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Arbitrability of Tortious Claims in India: A Comparative Analysis with other Countries

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ABSTRACT

Arbitration has steadily taken over the mantle from traditional courts and tribunals in adjudicating upon an increasing number of legal disputes, especially in the commercial and business sphere. Indeed, one of the prime factors contributing to arbitration's rise in the business world is the contractual nature of the vast majority of these claims, coupled with the fact that these disputes are convoluted and spread out over long periods of time, thus clogging the courts with trials which go on for decades at times. Thus, arbitration was readily encouraged and fostered for these disputes, and this has helped set up a conducive and flourishing business environment in India. However, one other area where arbitration is sorely needed in order to ease the burden on courts is that of torts and tortious liabilities. Opportunities for torts and tortious claims arise frequently in day-to-day life, as one is likely to have their legal rights infringed upon in the normal course of events. These claimants relying on tortious violation of legal rights however often find themselves overburdened and lost in the courts of our country, be it due to paperwork, formalities, huge pendency and waiting times, etc. This is where arbitration comes in and can greatly enhance protection and enforcement of tortious rights. The only impediment which remains is that torts consist of rights in rem which do not arise out of a contract between the victim and the accused, and this goes against the grain of arbitration as a mutually consensual mode of dispute resolution. How this conflict can be resolved, and has been attempted to be resolved by the courts of our country, as well as the courts of other countries, will be the topic of discussion of this paper.

I. INTRODUCTION

Arbitration, despite being around since time immemorial, has only in the last couple of centuries witnessed a surge in its use and popularity as a form of alternative dispute resolution. Even then, it was perceived mainly as being suitable for interstate disputes and claims, with domestic issues involving private non-state actors still left to the exclusive jurisdiction of courts.[2] Moreover, the practice was almost exclusively undertaken by a handful of Western states. However, at the turn of the preceding century, a major milestone in favour of arbitration was staked with the establishment of the Permanent Court of Arbitration; effectively cementing arbitration's status as a legitimate form of dispute resolution for the entire world.[3] Since then,

[1] Author is a student at National Law University Jodhpur, Rajasthan, India.
[2] Nelson M. Blake, 'The Olney-Pauncefote Treaty of 1897' (1945) 50 *American Historical Review* 228.
[3] Garth Schofield, 'The Permanent Court of Arbitration: From 1899 to the Present' in C.L. Lim (ed), *The Cambridge Companion to International Arbitration* (Cambridge University Press 2021).

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the inexorable rise of arbitration has been marked by an ever-expanding scope of arbitrability, with domestic disputes also being allowed to be settled outside courts.

With regards to international commercial arbitration, the advent of globalisation and increasing integration of domestic economies with each other, have spurred the adoption and creation of progressive principles and specialised institutions for the same. Endeavours by states to attract international investment and elevate their national output have necessitated acquiescence vis-à-vis ceding certain matters which were exclusively seen as being under the jurisdiction of courts.[4] Thus, this realm of 'arbitrability' has witnessed a manifold surge in its breadth and scope of application; however, not all jurisdictions commenced from a similar starting point in their drive to bring more and more issues under the umbrella of arbitrability. Developed Western nations, with their commitment to the principles of liberalism and laissez-faire, have unsurprisingly topped the chart with respect to the sheer variety of disputes which can be settled by arbitration. On the other hand, developing nations, with a history and/or present proclivity to socialistic tendencies, have been largely hesitant in permitting private parties to oust the jurisdiction of courts.[5]

One particularly contentious topic within this area has been the question whether claims arising from torts or tortious liability are capable of being settled by arbitration. This question acquires particular significance because arbitration, by definition, is meant to operate as a mechanism for resolving disputes between parties which have expressly, through use of an arbitration agreement between them, decided to confer jurisdiction on an arbitral tribunal for disputes arising between themselves.[6] However, torts arise from rights *in rem*, rights available against the whole world at large, as opposed to rights *in personam*, rights available against a specific person or body. Therefore, the ramifications of settling tortious liabilities by arbitration immediately emerge, insofar as a person who has not agreed to be subject to a decision through arbitration would have his right to a fair trial in a court of law curtailed.

The manner in which the courts have overcome this impasse, in order to open the gates of arbitration to torts, albeit in a qualified manner, is extremely interesting and worth looking into. Again, keeping in mind the plethora of legal systems and ideologies prevalent in the world today, this manner of allowing torts to be settled by arbitration has been dissimilar in different jurisdictions. As such, this paper seeks to delve into the extant situation with regards to

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[4] Lawrence Craig, 'Some Trends and Developments in the Laws and Practice of International Commercial Arbitration' (1995) 30 *Tex. Int'l L.J.* 1.
[5] L. Mistelis and S. Brekoulakis, *Arbitrability: International & Comparative Perspectives* (Wolters Kluwer Law & Business, 2009).
[6] A. Redfern & M. Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press 2009).

arbitrability of tortious liability in namely four countries, i.e., India, United Kingdom, United States and Germany, as also the evolution and reasoning employed in reaching the *status quo*.

II. India

In India, due to the nature of language employed in the Arbitration and Conciliation Act 1996 ("A & C Act"), as well as the preceding act of 1940, insofar as there is no explicit enumeration of disputes which are arbitrable and non-arbitrable, has left the job of determining the boundaries of arbitrability to courts.[7] The first decision in this regard which had a direct bearing on torts was a Guwahati HC decision in 1990, which was delivered in the context of the old A & C Act. The guidelines laid down by the court in this case would serve as a model for all subsequent judgments on the issue, and as such, hold enormous importance.[8] While declaring that tortious claims may be settled by arbitration, the court conditioned this on the nature of the claim itself, insofar as the claim is connected in some way or the other to the underlying contract between the parties within which there is an arbitration clause. Therefore, in a way, the court was restricting the very nature of torts to rights *in personam*; this is evidenced from the fact that the court was only allowing torts which are covered by the arbitration clause itself, and thus the primary objection of allowing torts to be settled by arbitration, i.e., the potential of affecting rights of persons who had not consented to arbitration, has been overcome. By explicitly stating that only such tortious claims which arise under the contract, and are covered by the arbitration clause, are capable of being adjudicated via arbitration, the court has necessarily divested arbitrable torts from their *in rem* character.

However, an interesting question which arises if one were to accept this contention is that the intrinsic difference itself between these two categories of rights is wiped off; allowing tortious claims to be arbitrated under the guise of being rights *in rem* within the confines of the underlying contract, is tantamount to converting the said right *in rem* into a right *in personam.* This paradox can be resolved by harking back to the very nature of what makes a right *in personam* and what makes a right *in rem*; while the two are often distinguished solely on the ground that the former is available against only specific people or bodies and the latter is available against the world is large, this is only one aspect which sets them apart. The other equally important aspect is the source of these rights. While the enjoyment of rights *in personam* is dependent on some agreement between the parties such as contractual rights, rights *in rem* are invested in people not by any contract or agreement but by the law itself.[9] This

[7] *Firm Ashok Traders and Anr. v. Gurumukh Das Saluja & Ors.* (2004) 3 SCC 155.
[8] *Bharat Heavy Electricals Pvt. Ltd. v. Assam State Electricity* (1990) 2 Gau LR 130.
[9] Alf Ross, 'The Theory of Rights In Rem and Rights In Personam', in Jakob v. H. Holtermann and Uta Bindreiter

crucial distinction is indeed maintained if one were to follow the Guwahati HC's framework for arbitrating torts. A tortious claim under this framework would still be such so as to derive its authority from the law; only the manner in which this right can be remedied has been qualified, insofar as only those rights which are covered by the arbitration clause will be capable of being arbitrated. Therefore, the *in rem* character of these rights is still preserved, and they would not be effectively converted into rights *in personam* for the purposes of arbitration. Nevertheless, this dilemma was laid to rest by the SC's detailed judgment in *Vidya Drolia* in 2019, which will subsequently be taken up here.

Next, in 2011, the SC laid down the Booz-Allen Test for determining whether a subject-matter of a dispute is capable of arbitration in India or not. Arising from the judgment given in the case, the Test was predicated on the fundamental distinction between rights *in rem* & *in personam*, and from this commencing point of inquiry, laid down a list of categories of disputes which are non-arbitrable. This list included categories such as criminal matters, matrimonial disputes, insolvency proceedings, etc.[10] The most comprehensive guidelines till date for determining the arbitrability of disputes in India has been the four-fold test laid down by a three-judge bench of the SC in 2019.[11] Naturally, one of the prongs of this test involved the *in rem*/*in personam* argument; however, this case was unique in the sense that it recognised for the first time the possibility of a right *in rem* to give rise to a subordinate right *in personam*, which is precisely what happens when a tort is evaluated solely on the basis of a relationship between two contracting parties.

Therefore, the judgment in *Vidya Drolia* did away with the controversy associated with converting tortious rights *in rem* to rights *in personam* as far as arbitration is concerned, while at the same time maintaining that the tortious right is still *in rem* in character. By effectively recognising that the two rights are more interconnected than polar opposites, and how in certain circumstances can split from each other to form subordinate rights of the other type, the SC in *Vidya Drolia* has finally clarified the position of law in India with regard to arbitrability of tortious claims, drawing from a wide field of common law and international legal principles.[12] In conclusion, it will be pertinent to note that the statement 'torts are arbitrable in India' does not refer to torts in the commonly understood sense. Torts are only arbitrable in India so long as they occur within a prior contractual relationship. However, the majority of torts and tortious litigation takes place between strangers, such as automobile driver and pedestrian,

(eds), *On Law and Justice* (OUP 2019).
[10] *Booz Allen and Hamilton Inc v. SBI Home Finance Ltd. & Others*, (2011) 5 SCC 532.
[11] *Vidya Drolia & Others v. Durga Trading Corporation*, 2019 SCCOnLine SC 358.
[12] Michael J. Mustill & Stewart C. Boyd, *Commercial Arbitration* (Butterworths, 2010).

manufacturer and consumer, polluter and property owner, and as such, so far as the common man is concerned, he cannot choose to settle tortious claims through arbitration unless the other party also agrees to do so after the injury has taken place.

III. UNITED KINGDOM

Akin to the Indian A & C Act, the primary legislation governing arbitration in the United Kingdom, The Arbitration Act 1996 ("AA Act"), does not expressly authorise or prohibit the arbitrability of certain kinds of disputes. As a general rule, disputes which are of a commercial nature, contractual or otherwise, are capable of being settled by arbitration.[13] Moreover, the United Kingdom is infamous for having a sky-high hurdle which must be crossed in order to successfully challenge an arbitral award under Sections 68 (serious irregularities) and 69 (appeal on point of law) of the AA Act. Indeed, between 2015 and 2017, of the 112 challenges brought under Section 68, only one was successful.[14] Although containing no specific provision dealing with arbitrability as a concept, the AA Act provides some hints as to how the legislature intended to deal with issues of arbitrability, insofar as there exist several provisions which lay down certain grounds on which an arbitration may be challenged, which can happen at the referral stage or the enforcement stage. A preliminary reading of Section 81(1)(a) makes it clear that in the referral stage at least, the applicable law to determine arbitrability would be English Common Law.[15]

As far as arbitrability during the enforcement stage is concerned, Sections 67 and 68 permit a challenge only on the grounds of substantive jurisdiction of the tribunal or 'serious irregularities' respectively. With regards to the former, Section 30 also empowers the tribunal to rule on its own substantive jurisdiction, which is entirely in keeping with the well-recognised international doctrine of *Kompetenz-kompetenz*.[16] The only ground under the list of serious irregularities laid down in Section 68 which can be used to declare a dispute non-arbitrable is the one relating to the award being obtained by fraud, or being contrary to public policy. Understandably, the public policy doctrine is very rarely, if ever, invoked by the courts to set aside an arbitral award, due to the wide leeway which the doctrine necessarily provides in such an endeavour. Therefore, it is clear that only in cases which are egregiously against public

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[13] Ministry of Justice, *Departmental Advisory Committee (DAC) on Arbitration Law Report* (February 1996).
[14] Ministry of Justice, *Commercial Court Users' Group Meeting Report (March 2018) <https://www.judiciary.gov.uk/publications/commercial-court-users-group-meeting-report-march-2018/> accessed 5 March 2023.*
[15] JDM Lew and O Mardsen, 'Arbitrability', in J D M Lew, H Bor, G Fullelove and J Greenaway (eds) *Arbitration in England with chapters on Scotland and Ireland* (Kluwer Law International, 2013).
[16] Adrianna Dulic, 'First Options of Chicago, Inc. v. Kaplan and the Kompetenz-Kompetenz Principle' (2002) 2 *Pepp. Disp. Resol. L.J.* 77.

policy or where some statutory rights of the parties are affected, will courts in UK refuse an arbitration to go through.[17]

From the above discussion, it should become clear that disputes involving tortious claims will not easily be barred from being settled by arbitration in the UK. Indeed, such is the commitment to party autonomy vis-à-vis private dispute resolution in the UK that it is the only country in the world to have a dedicated statute towards clarifying the choice of law in international case involving tortious claims. The Private International Law (Miscellaneous Provisions) Act of 1995 thus laid down detailed provisions clarifying the general rule and exceptions to determining the appropriate law to be followed by English courts while adjudicating upon disputes involving contractual and tort laws of multiple jurisdictions.[18] Although the statute bears no explicit reference to its applicability to tribunals, it has been subsequently implemented and relied upon by arbitrators in arbitral proceedings.[19] To conclude, the mere fact that a dispute involves tortious claims will not render said dispute non-arbitrable in the UK; only if there is an adverse impact on third-party rights or statutory rights, will courts refuse to allow such an arbitration to go through. Therefore, in a way, torts are more freely arbitrable in the UK than in India, since the whole *in personam/in rem* debate does not even arise. Nevertheless, despite the differences in the reasoning employed by courts in the UK and India to arrive at the conclusion that torts are in fact arbitrable, the end result is more or less the same in both countries, and thus torts are generally arbitrable under the laws of both jurisdictions.

IV. UNITED STATES OF AMERICA

Generally speaking, the US follows an approach to arbitrability of torts which is largely similar to that in India; torts are arbitrable as long as they are part of an existing contract between the parties, and are covered by the relevant arbitration clause.[20] However, even within this contractual framework, there may arise two instances wherein an arbitrator would be precluded from adjudicating upon tortious claims. Firstly, and this qualification is well recognised in India as well, the tort claim may not have a sufficiently proximate nexus with the underlying contract, or alternatively, the claim may fall outside the arbitration clause.[21] The incidence of such a situation arising is exceedingly rare though, due in large part to the modern practice of having

[17] LEONARDO V. P. DE OLIVEIRA, 'THE ENGLISH LAW APPROACH TO ARBITRABILITY OF DISPUTES' (2016) 19 *INTERNATIONAL ARBITRATION LAW REVIEW* 155.
[18] Private International Law (Miscellaneous Provisions) Act 1995 (Commencement Order) 1996, S.I. 1996 No. 995.
[19] *ENNSTONE BUILDING PRODUCTS LTD V. STANGER LTD*, [2002] EWCA 916.
[20] *AT & T Technologies, Inc*. v. *Communications Workers of America*, 475 US 643 (1986).
[21] Joseph T. McLaughlin, 'Arbitrability: Current Trends in the United States' in William W. Park (ed), *Arbitration International* (Oxford University Press 1996, Volume 12, Issue 2).

extremely broad standard, boilerplate arbitration clauses which make use of terms like 'arising out of' or 'in connection with'. Consequently, the settled legal position in the US is that in circumstances where a broad arbitration clause exists, all tort claims which are even remotely connected with the contract will be arbitrable.[22]

Secondly, in a situation unique to the American federal system, a state statutory law may make tortious claims non-arbitrable.[23] Although the US does have a nationwide Federal Arbitration Act, the doctrine of pre-emption with regards to federal and state laws regulating arbitration does have a few exceptions. In cases where the parties have expressly chosen to conduct their arbitral proceedings under a state arbitration statute, the state laws will not be pre-empted by the FAA as long as the broader pro-arbitration objective of the FAA is honoured.[24] Additionally, states can freely legislate with respect to areas of arbitration law which have not been explicitly covered by federal law. However, the enforceability of arbitration agreements must be determined under the general contract law principles of each State. In other words, if the state law does not use the same procedure and principles for determining the validity of an arbitration agreement which are used for general contracts and agreements, it will be pre-empted by the FAA.[25] Consequently, several states which have not adopted the Uniform Arbitration Act as their respective state arbitration statute have either excluded torts from compulsory arbitration or not enacted an arbitration statute at all.[26] Therefore, it might be slightly more difficult to arbitrate torts in these states, possibly requiring the parties to demonstrate that the said state law violates the FAA and should be pre-empted.

There are also certain special situations in which torts arising from even non-contractual relationships can be arbitrated. For example, medical malpractice claims can be subject to voluntary, binding arbitration under several state statutes.[27] Also, a host of state legislations as well as federal laws have mandated courts to impose non-binding arbitration on parties for tort claims below a specified amount of damages sought.[28] These patterns indicate that the urgent necessity for courts to handle their workload might persuade lawmakers to abolish outdated limitations on the ability of parties to freely opt for arbitration.

Lastly, one particular area with regard to arbitrability of torts which is perhaps unique to the

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[22] *Greenwood v. Sheffield*, 895 SW 2d 169 (Mo. Ct. App. 1995).
[23] (n 20).
[24] *Russ Berrie & Co. v. Gantt*, 988 S.W.2d 713 (Tex. Ct. App. 1999).
[25] *Scherk v. Alberto-Culver Co*., 417 U.S. 506, 511 (1974).
[26] *See* Ala. Code § 6-6-1 (1993); Ark. Code Ann. § 16-108-201 (Michie 1987 & Supp. 1994); Ga. Code § 9-9-80 (Michie 1982); Iowa Code. Ann § 679A.1(2)(a), (b).
[27] *See, e.g*., Cal. Code Civ. Pro. § 1295.
[28] Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089.

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American legal landscape is the domain of Mass Torts. Although mass torts have been witnessed and allowed in other countries as well, their incidence and influence in the US is much more pronounced than in other jurisdictions. The interplay between arbitration and mass torts arises in instances wherein the former is increasingly being employed as a settlement device for determining the individual claims of plaintiffs involved in the case.[29] Therefore, the extent of arbitrability of torts in the US is pronouncedly more than the previous two common law countries considered, insofar as the arbitration law and legal principles allow not only ordinary tortious claims arising from contractual agreements to be arbitrated, but also tort claims falling outside contractual agreements in certain cases. The cherry on top of the cake however, is that even claims arising from mass torts can be settled through elective binding arbitration. This current state of affairs vis-à-vis arbitrability of torts in the US is a reflection of the overall pro-arbitration stance of courts and the facilitative legal framework in place. A natural corollary of this is the popularity and preference of arbitration over court trials, especially among the vast number of multinational enterprises domiciled there, which has led to the proliferation of arbitration clauses in their contracts designating the U.S. as the seat of arbitration. This international presence underscores the country's reputation as a global leader in ease of arbitration and arbitrability of disputes.

V. Germany

So far, this paper has focused on Anglophonic, Common Law countries with largely similar principles of tortious liability, as well as the resultant interplay with arbitration. However, it would also be enlightening to take up a civil law jurisdiction and analyse the developments therein with regards to torts and arbitration. A suitable country for this exercise would be Germany, whose civil code has influenced a sizeable chunk of civil law countries in the world, and arguably is the industrial and commercial powerhouse of Europe.[30] Before delving into the question of arbitrability of torts in Germany, it would be pertinent to briefly go over the nature of tort law itself, being somewhat different that that found in Common Law countries.

In Germany, the law of torts, known as "Deliktsrecht," encompasses civil wrongs and liabilities, for which compensation in the form of damages is available in circumstances where there is no contractual relationship between the plaintiff and the wrongdoer. Unlike most of the Common Law countries where the law of torts is uncodified, German tort law is primarily

[29] Deborah R. Hensler, 'A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation' (1995) 73 *Tex. L. Rev*. 1587.

[30] Ernst Rabel, 'Private Laws of Western Civilization: Part III. The German and Swiss Civil Codes' (1950) 10 *Louisiana Law Review* 271.

governed by the provisions of the German Civil Code (Bürgerliches Gesetzbuch or BGB), specifically §§ 823-853.[31] These provisions outline the general principles and elements of tort liability, including the duty of care, fault-based liability, and the requirement to compensate for damages caused by unlawful acts. German tort law aims to provide remedies for harm caused by wrongful conduct, whether intentional or negligent, and seeks to balance the interests of individuals in seeking compensation for injuries with the need to prevent unjust enrichment and promote social order.[32]

The German Civil Code (BGB) embodies the principles of pandectism, a legal philosophy influenced by 19th-century classical liberalism, which prioritizes safeguarding individual freedom of action. This perspective contrasts with the Napoleonic Code, which, drafted a century earlier, placed greater emphasis on shielding individuals from the actions of others. As these two legal codes serve as the foundation for private law in numerous jurisdictions worldwide, the disparities between the BGB and the Napoleonic Code exemplify a significant division in legal philosophy among civil law systems.[33] Arising from this difference in ideologies, since 1900, both German judges and legislators have firmly rejected the notion of a general principle of civil liability, commonly found in civil codes influenced by the BGB, such as those of Japan and the Republic of China, which otherwise share many aspects of the pandectist school reflected in the BGB.

A notable aspect of German tort law is the degree to which liability hinges not only on the resulting damage but also on the actions of the alleged wrongdoer. Negligence may suffice in some cases, while more severe fault is required in others. Consequently, individuals who unlawfully infringe upon the life, body, health, freedom, or property of others—whether intentionally or through recklessness—are obligated to compensate for the resulting harm. However, less protection is afforded in cases involving purely intangible interests, such as purely economic or moral harm, arising from pecuniary losses due to erroneous information or malicious remarks.

With this foundational knowledge of German tort law, it is now permissible to delve into the arbitrability aspect. Set out in the Tenth Book of the Code of Civil Procedure, German arbitration law is modelled largely on the UNCITRAL Model Law and as such is very

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[31] Shigenari Kanamori, 'German influences on Japanese Pre-War Constitution and Civil Code' (1999) 7 *European Journal of Law and Economics* 93.
[32] Gerhard Dannemann & Reiner Schulze (eds), *German Civil Code (BGB) - Books 1-3: §§ 1-1296 (article-by-article commentary) Vol. 1* (C.H. Beck, 2020).
[33] Oliver Berg, 'L'influence du droit allemand sur la responsabilité civile française' *2006 Revue Trimestrielle de Droit civil*.

progressive and arbitration friendly.[34] As far as the question of arbitrability is concerned, the incredibly sweeping language of the provisions stipulate that any claim arising from a pecuniary or economic interest can be the subject matter of arbitration, except those arising from tenancy agreements or barred from arbitration by any statute.[35] The profound implications of such an approach towards arbitrability leave no scope for torts to be excluded from settlement by arbitration, and as such, German courts have routinely allowed cases involving tortious claims to be adjudicated by arbitral tribunals.[36] This stark difference in approach to arbitrability of tortious claims from that discussed in the aforementioned countries can largely be attributed to the fact that Germany is a Civil Law country with a comprehensive civil code for regulating torts. While in other countries with uncodified tort law, allowing private resolution of torts outside of contractual relationships by arbitration would have been against public policy, such a qualm is not observed in Germany.

VI. CONCLUSION

In conclusion, the thrust of the law today is towards commercial ease and party autonomy, and this general guiding principle has been followed to varying degrees throughout the world. As a result, arbitration has skyrocketed in popularity, thus easing the burden on traditional courts and tribunals. The gradual evolution of the subject matter which can be settled by arbitration has brought within its fore countless categories of disputes which were previously reserved exclusively to the courts. It is but natural that such a trend should encompass within itself torts and tortious claims as well. Thus, while the cap on arbitrability of torts due to their intrinsic nature has been removed in a number of manners worldwide, such as incorporating claims within existing arbitration agreements, it is unlikely that an unqualified right to arbitrate torts would ever emerge. In a way, this is desirable and equitable. Regardless, the literature and jurisprudence of arbitration vis-à-vis non-contractual claims such as torts will only continue to grow and evolve, and this paper is a small effort towards achieving such a state of affairs.

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[34] *Zivilprozessordnung* (ZPO), paras 1025-1066.
[35] *Ibid*, s 1030(1).
[36] Albert Jan van den Berg, 'Germany No. 34, German assignee of a (German) shipping Company v. Japanese shipyard, Hanseatisches Oberlandesgericht (Court of Appeal), Hamburg, Not Indicated, 17 February 1989' (1990) 35 *Recht der Internationalen Wirtschaft* 574.