contracts to use arbitration for tort claims which have no international characteristic is not universally recognized, while the use of arbitration for tort claims arising from international contracts is recognized as an international legal norm. The divergence of approaches in the use of purely domestic arbitration for tort claims is thus appropriate to examine from a comparative law and economics perspective. Domestic sources of law concerning the use of arbitration for tort claims are compared and international sources of law which influence each state’s legal culture are identified. In general, we can observe that European states are less accepting of the use of arbitration for tort claims, particularly those involving consumer contracts, when compared to the United States approach to the use of arbitration for tort claims. Relevant information about the use of arbitration tribunals to determine tort claims is essentially impossible to identify. Some of the publicly available data from domestic arbitration associations is examined, and in general this data is of little use due to the secretive nature of arbitration and the lack of disclosure concerning the use of arbitration for all claims, including tort claims. Due to the lack of publicly available information about the use of arbitration for tort claims, proxy measurements concerning the consumption of adjudication services are identified. Information concerning population rates, legal resources, civil claims, and transnational legal indicators (TLI), are used as a next best option. Because these proxy measurements alone provide little information about the use of arbitration for tort claims specifically, they are considered a poor next best option. However, these proxy measurements do highlight some important differences in the consumption of legal services in each state, of which arbitration services is a part. This paper identifies relevant sources of law concerning the use of arbitration for tort claims and highlights the need for additional research concerning rates of adjudication of tort claims across both public and private forums.*

1. Introduction

This chapter is a comparative analysis of several states’ laws covering the arbitration of tort claims and a comparative review of data related to the demand for judicial services in each state. It becomes immediately clear this issue also involves contracts, in this case contracts to arbitrate disputes between the contracting parties. In looking at the use of arbitration for tort claims one must consider if a claim is contractual or tortious in order to differentiate when tort due care standards or rules of contractual interpretation are needed, either independently or in combination. Public disclosures of judicial data from the states considered here do not differentiate between types of civil claims (tort or contract), and thus available data for all civil claims is considered. Although there is difficulty differentiating between the third party adjudication of civil claims, which include tort claims and contract claims, this analysis does provide some descriptive information about how third party adjudication services, both private and public, are consumed in these states.

This dissertation concerns the use of private arbitration for tort claims. The type of tort claims considered are not those between businesses, rather the contracts between individuals and between individuals and businesses. These claims have traditionally been publicly adjudicated, while claims between businesses have a long history of using arbitration. Arbitration removes a claim from publicly administered courts. Arbitration requires a contract to arbitrate between two parties, in this case a tortfeasor and a victim. These arbitration contracts are often found in, or alongside, consumer, employment, and service contracts. The enforcement of a contract to arbitrate tort claims is divergent across states. Some states, like the US, allow for the use of arbitration broadly, while other states have a more limited use, particularly with regards to consumer contracts.

Because of the divergent approaches which states have taken in enforcing contracts to arbitrate tort claims, a comparative approach is used in this chapter. There are important public policy issues raised by the use of contracts to arbitrate tort claims, as it has the potential to frustrate the development of the law, conceal criminal activity, and harm the public good. There are potential gains from using arbitration for tort claims which may or may not tend to promote the public welfare and efficient outcomes. This descriptive chapter is designed to provide a positive evaluation of the source of law concerning arbitration in several states in the western legal tradition, describe the available data concerning the use arbitration in these states for civil claims which include tort claims and contract claims, and to identify proxy measurements which describe the consumption of third party adjudication services in these states.

There is a divergence of approaches in enforcing arbitration contracts for determining tort claims. To understand this interaction between public and private law, domestic sources of law and international sources of law which may influence the domestic use of arbitration for tort claims needs to be considered. This chapter uses a comparative law methodology to briefly discuss variation in how a claim in tort and a claim in contract are interpreted. The arbitration laws across six states (nations) England and Wales, France, Germany, Italy, the Netherlands, and the United States (U.S.) are identified. This comparison provides context to the scope of the issue by describing how each state has developed a unique regulatory approach which may generate a different set of benefits and costs.

This chapter does not aim to provide any normative analysis of what the law should be, although it does raise some questions which are very important in a normative analysis. The research goals are to provide a positive analysis of what the law is and how legal services are consumed in each state.

In addition to identifying the source of law, this chapter attempts to measure the demand for judicial decision-making for tort claims in these states. The task proves problematic and proxy measurements, including Transnational Legal Indicators (TLI), are considered. Statistical measurements of judicial systems, the use of arbitration, and some proxy measurements for the demand for judicial services can provide information which will be useful in future research related to a comparative law and economics analysis of arbitration of tort claims.

Accordingly, the research questions of this chapter are: 1) What is the source of laws regulating the use of arbitration, or enforcement of contracts to arbitrate, in England and Wales, France, Germany, Italy, the Netherlands, and the United States? 2) Can the use of arbitration for tort claims, or any claims, be quantified? and; 3) Given that only vague and incomplete information about the use of arbitration is available, are there other ways to measure the demand for arbitral services for tort claims in these six states?

The remainder of the chapter is structured in the following manner: Section 2 addresses the laws governing the use of arbitration and enforcement of arbitration clauses for tort claims in six states, (U.S., UK (England and Wales), Netherlands, Germany, Italy and France) and international laws which may influence the use of arbitration for tort claims in these states; Section 3 addresses the demand for third party adjudication services, including arbitration and judicial services and proxy measurements for the demand for third party adjudication services in each state; Section 4 is a brief conclusion. An attached appendix addresses the sources used in compiling the descriptive data used in this analysis.

1. Laws for the use of Arbitration for Tort Claims.

Tort claims have historically been adjudicated in state courts, however, there has been an increased acceptance for the use of private arbitration tribunals to settle disputes involving tort claims. The enforcement by courts of *ex ante* contracts to arbitrate all claims, including tort claims, arising out of a contract have led to this increase. The use of arbitration for tort claims is not necessarily dependent only on national law. Within Europe, the laws of the European Union are also relevant. International conventions influence the use of arbitration, although to a lesser extent in purely domestic arbitration proceedings. A mix of domestic law and international law builds the foundation for each state’s approach to the arbitrability of tort claims.

The acceptance of the use of arbitration clauses which cover tort claims between businesses and consumers has not developed into an international legal norm, while international legal norms have developed in the use of arbitration for commercial disputes and investor state disputes.[[1]](#footnote-1) A review of the use of arbitration for tort claims across borders shows how approaches vary in application, scope, and use.

It is valuable to consider some of the approaches taken in the use of arbitration for tort claims. The laws of six states: England and Wales (having common arbitration laws), France, Germany, Italy, the Netherlands, and the U.S., will be compared to show the approaches they have developed. These six states represent a mix of legal traditions: common law (England and Wales); French civil law (France); Germanic civil law (Germany); a mix of French and German influences (Italy and the Netherlands); and a mix of common law and French civil law influences (U.S.). The European states included in this analysis have been historically influential in developing the western legal tradition.[[2]](#footnote-2) The U.S. can generally be considered as a common law jurisdiction, however French civil law and Spanish civil law are also used in some jurisdictions.[[3]](#footnote-3) One need only look at the popularity in Europe of Alexis de Tocqueville’s classic examination of the early American state in “De La Démocratie en Amérique” to see how the democratic ideals of the U.S. influenced European political thought in the 19th century.[[4]](#footnote-4) In the 20th century the role of the U.S. in influencing international law increased along with the growing U.S. military and economic power.

Although there are many states which could also have been included in this list these six states were chosen because of the influence of each state on European law, international law, the legal cultures of other states, or their importance in the practice of arbitration. Another important reason to consider these states is their relative use of arbitration, as private parties and firms from each state are regularly involved in international arbitration proceedings.[[5]](#footnote-5) From a practical matter, a limited examination demonstrates the divergence of approaches.

The following subsections describes the source of international laws which influence the use of arbitration and the source of domestic arbitration law in each of the six states.

2.1 International Sources of Law

Commercial arbitration has developed on an international scale. Trade between firms in states and between states has led to the development of international commercial law, or *lex mercatoria*. The *lex mercatoria* has been influential on the development of arbitration as a dispute resolution process in international commercial trade, has influenced the development of international legal norms, and has influenced the use of arbitration within individual states.[[6]](#footnote-6)

2.1.1 European Union Law

The EU has enacted a wide range of laws which govern the internal market of the EU. These laws often involve consumer protection. The Unfair Terms Directive is perhaps the most striking limit on the use of arbitration in consumer contracts. Some terms are considered to be unenforceable in consumer contracts in Europe under the directive. [[7]](#footnote-7) According to Born, “[u]nder the EU’s Unfair Terms in Consumer Contracts Directive, the provisions of standard form consumer contracts are subject to statutory fairness requirements” which “provides that a provision is prima facie unfair, and therefore invalid, if it requir[es] the consumer to take disputes exclusively to arbitration not covered by legal provision.”[[8]](#footnote-8) In the annex of the Unfair Terms Directive, arbitration is explicitly addressed under paragraph (g): “excluding or hindering the consumers 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”.[[9]](#footnote-9)

The EU has developed rules for determining the jurisdiction of legal disputes and the recognition of member states civil judgments through the Brussels I regulation.[[10]](#footnote-10) The Brussels I regulation excludes arbitration from its uniform jurisdictional regime for Europe and for the recognition of civil and commercial civil judgements.[[11]](#footnote-11) Despite the exclusion of addressing arbitration, a renegotiated Brussels I regulation does recognize the use of the New York Convention among member states.[[12]](#footnote-12)

2.1.2 New York Convention

The New York Convention of 1958 addresses the recognition and enforcement of foreign arbitral awards.[[13]](#footnote-13) The signatory states include France, Germany, Italy, the Netherlands, the United Kingdom and the U.S.[[14]](#footnote-14) Three important limitations are found within the NY Convention. Under the NY Convention there is a distinction between foreign awards and domestic awards, the recognition may be limited to awards from signatory states, and states may limit their recognition to awards for commercial disputes.[[15]](#footnote-15) There are several grounds for denying recognition of a foreign arbitral awards, including: incapacity, failure to give notice, the award is outside the scope of the agreement, the arbitral tribunal or arbitral procedure was outside the scope of the agreement, or the award has not been recognized as binding by the authorities in the location of the seat of the tribunal.[[16]](#footnote-16) Two significant limits found in the NY Convention concern the inarbitrability of a dispute and when the use of arbitration in a particular dispute is against public policy.[[17]](#footnote-17)

The New York convention applies to both contractual and non-contractual duties so long as they are agreed up by the parties. According to Born, “[t]here is no prohibition in most jurisdictions against the arbitration of non-contractual claims” and “Article II(1) of the New York Convention (and many arbitration statutes) defines an arbitration agreement as including differences arising from a relationship ‘whether contractual or not’.”[[18]](#footnote-18)

2.1.3 UNCITRAL Model laws and their influence

The United Nations Commission on International Trade Law (UNCITRAL) has developed a set of model laws “designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration” which “reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world”.[[19]](#footnote-19) The UNCITRAL model law of commercial arbitration is influential in the practice of arbitration, and commercial arbitration procedures may be used in arbitration proceedings which concern a tort claim. The UNCITRAL model laws have been widely adopted or used as the basis for state arbitration statutes. The model rules have been “extremely successful, both as the foundation for the national arbitration laws of many States, and more broadly by setting a standard against which arbitration laws are often judge”.[[20]](#footnote-20) Some states have used the model rules extensively in the codification of legal standards for the use of arbitration.[[21]](#footnote-21) UNCITRAL keeps track of the jurisdictions which have adopted “[l]egislation based on the Model Law”, which includes “80 States in a total of 111 jurisdictions”. [[22]](#footnote-22) Among the jurisdictions being considered here, Germany (1998) and California (1988) are listed by UNCITRAL as having legislation based on the model law.[[23]](#footnote-23)

2.2 Domestic Sources of Law

2.2.1 England and Wales

The Arbitration Act of 1996 is the law which governs the use of arbitration in England and Wales.[[24]](#footnote-24) When considering UK law and the law of England and Wales, it is important to recognize how the law of England and Wales are but a part of the UK alongside Scotland and Northern Ireland, with each having certain competencies to enact jurisdiction specific legislation. UK Courts have found “that the purpose of the Arbitration Act is to give effect to the autonomy of the parties to agree to have disputes determined by arbitration rather than by court”.[[25]](#footnote-25) The courts in the UK have also be willing to allow for arbitration to cover contractual disputes and non-contractual disputes, such as whether the contract is valid due to fraud.[[26]](#footnote-26) Arbitration may be limited to when the agreement limits a statutory right, involves insolvency, or involves a criminal act.[[27]](#footnote-27) Sex discrimination cases brought under the Equality Act 2010 are not limited by an arbitration agreement and the Employment Rights Act of 1996 voids any arbitration agreement which would “prevent a person from bringing claims before an |Employment Tribunal”.[[28]](#footnote-28)

2.2.2 France

In France the use of arbitration is addressed in the French Code of Civil Procedure (CPC) under art. 1442 to 1527.[[29]](#footnote-29) The CPC also differentiates between the use of arbitration in domestic and international matters.[[30]](#footnote-30) Several types of disputes are not arbitrable in France, including: status and capacity of individuals, divorce, disputes involving public institutions, and public policy related issues.[[31]](#footnote-31) Within France “parties can conclude an arbitration agreement after termination of employment, but cannot conclude a binding arbitration agreement relating to future disputes”.[[32]](#footnote-32) However, French Courts have found “an arbitration clause contained in an international employment contract was not null and void, but was not binding (“*inopposable”*) on the employee who had seized the competent French court under the applicable rules of jurisdiction”.[[33]](#footnote-33) An arbitration agreement between a football club and FIFA is considered valid, including for tort claims.[[34]](#footnote-34) Under French law, a non-professional party in a dispute with a professional party can choose to use either arbitration or litigation when there is a dispute, however between two professional parties and between two non-professional parties a contract to arbitrate is enforceable.[[35]](#footnote-35) In international disputes, claims in tort are generally considered arbitrable.[[36]](#footnote-36)

2.2.3 Germany

The German Code of Civil Procedure (*Zivilprozessordnung: ZPO*) art. 1025 to 1066 address the use of arbitration in Germany.[[37]](#footnote-37) Parties are free to arbitrate claims which involve an economic interest (*vermogensrechtlicher Anspruch*) and if the parties are free to resolve the dispute through settlement then the dispute is also arbitrable.[[38]](#footnote-38) The code prohibits the use of arbitration in disputes arising from landlord tenant relationships.[[39]](#footnote-39) A special arbitration tribunal has been established to arbitrate disputes arising from medical treatment, but the arbitral award is non-binding and the agreement to arbitrate is entered into *ex post*.[[40]](#footnote-40) There is a requirement for arbitration agreements to be in a separate contract which specifically concerns arbitration.[[41]](#footnote-41) There are also limits on the use of arbitration in family law and labor law.[[42]](#footnote-42) Some labor disputes in Germany may be arbitrated in accordance with the Labor Court Act.[[43]](#footnote-43)

2.2.4 Italy

In Italy, the rules governing arbitration are found in Title VIII of Book IV of the Italian Code of Civil Procedure (CCP) under art. 806 to 840.[[44]](#footnote-44) Parties are free to arbitrate any dispute which does not involve a “non-disposable” right.[[45]](#footnote-45) This allows for the use of arbitration over a wide range of contracts. Under CCP 2006, art. 806(2) “disputes referred to in Art.409 (*controversie individuali di lavoro)* may be decided by arbitrators only if so provided by collective labor contracts”.[[46]](#footnote-46) The Italian Supreme Court (*Corte di Cassaszione*) ruled in 2016 that a contract to arbitrate non-contractual disputes must specifically state so in the contract.[[47]](#footnote-47)

2.2.5 The Netherlands

The Netherlands has devoted a section of the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) to the use of arbitration under art. 1020 to 1077, also known as the Dutch Arbitration Act of 1986.[[48]](#footnote-48) Under the Act, parties are free to enter into agreements to arbitrate both contractual and non-contractual disputes.[[49]](#footnote-49) The Act limits the use of arbitration “to determine legal consequences that may not be freely determined by the parties”[[50]](#footnote-50) and extends to any dispute which is a “matter of public order”, including family law matters and issues involving bankruptcy.[[51]](#footnote-51) There are also limits on the use of arbitration for landlord and tenant disputes in the Netherlands.[[52]](#footnote-52)

2.2.6 The United States

The U..S. Arbitration Act or as it is more commonly known and referred to, the Federal Arbitration Act (FAA) is the federal law which governs the use of arbitration in the U.S.[[53]](#footnote-53) Through a series of Supreme Court rulings, the FAA is now broadly applied and has been determined to supersede any state laws on arbitration.[[54]](#footnote-54) The FAA today is an “expansive system” which involves “both state and federal courts and covering virtually all types of non-criminal disputes”.[[55]](#footnote-55)

The FAA was passed in 1925. For the next five decades the FAA was applied mainly to commercial disputes. According to Szalai, “the history of the FAA's enactment helps demonstrate that the FAAwas originally intended to provide a framework for federal courts to support a limited, modest system of private dispute resolution for commercial disputes”.[[56]](#footnote-56) Starting in the 1980s, the Supreme Court of the U.S. has extended the scope of the FAA. Beginning with the *Southland Corp. v. Keating* case in 1985, the Supreme Court of the U.S. has been applying the FAA to state courts.[[57]](#footnote-57) The Supreme Court of the U.S. subsequently expanded the scope of the FAA to labor agreements (*Preston v. Ferrer*), employment disputes (*Circuit City Stores, Inc. v. Adams*) personal injury claims (*Mamet Health Care Center, Inc. v. Brown*) and statutory claims (*Mitsubishi Motors Corp. v. Soler Crysler-Plymouth Inc.*).[[58]](#footnote-58) In March of 2022 the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act was signed into law, which prohibits the forced arbitration of sexual assault and harassment claims.[[59]](#footnote-59) Under § 402(a) “no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute”.[[60]](#footnote-60)

Figure 1. Source of Domestic Arbitration

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| --- | --- | --- |
| State | Domestic Source of Law | Selected Judicial Decisions |
| France | French Civil Code Art. 2059 to 2061 (Scope of Arbitration).  Code of Civil Procedure Art 1442 et seq., and 1504 et seq. (Distinction between foreign and domestic). | *FC Sochaux v. FIFA,* |
| Germany | Code of Civil Procedure (ZPO) 1025 et seq. |  |
| Italy | Italian Code of Civil Procedure Art. 806 to 840.  Legislative Decree No. 5/2003 (Corporate Matters); Italian Public Procurement Code of 2016 (Public Works). | *Wind Jet SPA v Compagnia Aerea Italiana SPA* |
| Netherlands | Code of Civil Procedure (DCCP) 1020 to 1077 | Utrecht District Court 12 May 1992, ECLI:NL:RBU TR:1992:AC250 7. |
| England and Wales | Arbitration Act of 1996 | *Fiona Trust & Holding Corp v. Privalov,* |
| United States | United States Arbitration Act (Federal Arbitration Act) 9. U.S.C. 1, (1925).  Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021. Pub. L. No. 117-90, 136 Stat. 26. | *Southland Corp. v. Keating, Circuit City Stores, Inc. v. Adams,*  *Preston v. Ferrer,*  *Marmet Health Care Center, Inc. v. Brown,*  *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, |

1. **The Demand for Dispute Resolution**

There is no readily available data about the specific outcomes when tort claims are arbitrated. Since the use of arbitration in adjudicating tort claims is difficult to measure it is useful to think of the overall demand for dispute resolution for tort claims. This is because contracts to arbitrate almost inevitably include a confidentiality clause. It is also difficult to measure the number of contracts which contain arbitration clauses.

The demand for dispute resolution encompasses several processes.[[61]](#footnote-61) The most visible process is the use of state courts. When an arbitration clause is challenged in state courts it creates a public record, and in a largely administrative role courts are used to enforce arbitration awards although the awards themselves often remain private information. A less visible process is arbitration itself. Negotiation and mediation, which are a less structured dispute resolution processes, often lead to a privately agreed upon solution between disputing parties without a need for a third party to adjudicate. A claim in a state court or in arbitration is adversarial, while the use of negotiation and mediation may be less so. Depending on the dispute, the parties’ positions and interests may lead to an adversarial dynamic which may prevent a private solution (settlement through negotiation or mediation) and which creates a need for third party adjudication of the dispute. The measurement of the demand for dispute resolution is broader than the demand for judicial services. The demand for dispute resolution can be broken down to better understand the data which may be available. Statistics on settlement are practically impossible to measure, while information about litigated claims can be easily identifiable through public records. Arbitration falls in the middle in terms of available information about dispute resolution. Some data about the arbitration is publicly available, however it generally does not include any detailed information about the claim in dispute.

While there has been an increase in the gathering of data related to the functioning of state courts over the last few decades, the use of arbitration is a secretive process and produces limited publicly available information.[[62]](#footnote-62) The instances of negotiation and mediation are even harder to quantify, as these processes are often informal and would leave little to no public records and perhaps some private records. The demand for arbitration is part of the demand for judicial services for tort claims. This is the statistic which would be most helpful in an empirical study of the use of arbitration for tort claims. However, from a practical matter it is nearly impossible to accurately gauge. Proxy measures are a next best option to consider. Looking at proxy measurements concerning a state’s legal system may help to gather some information about the demand for judicial services.

Legal scholars have recognized the difficulty in gathering information about the use of arbitration. According to Estlund “the lack of regulation and transparency has made it very difficult for scholars to assemble data about the aggregate dimensions or consequences of arbitration in employment (or consumer) cases”.[[63]](#footnote-63) Some limited statistical data about arbitration is available and discussed below, but this information is not particularly helpful. Public arbitration statistics provided from arbitration associations provide little information about the specifics of each case, as the parties involved in the dispute normally have a contract which also compels non-disclosure of the process and award. Information provided by courts is generally public knowledge, and therefore the information about the use of states courts in resolving disputes is more complete and more detailed than the information about arbitration.

There have been several law and economics papers which aim to categorize or measure the demand for, or use of, public judicial services, usually though a study of the state courts. Posner compared civil litigation rates in the U.S. and England and Wales while looking at “differences in …volume across jurisdictions” of tort litigation.[[64]](#footnote-64) Posner considered a number of proxy measurements including: The rate of accidental deaths in a state; The degree to which the state is urbanized; Population Density; Average years of education; Average household income; Liability insurance coverage; Number of lawyers per capita; Alcohol consumption; Ration of male to female; Percentage age under 25; and the Percentage age over 64.[[65]](#footnote-65) Ramseyer and Rasmusen measured “plausible proxies” in considering the use of courts systems in six developed states.[[66]](#footnote-66) Similarly to Posner, Ramseyer and Rasmusen looked at proxy measures such as: Number of suits filed per capita; Judges per capita; Lawyers per capita; Cost of prosecuting a contract claim; and Motor insurance premia.[[67]](#footnote-67) The OECD has also conducted studies on public judicial services which look at how judicial indicators and proxy measurements can help in comparing states judiciaries.[[68]](#footnote-68) Each of these studies looked at numerous different statistics to make proxy measurements of the quality and demand of public judicial services.

The demand for judicial services includes not only the demand of services from state courts but also the demand for services from private courts and the two systems of adjudication can be considered as competitors in the market for providing judicial services. The demand for adjudication from multiple producers of adjudication services means there is competition in-between private courts, in-between state courts and in between private and state courts. Landes and Posner address the issue of “Competition in the Judicial Services Market” in their 1978 article on the use of arbitration.[[69]](#footnote-69) According to Landes and Posner “[n]ot only does the public court system face potential competition both from private methods of dispute resolution and from substitution away from activities that lead to judicially cognizable disputes; there is also the possibility of competition between public court systems”.[[70]](#footnote-70) The same is true for private courts, as private arbitration tribunals compete with each other to prove judicial services. Measuring the demand for private judicial services is even more elusive than the demand for public judicial services.

This analysis considers several statistics which can help in understanding each states’ system for the adjudication of tort claims. For instance, measuring judicial resources, population of lawyers, and civil litigation rates, identifies some of the resources and demands which a judicial system has. This data provides some important information about trends in the use of judicial services in these states. A perfect proxy measurement for the demand for arbitration for tort claims in these states cannot be identified. In comparing the demand for judicial services, and the demand for arbitration services, the line remains blurred and obscured. However, the two adjudication processes are clearly related to each other. Thus, it is still useful to consider how public judicial services are consumed and produced.

A review of proxy measures may be most helpful when there is a clear line which has been drawn, for instance when laws have changed. If enough information about the demand for public judicial services before and after a change in law which either enables or prohibits the use of arbitration for tort claims can be gathered and the demand for public judicial services can be measured by looking at the demand for public judicial services before and after the change, then other information about the use of arbitration might also be produced. This may indirectly be a measurement of what the demand for private judicial services is. Such a study is beyond the scope of this paper.

Some of the data concerning the U.S. focuses exclusively on California. California has developed a mandatory system of annually reporting on the status of the state judiciary. This California data set includes information about judges, court types, litigation rates and government expenditures.[[71]](#footnote-71)

Most of the publicly available information describes the demand of services from, and supply of resources for, state courts. Measurements of state courts budgets may be misleading, in that there is a potential problem of administrative agencies seeking rent in the form of public expenditures.[[72]](#footnote-72) Notwithstanding this caveat, other measurements of a judiciary, such as international legal indicators can help to compare the relative strengths and weakness of a nation’s judicial system across borders. A less abundant source of data is the arbitration associations located within each state. The various arbitration associations only release a limited number of vague statistics about the cases they arbitrate. The following subsections address the public information available from arbitration associations, and potential proxy measurements which could provide some information about the demand for legal services for tort claims.

3.1 Data available for Arbitration

3.1.1 Reporting from Arbitration Associations

Information provided from the most prominent arbitration associations in each state is useful when considering the scope of the use of arbitration for tort claims. These larger arbitration associations are used extensively to settle commercial disputes. The extent to which these associations arbitrate tort claims, or claims involving consumer claims, is difficult to determine from the public reports.

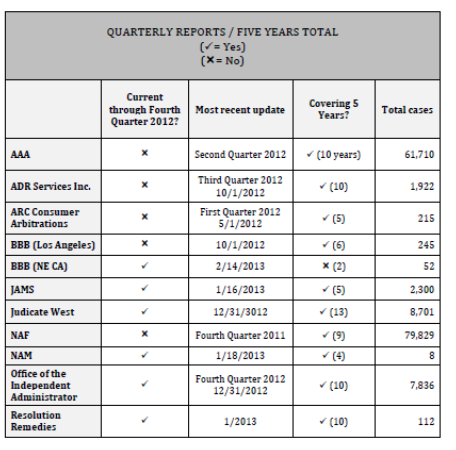
3.1.2 California’s Reporting Requirement

California requires arbitration tribunals operating in California to report certain information about the cases they arbitrate. The mandate for this reporting requirement is found in California Code of Civil Procedure (CCCP) § 1281.96.[[73]](#footnote-73) Under the CCCP reporting provisions private arbitration services must publish quarterly a public report which contains information about whether there was a pre dispute contract to arbitrate, “the name of the non-consumer party”, the type of dispute, the prevailing party (consumer names not disclosed), and a number of other information disclosure requirements.[[74]](#footnote-74)

A study conducted by UC Hastings in 2013 examined the data which was made publicly available from private arbitration associations under the CCCP reporting requirement.[[75]](#footnote-75) The report identifies some of the rational for the mandatory reporting requirement.

“With complete, accurate information, particularly about the outcome and speed of arbitrations, consumers and policy-makers could assess the arbitration system’s fairness, detect repeat player bias, and impose greater accountability upon arbitration providers. Without complete and accurate information, policy makers and the public cannot assess whether the process is fair, cannot compare arbitration’s operation to other forms of dispute resolution, and cannot detect bias in the system or on the part of particular arbitration companies.”[[76]](#footnote-76)

The study identified a serious lag in compliance with the reporting requirements. According to the study “even companies publishing some of the required disclosures often omitted information the statute requires to be disclosed, or reported information too inconsistently to permit analysis”.[[77]](#footnote-77) The report also found the information which was disclosed under the CCCP reporting provisions was presented in multiple formats, with no common methodology being used across the industry to comply with the reporting requirement.[[78]](#footnote-78) The following table was presented in the report, and includes a tally of the total cases which were reported by private arbitration associations operating in California through 2013.[[79]](#footnote-79)

**Figure 2. Findings of UC Hasting Report** [[80]](#footnote-80)

The report suggests further requirements to increase the consistency of the reporting in a “uniform” manner are necessary “for the statute’s goals to be more fully realized”.[[81]](#footnote-81)

3.1.3 American Arbitration Association

The American Arbitration Association (AAA) releases an annual report and financial statement about the work they do. The International Center for Dispute Resolution, the part of the AAA which focuses on international arbitration, arbitrated 1026 cases in 2017. According to the report “The largest claims by industry were (in descending order) in technology, commercial insurance, energy, aviation/aerospace/national security, pharmaceuticals, financial services and commercial construction”.[[82]](#footnote-82) The AAA also oversees a large number, 290,486 in 2017 to be exact, of New York “No Fault” insurance claims through a special No Fault Arbitration process.[[83]](#footnote-83)

3.1.4 International Chamber of Commerce

The International Chamber of Commerce (ICC) headquartered in Paris, with offices around the globe, is one of the most influential international arbitration tribunals in the world. Recently, the ICC “became the first business organisation to be admitted as Observer to the United Nations General Assembly”.[[84]](#footnote-84) According the ICC, “[a]s of end 2017, 1,578 pending cases were being administered by the Court and over 23,300 cases had been registered since its creation in 1923”. The ICC keeps track of the nationality of parties involved in ICC arbitration. In 2017 the U.S. (8.4%), Germany (5.5%), France (5.4%), Italy (3.2%), the Netherlands (2.5%) and the UK (2.9%), were all within the top ten of the “most frequent nationalities among parties” involved in ICC proceedings.[[85]](#footnote-85)

3.1.5 Netherlands Arbitration Institute

The Nederlands Arbitage Instituut (NAI) is the main arbitration association in the Netherlands. According to the NAI website “The NAI was established as a foundation in 1949 in order to promote arbitration, binding advice and mediation as a means of resolving and settling disputes”.[[86]](#footnote-86) The NAI publishes annual reports, which include statistics about the number of arbitration proceedings overseen by the NAI. According to the 2016 report, the total number of notified arbitrations (*Totaal aantal aangemelde arbitrages*) for 2016 was 81, and between 2010 and 2016 the NAI oversaw a total of 787 cases.[[87]](#footnote-87)

3.1.6 The German Institute for Arbitration

The German Institute for Arbitration’s (DIS, short for *Deutsches Institut für Schiedsgerichtswesen*) goals are to promote and provide “essential support for the conduct of arbitration related tasks in Germany”.[[88]](#footnote-88) The DIS published some statistics for 2017 via their webpage.[[89]](#footnote-89) DIS had 166 arbitration proceedings in 2016 and 152 in 2017.[[90]](#footnote-90) This included 19 sport arbitration proceedings in 2016 and 27 in 2017.[[91]](#footnote-91)

3.1.7 Milan Chamber of Arbitration

The Milan Chamber of Arbitration (CAM) is an agency under the *Camera di Commercio di Milano Monza Brianza Lodi*.[[92]](#footnote-92) The CAM is unique from other arbitration courts in that it is a “professional public entity” operating under Italian Law No. 580 of 1993.[[93]](#footnote-93) The CAM specializes in commercial disputes and provides reports on the number of proceedings it oversees.[[94]](#footnote-94) In 2017 there were 131 new request for arbitration with the CAM.[[95]](#footnote-95)

3.1.8 London Court of International Arbitration

The London Court of International Arbitration (LCIA) brands itself as “one of the world’s leading international institutions for commercial dispute resolution”.[[96]](#footnote-96) According to their 2017 Casework Report, “the LCIA received 285 arbitration referrals” during 2017.[[97]](#footnote-97) The LCIA report maps the nationality of parties which appear in arbitration cases before the LCIA.[[98]](#footnote-98) In 2017, parties to LCIA arbitration included 10.1% from the US, 19.3% from the UK, 3.4% from the Netherlands, and 2.5% from Italy.[[99]](#footnote-99)

3.2 Proxy Measurements

Due to the lack of available information from arbitration tribunals and from public reporting requirements, the data concerning the use of arbitration for tort claims is of a poor quality. Because of this poor quality, proxy measurements, ones which take into account various related information about the consumption of legal services for third party adjudication are considered. These proxy measurements are not perfect, and there remains a large gap in the available information about the use of arbitration for tort claims which cannot be adequately overcome by looking at proxies. Still, this analysis does shed light on the market for legal services, of which arbitration is such a service.

3.2.1 Civil Cases

Civil case data from EUROSTAT, California courts annual reports, U.S. Federal Court statistical reports, and data from the UK Ministry of Justice, is used to make a comparison of the civil cases filed in England and Wales, France, Germany, Italy, the Netherlands, and the U.S., including California.[[100]](#footnote-100) Table 2 shows statistics on the number of civil cases from 2011 to 2017 which were filed in state courts, the population of each jurisdiction, the per capita rate for filing civil claims, and the number of civil claims filed per 100,000 inhabitants. It is also important to note that not every civil claim is a tort claim, and the civil claims statistics will include any civil claim which was filed in court. Not every one of these civil claims goes through the entire litigation process, as many claims settle and no trial is needed. The statistics from California only represent the number of civil cases filed in California state courts, and not the number of civil cases filed in federal courts seated in California, which are a fraction of the number of cases filed in state courts. This trend is true across the U.S., with only a fraction of all civil claims being filed in Federal courts. The types of civil claims available, and variation in the categorization of claims across borders, means that one should be cautious when considering civil litigation rates. For instance, the minimum value of a claim to be filed in court may vary across jurisdictions and the way in which claims are categorized may vary depending on which criteria is being used. The CEPEJ data related to civil claims being filed appears to be different from the data provided by EUROSTAT.[[101]](#footnote-101) The following data should be viewed with some skepticism because variations in the classification standards used across jurisdiction can distort a cross border comparison.

Figure 3. Civil Claims Over a Five-Year Period[[102]](#footnote-102)

 **[[103]](#footnote-103)**

3.2.2 The structure of the judiciary

The number of judges working in a judicial system should reflect a combination of legal norms and the demand for adjudication. Some judicial positions can be considered essential to the functioning of a democratic government. As each of the states considered are democracies, there has been a separation of executive, legislative and judicial branches of the government. The judiciary in these states can be generally considered as a hierarchy, with the most powerful courts having the fewest judicial positions and the least powerful courts holding the greatest number of seats. Depending on the structure of the judiciary, there may be specialized courts or there may be courts of general jurisdiction. The use of nonprofessional or lay judges, and the way in which judges are categorized may cause some frustration when trying to compare these states. According to Fabri, who addressed problems in using a comparative analysis for number of judges across European states, “there are still some significant problems in the collection of data about the number of judges and court personnel and, more in general, about the functioning of justice systems finalized to a comparative analysis across states”.[[104]](#footnote-104) A comparative analysis of the number of judges in each state must be approached with caution because of the different classifications of judges and their competencies.

3.2.3 The Number of Attorneys

Each of the states considered has a highly regulated system for the practice of law. Each U.S. state sets requirements and administers exams as perquisites for being admitted to practice law.[[105]](#footnote-105) In the US, each state has the competency to regulate the practice of law within the state courts.[[106]](#footnote-106) The American Bar Association, a private and voluntary association of lawyers, keeps records of the number of admitted attorneys in all U.S. jurisdictions.[[107]](#footnote-107) The EU Justice Scoreboard reports the number of practicing attorneys in EU member states based on data provided from each states bar associations and state courts.[[108]](#footnote-108) The way in which each state determines whom is an attorney and what that entails is also important to consider. According to Bowles “[t]he work done by lawyers is, of course, sensitive to the constitutional and administrative structure of countries, and tasks done by a lawyer in one country may be done by non-lawyers elsewhere”.[[109]](#footnote-109) As each state has a unique requirement for the practice of law, and unique definition of what the practice of law is, there will be differences across borders. For instance, in England and Wales, the Legal Service act of 2007 delineates which activities are considered “reserved legal activities”[[110]](#footnote-110) which much be carried out by “entitled”[[111]](#footnote-111) persons whom have met the regulatory requirements to provide legal services.[[112]](#footnote-112) In Germany, the Federal Lawyer’s Act (*Bundesrechtsanwaltsordnung*)[[113]](#footnote-113) and the Rules of Professional Practice for lawyers (*Berufsordnung für Rechtsanwälte*)[[114]](#footnote-114) govern the practice of law.[[115]](#footnote-115) Each state has its own standard which has been codified in some manner, and the differences between the states in regulating attorneys will influence how the population of attorneys is calculated in each state. When considering the statistics on attorneys it is important to keep in mind there may be legal jobs which are limited to attorneys in one state, but not in another.

**Figure 4. Average population of judges and attorneys**



[[116]](#footnote-116)

Based on this analysis within these time frames, there seems to be three similar groups of populations among judges and separately among attorneys. In France and the Netherlands, the average number of attorneys in the population seems to be rather low compared to the other groups with 100.96 and 102.13 attorneys per one hundred thousand people, with Germany and England and Wales nearly twice as large with 198.68 and 259.25 respectively, while California and Italy are nearly four times as large with 424.14 and 379.03 which was in the range of the US as a whole which has 406.37.

When it comes to Judges, Germany has the most with 24.0, with a group of the Netherlands (13.6), Italy (10.6) and France (10.3) taking the middle cluster, with England and Wales (3.0) and California (5.1) in the lower end. It should be noted that in the US there is an average of (0.3) federal judges per one hundred thousand, of which some of these hold benches located in California.

This information about the judicial services of each state shows that there is a divergence in how judicial services are consumed in these states, with some states have relatively high numbers of attorneys or judges.

3.3 Publicly Available Transnational Legal Indicators (TLI)

The use of transnational legal indicators (TLIs) has been a growing trend in international business law, as firms look to quantify the quality of a state’s legal system and the protections it provides. According to Amariles and McLachlan “TLIs provide proxy measures about the quality of legal rules, institutions and processes across countries” using “large sample quantitative research methods on a periodic and systemic basis”.[[117]](#footnote-117) The quality of a state’s legal system should influence firms’ and individuals’ willingness to settle a claim, litigate a claim or arbitrate a claim. A common argument made in favor of using arbitration is that arbitration is cheaper and take less time than litigation. If a state has an overburdened court system or charges large filling fees for litigants, then it may be cheaper and faster to use arbitration. When a state has a cost and time efficient court system the argument that arbitration is the better choice for settling disputes becomes less clear. Comparing the TLI scores for these states shows some information about how these state’s legal systems function, and this provides some information about how legal services are consumed in these states.

Amariles and McLachlan identify a number of TLIs and discuss the methodology which these TLIs use.[[118]](#footnote-118) Based on the discussion of the use of TLIs by Amarile and McLachlan, twelve publicly available TLIs are considered for the six states in this analysis. The relevant TLI which are considered are: The WGI Rule of Law Indicators (WGI) issued by the World Bank; the Doing Business Index (DB) issued by the World Bank; the Investments Across Borders (IAB) indicator issued by the World Bank, (the arbitrating commercial disputes/strength of law score is reported here); the FDI Regulatory Restrictiveness Index (FDI) issued by the OECD; the Service Trade Restrictiveness Index (STRI) issued by the OECD (the insurance score is reported here); the Index of Economic Freedom (IEF) issued by the Heritage foundation; the Global Competitiveness Index (GCI) issues by the World Economic Forum; the Rule of Law Index (WJP) issued by the World Justice Project; the Global Business Rule of Law Dashboard (BROLD) issued by the US Chamber of Commerce; the Financial Secrecy Index (FSI) issued by the Tax Justice Network; the Global Rights Index (GRI) issued by the International Trade Union Confederation; and the Legal Certainty Index (LCI) issued by the Civil Law Foundation.

The WGI measures[[119]](#footnote-119)

The DB measures[[120]](#footnote-120)

The IAB measures[[121]](#footnote-121)

The “FDI restrictiveness is an OECD index gauging the restrictiveness of a country’s foreign direct investment (FDI) rules by looking at four main types of restrictions: foreign equity restrictions; discriminatory screening or approval mechanisms; restrictions on key foreign personnel and operational restrictions.”[[122]](#footnote-122)

The STRI measures “The Service Trade Restrictions Index (STRI) helps identify which policy measures restrict trade. The STRI indices take the value from 0 to 1, where 0 is completely open and 1 is completely closed.”[[123]](#footnote-123)

The IEF has “documented since 1995, the positive connection between economic freedom and longterm improvements in economic performance and overall development is unambiguous and robust”[[124]](#footnote-124)

The GCI measures “the Global Competitiveness Index 2017–2018 measures national competitiveness—defined as the set of institutions, policies and factors that determine the level of productivity.”[[125]](#footnote-125)

The WJP is “quantitative tool that measures the rule of law in practice.”[[126]](#footnote-126)

The FSI Secrecy score “is a ranking of jurisdictions most complicit in helping individuals to hide their finances from the rule of law. The Financial Secrecy Index thoroughly evaluates each jurisdiction’s financial and legal systems to identify the world’s biggest suppliers of financial secrecy. The index spotlights the laws and policies that governments can change to reduce their contribution to financial secrecy.”[[127]](#footnote-127) “A high or low Global Scale Weight is neither good nor bad, but the higher a jurisdiction’s Global Scale Weight is, the greater the responsibility the jurisdiction has to guard against financial secrecy – and conversely, the greater the risk for financial secrecy when the jurisdiction fails to uphold that responsibility.”[[128]](#footnote-128)

Since specific scores for England and Wales were not available, the score of the UK was used in its place. These publicly available indexes provide information about how each state’s judiciary compares to the others. Some of these TLIs do not include every state. For instance, the IAB arbitration indicators, perhaps the most relevant TLI when considering the arbitration of tort claims, did not provide a score for Germany, Italy or the Netherlands. The Netherlands was also not included in the BROLD and LCI indexes. Each one of these indicators provides a different piece of information which is relevant to determining the demand for adjudication.

**Figure 5. Fifteen TLI Scores for Six States** [[129]](#footnote-129)



To compare these TLIs, the ranking of each state is compared to the others. For instance, in the WGI indicator the Netherlands would be ranked 1 out of 6 with a WGI of 97 and Italy would be ranked 6 out of 6 with a WGI of 63. Some other TLIs scores flow the other way, where a GRI score of 1 is ranked higher than a GRI score of 4. Each TLI provides a unique set of information based on the methodology used to give scores to these states. The TLIs which did not score each state are ignored from this comparison. The ranking of the ten remaining indicators (WGI, DB, FDI, STRI Insurance, STRI Legal, IEF, GCI, WJP FSI and GRI) which scored every one of the six states was compiled, and ranked from highest to lowest, relatively. The results show that when these six states are compared to each other using ten TLIs, the UK and the Netherlands are tied with the highest rank on average, followed by Germany, the U.S., France, and Italy.

**Figure 6. Average Score of Ten TLIs Across Six States**



[[130]](#footnote-130)

1. **Conclusion**

This chapter addresses the use of arbitration in tort claims across six states. This issue involves both tort and contract law, and from a comparative perspective there are difficulties in separating tort and contract claims, as they vary across states. The source of domestic arbitration laws is identified, along with international sources of law which are applicable. This positive analysis shows both the similarities and differences between each state in terms of the source of law, how the arbitration laws are applied and how arbitration can be used for tort claims. Legal norms in the use of arbitration for international arbitration exist and all examined states are members to the New York Convention, while legal norms in the use of domestic arbitration do not exist or exist only within EU member states to a limited degree. Data concerning the use of arbitration for tort claims is difficult to obtain, mainly due to the secret nature of arbitration. The limited available data is not of much use and lacks specific data concerning the types of claims being arbitrated.

In order to understand the demand for third party decision making for tort claims, including both arbitration and litigation, proxy measurements are considered. These proxy measurements include a comparison of data concerning the rates of civil litigation in each state and available information from arbitration associations is discussed. Related data about the quality of each state’s judiciary, and the population of judges and attorneys in these six states are also identified. This analysis shows that there are groupings of states with higher numbers of attorney populations in the US, specifically California, Italy, and to a lower extent, England and Wales. The Common Law jurisdictions of England and Wales and California showed to have a much lower judge populations than in the states with more influential civil law legal tradition, where Germany was the outlier with a markedly higher population of judges than all other states considered. Multiple TLI proxy measurements related to the functioning of the judiciary of each state are compared. Using ten TLIs which scored all 6 states considered in this study, a ranking of these states was made, which shows that on average, the Netherlands and the UK ranked highest with a (2.6) average, with Germany (2.7) closely following, with the US (3.4), France (3.7) and Italy (4.4) rounding out the bottom half of rankings.

A comprehensive understanding of the scope of arbitration being used for adjudicating tort claims is obscured by the clouds of secrecy which hover over arbitration proceedings and proxy measurements which describe the demand for court services are a poor second best option of measurement. Further research which seeks to quantify the use of arbitration for tort claims in these states is warranted given the lack of meaningful data which is available. Any future analysis of the use of arbitration for tort claims may need to incorporate innovative methodologies to overcome the “black box” which the arbitration process places over information about arbitrated claims.

1. For a discussion about the use of legal norms in international investor arbitration see: Paulsson 2006. For a discussion about the role of international legal norms from the use of commercial arbitration see: Drahozal 2000. [↑](#footnote-ref-1)
2. The UK is generally considered to be the birthplace of the common law legal tradition. The French civil code has been widely influential across the globe, with many states modeling their legal system on it. The German legal tradition is rooted in Roman law and developed with influences from multiple legal traditions, including canonical law. The horror of WWII and the division of Germany into East and West after WWII was also influential in the drafting of the German Basic Law. The concept of “Sonderweg” or the special way refers the unique path which Germany took in developing the modern German legal system, which in turn has been influential on other legal systems. The Dutch legal tradition has been widely influential on the law of the sea and on international commercial legal norms. The Italian legal culture is rooted in the Roman tradition which was subsequently subsumed by the adoption of a French style civil law system which was also influenced by the German legal tradition. [↑](#footnote-ref-2)
3. French civil law is the basis for the legal system of Louisiana and Spanish civil law is the basis for the legal system of Puerto Rico. For a historical review of the role of the French Civil Code in the laws of Louisiana see: Dart 1929. For a historical review of the role of the Spanish Civil Code in Puerto Rico see: Fiol-Matta 1995. [↑](#footnote-ref-3)
4. De Tocqueville 1850. [↑](#footnote-ref-4)
5. In 2017, the U.S. (8.4%), Germany (5.5%), France (5.4%), Italy (3.2%), the Netherlands (2.5%) and the UK (2.9%), were all within the top ten of the “most frequent nationalities among parties” involved in ICC proceedings. ICC BULLETIN 2018, p. 53. f [↑](#footnote-ref-5)
6. For a discussion on the role of *lex mercatoria* on international commercial arbitration see: Lando 1985. [↑](#footnote-ref-6)
7. Unfair Terms Directive 1993. [↑](#footnote-ref-7)
8. BORN 2020. 'Chapter 6: Nonarbitrability and International Arbitration Agreements', in Gary B. Born , International Commercial Arbitration (Second Edition), 2nd edition, [↑](#footnote-ref-8)
9. Unfair Terms Directive 1993. [↑](#footnote-ref-9)
10. Brussels I. [↑](#footnote-ref-10)
11. Brussels I. and Ortolani et al. 2014, p. 13. [↑](#footnote-ref-11)
12. “Recital 12 of the recast Brussels I Regulation confirms that arbitration falls outside of the scope of the Regulation, and Member States are left free to comply with their international obligations under the New York Convention”. Legal Instruments and Practice of Arbitration in the EU, page 14. Brussels I. [↑](#footnote-ref-12)
13. NEW YORK CONVENTION 1958. [↑](#footnote-ref-13)
14. For a full list of Contracting States to the New York Convention see: the New York Arbitration Convention website: http://www.newyorkconvention.org/countries. [↑](#footnote-ref-14)
15. NEW YORK CONVENTION 1958., Ortolani et al. 2014. p. 31-32. [↑](#footnote-ref-15)
16. Ortolani et al. 2014. p. 32 [↑](#footnote-ref-16)
17. NEW YORK CONVENTION 1958. [↑](#footnote-ref-17)
18. BORN 2020. Chapter 4: Interpretation of International Arbitration Agreements

    International Arbitration: Law and Practice (Second Edition) (Born; Nov 2015) B.3. [↑](#footnote-ref-18)
19. UNCITRAL Model Law 1985.

    The UNCITRAL webpage also includes a database of case law which concerns the interpretation and scope of the model laws in national courts. http://www.uncitral.org/clout/search.jspx?f=en%23cloutDocument.textTypes.textType\_s1%3aModel%5c+Law%5c+on%5c+International%5c+Commercial%5c+Arbitration%5c+%5c(1985%5c) [↑](#footnote-ref-19)
20. Ortolani et al. 2014. p. 23. [↑](#footnote-ref-20)
21. http://www.uncitral.org/uncitral/en/uncitral\_texts/arbitration/1985Model\_arbitration\_status.html [↑](#footnote-ref-21)
22. http://www.uncitral.org/uncitral/en/uncitral\_texts/arbitration/1985Model\_arbitration\_status.html [↑](#footnote-ref-22)
23. http://www.uncitral.org/uncitral/en/uncitral\_texts/arbitration/1985Model\_arbitration\_status.html [↑](#footnote-ref-23)
24. The long citation for the Arbitration Act of 1996 is: An Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement; to make other provision relating to arbitration and arbitration awards; and for connected purposes. [↑](#footnote-ref-24)
25. WILLIAMS et al. 2022. [↑](#footnote-ref-25)
26. *Fiona Trust & Holding Corporation v. Privalov.*  [↑](#footnote-ref-26)
27. *Clyde & Co LLP v Bates van Winkelhof* (2011).

    Insolvency Act 1986.

    WILLIAMS et al. 2022. [↑](#footnote-ref-27)
28. *Clyde & Co LLP v Bates van Winkelhof* (2011). [↑](#footnote-ref-28)
29. FCCP. art. 1442 to 1527 [↑](#footnote-ref-29)
30. FCCP. art. 1442 et seq- Domestic

    FCCP. art. 1504 et. seq.- International [↑](#footnote-ref-30)
31. Bailey et al. 2020. [↑](#footnote-ref-31)
32. Poudret et al. 2007, p. 313. [↑](#footnote-ref-32)
33. Poudret et al. 2007, p. 313. [↑](#footnote-ref-33)
34. *FC Sochaux v. FIFA.* [↑](#footnote-ref-34)
35. FCCP. art. 2061. [↑](#footnote-ref-35)
36. Bailey et al. 2020. [↑](#footnote-ref-36)
37. ZPO art. 1025 to 1066 [↑](#footnote-ref-37)
38. Bücheler and Flecke-Giammarco 2021. [↑](#footnote-ref-38)
39. ZPO 1030(2). [↑](#footnote-ref-39)
40. For a review of Germany’s medical malpractice arbitration system see: STAUCH 2011. [↑](#footnote-ref-40)
41. ZPO 1032(5). [↑](#footnote-ref-41)
42. Bücheler and Flecke-Giammarco 2021.

    ZPO 1030(2). [↑](#footnote-ref-42)
43. According to Born, there are specific labor disputes which may be arbitrated under the German Labor Court Act, §101, which provides “as a statutory exception to arbitrability pursuant to German ZPO, §1030(3)” with a “detailed system for arbitration regarding collective wage agreements”. While, “Other employment disputes are not arbitrable under German law.” BORN 2020. See 'Chapter 6: Nonarbitrability and International Arbitration Agreements', in Gary B. Born , International Commercial Arbitration (Second Edition), 2nd edition, FN 368. [↑](#footnote-ref-43)
44. CCP art. 806 to 840. English translation https://www.jus.uio.no/lm/italy.arbitration/portrait.pdf [↑](#footnote-ref-44)
45. Carrara et al. 2021. [↑](#footnote-ref-45)
46. Poudret et al. 2007, p. 313. [↑](#footnote-ref-46)
47. *Wind Jet SPA v Compagnia Aerea Italiana SPA.* [↑](#footnote-ref-47)
48. DUTCH ARBITRATION ACT 1986. Articles 1022-1073 CCP. [↑](#footnote-ref-48)
49. DUTCH ARBITRATION ACT 1986. , Art. 1020(1). [↑](#footnote-ref-49)
50. DUTCH ARBITRATION ACT 1986. Art. 1020(3). [↑](#footnote-ref-50)
51. Margetson and Margetson 2022. [↑](#footnote-ref-51)
52. Utrecht District Court 12 May 1992, ECLI:NL:RBU TR:1992:AC250 7.

    Meijer and Dutilh summarize the ruling as “The award decides a landlord/tenant dispute which is nonarbitrable; this is a violation of public policy”. Meijer, Gerard, “Memorandum to the IBA Sub-Committee on recognition and Enforcement of Awards”, 24 April, 2015. https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwibkKv5iffdAhUmwAIHHekVDG8QFjABegQIABAC&url=https%3A%2F%2Fwww.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUid%3D3CF90CE4-301D-42AA-91BB-553E0E70ACE9&usg=AOvVaw3XD81iCeTpUS1cl-z3fylW [↑](#footnote-ref-52)
53. FAA. [↑](#footnote-ref-53)
54. For a comprehensive study of the historical development of the FAA see: Szalai 2016. [↑](#footnote-ref-54)
55. Szalai 2016, p. 117. [↑](#footnote-ref-55)
56. Szalai 2016, p. 117. [↑](#footnote-ref-56)
57. *Southland Corp. v. Keating.* [↑](#footnote-ref-57)
58. *Preston v. Ferrer.*

    *Circuit City Stores, Inc. v. Adams.*.

    *Marmet Health Care Ctr, Inc. v. Brown.*

    *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*. [↑](#footnote-ref-58)
59. Ending Forced Arbitration Act 2022. [↑](#footnote-ref-59)
60. Ending Forced Arbitration Act 2022. [↑](#footnote-ref-60)
61. For an analysis of the competition between dispute resolution services, including arbitration and public judicial services, see: Wagner 2015. [↑](#footnote-ref-61)
62. See the subsequent discussion about TLIs in sec 3. [↑](#footnote-ref-62)
63. Estlund, 2018, p. 684. [↑](#footnote-ref-63)
64. POSNER 1997, p. 478. [↑](#footnote-ref-64)
65. POSNER 1997, p. 478. [↑](#footnote-ref-65)
66. Ramseyer and Rasmusen 2010. [↑](#footnote-ref-66)
67. Ramseyer and Rasmusen 2010. [↑](#footnote-ref-67)
68. Palumbo et al. 2013. [↑](#footnote-ref-68)
69. Landes and Posner 1979, p. 27. [↑](#footnote-ref-69)
70. Landes and Posner, pg 28. [↑](#footnote-ref-70)
71. California Court Statistics 2017. [↑](#footnote-ref-71)
72. For an analysis of administrative rent seeking, see: Congleton, Roger D. "Committees and rent-seeking effort." *Journal of Public Economics* 25.1-2 (1984): 197-209; and, Peltzman, Sam. "Toward a more general theory of regulation." *The Journal of Law and Economics* 19.2 (1976): 211-240. [↑](#footnote-ref-72)
73. CAL. Civ. Proc. Code § 1281.96 through (2015) Leg Sess.

    American Arbitration Association Statistics 2017. The excel report of the American Arbitration Association AAA can be found at <https://www.adr.org/consumer>. [↑](#footnote-ref-73)
74. CAL. Civ. Proc. Code § 1281.96 through (2015) Leg Sess. [↑](#footnote-ref-74)
75. Jung 2013. [↑](#footnote-ref-75)
76. Jung 2013, p. 2. [↑](#footnote-ref-76)
77. Jung 2013, p. 6 [↑](#footnote-ref-77)
78. Jung 2013, p. 6 [↑](#footnote-ref-78)
79. Jung 2013, p. 13 [↑](#footnote-ref-79)
80. Jung 2013, p. 13. [↑](#footnote-ref-80)
81. Jung 2013, p. 39. [↑](#footnote-ref-81)
82. American Arbitration Association Statistics 2017, p. 20. [↑](#footnote-ref-82)
83. American Arbitration Association Statistics 2017, p. 22. [↑](#footnote-ref-83)
84. ICC Bulletin 2018, p. 51. [↑](#footnote-ref-84)
85. ICC Bulletin 2018, p. 53. [↑](#footnote-ref-85)
86. NAI Annual Report 2016. [↑](#footnote-ref-86)
87. NAI Annual Report 2016. [↑](#footnote-ref-87)
88. NAI Annual Report 2016. [↑](#footnote-ref-88)
89. DIS 2017. [↑](#footnote-ref-89)
90. DIS 2017. [↑](#footnote-ref-90)
91. DIS 2017. [↑](#footnote-ref-91)
92. CAMERA ARBITRALE DI MILANO STATISTICS 2017. [↑](#footnote-ref-92)
93. CAMERA ARBITRALE DI MILANO STATISTICS 2017. Italian Law No. 580 of 1993 [↑](#footnote-ref-93)
94. CAMERA ARBITRALE DI MILANO STATISTICS 2017. [↑](#footnote-ref-94)
95. CAMERA ARBITRALE DI MILANO STATISTICS 2017. [↑](#footnote-ref-95)
96. LCIA Facts & Figures 2017, p. 2. [↑](#footnote-ref-96)
97. LCIA Facts & Figures 2017, p. 3. [↑](#footnote-ref-97)
98. LCIA Facts & Figures 2017, p. 7. [↑](#footnote-ref-98)
99. LCIA Facts & Figures 2017, p. 7. [↑](#footnote-ref-99)
100. California Court Statistics 2017. [↑](#footnote-ref-100)
101. See Appendix 2 and 3. [↑](#footnote-ref-101)
102. note: California state courts excluding federal claims.

     Euro Stats Judicial Scoreboard:

     <https://ec.europa.eu/info/sites/info/files/20180405_-_eu_scoreboard_-_indicators.pdf>

     Califronai Courts FAQ: <http://www.courts.ca.gov/2954.htm>

     Office for National Statistics: <https://www.gov.uk/government/statistics/judicial-statistics-2017>

     Federal Court Management Statistics: <http://www.uscourts.gov/report-name/federal-court-management-statistics>

     solicitors regulatory authority: <https://www.sra.org.uk/sra/how-we-work/reports/data/population_solicitors.page>

     ABA State Attorneys: <https://www.americanbar.org/content/dam/aba/administrative/market_research/National%20Lawyer%20Population%20by%20State%202007-2017.authcheckdam.pdf>

     CCBE Number of Attorneys Statistics:

     <https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Statistics/EN_STAT_2006_Number_of_lawyers_in_European_countries.pdf>

     World Bank Population Statistics: http://databank.worldbank.org/data/reports.aspx?source=2&series=SP.POP.TOTL&country=FRA# [↑](#footnote-ref-102)
103. EuroStat

     California Reports

     See Appendix for Source details [↑](#footnote-ref-103)
104. FABRI 2017, p. ????. [↑](#footnote-ref-104)
105. For an overview of the practice of law in the U.S. see: Johnstone 2007. [↑](#footnote-ref-105)
106. Under the Inherent powers doctrine, individual states in the U.S. have the right to regulate the practice of law before state courts. For a further explanation of the inherent powers doctrine see: Thill 1994. [↑](#footnote-ref-106)
107. American Bar Association 2017. [↑](#footnote-ref-107)
108. EU Justice scoreboard 2017. [↑](#footnote-ref-108)
109. Bowles, Roger. "The structure of the legal profession in England and Wales." Oxford Review of Economic Policy 10.1 (1994): 18-33. 18. [↑](#footnote-ref-109)
110. LEGAL SERVICES ACT 2007. c. 29 Pt 3 [↑](#footnote-ref-110)
111. LEGAL SERVICES ACT 2007. c. 29 Pt 3 s 13 [↑](#footnote-ref-111)
112. According to Bowles, “The legal profession in England and Wales is split into two main branches,” Solicitors and barristers. “There are other practitioners who are allowed to offer certain kinds of legal service but are not qualified to practise as solicitors or barristers. Legal executives and licensed conveyancers are two examples Bowles 1994, p.23. [↑](#footnote-ref-112)
113. German Federal Lawyers’ Act. [↑](#footnote-ref-113)
114. German Professional Code of Conduct for Lawyers. [↑](#footnote-ref-114)
115. According Gerold “there is no distinction between different legal services provided by a lawyer (Rechtsanwalt) in the German system today. Every legal professional, who has joint the chamber of lawyers, can practice all kind of legal services for their clients. The German system does not have any distinction as in the common law countries between a barrister, who is allowed to appear in court and to present the case and solicitor, who prepares the statements and consults the client”. Gerold 2008 p. 2. [↑](#footnote-ref-115)
116. The 2016 data used in this chart was recovered from CEPEJ, The World bank, The Judicial branch of the State of California, The US Federal Courts, The American Bar association, The US Census Bureau, and The UK Office of National Statistics. [↑](#footnote-ref-116)
117. Ammariels and McLachlan 2018. 167, 168. [↑](#footnote-ref-117)
118. Ammariels and McLachlan 2018. [↑](#footnote-ref-118)
119. [↑](#footnote-ref-119)
120. [↑](#footnote-ref-120)
121. [↑](#footnote-ref-121)
122. https://data.oecd.org/fdi/fdi-restrictiveness.htm [↑](#footnote-ref-122)
123. https://tcdata360.worldbank.org/indicators/trade.stri.stri?country=FRA&indicator=3129&product=11&countries=DEU,GBR,ITA,NLD,USA&viz=bar\_chart&years=2017&indicators=944 [↑](#footnote-ref-123)
124. https://www.heritage.org/index/pdf/2018/book/highlights.pdf [↑](#footnote-ref-124)
125. https://www3.weforum.org/docs/GCR2017-2018/05FullReport/TheGlobalCompetitivenessReport2017%E2%80%932018.pdf [↑](#footnote-ref-125)
126. https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition\_0.pdf [↑](#footnote-ref-126)
127. https://fsi.taxjustice.net/faq/ [↑](#footnote-ref-127)
128. https://fsi.taxjustice.net/what-we-measure/ [↑](#footnote-ref-128)
129. See Appendix 5 for a link to the sources for each TLI, and explanatory tables about each TLI. [↑](#footnote-ref-129)
130. See Appendix 5. [↑](#footnote-ref-130)