COMPETITION BETWEEN STATE COURTS AND PRIVATE TRIBUNALS

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ABSTRACT

In this essay, I investigate the competition between state courts and private tribunals for dispute resolution. I distinguish between different market segments: business to business ("B2B") and business to consumer ("B2C") transactions and, in each case, small-, medium- and high-stakes disputes. The analysis is informed by a survey of the dispute resolution preferences of "case placers" carried out in 2015. I find that competition between state courts and arbitral tribunals is currently most intense with respect to high-stakes B2B disputes. A significant portion of the total dispute resolution volume in this market segment goes to arbitration. If parties decide to arbitrate, they do so primarily because of the effective international enforceability of an award, the autonomy to choose competent and neutral arbitrators, and the confidentiality of the proceedings. Speed and costs of the proceedings are much less relevant. Commercial arbitrations are usually administered by an arbitral institution. The choice of institution is primarily influenced by its reputation as a professional case manager and by prior positive experiences of the parties. I argue that access to arbitration should be made easier with respect to B2C small- and medium-stakes disputes. The trend in the European Union of promoting conciliation/mediation for the resolution of these disputes should be reversed. Arbitration is less "dangerous" for consumers because it is a *legal* process governed by fundamental due process guarantees. By contrast, conciliations/mediations are not subject to these guarantees, and they are not well suited for the enforcement of mandatory consumer rights. No compelling case can be made to increase access of businesses to arbitration in medium-stakes B2B disputes. Arbitral institutions have high-powered incentives to design new and efficient procedures for these types of disputes. Technological innovations will reinforce the trend towards privatizing dispute resolution. This poses unique regulatory challenges for the protection of weaker parties, especially consumers.

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I. INTRODUCTION

Different forms of alternative dispute resolution ("ADR") have become key elements of the civil justice systems in many jurisdictions around the world. Arbitration by private tribunals has been with us already for a very long time.[1] Mediation started to gain importance in the United States in the late 1970s, and it spread into other parts of the world, including Europe, in the 1990s.[2] The latest addition to ADR methods, with a significant practical relevance, is conciliation. In the European Union ("EU") in particular, conciliation in B2C disputes is viewed by many as the "Dispute Resolution Procedure of Choice," promising better outcomes for the parties than court adjudication or even mediation.[3] Technologically, the rise of different forms of ADR has been accompanied and supported by increasing digitization, artificial intelligence, and tools of Online Dispute Resolution ("ODR").[4] Especially in small-stakes disputes arising from e-commerce, ODR seems to hold significant promise.

This article investigates competition between state courts and private tribunals for dispute resolution. I am interested in three connected questions: Is there competition between state courts and private tribunals? If so, what are the factors and elements that determine success in such competition? Finally, how should such competition, assuming that it does exist, be evaluated normatively, and what are the regulatory consequences that follow? My analysis is supported by an empirical investigation on competition in the arbitration market, which I conducted in 2015 with two colleagues.[5]

My primary focus is on forms of ADR in which a neutral third party renders a final and binding decision. Central to the analysis will be private law disputes, rather than adjudication with respect to criminal law or public law disputes. "Competition" in this essay is taken to mean competition between adjudication providers that

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[1] On the evolution of the standing of arbitration within the legal system, *see* TIBOR VÁRADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION—A TRANSNATIONAL PERSPECTIVE 63–83 (6th ed. 2015).

[2] For an overview of the evolution of the "mediation field" *see* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION—THE TRANSFORMATIVE APPROACH TO CONFLICT 7–39 (2005).

[3] CHRISTOPHER HODGES ET AL., CONSUMER ADR IN EUROPE—CIVIL JUSTICE SYSTEMS (2012).

[4] For an overview *see* Nicolás Lozada-Pimiento, *AI Systems and Technology in Dispute Resolution*, 24 UNIFORM L. REV. 348 (2019).

[5] *See infra* Section III.

compete based on dispute process design and/or the proper application of the law that governs the substance of a dispute. I am not concerned with investor-state arbitration as it raises a host of specific problems that are very different from arbitration of private law disputes between two private entities.

I find that competition between state courts and arbitral tribunals currently exists primarily with respect to high-stakes B2B disputes. A significant portion of the total dispute resolution volume in this market segment goes to arbitration. If parties decide to arbitrate, they do so primarily because of the effective international enforceability of an award, the autonomy to choose competent and neutral arbitrators, and the confidentiality of the proceedings. Speed and costs of the proceedings are much less relevant. Commercial arbitrations, especially international commercial arbitrations, will usually be administered by an arbitral institution. The choice of institution is influenced primarily by its reputation as a professional case manager and by past positive experiences of the parties.

I argue that access to arbitration should also be made easier for the resolution of small- and medium-stakes B2C disputes. The trend in the EU of promoting conciliation/mediation regarding these disputes should be reversed. Arbitration is less "dangerous" for consumers than conciliation/mediation because it is a *legal* process governed by fundamental due process guarantees. By contrast, conciliations/mediations are not subject to these guarantees, and they are not well suited for the enforcement of mandatory consumer rights.

The rest of this essay is organized as follows: In Section II, I provide a brief overview of the framework conditions and tendencies in dispute resolution that are relevant to the topic of the essay. In Section III, I investigate whether there is competition between state courts and private tribunals for dispute resolution. This will be followed by a section that deals with the factors that are determinative with respect to success/failure in such competition (Section IV). Finally, I analyze this competition normatively and suggest some regulatory consequences that might be inferred from my analysis (Section V). I conclude with a summary of the main results of this essay and an outlook on how new technological developments might influence the (alternative) dispute resolution market.

II. Framework Conditions and Trends in (Alternative) Dispute Resolution

In order to understand the dynamics of the international "markets for adjudication" it is helpful to take note of some important framework conditions and worldwide trends in (alternative) dispute resolution.

First, e-commerce is growing significantly. In 2017, retail e-commerce sales accounted for 10.4% of total retail sales worldwide.[6] This share is projected to reach 22.0% in 2023, implying annual growth rates in the range from 15% to 28%.[7]

Second, traders and platforms have developed their own (online) dispute resolution programs. Amazon, for example, has created and uses a "Buyer Dispute Program."[8] A similar conflict management tool is used by eBay ("Resolution Center").[9] Payment services providers such as PayPal also have developed (online) dispute resolution tools.[10] Instead of using self-made, proprietary tools and processes, market actors can also resort to the offerings by specialized conflict management services providers, such as Modria.[11] The firm provides, *inter alia*, online dispute resolution tools for a wide range of applications, claiming to offer the world's leading ODR product: "[N]o other ODR system anywhere in the world has handled millions of cases."[12]

Third, the caseload of state courts handling private law disputes declines steadily, year by year, in many jurisdictions around the world. In Germany, for example, this caseload saw a reduction of 22% between 2005 and 2015.[13] The average caseload reduction

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6 *See* Andrew Lipsman, *Global Ecommerce 2019*, eMarketer (June 27, 2019), https://www.emarketer.com/content/global-ecommerce-2019.

7 *Id.*

8 *See Buyer Dispute Program*, Amazon Pay, https://pay.amazon.com/help/201212460 (last visited Apr. 26, 2020).

9 *See Resolution Center*, eBay, https://resolutioncenter.ebay.com/ (last visited Apr. 26, 2020).

10 *See Resolving Disputes, Claims, and Chargebacks*, PayPal, https://www.paypal.com/ee/webapps/mpp/resolve-disputes-chargebacks (last visited Apr. 26, 2020). *See also Resolving a Dispute with Your Seller*, PayPal, https://www.paypal.com/sg/webapps/mpp/buyer-dispute-resolution (last visited Apr. 26, 2020).

11 *See Modria*, Tyler Tech., https://www.tylertech.com/products/modria (last visited Apr. 26, 2020).

12 *Id.*

13 See Gerhard Wagner, Rechtsstandort Deutschland im Wettbewerb 244–45 (2017) (providing data on new cases before *Amtsgerichte* [local courts] and *Landgerichte* [county courts] from 2005 to 2015).

per year exceeds 2%. The figures for England and France show a similar picture with the exception of the *Tribunaux d'instance/ Tribunaux de grande instance* (Courts of First Instance/High Courts) in France, which recorded a caseload increase of 6% between 2005 and 2015, i.e. by approximately 0.6% per year.[14] In the United States, the caseload of the Federal District Courts has remained stable over this period, while that of the State Courts in New York and California saw a decline of 19% and 20%, respectively.[15]

Fourth, the *legal* relevance of ADR procedures is on the rise, in Europe and beyond. In 2008, for example, the EU passed a directive on mediation in civil and commercial disputes, which had to be transposed by all Member States.[16] Based on the directive, the German legislator, for one, enacted a mediation statute in 2012.[17] In 2013, the European lawmaker followed up with a directive on ADR procedures and a regulation on Online Dispute Resolution ("ODR").[18] Again, all Member States had to transpose the directive, and the German lawmaker did so with the "Verbraucherstreitbeilegungsgesetz" ("Law to Resolve Consumer Disputes") in 2016.[19] UNCITRAL finalized and adopted "Technical Notes on Online Dispute Resolution" at its forty-ninth session in 2016.[20] This is a non-binding instrument, reflecting elements of an online dispute resolution process. The Notes will be helpful for states worldwide in establishing ODR regimes. Finally, the "United Nations Convention on International Settlement Agreements Resulting from Mediation" (the "Singapore Convention on Mediation") was adopted on December 20, 2018, and has been open for signa-

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14 *Id.* at 246. The negative trend is least pronounced in England for the Commercial Court. There were 981 cases in 2005, 1256 in 2009, 1331 in 2011 and 870 in 2015 (Wagner *id.*). The most recent data for 2016-17 and 2017-18 shows 888 and 864 cases, respectively. *See* JUDICIARY OF ENG. & WALES, BUSINESS AND PROPERTY COURTS: THE COMMERCIAL COURT REPORT 2017-2018 10, https://www.judiciary.uk/wp-content/uploads/2019/02/6.5310_Commercial-Courts-Annual-Report_v3.pdf. It appears that the long-term trend is a gradual, albeit small, decline. The uptick in 2009/2011 probably was caused by the financial and economic crisis of 2008/2009.

15 WAGNER, *supra* note 13, at 247.

16 Council Directive 2008/52/EC, 2008 O.J. (L 136) 3.

17 *Mediationsgesetz (MediationsG)*, BGBl. 2012 I, p. 1577.

18 Council Directive 2013/11/EU, 2013 O.J. (L 165) 63; Regulation 524/2013 of 21 May 2013, 2013 O.J. (L 165) 1; For a critical evaluation of these two legislative instruments *see* Giesela Rühl, *Alternative and Online Dispute Resolution for Cross-Border Consumer Contracts: a Critical Evaluation of the European Legislature's Recent Efforts to Boost Competitiveness and Growth in the Internal Market*, 38 J. CONSUMER POL'Y 431 (2015).

19 BGBl. 2016 I, p. 254.

20 *See* UNCITRAL, TECHNICAL NOTES ON ONLINE DISPUTE RESOLUTION (2017), http://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf.

ture since August 7, 2019.[21] The Convention establishes a harmonized legal framework for the right to invoke mediated settlement agreements as well as for their enforcement.

It is difficult to assess empirically whether these *legal* developments are matched by a corresponding rise in the practical relevance of such ADR procedures. The data we have from institutional commercial arbitrations do not suggest that the arbitration market experiences significant (exponential) growth rates.[22] Mediation in Europe is mostly ad hoc, and that means that we do not know for sure how the market is evolving. Anecdotal evidence suggests that it is not a significant growth industry, at least not in continental Europe.[23] Something different might be true with respect to conciliation in B2C disputes. The Financial Ombudsman Service in the UK, for example, handles hundreds of thousands of complaints every year.[24] Similar institutions exist in other Member States such as Germany where ombudsmen handle B2C disputes arising from banking and insurance transactions.[25] The German Insurance Ombudsman dealt with approximately 19,000 new cases in 2018, and the German Banking Ombudsman with approximately 4,200 new cases.[26]

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21 *See United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation")*, UNCITRAL, https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements (last visited Apr. 26, 2020).

22 *See infra* Section III. *See also* WAGNER, *supra* note 13, at 247 (recording new cases administered by the LCIA, the ICC and the DIS from 2005 until 2015).

23 For example, on the mediation market in Germany *see* KAI MASSER ET AL., EVALUIERUNG DES MEDIATIONSGESETZES, RECHTSTATSÄCHLICHE UNTERSUCHUNG IM AUFTRAG DES BUNDESMINISTERIUMS DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ 6 (2017), https://www.bmjv.de/SharedDocs/Downloads/DE/Service/StudienUntersuchungenFachbuecher/Evaluationsbericht_Mediationsgesetz.pdf?__blob=publicationFile&v=1 reporting a "stagnating mediation market" ("Eine im Rahmen der Evaluation durchgeführte bundesweite Mediatorinnen- und Mediatoren-Befragung mit mehr als 1.000 Antwortenden hat ergeben, dass der Mediationsmarkt, d.h. die Zahl der durchgeführten Mediationsverfahren, stagniert.").

24 *See Annual Review 2018/2019*, FIN. OMBUDSMAN SERV., https://annualreview.financial-ombudsman.org.uk/ (last visited Apr. 26, 2020) (388,392 new complaints were received in 2018/2019).

25 *See* Ombudsman der privaten Banken, https://bankenombudsmann.de/ (last visited Apr. 26, 2020); Versicherungs Ombudsmann, https://www.versicherungsombudsmann.de/ (last visited Apr. 26, 2020).

26 *Id.*

III. Competition Between Courts and Arbitral Tribunals for Cases

In this section, I investigate whether courts and arbitral tribunals compete for dispute resolution business, and—assuming that they do—I attempt to assess the intensity of such competition. For these purposes, it is helpful to distinguish between different types of private law disputes. I seek to demonstrate that competition between courts and arbitral tribunals is primarily a phenomenon with respect to high-stakes B2B disputes.

A. *Taxonomy of Private Law Disputes*

In the following, I classify disputes based on the amount in dispute and the parties to the dispute. Using a metric based on the amount in dispute is of course, to a certain extent, arbitrary. At the same time, for heuristic purposes the precise numbers do not matter that much.

The first category of disputes are low-stakes disputes with an amount in dispute of less than approximately 100 Euros, arising primarily out of B2C transactions and doing so with high frequency. The archetypical dispute here results typically from a B2C transaction in e-commerce. These disputes usually end up neither before state courts nor before arbitral tribunals (on class actions/arbitrations see *infra*). Rather, effective contract design—including security rights (such as retention of title clauses) and contractual dispute resolution mechanisms—reputational sanctions, and the above-mentioned ODR tools are important features of resolving low-stakes B2C disputes. Given the low amount in dispute, the high frequency of the transactions (and disputes), and the competitiveness of most markets on which the relevant goods and services are sold/provided, any conflict resolution mechanism must be very cheap and very fast. It usually would be inefficient to bring in a neutral third party to adjudicate the dispute and issue a judgment or an arbitral award following lengthy court or arbitration proceedings, taking of evidence etc. The exception to this assessment is mass disputes with similarly situated claimants if effective collective adjudication schemes (class actions or arbitrations) are availa-

ble in a particular jurisdiction. However, this is not the case, for example, in the majority of European jurisdictions.[27]

The second type of disputes are those arising from transactions in a medium range from approximately 100 to 100,000 Euros. These can be B2B but also B2C transactions, and the ADR trends that we witness differ depending on which of these two categories the dispute relates to.

With respect to B2B transactions, we observe a rising relevance of ADR procedures in general, and of mediation in particular.[28] Businesses seek speedy, cost-efficient dispute resolution processes that focus on their respective commercial interests and preserve (existing) business relationships. Mediation, in particular, serves these needs. However, mediation is cost-efficient only in disputes that go beyond a threshold of approximately 2,000 to 5,000 Euros.[29] This is because mediation involves relatively high fixed costs: a mediator must be hired, and he or she is usually paid by the hour. Even in a dispute with a relatively low commercial value, a mediator typically will spend a couple of hours, if not (half) a day, on the case, and it would not be efficient to pay over 1,000 Euros in fees in a 2,000 Euro dispute, for example.

This is the reason why arbitration in this medium range does not have much relevance at all. The fees of a tribunal consisting of three arbitrators will usually reach a five-digit Euro figure and will exceed or come close to the amount in dispute also if only one arbitrator is appointed.[30] Further, the proceedings will last at least a couple of months even if fast-tracked. It does not make commercial sense for the parties to the dispute to arbitrate cases like this.

This is even truer with respect to commercial disputes in the medium range arising from B2C transactions. In addition to the fact that arbitration will not be commercially sensible in most of these cases, there are legal hurdles. In Europe, for example, con-

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27 *See generally* CHRISTOPHER HODGES & STEFAAN VOET, DELIVERING COLLECTIVE REDRESS—NEW TECHNOLOGIES 43–143 (2018).

28 *See The Year Ahead—Developments in Global Litigation and Arbitration in 2020*, BAKER MCKENZIE, https://bakermckenzie.turtl.co/story/the-year-ahead-2020/page/4/2?teaser=true (last visited Apr. 26, 2020) ("Mediation is gaining traction around the world, with increasing amounts of legislation to support and promote it.").

29 For a cost/benefit analysis of mediation *see* HORST EIDENMÜLLER, VERTRAGS-UND VERFAHRENSRECHT DER WIRTSCHAFTSMEDIATION 5–7, 67–68 (2001).

30 In a $5,000 dispute, the International Chamber of Commerce ("ICC"), for example, sets fees of $9,000 for a tribunal of three arbitrators and of $3,000 for a sole arbitrator. *See Cost Calculator*, ICC, https://iccwbo.org/dispute-resolution-services/arbitration/costs-and-payments/cost-calculator/ (last visited Apr. 26, 2020).

sumers are not able to agree to arbitration in an arbitration clause *ex ante*, *i.e.*, in a provision of the contract that gives rise to the dispute.[31] Given that it is usually extremely difficult to agree on anything—including a dispute resolution procedure—once a dispute has already arisen (*ex post*), this is a serious legal obstacle for the development of arbitration in B2C disputes, at least in Europe. Instead of arbitration, it is conciliation and—if the dispute is in the five-digit Euro range or higher—mediation that have become more relevant as dispute resolution procedures in practice, taking away some of the cases that formerly were handled by the state courts.[32]

The third segment of the dispute resolution market consists of high-stakes disputes with an amount in dispute exceeding 100,000 Euros. These disputes arise primarily out of B2B transactions, and they are relatively infrequent, at least compared to the small-stakes or medium-stakes disputes discussed above. It is in this segment of the dispute resolution market that arbitration is still very popular.[33] With respect to certain sub-segments, it is probably even the case that arbitration is the leading dispute resolution process. Just think of disputes arising out of complex mergers and acquisitions ("M&A") transactions. It has been observed that "[a]rbitration has indeed emerged as the preferred method to resolve M&A related disputes . . . ."[34]

Other ADR methods are also gaining importance in this market segment. This includes mediation. However, as already mentioned, it is very difficult to ascertain the practical relevance of mediation given the dearth of data.[35] In special sub-segments of this market, ADR procedures other than mediation are also practically relevant. This is the case, for example, with respect to the construction industry. Here, Dispute Review Boards have become a practically relevant ADR mechanism.[36] The state courts try hard to maintain their market share in dispute resolution services in this segment or even reclaim lost market share. It is probably in this segment that the competition between state courts and arbitral

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31 *See* Counsil Directive 2013/11/EU, art. 10(1), 2013 O.J. (L 165) 63.

32 *See* WAGNER, *supra* note 13, at 247. *See also* MASSER ET AL., *supra* note 23; *Annual Review 2018/2019*, *supra* note 24; Ombudsman der privaten Banken, *supra* note 25.

33 For data *see infra* Section IV.

34 Bernd D. Ehle, *Arbitrations as a Dispute Resolution Mechanism in Mergers and Acquisitions*, 27 COMPARATIVE L. YEARBOOK OF INT'L BUSINESS 287 (2005), https://www.lalive.law/wp-content/uploads/2019/10/beh_arbitration_as_a_dispute.pdf.

35 *See supra* Section I.

36 *See* Martin Engel, *Hybride Verfahren*, *in* MEDIATIONSRECHT 403, 406–07 (Horst Eidenmüller & Gerhard Wagner eds., 2015).

tribunals is most stiff. A couple of indicators, to which I now turn, support this assessment.

B. *Indicators for Competition with Respect to High-Stakes Disputes*

First, state courts in many jurisdictions explicitly attempt to modernize their "services," trying to become more efficient dispute resolution providers and more competitive in the dispute resolution market. In Germany, for example, a new legislative proposal would, if passed, introduce special chambers for international commercial disputes within the county courts (*Landgerichte*). Before these chambers, proceedings could be conducted in the English language.[37] Further, according to another legislative proposal, the various German federal states (*Länder*) would be given the possibility to introduce specialized chambers for specific types of commercial disputes, and they could reduce the number of regional courts and create more concentrated court structures, thereby enhancing the specialty of the tribunals.[38] These legislative developments clearly evidence the fact that the German lawmaker, for one, believes it needs to modernize its procedures in order to attract a sophisticated international clientele of case placers.

Similar developments, in particular the establishment of specialized "business/commercial courts," have taken place in many other jurisdictions worldwide.[39] For example, the Singapore International Commercial Court was established on January 5, 2015,[40] the International Chamber of the Paris Court of Appeal on February 7, 2018,[41] and the Netherlands Commercial Court on January 1, 2019.[42] The Brussels International Business Court aims to become

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[37] *See* "Entwurf eines Gesetzes zur Einführung von Kammern für internationale Handelssachen (KfiHG)", Deutscher Bundestag Drucksache 19/1717, Apr. 18, 2018.

[38] *See* "Entwurf eines Gesetzes zur Modernisierung der Strukturen der Landgerichte," Deutscher Bundesrat Drucksache 322/15, July 10, 2015.

[39] *See* WAGNER, *supra* note 13, at 196–98 (surveying developments in Singapore, Dubai, Qatar, Abu Dhabi, India and The Netherlands).

[40] *See Establishment of the SICC*, SING. INT'L COM. CT., https://www.sicc.gov.sg/ (last updated May 2, 2019).

[41] *See Accueil*, COUR D'APPEL DE PARIS, https://www.cours-appel.justice.fr/paris (last visited Apr. 26, 2020).

[42] *See A Practitioner's Guide to Commercial Litigation in the Netherlands*, NETH. COMM. CT. https://netherlands-commercial-court.com/ (last visited Apr. 26, 2020).

operational by 2020.[43] In most of these courts, it is possible for the parties to use English as their language. In Europe, the goal is not only to take business away from arbitration but also to challenge the dominant position of the English courts in a *post*-Brexit world.[44] A recent study for the European Parliament's Committee on Legal Affairs concludes that the EU should seek to establish a "European Commercial Court."[45]

Secondly, various arbitral institutions such as, for example, the American Arbitration Association ("AAA"), the London Court of International Arbitration ("LCIA"), or the International Chamber of Commerce ("ICC"), continually attempt to modernize their procedures or introduce new ones, trying to maintain or improve their market share in the dispute resolution market.[46] In Europe, the ICC clearly is considered the market leader amongst service providers by disputing parties and their lawyers. I will present and discuss data on this issue in the next section of this essay.

A final indicator for the existence of the relatively stiff competition between state courts and arbitral tribunals with respect to high-stakes disputes is the fact that parties take sophisticated decisions on the litigation/arbitration issue. For example, arbitration carve-outs are widespread in the US regarding the protection of information and intellectual property ("IP") rights.[47] Parties agree to arbitration in principle, but they reserve the right to submit the

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[43] *See* Erik Peetermans & Philippe Lambrecht, *The Brussels International Business Court: Initial Overview and Analysis*, 12 ERASMUS L. REV. 42 (2019), http://www.erasmuslawreview.nl/tijdschrift/ELR/2019/1/ELR-D-18-00025.pdf.

[44] *See* Horst Eidenmüller, *The Rise and Fall of Regulatory Competition in Corporate Insolvency Law in the European Union*, 20 EUROPEAN BUS. ORG. L. REV. 547, 560–63 (2019).

[45] *See* GIESELA RÜHL, BUILDING COMPETENCE IN COMMERCIAL LAW IN THE MEMBER STATES 58–63 (2018), http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604980/IPOL_STU(2018)604980_EN.pdf.

[46] Whether these "new services" introduced by arbitral institutions are leading towards an over-proceduralization or over-judicialization of arbitration, is discussed intensively in arbitration scholarship. *See* Yves Dezalay & Bryant G. Garth, *Fussing About the Forum: Categories and Definitions as Stakes in a Professional Competition*, 21 L. & SOC. INQUIRY 285, 299 (1996) (arguing that such formalization and institutionalization of arbitration should be perceived as an adaptation strategy, enhancing the legitimacy of this form of dispute resolution in circumstances where it is used on a mass scale). Whether and how this is going to affect participation and participants in arbitrations is a question of empirical research for the future. *See also* Catherine Rogers, *Is International Arbitration in a Race to the Top?* (Mar. 15, 2018), http://arbitrationblog.kluwerarbitration.com/2018/03/15/is-international-arbitration-in-a-race-to-the-top/ ("This competition among institutions has both prompted and been pushed by greater transparency so that the relative strengths of institutions can be assessed by parties and attorneys.").

[47] *See* Erin O'Hara O'Connor, *Jurisdictional Competition for Dispute Resolution: Courts Versus Arbitration*, *in* REGULATORY COMPETITION IN CONTRACT LAW AND DISPUTE RESOLUTION 427 (Horst Eidenmüller ed., 2013).

above-mentioned issues to the state courts, for example, by asking for injunctive relief. Apparently, such parties fear that, with respect to such sensitive issues, state courts potentially could do a better job than arbitral tribunals.

IV. Success Factors in Regulatory Competition

What then are the factors that are determinative with respect to parties' choice for or against litigating/arbitrating a dispute? And if they decide to arbitrate, what are the factors that are determinative with respect to picking a particular arbitral institution? In the following, I attempt to answer these questions. My analysis is based on key findings from an empirical study on the arbitration market undertaken with two colleagues in 2015.[48]

A. *The Decision to Arbitrate*

We found that the decision to arbitrate is driven primarily by three factors: the enforceability of awards, party autonomy with respect to the choice of the arbitrators, and confidentiality. More specifically, approximately 50% of the respondents in our survey considered the enforceability of awards to be a very important factor when deciding whether to arbitrate a case instead of litigating. Close to 45% thought that the neutrality of the arbitrators, their expertise, and the free choice of the arbitrators by the parties was a very important factor. More than 40% thought that the confidentiality of the proceedings was a very important factor.

By contrast, speed and costs of the proceedings are much less relevant. Less than 20% of the respondents thought that a very important factor was that arbitration proceedings are faster than

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[48] Caspar Behme, Horst Eidenmüller & Martin Fries, *Competition in the Arbitration Market* (2016) (unpublished manuscript) (on file with author). The study is based on an empirical survey which was undertaken from January until March 2015. We sent out a questionnaire invitation to 8,200 individual arbitration practitioners worldwide. We received 357 completed answers. Respondents were mostly either in-house or external counsel. There is a certain bias in the survey towards German respondents: 44% of the completed answers came from German respondents, 12% from Swiss respondents, 6% from respondents based in the UK, 5% from US and 4% from French respondents. This bias and the low response rate rules out any claims to representativeness. However, our goal was to generate a significant number of responses from which one can derive hypotheses which could be investigated further. For this (limited) goal, 357 completed answers appear to be a good result.

litigation, and only approximately 5% considered it very important that arbitration proceedings were less costly. These results confirm anecdotal evidence that many arbitration proceedings take as long as or even longer than court proceedings, and they can be as costly (or even more expensive) than litigation.

A specific reason to arbitrate a case in some jurisdictions is the fact that parties expect arbitral tribunals to be more faithful to upholding contractual freedom than state courts. In Germany, for example, courts scrutinize standard terms and conditions in B2B contracts for their fairness or unfairness.[49] Hence, terms and conditions in complex M&A or construction deals that are not individually negotiated might be considered unenforceable by a German court if the transaction is subject to German law. This has led German companies to seek alternatives to German law and courts with respect to significant international commercial transactions.[50] Either Swiss or English law usually governs these transactions, and arbitral tribunals in Switzerland or in the UK resolve conflicts.[51] The German lawmaker is aware of the problem and is considering whether the above-mentioned court control of standard terms and conditions in B2B transactions should be relaxed or even abolished.[52] This is another development that supports the thesis in this essay that state courts and arbitral tribunals compete for market shares with respect to high-stakes commercial disputes.

B. *The Choice of an Arbitral Institution*

If parties decide to arbitrate, they will usually resort to an arbitral institution to administer the case, *i.e.*, the arbitration will be "institutional" and not "ad hoc." Once again, three factors are primarily determinative with respect to the choice of a particular institution. More than 40% of the respondents in our survey considered the expertise of the institution and its professionalism in case management to be a very important factor. Further, more than 40% considered (their) positive experience with a certain in-

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49 *Bürgerliches Gesetzbuch* [BGB] [Civil Code], §310(1).

50 *See* Horst Eidenmüller, *The Transnational Law Market, Regulatory Competition, and Transnational Corporations*, 18 IND. J. GLOBAL LEGAL STUD. 707, 719–23 (2011).

51 *Id.*

52 *See* "Koalitionsvertrag zwischen CDU, CSU und SPD—19. Legislaturperiode," Mar. 12, 2018, https://www.cdu.de/system/tdf/media/dokumente/koalitionsvertrag_2018.pdf?file=1, at 131 ("Wir werden das AGB-Recht für Verträge zwischen Unternehmen auf den Prüfstand stellen mit dem Ziel, die Rechtssicherheit für innovative Geschäftsmodelle zu verbessern.").

stitution and the expertise of the arbitrators on the roster of the institution to be very important factors. Hence, it is primarily the reputation of an institution as a professional case manager which builds on prior positive experiences that determines parties' choice.

V. Evaluation of Competition and Regulatory Consequences

In the final section of this article, I reflect on the normative evaluation of the competition discussed in the previous sections and offer thoughts on the regulatory consequences that one might wish to derive. I distinguish between certain general considerations and specific issues relating to arbitral proceedings regarding B2C disputes on the one hand and B2B disputes on the other hand.

A. *General Considerations*

As a starting point, one can say that competition between state courts and arbitral tribunals is a positive phenomenon as long as first, the respective procedures are structurally fair—in relation to the interests of the participants and affected third parties—and second, access to the procedures is guaranteed for everybody. Competition is to be welcomed under these conditions because it creates pressure to innovate and make the procedures more user-friendly.[53]

Disputing parties that are in a weaker bargaining position than their counterparties—for example, because they are less sophisticated or have fewer resources at their disposal—should be protected by initial controls on whether they are allowed to use a particular procedure and/or by process rules that seek to establish and maintain procedural fairness. If one relaxes initial controls, *i.e.*, liberalizes the use of a particular process, more controls and checks must be established within the process to make sure that weaker parties are sufficiently protected.

ADR procedures in general have been criticized because they allegedly water down behavioral incentives for disputing parties.[54] If one assumes that ADR procedures such as mediation or concili-

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[53] *See* Eidenmüller, *supra* note 50, at 729–35.

[54] *See* Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. Legal Stud. 1 (1995).

ation end up with a compromise in the majority of cases, and if one further assumes that these processes are so widespread that such results influence the decision of parties when they consider, for example, whether to breach a contract or not, these parties would have the wrong incentives. They would not internalize the full anticipated costs of their behavior. At the same time, it is not at all clear whether the assumptions just mentioned are realistic. More specifically, we do not have reliable data on the frequency with which these processes are used in dispute resolution practice and on whether and to what extent human decision-makers are influenced by anticipated outcomes of dispute resolution processes during contract performance. It appears quite far-fetched to assume that a contracting party that considers breaching a contract is influenced by the likelihood and expected outcome of a potential ADR proceeding.

B. *B2C Arbitral Proceedings*

Arbitration proceedings should be opened up to the greatest extent possible, including, in particular, in relation to B2C disputes. This suggestion goes against a trend that is critical of arbitration with respect to these disputes. Article 10 of the ADR Directive in Europe has already been mentioned, according to which arbitration clauses in B2C contracts are unenforceable.

The case for arbitration with respect to these types of disputes rests primarily on a comparative analysis with conciliation and mediation.[55] The EU in particular promotes conciliation and mediation in B2C disputes. However, these types of disputes are characterized by mandatory consumer protection regulations. Mediators and conciliators are not necessarily jurists, and they are not necessarily well qualified to enforce mandatory consumer rights.[56] A better approach would be to entrust arbitral tribunals with enforcing these rights. Arbitral proceedings are "rights-based," and arbitrators must respect fundamental due process guarantees such as the right to be heard and equal treatment of the

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[55] *See* Horst Eidenmüller, *Online Dispute Resolution (ODR) und Consumer ADR: Ein Plädoyer für die Online-Verbraucher(schieds)gerichtsbarkeit*, 2016 BITBURGER GESPRÄCHE JAHRBUCH 101, 110–12 (2017).

[56] *See* Horst Eidenmüller & Martin Engel, *Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe*, 29 OHIO ST. J. ON DISP. RESOL. 261, 287, 296 (2014); MARTIN FRIES, VERBRAUCHERRECHTSDURCHSETZUNG (2016).

parties.[57] Tribunals could be financed by businesses or trade associations so that consumers would have free access.[58] However, a nominal fee might be charged to prevent frivolous claims. Institutional safeguards should be established to secure the independence of tribunals if these are financed by businesses/trade associations.[59]

Mass claims and class actions/arbitrations pose particular regulatory challenges. If class arbitrations are not feasible, consumers should not be forced to arbitrate disputes individually and lose the benefit of collective action and special remedies such as punitive damages.[60] However, *generally* upholding the barriers to arbitrate B2C conflicts and promoting access to litigation instead has, as has been shown, regressive effects: it disadvantages the potentially large subgroup of poor, uninformed, and unlikely-to-sue consumers and advantages the stronger, more informed and vigilant ones.[61]

C. *B2B Arbitral Proceedings*

As discussed above in Section II(A), arbitration is not frequently employed with respect to medium-stakes disputes. Most often, it is too costly and too lengthy a dispute resolution mechanism to be efficient enough for the parties to choose in these kinds of disputes. Hence, one can consider sponsoring access by businesses to arbitration with respect to medium-stakes disputes. At the same time, arbitral institutions should have enough market-

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57 *See* Council Directive 2013/11/EU, art 11, 2013 O.J. (L 165) 63; Article 18 of the U.N., UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17 (1994), https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf.

58 That raises the question what incentives, financial or otherwise, businesses would have to participate in such arbitral proceedings instead of designing their own systems (for examples *see supra* Section II). First, more independent tribunals might be a source of higher legitimacy. Second, smaller businesses will usually lack the resources to develop in-house solutions.

59 *See* Enrique Vallines Garcia, *Impartiality and Independence of the Persons Entrusted with Consumer ADR*, *in* THE ROLE OF CONSUMER ADR IN THE ADMINISTRATION OF JUSTICE 79, 87–101 (Michael Stürner, Fernando Gascón Inchausti & Remo Caponi eds., 2015).

60 However, the US Supreme Court takes a different view. According to its jurisprudence, the availability of class arbitrations is not a prerequisite for enforcing an arbitration clause. *See AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011); *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

61 Omri Ben-Shahar, *Arbitration and Access to Courts: Economic Analysis*, *in* REGULATORY COMPETITION IN CONTRACT LAW AND DISPUTE RESOLUTION 447 (Horst Eidenmüller ed., 2013).

based incentives to develop new and more efficient procedures themselves.[62] There is no market failure in this regard.

Another problem often associated with arbitration is lack of publicity of its results, and as a consequence, few (if any) precedents.[63] Commercial actors act and transact in the "shadow of the law."[64] They figure in legal rules and regulations, including precedents, in their commercial decisions. Promoting the use of arbitrations appears to diminish the shadow of the law and therefore, to diminish the behavioral incentives associated with it.

There are two ways to address this point. First, the publicity of results of arbitral proceedings can be increased. This is easier with respect to special forms of arbitrations such as investor-state arbitrations where there is a strong political interest in the publication of results. Excerpts of ICSID (International Centre for Settlement of Investment Disputes) awards, for example, are published even if the parties do not consent to the publication of the award *in toto*.[65] But even with respect to "ordinary" commercial arbitrations, the trend is towards more transparency. Under the ICC Rules of Arbitration, for example, publication—at the discretion of the ICC—is now the default position unless the parties object.[66]

Second, and more importantly, the concern about loss of precedent associated with arbitrations appears overstated. Not so many cases go to arbitration in specific areas that the behavioral steering function of the law would be severely compromised. After all, it is not only court decisions that make up the law, even in common law jurisdictions. Statutory provisions and regulations also play an important role, and this role is increasing. For an example, just think of the financial and economic crisis in 2007-2009 and its regulatory aftermath worldwide. Further, some case law

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62 An example is the London Maritime Arbitrators Association ("LMAA") Small Claims Procedure 2017 which applies to disputes not exceeding USD 100,000. *See The LMAA Small Claims Procedure* 2017, LONDON MAR. ARB. ASS'N, http://www.lmaa.org.uk/terms-the-lmaa-small-claims-procedure.aspx (last visited Apr. 26, 2020).

63 *See* Stefan Pislevik, *Precedent and Development of Law: Is it Time for Greater Transparency in International Commercial Arbitration?*, 34 ARB. INT'L 241 (2018).

64 *See generally* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1977).

65 *See* Article 48(4) of the ICSID Arbitration Rules: "The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal."

66 *See* ICC, NOTE TO PARTIES AND ARBITRAL TRIBUNALS ON THE CONDUCT OF THE ARBITRATION UNDER THE ICC RULES OF ARBITRATION 7–8 (2019), https://iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf.

will exist even in those areas of the law where arbitration has a strong foothold. Finally, if businesses opt out of the process of case law creation by choosing arbitration for particular transactions, it is their voluntary decision. In this sense, relevant case law is a private, not a public good.

IV. Conclusion

This essay has investigated some important aspects of competition between state courts and private tribunals. ADR procedures are on the rise worldwide, and so is competition for cases by providers of dispute resolution services. However, one needs to distinguish carefully between different market segments in this regard. The analysis in this article has been informed by an empirical investigation of the dispute resolution preferences of "case placers" undertaken in 2015. The key findings of the article can be summarized as follows:

1. Competition between state courts and arbitral tribunals currently exists primarily with respect to high-stakes B2B disputes. The amount in dispute in these cases will usually exceed 100,000 or even 1,000,000 Euros. A significant portion of the total dispute resolution volume in this market segment goes to arbitration. State courts and arbitral institutions are in stiff competition to maintain or increase their respective market shares.
2. If parties decide to arbitrate a dispute, they do so primarily because of the effective international enforceability of an award, the autonomy to choose competent and neutral arbitrators and the confidentiality of the proceedings. Speed and costs of the proceedings are much less relevant. Commercial arbitrations, especially international commercial arbitrations, will usually be administered by an arbitral institution. The choice of an arbitral institution is primarily influenced by its reputation as a professional case manager and by prior positive experiences of the parties.
3. Access to arbitration should be made easier also with respect to B2C small- and medium-stakes disputes. This means that the trend in the European Union of promoting conciliation/mediation with respect to these types of disputes should be reversed. Arbitration is less "dangerous" than conciliation/mediation in small- or medium-stakes B2C disputes because it is a *legal* process governed by fundamen-

tal due process guarantees. By contrast, conciliations/mediations are not subject to these guarantees, and they are not well suited to enforce mandatory consumer rights.

4. No compelling case can be made for increasing access of businesses to arbitration in medium-stakes B2B disputes. Arbitral institutions have high-powered incentives to design new and efficient procedures for these types of disputes.

How will new technologies, especially artificial intelligence ("AI"), affect the analysis in this essay and its conclusions? It is too early to tell for sure. However, technological innovations with an application for dispute resolution are pushed primarily by private sector firms, as discussed briefly in Section II. This trend will probably continue and might even get stronger. Hence, dispute resolution will be *privatized* to an ever-greater degree. This development poses unique regulatory challenges for the protection of weaker parties, especially consumers.